BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of the Joint Application	)	
Of Missouri-American Water Company	)	
And DCM Land, LLC for a Variance	)	**File No. WE-2021-0390**
From the Company's Tariff Provisions	)	
Regarding the Extension of Company Mains	)	

STAFF'S BRIEF

Introduction and Background

On May 6, 2021, Missouri-American Water Company ("MAWC") and DCM Land, LLC ("DCM") (together, "Joint Applicants") filed their *Joint Application for Variance and Motion for Waiver* ("Application") requesting, pursuant to Commission Rule 20 CSR 4240-2.060(4), a variance from certain provisions of MAWC's tariff with regard to the extension of company mains; more specifically, with terms related to the time by which DCM must connect to MAWC's system, and relating to the funding ratio associated with an extension of MAWC's water main into a development located in St. Charles County, Missouri. The Application requests a variance from provisions of PSC MO No. 13, 1st Revised Sheet No. R 48, Rule 23A.2. and 3, as well as a waiver from PSC MO. No. 13, 1st Revised Sheet No. R 51, Rule 23C.6. The Joint Applicants further request a waiver from the notice requirement in Commission Rule 20 CSR 4240-4.017.[1]

MAWC is an active Missouri corporation in good standing with the Missouri Secretary of State. Its principal place of business is 727 Craig Road, St. Louis, Missouri 63141. MAWC is a "water corporation," a "sewer corporation," and a "public utility" as defined by Section 386.020 RSMo and is subject to Commission jurisdiction.[2]

[1] Stipulation of Facts and Issues, par. 1-2.
[2] *Id.* par. 6-7.

DCM is a Missouri limited liability company and listed as active with the Missouri Secretary of State. DCM's principal place of business is 5731 Westwood, St. Charles, Missouri 63304. DCM Land develops real estate projects in the St. Charles County area.[3]

The Joint Applicants request a variance from the definition of new applicants in Rule 23A.2. Instead of the one hundred twenty (120) days currently in the tariff, the Joint Applicants requests the estimated average annual revenue from new applicants for DCM's new development (Cottleville Trails) be calculated using "…those who commit to purchase water service for at least one year, and guarantee to the Company that they will take water service at their premises within five (5) years after the date the Company accepts the main and determines it ready for Customer service."[4]

The Joint Applicants also request a variance from the 95:5 funding ratio for the St. Louis Metro District as detailed in Rules 23A.3 and 23C.6, and instead use an 86:14 ratio for Cottleville Trails.[5]

Despite the Joint Applicants argument that good cause exists to grant the requested variance, the Commission, for reasons detailed below, does not have the authority to grant these variances. Further, it is Staff's position that even if the Commission had the authority to grant a variance in this case, doing so with regard to the requested variance from the 95:5 funding ratio detailed in Rules 23A.3 and 23C.6 would be unduly discriminatory and should not be granted.

[3] *Id.* par. 8.
[4] *Id.* par. 13.
[5] *Id.* par. 14.

1. **Should the Commission waive the 60-day notice required by Rule 20 CSR 4240-4.017 to file a case given that no party opposes the grant of such waiver?**

The Parties agree that good cause has been shown to grant a waiver of this rule.[6]

2. **Does the Commission have the authority to grant a waiver or variance from the Company's Tariff?**

No. Commission Rule 20 CSR 4240-2.060(4) prescribes the filing procedures related to applications for variances or waivers from tariff provisions, but under ***State ex rel. Kennedy v. Pub. Serv. Comm'n****, 42 S.W.2d 349, 352-53 (Mo. 1931)*, those procedures can apply only where the tariff provisions themselves authorize a waiver.[7] In *Kennedy*, the Supreme Court of Missouri held that "[w]ithout some such [waiver] provision in the rule the commission could not authorize the company to make an exception in the application of its approved rule."[8]

