

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

Roman Dzhurinskiy,)	
)	
Complainant,)	
)	<u>Case No. WC-2010-0215</u>
v.)	
)	
Missouri-American Water Company,)	
)	
Respondent.)	

STAFF RESPONSE

COMES NOW the Staff of the Missouri Public Service Commission (Staff), by and through the undersigned counsel, and for its response respectfully states the following to the Missouri Public Service Commission (Commission):

On September 2, 2010, Mr. Roman Dzhurinskiy (Complainant), filed a motion with the Commission that sought as relief a Commission order directing the Staff to reinvestigate the *Complaint* filed January 19, 2010, or an order striking the Staff’s evidence and recommendations in this case. On September 3, 2010, the Staff, the Complainant and Missouri-American Water Company (Missouri-American or Company) filed a *Joint Proposed Procedural Schedule* that culminated with an evidentiary hearing on November 15, 2010. Based on telephone conversations with the Complainant and the motion filed, the Staff understands the Complainant’s issues as concerns with the Staff entering property during investigations, as well as maintaining independence during investigations. The Staff will respond to these two points separately herein.

INVESTIGATING PROPERTY

4 CSR 240-2.070 (10) provides that “[t]he Commission may order, at any time after the filing of a complaint, an investigation by its staff as to the cause of the complaint. The Staff

shall file a report of its findings with the commission and all parties to the complaint case.” Section 393.140 (2) RSMo (2000)¹ provides that the Commission shall “[i]nvestigate and ascertain, from time to time, the quality of...water supplied...by persons and corporations, examine or investigate the methods employed by such persons and corporations...in supplying and distributing water for any purpose whatsoever....” The Commission, pursuant to Section 386.240 RSMo, may allow the Staff to carry out certain acts authorized by Chapter 386 RSMo, including examinations and investigations. Finally, Section 386.490.3 allows the Commission to change any order it issues at any time. Therefore, a case is never “closed” and is always before the Commission unless a court has removed jurisdiction.

Missouri-American’s current tariff P.S.C. MO. No. 6, First Revised Sheet No. DF1.5 defines “meter” as “[a] device, *owned by the Company*, which measures the quantity of water which passes through a Water Service Line supplying one or more premises.” (emphasis added). The same sheet also defines “meter box” as “[a]n underground enclosure, of a design acceptable to the Company, with a removable lid or entrance opening from ground level, which houses or encloses a meter.” Second Revised Sheet No. R9.0 of the Company’s current tariff states that

[a]uthorized personnel of the Company shall have access at all reasonable hours to the premises supplied, for the purpose of making necessary examination of the plumbing and fixtures; taking meter readings; changing meters; installing; removing or servicing remote reading attachments; and for any other reasons deemed necessary by the Company. Such access must be provided as specified in this rule to avoid discontinuance of service.

Second Revised Sheet No. R9.0 also provides “ACCESS FOR MAINTENANCE: The Company may discontinue service as provided in this rule if a customer fails to provide access to allow *inspection*, maintenance, or changing the meter, notwithstanding the presence of a remote meter reading attachment, or successful actual meter reads. (emphasis added). Second Revised Sheet

¹ All citations are to the 2000 Missouri Revised Statutes as currently supplemented.

No. R9.0 and Original Sheet No. R12.0 provide in general that as a condition of service, the meter box shall be placed at or near the customer's property line to improve the Company's ability to read the meter.

Acting on behalf of the Commission, the Staff typically visits both the complainant's and the company's property subject to a complaint to investigate the allegations contained therein, and to observe the company's practices and procedures relevant to a complaint. The filing of a complaint before the commission not only necessitates, but implicitly authorizes the Staff to enter a complainant's property to observe the causes of the complaint. The Staff often conducts unannounced site visits to observe and investigate systems under "normal" operating conditions. This procedure prevents the parties to a case from making adjustments prior to an investigation that could benefit a particular position in a case. Accepting the Complainant's position of trespass ignores the statutory authority given to the Commission by the legislature, and in essence, retracts the Complainant's request for the Commission to independently investigate and decide the matter before it.

Missouri-American's current tariff dictates as a condition of service that a customer place a meter box close to the customer's property line abutting the utility's water main easement; i.e., most often a few feet from the public street curb. Additionally, Missouri-American's tariff reserves the right to discontinue service should the customer refuse access to allow the inspection of Company property used in the provision of service, including the Company's water meter. As the Commission has regulatory authority over public utilities, the Staff may enter upon any property that authorized personnel of a public utility have a right to access in order to carry out the Commission's statutory mandate.

