

**BEFORE THE PUBLIC SERVICE COMMISSION  
OF THE STATE OF MISSOURI**

Louis DeFeo,	)	
	)	
Complainant,	)	
	)	
v.	)	<b><u>File No. WC-2021-0075</u></b>
	)	
Missouri-American Water Company,	)	
	)	
Respondent.	)	

**MAWC’S INITIAL BRIEF**

**COMES NOW** Missouri-American Water Company (“MAWC” or “Company”) and, as its *Initial Brief*, states as follows to the Missouri Public Service Commission (“Commission”):

**STANDARD**

The Court of Appeals has confirmed that the burden of proof in this matter rests with Complainant (“Mr. DeFeo”). Among other things, this means that “if the evidence is ‘equally balanced and the [fact-finder] is left in doubt, the litigant having the burden of proof loses. . . .’” *McCloskey v. Koplak*, 329 Mo. 527, 46 S.W.2d 557, 563 (Mo. banc 1932).

The following is a more complete description of the burden of proof and burdens of producing evidence as they relate to Commission complaint cases:

In cases where a complainant alleges that a regulated utility is violating the law, its own tariff, or is otherwise engaging in unjust or unreasonable actions, . . . the burden of proof at hearing rests with complainant." *AG Processing, Inc. v. KCP & L Greater Mo. Operations Co.*, 385 S.W.3d 511, 514 (Mo. App. 2012) (citations and internal quotation marks omitted). The burden of proof has two parts: the burden of production and the burden of persuasion. *White v. Director of Revenue*, 321 S.W.3d 298, 304 (Mo. banc 2010). As the *White* court explained:

The burden of production is "a party's duty to introduce enough evidence on an issue to have the issue decided by the fact-finder[.]" BLACK'S LAW DICTIONARY 223 (9th ed.2009). The

burden of persuasion is defined as "[a] party's duty to convince the fact-finder to view the facts in a way that favors that party." *Id.*

*White*, 321 S.W.3d at 304-05.

The burden of producing evidence is "simply the burden of making or meeting a prima facie case." *McCloskey v. Koplar*, 329 Mo. 527, 46 S.W.2d 557, 563 (Mo. banc 1932). Once a plaintiff has discharged his burden of production, the burden shifts to the other party "to produce, if he desires, competent controverting evidence which, if believed, will offset the plaintiff's prima facie case." *Id.* "If this is done the defendant has met the burden of evidence cast upon him, and made a prima facie defense, whereupon the burden swings back to the plaintiff to bring forward evidence in rebuttal, and so on." *Id.* While the burden of producing evidence may shift from one party to the other and back again, the burden of persuasion does not. *Brinker v. Director of Revenue*, 363 S.W.3d 377, 380 (Mo. App. 2012). The party having the burden of proof carries "the risk of nonpersuasion." *McCloskey*, 46 S.W.2d at 563 (citation omitted). Therefore, if the evidence is "equally balanced and the [fact-finder] is left in doubt, the litigant having the burden of proof loses; he must sustain his case by the greater weight of the evidence." *Id.*

*Mo. Pub. Serv. Comm'n v. Office of Pub. Counsel (In re Emerald Point Util. Co.)*, 438 S.W.3d 482, 490-491 (Mo. App. W.D. 2014) (emphasis added).

## **BACKGROUND**

MAWC provided and continues to provide water service to the Complainant at the address at issue in this case, 1700 Green Berry Road, Jefferson City, Missouri (Ex. 2, pp. 1-37; Ex. 200, p. 5).

Complainant constructed an indoor pool at his residence which is 36' by 18', has a depth of 4.1', and has a capacity of 20,000 gallons (Ex. 8, p. 3). Complainant states that there is no automatic feature to add water to the pool, and that he does so manually with a hose connected to a spigot once every five days (*Id.*).

On April 21, 2020, Mr. DeFeo contacted MAWC regarding a high water bill resulting from a spike in metered usage of about 40,000 gallons at his residence occurring between April 1, 2021 and April 4, 2021. During this call with a MAWC customer service representative it was

noted that Mr. DeFeo had a plumber to his home roughly two weeks earlier to address a stopped-up toilet. Mr. DeFeo requested more information regarding the time of high usage, but detailed data was unavailable at the time. (Ex. 200, p. 6; Ex. 100, Appx. A, p. 2).