Any validly adopted tariff "has the same force and effect as a statute, and it becomes state law." ***State ex rel. Mo. Gas Energy v. Pub. Serv. Comm'n,*** 210 S.W.3d 330, 337 (Mo. App., W.D. 2006), ***Public Service Com'n of State v. Missouri Gas Energy,*** 388 S.W.3d 221, 227 (Mo. App., W.D. 2012). As such, a tariff is binding on the utility, the public, and this Commission. This is referred to as the "Filed Rate Doctrine" or

[6] *Id.* par. 22.
[7] ***State ex rel. Kennedy v. Pub. Serv. Comm'n***, 42 S.W.2d 349, 352-53 (Mo. 1931). Staff is not contending that this rule exceeds the Commission's statutory authority.
[8] *Id.* (citing ***State ex rel. St. Louis County Gas Co. v. Pub. Serv. Comm.***, 315 Mo. 312, 286 S. W. 84.). When using the word "rule" in *Kennedy*, the Court was referring to the "rule" in the company's tariffs governing line extensions.

"Filed Tariff Doctrine."[9] Missouri courts have uniformly applied the Filed Rate Doctrine to decisions of the PSC.[10]

That being said, it is not untypical for a utility to include waiver provisions within its Commission-approved tariff.[11] However, no language exists in MAWC's tariff that allows for a variance from the requested provisions. Thus, pursuant to Section 393.140(11),

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[9] "As developed for purposes of the Federal Power Act, the 'filed rate' doctrine has its genesis in ***Montana-Dakota Utilities Co. v. Northwestern Public Service Co.,*** 341 U.S. 246, 251-252, 71 S.Ct. 692, 695, 95 L.Ed. 912 (1951). There, this Court examined the reach of ratemakings by FERC's predecessor, the Federal Power Commission (FPC). * * * [M]any state courts have applied the filed rate doctrine of ***Montana-Dakota*** to decisions of state utility commissions and state courts that concern matters addressed in FERC ratemakings." ***Nantahala Power and Light Co. v. Thornburg,*** 476 U.S. 953, 962, 964, 106 S.Ct. 2349, 2354-55, 2356, 90 L.Ed.2d 943, (1986).

[10] S*ee, e.g.,* ***State ex rel. AG Processing, Inc. v. Public Service Commission,*** 311 S.W.3d 361 (Mo. App., W.D. 2010); ***Bauer v. Southwestern Bell Tel. Co.,*** 958 S.W.2d 568 (Mo. App., E.D. 1997). See also Section 393.140(11) RSMo "…No corporation shall charge, demand, collect or receive a greater or less or different compensation for any service rendered or to be rendered than the rates and charges applicable to such services as specified in its schedule filed and in effect at the time; nor shall any corporation refund or remit in any manner or by any device any portion of the rates or charges so specified, no to extend to any person or corporation any form of contract or agreement, or any rule or regulation, or any privilege or facility, except such as are regularly and uniformly extended to all persons and corporations under like circumstances."

[11] The practice of including waiver provisions within Commission approved tariffs is not new, and has been held by Missouri Courts to be lawful. *See* ***State ex rel. Kennedy v. Pub Serv. Comm'n***, 42 S.W.2d 349, 352-353 (MO Sup Ct 1931), where the Court discussed the legality of the inclusion of a waiver provision within a line extension tariff for St. Louis County Water Company:

> It is urged that the last paragraph of the rule, whereby it is provided that, in exceptional cases where conditions may appear to warrant departures from the rule, the cost of the extension, if so requested by the company, shall be borne as may be approved by the commission, makes the rule discriminatory, or at least makes it possible for the company under the rule to discriminate between proposed consumers. Discrimination is not unlawful unless arbitrary or unjust. ***State v. M., K. & T. Ry. Co.***, 262 Mo. 507, 524, 525, 172 S. W. 35, L. R. A. 1915C, 778, Ann. Cas. 1916E, 949: ***State ex rel. and to Use of Pugh et al. v. Pub. Serv. Comm.***, 321 Mo. 297, 10 S.W.(2d) 946, 951, and cases cited. The rule does not permit the company at its own will to extend to one applicant for service treatment different from that accorded to others. It is only in exceptional cases where conditions may appear to warrant departure from the rule that the deposit requirement may be waived, and then only by permission of the commission, which body is to determiner (sic) whether or not the exceptional conditions exist and, if so, how the cost shall be borne.* * * But that provision was designed only to afford the possibility of granting relief where, because of exceptional conditions, there may be urgent need for such relief and it may justly be granted. Without some such provision in the rule the commission could not authorize the company to make an exception in the application of its approved rule. ***State ex rel. St. Louis County Gas Co. v. Pub. Serv. Comm.***, 315 Mo. 312, 286 S. W. 84. If rightly observed, as we must assume it will be, we think that provision of the rule will not result in unjust discrimination. The evidence indicates that there has been no attempt or disposition so far on the part of the company to do other than comply with the rule according to its spirit and purpose.

