

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

Utility Workers Union of America,)	
Local 335,)	
)	
v.)	<u>Case No. WC-2011-0341</u>
)	
Missouri-American Water Company.)	

STAFF’S RESPONSE TO ANSWER AND MOTION TO DISMISS

COMES NOW the Staff of the Missouri Public Service Commission (Staff), by and through the undersigned counsel, and files this *Response to Answer and Motion to Dismiss* (*Response*) with the Missouri Public Service Commission (Commission), respectfully stating the following:

1. On April, 14, 2011, a *Complaint* was filed by Utility Workers Union of America, Local 335 (“Local 335” or “Union”) against Missouri-American Water Company (“Missouri-American” or “Company”). On May 18, 2011, Missouri-American filed its Answer and Motion to Dismiss. On May 23, 2011, Local 335 filed its response in Opposition to Motion to Dismiss. On May 23, 2011, the Commission issued an *Order Directing Filing (Order)* stating that Staff shall file its response to the Answer and Motion to Dismiss no later than June 7, 2011. This filing is meant to comply with that *Order*.

2. In Count I, Local 335 alleges that Missouri-American is no longer following a certain policy related to a valve maintenance program. The Union goes on to allege that Missouri-American previously retained 3-4 maintenance employees who were exclusively assigned to exercising valves, but has discontinued the use of those employees to perform these

duties. In terms of specific incidences, Local 335 asserts one specific occasion where, during a main break on April 10, 2011, the first three (3) valves workers attempted to close were not operational.

3. In response, Missouri-American asserts that it uses a valve operation or exercising program in one of three ways, which are designed to locate and operate valves periodically to make sure they are accessible and functioning properly. The Company asserts that in determining which program is implemented, it considers many factors, including cost. As for the specific situation, Missouri-American responded that supervisors on the scene of the main break determined a series of seven (7) valves that would have to be closed to stop the release of water and five (4) of those seven (7) functioned properly.

4. In Count II, Local 336 alleges that Missouri-American's current fire hydrant maintenance program is insufficient because it lacks the manpower to insure all hydrants operate effectively, and that a hydrant inspection and maintenance program should operate year round rather than only being performed in the summer months.). Local 335 states that the proper functioning of these hydrants is a critical fire safety issue, and Missouri-American admits this fact. There is no other mention of safety.

5. Missouri-American answers that it is it in compliance with its tariff in the way it performs hydrant inspections. Missouri-American further asserts that its current hydrant maintenance program utilizes a thorough inspection, including visual inspections, inspection for functionality, performing maintenance as need and sounding for leaking, in addition to pressure testing and spot painting described by Local 335 in the *Complaint*.

6. In Count III, Local 335 argues that the Commission should oversee Missouri-Americans subcontracting of ISRS work.

7. In response, Missouri-American asserts that some ISRS work is performed by Local 335 members and some is performed by outside contractors, as permissible under the Collective Bargaining Agreement entered into by Local 335 and Missouri-American.

STAFF'S RESPONSE

8. In response to Counts I and II, Staff generally supports and encourages both valve exercising and fire hydrant maintenance and establishes that it is reasonable to perform both activities on some type of routine basis.

9. Valve exercising assists the Company in keeping track of valve accessibility and provides better assurance of valve operability. According to the pleadings, Missouri-American has a plan in place for valve replacement, albeit not the one the Union prefers, and while Staff encourages the use of valve exercise and records reflecting such exercise, it does not recommend the Company be required to follow any specific policy or reporting for valve maintenance in this case.

10. Staff understands that fire hydrant inspections, including flow tests, are not always practical under some weather conditions and do not need to be done on a year-round basis. Staff reports that these inspections could be combined with efforts from fire departments, as they share the same interests. Missouri-American's tariff for its St. Louis County service district addresses fire hydrant location and inspections on a fourteen (14) month basis for any hydrant. At this time, Staff cannot identify any specific violation of a rule, regulation or statute that Missouri-American violated with regard to fire hydrant inspections and does not recommend the Company be required to follow any specific policy for fire hydrant maintenance in this case.

11. However, should the Commission prefer more specific detail regarding a valve exercise procedure or fire hydrant maintenance, or choose to order Missouri-American to

implement a reporting procedure, any such report should identify specific programs for all of the Company's various service districts (or limit it to only the area Local 335 covers) and include the data quantifying information on the valves or hydrants, issues discovered, tests utilized and work performed to resolve such issues, noting sizes and types of valves involved or the size water main for hydrants tested. It is important to note that any such reporting or implementation might create an additional cost that may be passed to the rate payers in the future.

12. In regard to Count III, the Commission "shall not reduce or otherwise change any wage rate, benefits, working condition, or other term or condition of employment that is the subject of a collective bargaining agreement between the public utility and a labor organization." Section 386.315.1, RSMo (Supp 2010). As such, the Commission does not have jurisdiction on this claim and there is no relief that the Commission may grant in regard to this Count. Therefore, Missouri-American's affirmative defenses are supported and its Motion to Dismiss Count III should be granted by the Commission.

AFFIRMATIVE DEFENSES

I. Missouri-American states that the Complaint fails to state a claim upon which relief may be granted in that the Complainant is not a party authorized to bring a complaint under Section 386.390, RSMo and Commission Rule 4 CSR-2.070.

