

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

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| George L. Eliceiri, |) | |
| |) | |
| Complainant, |) | |
| |) | |
| v. |) | <u>File No. WC-2020-0145</u> |
| |) | |
| Missouri-American Water Company, |) | |
| |) | |
| Respondent. |) | |

**MISSOURI-AMERICAN’S MOTION TO DISMISS
AND SUGGESTIONS IN SUPPORT**

COMES NOW the Respondent Missouri-American Water Company (“Missouri-American”), and for its Motion to Dismiss, pursuant to 20 CSR 4240-2.070(7), respectfully states as follows:

On November 22, 2019, Mr. George L. Eliceiri (“Complainant”) filed a *Complaint* against Missouri-American. The Complainant seeks *** [REDACTED]

[REDACTED] *** On November 25, 2019, the Commission issued its *Order Giving Notice Of Contested Case And Directing Answer* (“*Order Giving Notice*”) and stated the Commission will treat the *Complaint* as a formal complaint under Section 386.390, RSMo, verses a small formal complaint case under Commission regulation 20 CSR 4240-2.070(15). The *Order Giving Notice* also directed Missouri-American to file a response to the *Complaint* no later than December 26, 2019. In compliance with the *Order Giving Notice*, Missouri-American is filing this motion to dismiss and suggestions in support along with its *Answer To Complaint*.

“As a creature of statute, the Commission ‘only has the power granted to it by the Legislature and may only act in a manner directed by the Legislature or otherwise authorized by

necessary or reasonable interpretation.”¹ “If a power is not granted to the Commission by Missouri statute, then the Commission does not have that power.”² “A basic tenet of administrative law provides that ‘an administrative agency has only such jurisdiction or authority as may be granted by the legislature.’ If an administrative agency lacks statutory power to consider a matter, the agency is without subject matter jurisdiction. The agency’s subject matter jurisdiction cannot be enlarged or conferred by consent or agreement of the parties.”³ “Without subject matter jurisdiction, the agency can take no other action than to dismiss the proceeding.”⁴

The Commission should dismiss the entire *Complaint* because it fails to state a claim upon which relief can be granted. Further, the Commission lacks the statutory authority to grant the relief the Complainant requests, that is, *** [REDACTED]

[REDACTED]

[REDACTED] ***

The Complaint Fails to State a Claim Upon Which Relief Can Be Granted

A complaint fails to state a claim upon which relief can be granted if, accepting the well-pleaded factual allegations as true, the complaint nevertheless fails to establish that the complainant is entitled to the relief sought.⁵ Section 386.390, RSMo, is the general complaint statute. Section 386.390, RSMo states in part:

Complaint may be made . . . setting forth any act or thing done or omitted to be done by any corporation, person or public utility, including any rule, regulation or charge heretofore established or fixed by or for any corporation, person or public utility, *in violation, or claimed to be in violation, of any provision of law, or of any rule or order or decision of the commission.* . . .

¹ *Public Serv. Comm’n v. Consol. Pub. Water Supply Dist. C-1*, 474 S.W.3d 643, 649 (Mo. App. W.D. 2015)(citing *Evans v. Empire Dist. Elec. Co.*, 346 S.W.3d 313, 318 (Mo. App. W.D. 2011)).

² *Id.*

³ *Livingston Manor, Inc. v. Dep’t of Soc. Servs.*, 809 S.W.3d 153, 156 (Mo. App. W.D. 1991)(quoting *State ex rel. Mo. Health Care Ass’n v. Mo. Health Facilities Review Comm.*, 768 S.W.2d 559, 562 (Mo. App. W.D. 1988)).

⁴ *St. Charles Ambulance Dist., Inc. v. Dep’t of Health & Senior Servs.*, 248 S.W.3d 52, 54 (Mo. App. W.D. 2008).

⁵ See, e.g. *Tari Christ v. Southwestern Bell Tele. Co. et al.*, 2003 Mo. PSC LEXIS 37 (Case No. TC-2003-0066, *Order Regarding Motions to Dismiss*, Jan. 9, 2003)(citing *Nazeri v. Missouri Valley College*, 860 S.W.2d 303, 306 (Mo. banc 1993)).

(emphasis added). There are only two types of complaints that may be brought pursuant to the general complaint statute: (1) a complaint alleging a utility violation of a statute, rule, order or decision of the Commission; and (2) a complaint as to the reasonableness of any utility rate or charge.⁶ A complaint of the first type must *necessarily* include an allegation of a violation by the utility of a law or of a Commission rule, order or decision or it does not invoke the Commission's jurisdiction.⁷ Otherwise put, when the subject of a complaint is not one contemplated by Section 386.390, RSMo, the complaint has failed to invoke the Commission's jurisdiction.⁸

Even if all the facts stated in the *Complaint* are accepted as true, the *Complaint* fails to invoke the Commission's jurisdiction. *** [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] *** For these reasons, the *Complaint* fails to state a claim upon which relief can be granted under the general complaint statute and should be dismissed.