RSMo, and the Filed Rate Doctrine, the Commission may not grant variances requested by MAWC and DCM.

3. If the Commission does have the authority to grant a waiver or variance from the Company's tariff, should the Commission grant a variance allowing MAWC to:

a. Extend in this case the 120-day period for connecting customers to qualify for reimbursement from the Company to 5 years; and

The Joint Applicants request to extend the timeline from one hundred twenty (120) days to 5-years is reasonable as it pertains to perceived and actual construction times. Phase 1 of DCM's development will include 355 single family residences and 175 apartments.[12] If there were a waiver provision in the Company tariff, Staff would support extending the 120-day period for connecting customers to qualify for reimbursement from the Company to five years.

b. Apply the upfront 86:14 cost sharing ratio from the Company's other districts to Cottleville Trails, rather than the 95:5 cost sharing ratio that otherwise applies in the Company's St. Louis Metro District.

Even if the Commission finds it has the authority to grant the requested waivers, it is Staff's position that the Joint Applicants' request for a waiver from the 95:5 funding ratio detailed in Rules 23A.3 and 23C.6 would be unduly discriminatory and should not be granted. The purpose of the Public Service Commission Act is primarily to protect the public from utilities. ***State ex. inf. Barker v. Kansas City Gas Company***, 254 Mo. 515,

[12] Stipulation of Facts and List of Issues, par. 15.

S163 S.W. 854, 857-58 (1914).7. In ***State ex rel. St. Louis Gas Co. v. Public Service Commission***, 315 Mo. 312, 286 S.W. 84 (Mo. 1926), the Missouri Supreme Court held that the Commission, while it had authority to change tariff provisions, did not have authority to waive them to allow new customers to pay less than the tariff rate for extension of a gas line to service them, as this is discriminatory. In its opinion the Court stated:

> A schedule of rates and charges filed and published in accordance with the foregoing provisions acquires the force and effect of law; and as such it is binding upon both the corporation filing it and the public which it serves. It may be modified or changed only by a new or supplementary schedule, filed voluntarily, or by order of the commission. Such is the construction which has been universally put upon analogous provisions of the Interstate Commerce Act, being U. S. Comp. St. s 8563 et seq. (***Louisville, etc., Ry. Co. v. Maxwell***, 237 U. S. 94, 35 S. Ct. 494, 59 L. Ed. 853, L. R. A. 1915E, 665; ***Gulf, etc., Ry. Co. v. Hefley***, 158 U. S. 98, 15 S. Ct. 802, 39 L. Ed. 910); and we have so ruled with respect to similar provisions of our Public Service Commission Law relating to telegraph companies (**State v. Public Service Commission**, 304 Mo. 505, 264 S. W. 669, 671, 672, 35 A. L. R. 328). If such a schedule is to be accorded the force and effect of law, it is binding, not only upon the utility and the public, but upon the Public Service Commission as well.
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> The general purpose of the statutory provision above referred to is to compel the utility to furnish service to all the inhabitants of the district which it professes to serve at reasonable rates and without discrimination. The methods by which these results are to be obtained are clearly and definitely prescribed:
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> "Whenever the commission shall be of the opinion, after a hearing had upon its own motion or upon complaint, that the rates or charges or the acts or regulations of any such * * * corporation * * * are unjust, unreasonable, unjustly discriminatory or unduly preferential or in any wise in violation of any provision of law, the commission shall determine and prescribe the just and reasonable rates and charges thereafter to be in force for the service to be furnished." Rev. St. 1919, § 10478.
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> The rules and regulations of the St. Louis Gas Company as to extensions are integral parts of its schedule of rates and charges. If