A complaint "may be made by ... any civic, commercial, mercantile, traffic, agricultural or manufacturing association or organization, or any body politic or municipal corporation, by petition or complaint in writing setting forth any act or thing done or omitted to be done ... in violation, or claimed to be in violation, of any provision of law, or of any rule or order or decision of the commission..." Section 386.390.1, RSMo. The Commission's Rules state, "...[A]ny person or public utility who feels aggrieved by a violation of any statute, rule, order or

decision within the commission's jurisdiction may file a complaint". 4 CSR 340-2.070.1. Commission Rules also define "party" to include" any applicant, complainant, petitioner, respondent, intervenor or public utility in proceedings before the commission." 4 CSR 340-2.010(11).

In this case, Local 335 filed a formal written complaint, in accordance with 4 CSR 340-2.070.5, that alleges actions performed by Missouri-American that violate the Company's obligation to provide safe and adequate service and that puts at risk the safety and health and the public, pursuant to Section 386.310 and 393.130 (Supp. 2010), respectively. Therefore, Missouri-American's first affirmative defense lacks merit because Local 335 is a proper party that may file a complaint with the Commission.

II. Missouri-American states that the Complaint fails to state a claim upon which relief may be granted in the Complaint requests relief that is beyond the Commission's jurisdiction. Missouri-American states that the Complaint fails to state a claim upon which relief may be granted in that the Complaint does not allege a violation of any provision of law or of any rule or order or decision of the Commission.

The Commission's powers are described in Section 393.140, RSMo, and include general supervision over water corporations and sewer corporations, among others. The Commission also has the power to investigate and ascertain the methods employed by such corporations in distributing water and have the power "to order such reasonable improvements as will best promote the public interest, preserve the public health and protect those using such gas, electricity, water, or sewer system..." Section 393.140.2, RSMo.

On its face, the *Complaint* does include a specific statement that Missouri-American violated any law, rule, order or decision of the Commission. Local 335 broadly alleges that

Missouri-American's practices, as they relate to valve maintenance program and fire hydrant maintenance program, put the public safety at risk and impede safe and adequate service. However, based on the documents filed it appears there was a reasonable belief that the current practices jeopardize public safety and the ability to provide safe and adequate service. As such, Staff finds that Local 335 adequately states a claim for Counts I and II and the Commission may exert jurisdiction.

As stated above, Staff does not recommend that the Commission order Missouri-American to establish reporting mechanisms for valve and fire hydrant maintenance because it appears Missouri-American is adequately maintaining those issues currently and any such reporting will result in additional costs that may be transferred to the ratepayers in the future.

III. Missouri-American states that is has acted in accordance with its tariffs and applicable statutes and regulations.

Staff asserts that this defense is sustainable. Staff asserts, based on the documents filed in this case and its general knowledge of the Company's operation, that there is no indication of a violation of Missouri-American's tariffs or regulations in its review of this Complaint. Staff further found no specific violation of applicable statutes, but again states that the Commission may choose to issue an order imposing additional requirements in regard to Missouri-American's valve maintenance and fire hydrant maintenance programs.

MOTION TO DISMISS

A motion to dismiss for failure to state a claim “ ‘is solely a test of the adequacy of the plaintiff's petition.’ *City of Lake St. Louis v city of O’Fallon*, 324 S.W.3d 756, 759 (Mo. Banc 2010) (quoting *Reynolds v. Diamond Foods & Poultry, Inc.*, 79 S.W.3d 907, 909 (Mo.banc 2002) “A court reviews the petition ‘in an almost academic manner, to determine if the facts alleged meet the elements of a recognized cause of action, or of a cause that might be adopted in that case.’” *Id.* (quoting *Nazeri v. Mo. Valley Coll.* 860 S.W.2d 303, 306 (Mo. Banc 1993). The court treats the plaintiff's averments as true and liberally grants the plaintiff all reasonable inferences. *Id.*

As described above, a Motion to Dismiss should be granted for Count III of the *Complaint*. A Motion to Dismiss Counts I and II may be granted.

Local 335 fails to specifically allege in the *Complaint* that any of Missouri-American’s actions resulted in a failure to provide safe and adequate service or placed in jeopardy the issue. It may be argued that by citing the Company’s statutory references in the first seven (7) paragraphs of the complaint allows the reasonable inference that it is those allegations that the Union is claiming the Company violated. The remedy available includes reporting requirements or the creation of procedures or any other that that Commission deemed necessary.

However, it may also be argued that Local 335 fails to ascertain with certainty its cause of action against the Company. Allowing such general statements of statutory violations may result in multiple and repetitive complaints being filed that lack sufficient merit and result in an abuse of resources. It is not simply enough to allege that a danger may exist. It may be improper to allow this case to continue when it appears that the Company has procedures for both valve and fire hydrant maintenance and those procedures do not violate any current rules, statutes or

tariffs issued by the Commission. As such, the Commission may grant Missouri-American's Motion to Dismiss all three counts of the *Complaint*.

WHEREFORE, Staff respectfully submits this *Response* to the Commission for its information and consideration.

Respectfully submitted,

/s/ RACHEL M. LEWIS

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been mailed, hand-delivered, transmitted by facsimile or electronically mailed to all counsel of record this 7th day of June, 2011.

/s/ RACHEL M. LEWIS