A Complaint That Requests Special Preference as Relief Should be Dismissed

*** [REDACTED]

[REDACTED] *** Section 393.130, RSMo prevents Missouri-American from granting an undue or unreasonable preference to any customer. Section 393.130.3, RSMo provides:

No gas corporation, electrical corporation, water corporation or sewer corporation shall make or grant any undue or unreasonable preference or advantage to any person, corporation or locality, or to any particular description of service in any

⁶ Section 386.390.1, RSMo.

⁷ *Tari Christ* at 22-23 (citing *State ex rel. Ozark Border Elec. Coop. v. Pub. Serv. Com'n*, 924 S.W.2d 597, 599-600 (Mo. App. W.D. 1996)).

⁸ *MCI Telecom. V. SWBT*, 1997 Mo. PSC LEXIS 126 (Mo. PSC 1997).

respect whatsoever, or subject any particular person, corporation or locality or any particular description of service to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

(emphasis added).

the Commission to order such relief.

The Court in *State ex rel. The Laundry Inc. v. Publ. Serv. Comm.*, 327 Mo. 93 (Mo. 1931) discussed the purpose behind Section 393.130, RSMo, first enacted in 1919. The Court quoted from an early Commission decision:

In the Missouri act (Public Service Commission Law) supervision and regulation seek to require all public utilities operating in the State, whether owned by private persons, corporations or municipalities, not only to serve the public at reasonable rates or charges, but to require them also to serve the public efficiently and without unjust discrimination. The consensus of opinion everywhere is that such requirements are imperatively demanded by modern industrial conditions.⁹

The Court opined that partiality is not allowed in the Commission's discharge of its responsibilities: "The public duty must be discharged for the equal benefit of all, and obviously to permit discrimination or inequality in the service or charges is to ignore the public obligation. The common right of all involves the obligation to give equal rights to all for the same service."¹⁰

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motion to dismiss should be granted unless the challenged petition invokes principles of law that entitle the petitioner to the relief requested.¹¹ As Section 393.130, RSMo does not allow the Commission to order the relief requested by the Complainant, the Commission should dismiss the *Complaint*.

The Commission Cannot Order the Involuntary Conveyance of Property

*** [REDACTED]

[REDACTED] *** Missouri-American has the right to use the utility easement for the public purpose of supplying water to its customers, including the Complainant. “An easement, strictly speaking, does not carry any title to the land over which it is exercised; it is rather a right to use the land for particular purposes.”¹² “Although an easement does not vest title, an easement is a form of private property....”¹³ *** [REDACTED]

[REDACTED] *** The Commission’s powers are purely regulatory. “The dominating purpose in the creation of the Public Service Commission was to promote the public welfare. To that end the statutes provided regulation which seeks to correct the abuse of any property right of a public utility, *not to direct its use*. Exercise of the latter function would involve a property right in the utility. The law has conferred no such power upon the Commission.”¹⁴

⁹ *State ex rel. The Laundry Inc. v. Publ. Serv. Comm.*, 327 Mo. 93, 109 (Mo. 1931), *quoting Civic League of St. Louis et al. v. City of St. Louis*, 4 Mo. P.S.C. 412.

¹⁰ *Id.* at 110 (internal citations omitted).

¹¹ *See Murray v. Ray*, 862 S.W.2d 931, 933 (Mo. App. 1993).

¹² *St. Charles Cty. v. Laclede Gas Co.*, 356 S.W.3d 137, 139-40 (Mo. 2011), *quoting Blackburn v. Habitat Dev. Co.*, 57 S.W.3d 378, 389 (Mo. App. 2001) (internal quotations omitted).

¹³ *St. Charles Cty.*, 356 S.W.3d at 139-140, citing *Panhandle E. Pipe Line Co. v. State Highway Comm’n*, 294 U.S. 613, 617-18 (1935).

¹⁴ *State ex rel. Harline v. Pub. Serv. Com.*, 343 S.W.2d 177, 181 (Mo. App. 1960), *quoting State ex rel. Kansas City v. Public Service Commission of Missouri*, 301 Mo. 179, 257 S.W. 462.

Summary

Missouri-American has not violated any law, Commission regulation or order, or provision of its tariff with regard to the Complainant's allegations set forth in the *Complaint*. Further, the Commission lacks the statutory authority to grant the relief the Complainant requests, that is, *** [REDACTED]

[REDACTED]

[REDACTED] *** Therefore, a motion to dismiss is proper and should be granted.

WHEREFORE, having fully answered the *Complaint*, Missouri-American requests the Commission dismiss the *Complaint* for failure to state a claim against Missouri-American to which the Commission has jurisdiction to grant relief. Missouri-American also requests such other and further relief as is just and proper under the circumstances.

Respectfully submitted,

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ATTORNEYS FOR MISSOURI-AMERICAN
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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been transmitted by electronic mail to the Complainant and all counsel of record this 26th day of December 2019:

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