> they are unjust and unreasonable, the commission, after a hearing, as just referred to, may order the schedule modified in respect to them. But it cannot set them aside as to certain individuals and maintain them in force as to the public generally. The gas company cannot—
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> "extend to any person or corporation any form of contract or agreement, or any rule or regulation, or any privilege or facility, except such as are regularly and uniformly extended to all persons and corporations under like circumstances."[13]

The Joint Applicants' request for a variance from the 95:5 funding ratio for the St. Louis Metro District in favor of an 86:14 ratio for Cottleville Trails gives DCM an advantage not afforded to other developers. A Company cannot legally offer one customer a different rate than another unless the customers are receiving different services.[14]

> All individuals have equal rights both in respect to service and charges. Of course, such equality of right does not prevent differences in the modes and kinds of service and different charges based thereon. There is no cast iron line of uniformity which prevents a charge from being above or below a particular sum, or requires that the service shall be exactly along the same lines. But that principle of equality does forbid any difference in charge which is not based upon difference in service, and, even when based upon difference of service, must have some reasonable relation to the amount of difference, and cannot be so great as to produce an unjust discrimination.[15]

Further, under Section 393.130.3, utilities are forbidden from granting undue preference or advantage to any ratepayer, just as they may not unduly or unreasonably prejudice or disadvantage any ratepayer in the provision of services. ***State ex rel. City of Joplin v. Public Service Com'n of State of Mo.,*** 186 S.W.3d 290, 296 (Mo. App., W.D. 2005). The question of whether discriminatory rates are unlawful and

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[13] The statutory language being interpreted in this case is currently included in Sections 393.130 and 393.140 RSMo.

[14] Stipulation of Facts and List of Issues, par. 13.

[15] ***State ex rel. Laundry, Inc. v. Public Service Com'n,*** 327 Mo. 93, 111, 34 S.W.2d 37, 45 (Mo. 1931) (*quoting* ***Western Union Telegraph Co. v. Call Pub. Co.,*** 181 U.S. 92, 100, 21 S.Ct. 561, 564, 45

unjust is usually a question of fact, ***State ex rel. Mo. Office of Pub. Counsel v. Mo. Pub. Serv. Comm'n,*** 782 S.W.2d 822, 825 (Mo. App., W.D. 1990). Here, the Joint Applicants requested funding ratio provides an advantage to DCM over other MAWC customers. No legal justification has been offered to show that DCM is a unique customer seeking a unique service for which this variance would be reasonable.[16] Thus, it is Staff's position that granting such a variance would be unduly and unjustly discriminatory.

Cottleville Trails is located within the exclusive service area of MAWC as a result of a Territorial Agreement entered into between MAWC and Public Water District No. 2 of St. Charles County, Missouri, and approved by the Commission in Case No. WO-2001-441. DCM uses the existence of a territorial agreement, making their development a customer of MAWC, as support for the argument that their proposed cost-sharing is just, reasonable, and non-discriminatory.[17] In fact, DCM could not receive service from the Public Water District No. 2 in the absence of an order from the Commission approving a change of supplier, and in ordering a change of supplier, the Commission is prohibited from considering any rate differential.[18]

Should DCM contend it was not properly provided notice of the Territorial Agreement conferring an exclusive authority to serve to MAWC, its argument would fail. In File No. WO-2001-441, the Commission sent notice to the members of the General Assembly representing the Applicants'[19] service areas and "to the newspapers which serve Applicants'' service areas as listed in the newspaper directory of the current

[16] Stipulation of Facts and List of Issues, par. 19 and 20. The only justification provided is related to cost-savings. Cost-savings is not a difference of service.
[17] *Id.* par. 5.
[18] See the Commission's *Order Granting Variance, Approving Stipulation and Agreement, and Notice that Tariff Will Be Allowed to Go Into* Effect, issued October 21, 2020, in File EE-2021-0086, EFIS Item No. 7.
[19] MAWC and Public Water Supply District No. 2 of St. Charles County.

