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 from the Company's Tariff Provisions Regarding the Extension of Company Mains.	)))))	**File No. WE-2021-0390**

RESPONSE OF DCM LAND, LLC TO OFFICE OF PUBLIC COUNSEL APPLICATION FOR REHEARING

COMES NOW DCM Land, LLC ("DCM"), and provides this response to the Office of Public Counsel's ("OPC's") Application for Rehearing ("Application") filed on October 22, 2021:

1. In its Application, OPC first takes the position that the Staff had taken in its Recommendation, i.e., that the Missouri Public Service Commission (the "Commission") does not have the authority to grant the variances jointly requested by DCM and Missouri-American Water Company ("MAWC" and, collectively with DCM, the "Applicants") in this matter, because "No authority exists for the Commission to grant a variance from the rules set forth in MAWC's tariff." *Application, p. 6*.

2. To support its position, OPC cites to a 1926 Missouri Supreme Court case, State ex rel. St. Louis County Gas Co. v. Public Service Comm'n, 286 S.W. 84,86, 315 Mo. 312 (1926), that OPC quotes as finding that a tariff is accorded the force and effect of law; and that the "Commission 'cannot set . . . aside' a utility's tariff 'as to certain individuals and maintain them in force as to the public generally". *Id*.

3. That argument ignores, however, both that the Court, also, held in that case that service was to be "uniformly extended to all persons and *corporations under like circumstances*", *St. Louis County Gas, supra*.; and that the Court more recently held that a waiver of a line

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extension tariff for a water corporation is lawful, "upon approval of the Commission" . *State ex rel. Kennedy v. Public Service Commission*, 42 S.W2d 349, 350, 352-53 (Mo. 1931).

4. In *Kennedy*, in order to counter the argument that a clause that allowed the Commission to vary a tariff would allow for discrimination in service, the Court noted that: "Discrimination is not unlawful unless arbitrary or unjust"; and further held that the "provision was designed only to afford the possibility of such relief [i.e., a different cost sharing ratio] where, because of exceptional conditions, there may be urgent need for such relief and it may be justly granted." *Id*. That is exactly the conditions that exist, in this matter; and the *Kennedy* case, *Id*.., was rightly found to support the granting of the variances requested herein.

5. OPC has cited to one sentence in the *Kennedy* case that reads:: "Without some such provision in the [tariff] the commission could not authorize the company to make an exception in the application of its approved [tariff]." *Id*.

6. The statement on which OPC relies, however, was made in 1931, well before Section 386.250 (6), RSMo. which authorized the Commission to adopt rules that prescribe the conditions for billing for public utility service, was first adopted. *See* Revised Statutes of Missouri 1929, §5136. The Commission's adoption of 20 CSR 4240-2.060(4), thereafter, codified the procedure by which the Commission's authority, as described by the *Kennedy* court, to grant a variance or waiver, rather than requiring each and every tariff to include a statement that would allow for the Commission to grant such a waiver.

7. To find that the Commission could only grant a variance if the specific tariff expressly stated that it might be varied would both (i) create discrimination, by disallowing some of the public to obtain a variance if they demonstrate special circumstances, simply because the utility that serves their area did not request to include an express statement in its tariff; and (ii) be

contrary to the purpose of allowing the Commission the authority to grant a variance – i.e., the recognition that there may be exceptional conditions that create an urgent need for such relief, so that the relief may be justly granted. *Kennedy*, supra.

8. If OPC's position were correct, the variances granted in numerous other cases would be invalidated. See *In the Matter of the Application of Missouri-American Water Company for Approval of an Agreement with MLM Properties, Inc.*, WO-2008-0301, 2008 WL 4488297 (Mo.P.S.C.), in which the Staff of the Commission requested a variance from MAWC's tariff; as well as GE-2016-0142, WO-2008-0301, EE-2006-0124, EE-2003-0282, GR-2001-461, GR-2000-520, and, GO-98-500, as cited by MAWC in its Brief.