On May 20, 2020, a field service representative (“FSR”) from MAWC conducted an investigation of Mr. DeFeo’s residence (Ex. 200, p. 7). The FSR data logged Mr. DeFeo’s meter to see historical hourly usage. The meter data revealed continuous water usage between 1352 hours on April 2, 2020, and 1552 hours, on April 4, 2020 (Ex. 200, p. 8). A subsequent bench test of Mr. DeFeo’s meter that day showed it operating between 98% and 102% accuracy (Ex. 200, p. 7).

Mr. DeFeo initiated an informal complaint with the Commission on July 13, 2020, stating that he had been billed erroneously for usage by MAWC between the dates of April 1 and April 4, 2020, for approximately 40,000 gallons of water, resulting in a roughly \$250 overcharge. MAWC offered a leak adjustment to resolve the informal complaint (Ex. 100, Appx. A, pp. 1-2). Mr. DeFeo declined that adjustment and, on September 18, 2020, filed his formal complaint with the Commission (*Id.*).

On September 29, 2020, a Staff expert investigated Mr. DeFeo’s residence, but was unable to conclusively explain the spike in usage (Ex. 100, Appx. A, p. 4; Tr. P. 56).

On July 13, 2021, MAWC credited Complainant the \$250 at issue to the Complainant’s account and contemporaneously filed its *Notice of Satisfaction* in the above-captioned case (*Notice of Satisfaction*, para. 3). Staff filed a *Motion to Dismiss* on November 3, 2021. An evidentiary hearing in the above-captioned case was conducted on November 19, 2021.

## ISSUES

In the following paragraphs, MAWC will address the issues identified in Staff and MAWC’s *List of Issues, List and Order of Witnesses, Order of Opening and of Cross, and List of*

*Exhibits* and Mr. DeFeo's separately filed *Complainant's List of Issues, Witnesses and Exhibits*, each filed with the Commission on November 12, 2021.

**1. Did MAWC's Notice of Satisfaction filed on July 13, 2021, and the actions described therein, satisfy the complaint?**

Yes. The only relief sought in Mr. DeFeo's formal complaint was that MAWC "claims that the Complainant (the Customer) received over 40,000 gallons of water which he did not. Customer requests that the Company remove any charge base [sic] on this alleged use." (Complaint. p. 2). Upon satisfaction of that requested remedy by MAWC on July 13, 2021, the remainder of Mr. DeFeo's Complaint and subsequent filings fail to state a claim upon which the Commission may grant relief.

At hearing, Mr. DeFeo acknowledged receipt of the \$250 credit to his account, although he stated that he "did not accept it." (Tr. 38). When asked on cross-examination by Staff attorney Kevin Thompson what remedy, aside from the disputed billed amount, Mr. DeFeo was seeking through hearing, Mr. DeFeo answered:

A: The remedies that I am seeking are three fold which are set forth in Exhibit No. 8. If you look at Exhibit No. 8, basically we are – the money is not owed because the water was not received but also that the Company failed to carry out their obligations to inform me of the right to file an in formal complaint with the Commission if I didn't agree with them. And thirdly, what I would call a bias on behalf of the Company Staff in not applying the law and the regulations as to proof of delivery of service but on a bias that meters never fail.

Q: (by Mr. Thompson) I understand those are issues that you are complaining of. What I want to understand is what are the remedies that you want the Commission to give you if you prevail on those issues?

A: The remedies would be I would assume the Commission has authority to enforce its own rules, regulations and statute. These things are set forth in the statute more generally and more specifically in the regulations. And it is there that the Commission could take action to require the Company to do something to

educate their staff that it is supposed to be handling these consumer complaints as to what the law is both statutory, regulatory, and the decisions, the prior decisions of the Commission. And there are different tools that could be used to provide that education to provide that way of communicating with customers to inform them of their rights and inform Company staff that there must be actual proof, not merely meter readings. That is the remedy that I would look for.

(Tr. 38, 39) (parentheses added).

Although it is difficult to identify the requested relief from Mr. DeFeo's answers at hearing, it appears he is requesting both that MAWC be required to notify consumers about the Commission's complaint process, and that MAWC specifically educate consumers on Mr. DeFeo's own interpretation of the Commission's regulation and the *Report and Order* in *Beecham v. Missouri American Water Company*, Case No. WC-2020-0181. As for the former, there is already an existing obligation under both 20 CSR 4240-13.045(9) and 20 CSR 4240-13.070(3) for utilities to inform customers of this process in certain circumstances, and, as for the latter, much like Staff pointed out in its *Motion to Dismiss*, the Commission lacks authority to grant such relief. (para.15).