Official Manual of the State of Missouri."[20] Further, the Commission established a deadline for any interested person wishing to intervene to do so. Ultimately, the parties to the case entered into a Unanimous Stipulation and Agreement,[21] and the Commission issued its *Report and Order*[22] approving the Stipulation and Agreement, and the applied for Territorial Agreement. While no hearing was held,[23] the Commission's *Report and Order* was issued in compliance with Section 386.490, RSMo, allowing affected parties the opportunity to review the Commission's order, and request rehearing in accordance with the provisions of Section 386.500 and 386.510, RSMo. Compliance with this statutory framework satisfied the constitutional requirements of due process.[24]

Further, should DCM contend the failure to grant a waiver from MAWC's tariffs would create an unconstitutional taking that argument too must fail. Consumers of public utilities *do not* hold a vested property interest in their utility rates. In ***State ex rel. Jackson County v. Public Service Commission***, 532 S.W. 2d 20, the court stated:

> Consumers' contention of necessity is premised on the argument that they have a protected 'property' interest in the present level of utility rates. We have not been cited any authority for that proposition. On the other hand, there are a number of cases to the contrary.
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> In ***Sellers v. Iowa Power and Light Company***, 372 F.Supp. 1169 (S.D.Iowa 1974, with three judges participating), plaintiffs challenged the constitutionality of a temporary utility rate increase without a hearing with a due process argument. The court said, l.c. 1172:

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[20] *See* the Commission's *Order and Notice*, p. 3, issued February 23, 2001, in File No. WO-2001-441, EFIS Item No. 2. See also, Section 386.550 RSMo and *State ex rel. Ozark Border Elec. Co-op v. Pub. Serv. Comm'n,* 924 S.W.2d 597, 601 (Mo. App. W.D. 1996. A territorial agreement cannot be challenged without a showing of a change in circumstances.

[21] *See Unanimous Stipulation and Agreement*, filed April 16, 2001, in File No. WO-2001-441, EFIS Item No. 5.

[22] *See* the Commission's *Report and Order*, issued May 15, 2001, in File No. WO-2001-441, EFIS Item No. 8.

[23] The Commission need not hold a hearing if, after proper notice and opportunity to intervene, no party requests such a hearing. ***State ex rel. Rex Deffenderfer Enterprises, Inc. v. Public Service Commission***, 776 S.W.2d 494 (Mo. App. W.D. 1989).

[24] *See* ***Harter v. Missouri Pub. Serv. Comm'n***, 361 S.W.3d 52, 59 (Mo. Ct. App. 2011)

‘Plaintiffs describe the property they claim was taken from them without procedural due process as the money required to pay the rate increases prior to the determination of their legality, thus depriving them of the use and enjoyment of the fruits of their labors or statutory grants which, but for the increases, would have been available to pay other household expenses.

We believe plaintiffs' claim of property interest is too broadly stated to be within the protection of the Fourteenth Amendment. In our opinion plaintiffs must show they have a legal entitlement to or a vested right in the rates being charged before the proposed increase, before they can claim any property rights protected by the United States Constitution.

At common law a public utility ‘like the seller of an unregulated commodity, has the right in the first instance to change its rates as it will, unless it has undertaken by contract not to do so’. ***United Gas Co. v. Memphis Gas Division*** (1958), 358 U.S. 103, 113, 79 S.Ct. 194, 200, 3 L.Ed.2d 153; ***FPC v. Hunt*** (1964), 376 U.S. 515, 522, 84 S.Ct. 861, 11 L.Ed.2d 878; ***United Gas Pipe Line Co. v. Mobile Gas Service Corp.*** (1956), 350 U.S. 332, 343, 76 S.Ct. 373, 100 L.Ed. 373; ***Gas Service Co. v. FPC*** (1960), 108 U.S.App.D.C. 334, 282 F.2d 496, 500.