9. OPC refers to Rule 20 CSR 4240-2.060(4) as only a procedural rule. For a procedural rule to have been needed, however, the Commission would have had to have substantive authority to grant a variance in the first place. *Kennedy*, supra clearly held that the Commission does have such authority where, because of exceptional conditions, there may be urgent need for such relief and it may be justly granted. *Id.*

10. As the Commission found in its Order, this is just such a case, because of the specific facts surrounding the location of the development. *Order p. 4.* This is a situation where the requested variance is just and fair, because absent the Territorial Agreement between MAWC and Public Water District No. 2 ("PWD No. 2"), the development could and would receive water service from PWD No. 2 and be able to recover significantly more of its costs.

11. OPC makes the argument that because no party disputes that the Territorial Agreement places the Cottleville Trails development within the exclusive service area of MAWC, it is irrelevant that absent the Territorial Agreement the development could and would receive water service from PWD No. 2. *Application, p. 12.* The goal to provide least cost utility service

to customers should never, however, be considered "irrelevant". Indeed, it would seem that should be a primary goal of both this Commission and the Office of Public Counsel.

12. RSMo Section 393.140 (11) requires rates to be the same for all those "under like circumstances". Here, the circumstance is not the same as other portions of MAWC's service territory, because Cottleville Trails is located in PWD No. 2's annexed area, as well as in MAWC's certificated area.

13. The basic purpose of public utility regulation is to provide utility service at just and reasonable rates. But it is neither just nor reasonable to require a developer to pay significantly higher costs than would be available from another utility that is ready, willing, and able to provide the necessary service to the development.

14. The fact that service is available from another utility at significantly lower cost, absent the Territorial Agreement, is the unique condition that provides justification for varying MAWC's tariff.

15. OPC also takes the position that, even if DCM does not proceed with the Cottleville Trails development if the requested variances are not granted, it is likely that the land will be developed. *Id., p. 11.* OPC provides absolutely no evidence to support this statement; and certainly no evidence exists to say that a development the size of Cottleville Trails would be undertaken by anyone.

16. As its "first" reason why the bases the Commission cited in its Order to grant the variances were unfounded, OPC states that "no evidence exists that fire protection in the area is lacking or that properties in the area lack access to a water supply or are forced to take water from inadequate sources". *Id.*

17. This argument is extremely puzzling, as OPC joined in the Stipulation of Facts and Lists of Issues filed by the parties; and the parties stipulated in Section 22 thereof that "replacement [of the existing 4" main with a 12" main] would improve fire protection in the area and provide water main access to several additional properties nearby".

18. Lastly, on p. 12 of its Application, OPC makes the statement that "no party has moved to invalidate the Territorial Agreement". This statement ignores the fact that DCM has taken the position that the Territorial Agreement amounts to an unconstitutional taking, because due process was not afforded through the delivery of notice "to the members of the General Assembly representing the Applicants' service areas and 'to the newspapers which serve Applicants' service areas" . *DCM Response to Staff Recommendation*. No notice was given to any property owner in the affected area, even though ownership of the property could be readily determined from County Assessor or Recorder of Deeds records. Additionally, no notice of the Territorial Agreement was recorded in the land records in St. Charles County. Therefore, no person buying property subject to such Territorial Agreement would be advised of its existence.

19. DCM does not disagree with OPC that this is not the case for the Commission to invalidate the Territorial Agreement, as this case is an application for variances that will allow the development to proceed, notwithstanding the Territorial Agreement. The existence of the Territorial Agreement and fact that absent it, water could and would be obtained from PWD No. 2 at a lower cost does provide a proper basis for the Commission to grant the requested variances.

WHEREFORE, DCM respectfully requests the Commission deny OPC's Application for Rehearing.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the foregoing document has been sent by electronic mail this 26th day of October 2021, to:

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