Either way, the relief apparently requested does not amount to a justiciable claim upon which relief may be granted, but rather an advisory opinion, which this Commission and other administrative courts are not authorized to issue. "[T]he court must have before it a justiciable controversy. The petition must present a 'real, substantial, presently existing controversy admitting of specific relief as distinguished from an advisory or hypothetical situation.' A mere difference of opinion or disagreement on a legal question is insufficient, but parties must show that their rights and liabilities are affected." *Akin v. Dir. of Revenue*, 934 S.W.2d 295, 298 (Mo. banc 1996) (internal citations omitted) (emphasis added). "A complaint fails to state a claim when, assuming that everything alleged is the complaint is true, the Commission has no authority

to grant the relief sought.” *Order Dismissing Complaint*, Case No. WC-2017-0251, quoting *Zeller v. Scafe*, 498 S.W.3d 846, 849 (Mo. App., W.D. 2016).

Therefore, the existing justiciable controversy in the instant case has been resolved and there is no remaining remedy the Commission may grant Mr. DeFeo. As such, the Commission should recognize MAWC’s satisfaction of the Complaint and grant *Staff’s Motion to Dismiss* filed November 3, 2021.

**2. Did the Company through its employee fail to correctly bill the Customer by refusing to consider actual evidence of water usage offered by the Customer but rather relied solely on the bias that meters are always accurate?**

No. At all times relevant herein, bills for water usage at Complainant’s service address were based on actual meter readings (Ex. 200, Schd. T-F4). Further, that meter was tested for accuracy (Ex. 200, p. 7).

The actual meter readings were recorded on Mr. DeFeo’s meter in hourly increments (*Id.*). The meter data log shows continuous water use between the afternoon of April 2, 2020, and the evening of April 4, 2020 (Ex. 200, p. 8). In his initial contact with a MAWC customer service representative on April 21, 2020, regarding the high usage in early April, Mr. DeFeo indicated that he had called a plumber to the house two weeks prior to address an issue with his toilet (Ex. 200, p. 6, Schd. TF-2).

Additionally, Mr. DeFeo made a call to the Company on May 19, 2020, regarding the portion of the recorded “spike” in usage that appeared in the following billing cycle (Ex. 200, p. 6). During that call, the MAWC customer service representative scheduled an investigative service order for May 20, 2020 (*Id.*). At the service call, MAWC’s field service representative conducted bench test of Mr. DeFeo’s meter, which had been in place since July 9, 2019 (*Id.* at 7).

MAWC's bench test revealed that Mr. DeFeo's meter was performing at over 99% accuracy (*Id.* at Schd. TF-3; Tr. 67). As MAWC Customer Experience Specialist Tracie Figueroa explained:

A: The FSR data logged the meter to see historical hourly usage. The FSR noticed a spike in usage from April 1, 2020, through April 4, 2020. He spoke to Mr. DeFeo and went over the results of the data log with him.

Q: Did MAWC conduct a test of the meter?

A: Yes. The Company conducted a bench test of his meter.

Q: How is that accomplished?

A: A meter bench test consists of two separate tests:

Test#1 – Low flow – 1gpm for 10min.

Test#2 – High flow – 10gpm for 10min.

The Company records the before and after reading on the meter and to determine the percentage of accuracy. For this test, MAWC [has] a standard of between 98% and 102% (this is a stricter standard than what appears in the Commission's rules).

Q: What was the result of the meter test?

A: Both the low and high tests for [Mr. DeFeo] indicated that the meter was reading accurately.

(Ex. 200, p.7, Schd. TF-3) (parentheses included).

Staff witness David Spratt conducted an inspection of Mr. DeFeo's residence on September 29, 2020 (Ex. 100, Appx. A, p. 4). Although Mr. Spratt was unable to observe any evidence of water damage in or around the property that would indicate leaks or an over-filled pool, on cross-examination he proffered several scenarios that might explain such usage, such as

reversal of the pool filter system while the pool was filling, which would drain the water to the sewer, pilfering of the water via an outdoor faucet, and a leaking toilet (Tr. 59-61).