Conversely, utility customers have no vested rights in any fixed utility rates, ***Wright v. Central Kentucky Natural Gas Co.*** (1936), 297 U.S. 537, 542, 56 S.Ct. 578, 80 L.Ed. 850; ***Norwegian Nitrogen Products Co. v. United States*** (1933), 288 U.S. 294, 318, 53 S.Ct. 350, 77 L.Ed. 796; ***San Antonio Utilities League v. Southwestern Bell Telephone Co.*** (5th Cir., 1936), 86 F.2d 584, cert. den., 301 U.S. 682, 57 S.Ct. 783, 81 L.Ed. 1340; ***United States Light and Heat Corp. v. Niagara Falls Gas & Electric Light Co.*** (2nd Cir., 1931), 47 F.2d 567, 570, cert. den., 283 U.S. 864, 51 S.Ct. 656, 75 L.Ed. 1469; ***Lenihan v. Tri-State Telephone & Telegraph Co.*** (1940), 208 Minn. 172, 293 N.W. 601, cert. den., 311 U.S. 711, 61 S.Ct. 392, 85 L.Ed. 463; ***Wisconsin Telephone Co. v. Public Service Commission*** (1939), 232 Wis. 274, 287 N.W. 122, cert. den., 309 U.S. 657, 60 S.Ct. 514, 84 L.Ed. 1006.

As plaintiffs have no property interest in existing rates which is protected by the Fifth and Fourteenth Amendments, we hold that plaintiffs are not entitled to a procedural due process hearing prior to a determination of the lawfulness of the proposed rate increase and that the Iowa statutory provision in 490A.6 which provide for interim collection of the proposed increase under bond to be refunded if found to be excessive does not violate the Due Process Clauses of the Fifth and Fourteenth Amendments.'

The rationale of most of the cases is consistent with the following statement from ***Ten-Ten Lincoln Place, Inc. v. Consolidated Edison Co.***, 190 Misc.

> 174, 73 N.Y.S.2d 2 (1947), to-wit: 'Nor has plaintiff any vested right to utility service or to any particular rate except to the extent that the public service law grants him such right; and he is not entitled to invoke his constitutional guarantees of 'due process' or 'equal protection' under such circumstances.' (Emphasis added.) ***We find no provision in the statutory scheme for Missouri granting consumers such a right… (Emphasis added)***

The conclusion drawn by DCM leads to unreasonable and illogical consequences: DCM appears to argue that all future customers in an area that was once the subject of a territorial agreement has the right to lower rates that other customers if the area's previous utility supplier has lower rates.[25]

Conclusion

As outlined above, MAWC has no provision within its tariffs allowing for a waiver of those requested by the Joint Applicants. Without some such provision in its tariff, the Commission cannot authorize MAWC to make an exception in the application of its approved tariff.[26] The Commission "cannot set [the terms of MAWC's tariffs] aside as to certain individuals and maintain them in force as to the public generally."[27]That being said, if the appropriate waiver provisions existed within MAWC's tariffs, Staff would be able to support a waiver to extend the 120-day customer connection period to five years, but Staff has seen no evidence to show that changing the cost sharing ratio would be anything other than discriminatory.

[25] While DCM states in par. 14 of their *Response of DCM, LLC to Staff Recommendation* that PWD No. 2 could provide service to their development at a significantly lower cost than MAWC, no concrete evidence of this assertion has been provided.
[26] ***State ex rel. Kennedy v. Pub. Serv. Comm'n***, 42 S.W.2d 349, 353 (Mo. 1931)
[27] ***State ex rel. St. Louis Cty. Gas Co. v. Pub. Serv. Comm'n of Missouri***, 315 Mo. 312, 318, 286 S.W. 84, 86 (1926)

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served upon all of the parties of record or their counsel, pursuant to the Service List maintained by the Data Center of the Missouri Public Service Commission, on this 16th day of September, 2021.

/s/ Casi Aslin