Finally, per the MAWC commission-approved tariff, “[MAWC’s] installed meter shall be the standard for measuring and/or billing water service.” (Ex. 101; P.S.C. MO No. 13, 1<sup>st</sup> Revised Sheet No. R 32). A tariff provision “that has been approved by the Commission becomes Missouri law. As a result, the tariffs have the same force and effect as a statute directly prescribed from the legislature.” (*State ex rel. Laclede Gas Co. v. PSC of Mo.*, 156 S.W.3d 513, 521 (Mo. App. W.D. 2005) (internal citations and quotations omitted).

Mr. DeFeo predicates his argument on the proposition that if he used the water indicated by the meter, that an inspection of his residence would reveal “40,000 gallons of water either on the ground or inside in my pool house or any other physical place.” (Tr. 45). Mr. DeFeo argues the absence of the presence of 40,000 gallons of water “hidden” on his property is stronger evidence that he never received the water, than the actual metered water use is evidence that he did receive the water (Tr. 44). Of course, this ignores other results, such as from a leaking toilet running down the drain. In fact, according to Mr. DeFeo’s own testimony and the records of MAWC, Mr. DeFeo had a plumber to his residence regarding an issue with his toilet about the time that the meter recorded the spike in usage (Tr. 70; Ex. 200 p. 6). As established by the testimony of David Spratt and Tracie Figueroa, a leaking toilet can use a substantial amount of water, in fact, up to 400 gallons per hour, depending on various factors (Tr. 61:9-11; Ex. 200, p. 8).

In support of his proposition, Mr. DeFeo relies exclusively on *Beecham v. Missouri-American Water Company* Case No. WC-2020-0181. However, the *Beecham* case is easily distinguishable, as rather than the Commission relying on the presence or lack of physical evidence of water usage, as Mr. DeFeo suggests, the Commission rejected the actual metered



usage as accurate based upon testimony of average usage, and a dramatic drop in metered usage immediately after the installation of a new meter (Ex. 5, 14-16). Nowhere is there mention of “physical evidence” in the *Beecham Report and Order*. Moreover, no similar evidence is present in the instant case. As Ms. Figueroa testified at hearing regarding the meters and circumstances in *Beecham* and the instant case:

A: [T]hey are different in that Ms. Beecham, she experienced higher usage where it slowly went up over time over a number of years. Mr. DeFeo’s was very sudden over I believe like a four-day period of time from April 1 to April 4 of 2020, and then it stopped. So there are differences between the two.

Q: How about the testing of the meter? I think you addressed the meter test of Mr. DeFeo’s meter in your rebuttal testimony, correct?

A: I believe so, yes.

Q: Was that done relatively contemporaneously with the leak issue?

A: Yes, it was done fairly quickly by our local office and it was an in place test. So an in place test means they time it there as the meter is in the ground, and it passed with 99.1 percent accuracy.

Q: Was there a test done in the Beecham case at a similar point in time?

A: I believe for Beecham it was later after she had initially filed her dispute. And hers actually we did a bench test which means we pulled the existing meter out of the ground and took it to a test bench[.]

(Tr. 67-68).

Additionally, Ms. Figueroa testified at hearing that the meters at the Beecham household and the DeFeo household had different manufacturers and different reading devices (Tr. 66). The Beecham meter was 13 years-old at the time of complaint, whereas Mr. DeFeo’s was only approximately one year-old (*Id.*). Considering the distinguishing factors between the *Beecham*

case and the instant case, Mr. DeFeo's insistence that the *Beecham* case is determinative here is misplaced.

**3. Did the Company through its employee fail to respect Customer's right to appeal by failing to inform the Customer of his right to file an in formal complaint with the PSC which is required?**

No. Commission Rule 20 CSR 4240-13.045(9) states as follows:

If the utility does not resolve the dispute to the satisfaction of the customer, the utility representative shall notify the customer that each party has a right to make an informal complaint to the commission, and of the address and telephone number where the customer may file an informal complaint with the Commission.

Commission Rule 20 CSR 4240-13.070(3) also states as follows:

If a utility and a customer and/or applicant fail to resolve a matter in dispute, the utility shall advise the customer and/or applicant of his/her right to file an informal complaint with the commission under 4 CSR 240-2.070 [sic].

As explained by Ms. Figueroa, once an interaction with a customer has reached a point where it is clear that the dispute cannot be resolved between the parties, and MAWC's customer services have exhausted all options in reaching a resolution, a letter from MAWC is sent to the customer notifying them of the opportunity to present a complaint to the Commission pursuant to 20 CSR 4240-13.045(9) and 20 CSR 4240-13.070(3) (Ex. 200, p.10). Before such a letter is sent, the complainant customer is directed to the Account Resolution Team at MAWC, which is comprised of the highest-level billing representatives within the Customer Service Organization at MAWC (Ex. 200, p. 11). It is only after the Account Resolution Team is unable to resolve the issue that the resolution process would be considered exhausted, and the dispute considered unresolved, that a letter would issue from MAWC to the complainant customer directing them to the Commission's complaint process (*Id.*).

Mr. DeFeo admitted on examination that he initially learned the procedure to file an informal complaint with the Commission from a letter issued by MAWC regarding a dispute in 2019, but that MAWC had “failed to comply with regulations at the present time.” (Tr. 51-52). However, the filed rebuttal testimony of Ms. Figueroa indicates that Mr. DeFeo never responded to a letter issued by MAWC stating that if he had any questions regarding MAWC’s initial service order finding the meter reading to be accurate, he should contact a customer service representative (Ex. 200, p. 10; Schd. TF-8). Had Mr. De Feo responded to the letter and contacted customer service, he would have been directed to the Account Resolution Team (Ex. 200, p. 10-11). Were the situation not resolved by the Account Resolution Team, a letter would have issued directing Mr. DeFeo to the Commission’s complaint process (*Id.*). Instead of contacting the Account Resolution Team, Mr. DeFeo instead elected to file an informal complaint with the Commission using the method communicated to him by MAWC in 2019.

Additionally, instruction regarding customer’s rights to bring unresolved issues with MAWC before the Commission are always available on MAWC website, and were so at all times relevant herein (Ex. 200, p. 9) (see [www.amwater.com/moaw/Customer-Service-Billing/Rights-Responsibilities/Customer-Rights-And-Responsibilities/index](http://www.amwater.com/moaw/Customer-Service-Billing/Rights-Responsibilities/Customer-Rights-And-Responsibilities/index)). Specifically,

MAWC’s website states:

## **Missouri Public Service Commission**

Missouri American Water operates under regulations established by the PSC. If you feel we have not responded to your issue in a satisfactory manner, you have the right to request that the PSC review the unresolved issue. You may contact the PSC at

Missouri Public Service Commission Governor

Office Building

200 Madison Street, PO Box 360

Jefferson City, MO 65102-0360

(800) 392-4211

[www.psc.mo.gov](http://www.psc.mo.gov)

## Office of Public Counsel

The Office of Public Counsel (OPC) provides an additional resource for Missouri utility customers. The OPC represents the interests of the public and utility customers in proceedings before the Missouri Public Service Commission and in appeals in the courts. You may contact the OPC at

Office of Public Counsel Governor  
Office Building  
200 Madison Street, Suite 650  
PO Box 2230  
Jefferson City, MO 65102-2230  
(866) 922-2959  
[opc.mo.gov/](http://opc.mo.gov/)

(Ex. 200, pp.9-10).

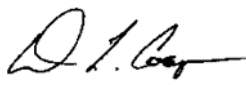
- 4. Did the PSC representative handling the informal complaint error by refusing to consider actual evidence of water usage offered by the Customer but rather relied solely on the bias that meters are always accurate? Did the PSC representative handling the informal complaint error by failing to inform the Customer of his right to file a formal complaint?**

As this issue does not directly address the Respondent, MAWC will defer to Staff regarding the issue.

**WHEREFORE**, MAWC respectfully requests that the Commission consider this *Initial Brief* and, thereafter, issue such orders as it should believe reasonable and just.

Respectfully submitted,

**BRYDON, SWEARENGEN & ENGLAND, P.C.**

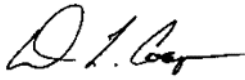
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**ATTORNEYS FOR MISSOURI-AMERICAN  
WATER COMPANY**

**CERTIFICATE OF SERVICE**

The undersigned certifies that a true and correct copy of the foregoing document was sent by electronic mail to all parties of record this 7<sup>th</sup> day of January 2022.

  
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