The Staff filed a recommendation in this case on March 12, 2010. The filing of a recommendation does not end the Staff's involvement in a case; the Staff continues to monitor cases thereafter. The Staff again examined the Complainant's meter, as well as other meters registering water service from the same Company main, on August 18, 2010. Staff member Steve Loethen observed the meters of four homes on the same side of the street as the Complainant's home, including two houses to each side. Mr. Loethen also observed the meters of four homes located directly across the street from the Complainant's home. The observation of the meters involved stepping onto the curb at the property line of each home and lifting the meter pit lid to view the meter dial and look for ratcheting movement. Any further information obtained during monitoring is used by the Staff to support its position and recommendation to the Commission, and is subject to cross examination by the Parties if used at hearing. Certainly, should the Staff ever discover information that would change any recommendation filed before the Commission, the Staff would file a pleading to that effect as soon after the discovery as practicable. However, that is not the situation in this case and the Staff continues to support its March 2010 filed memorandum of investigation and recommendation. Mr. Loethen observed ratcheting movement only on the Complainant's meter dial.

STAFF'S INDEPENDENCE

Section 386.110 RSMo provides that "[n]o person shall be eligible to...hold any office or position under the commission, who holds any official relation to any...water corporation, or who owns stocks or bonds therein, or who has any pecuniary interest therein." Section 386.200.1 RSMo forbids any Staff person from receiving "...any present, gift, entertainment or gratuity of any kind." Additionally, Section 386.200.2 RSMo provides that each Staff member shall be

deemed a public officer, and any violation of this section shall be grounds for removal from office.

Motions to strike, like objections, must be made at the first opportunity. *See Spalding v. Monat*, 650 S.W.2d 629, 631 (Mo. Ct. App. E.D. 1981). It is the general rule that any later objection to evidence is waived when the objecting party does not take prompt action to obtain a ruling from the court. *Id.* A party's unexcused failure to make a specific timely objection cannot be rectified by a motion to strike. *See State v. Cannady*, 660 S.W.2d 33, 37 (Mo. Ct. App. E.D. 1983).

Mr. Loethen attached an affidavit to his March 2010 memorandum of investigation and recommendation. He averred that the facts contained therein are true and correct to the best of his knowledge, information and belief. The Complainant's allegations of the Staff assisting Missouri-American to collect information are serious allegations with the penalty of termination of employment. However, the Complainant's allegations have no reasonable ground of support.

The Complainant could have timely raised the motion to strike after the March 2010 recommendation instead of waiting approximately six months to do so. As such, the Commission should deny the Complainant's motion to strike the evidence and recommendations of the Staff. The Complainant only points to the coincidence in the timing of the Staff's follow-up on August 18, 2010, with the Complainant's service of a subpoena for documents upon Missouri-American on August 17, 2010. However, the Staff remained unaware of the Complainant's service of the subpoena until the Complainant notified the undersigned of the service on August 24, 2010. One would be hard pressed to find bias towards Missouri-American in the Staff's recommendation when it stated that the difference in meter accuracy between reverse and normal directional flows suggests the possibility of a ratcheting effect occurring at

the Complainant's meter. Further, the Staff pledged to continue to work with the Complainant and the Company to monitor the Complainant's usage with a backflow preventer installed. The Staff stated that if usage decreased, the Staff would recommend to the Commission that Missouri-American make an appropriate adjustment to the Complainant's bill.

In response to the request for another investigation by the Staff, such would take additional time and resources when the Staff is confident that it provided a true and accurate report in March 2010. If another Staff member investigated the *Complaint* and came to the same conclusion, it is questionable whether such investigation would satisfy the Complainant. Further, as an alternative, the Complainant suggests to the Commission that it hire an outside independent party to investigate the *Complaint*. Without considering the cost to the Commission, it is questionable as to whether the Commission could rely on a report by an outside investigator as there is current litigation pending in the Missouri Western District Court of Appeals on that exact point. The Commission should also deny the Complainant's request for a new investigation along with the motion to strike.

WHEREFORE, the Staff submits this response for the Commission's information and consideration, and requests that the Commission enter an order: (1) denying in its entirety the Complainant's *Motion to have the case reinvestigate [sic] or strike down the evidence and recommendations by the Staff investigator*; and (2) maintain the current procedural schedule as ordered by the Commission on September 8, 2010, for resolution of this case.

Respectfully submitted,

/s/ Jennifer Hernandez
Jennifer Hernandez
Associate Staff Counsel
Missouri Bar No. 59814

Attorney for the Staff of the

Missouri Public Service Commission
P. O. Box 360
Jefferson City, MO 65102
(573) 751- 8706 (Telephone)
(573) 751-9285 (Fax)
jennifer.hernandez@psc.mo.gov

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served via first class U.S. postal mail, postage prepaid, on Roman Dzurinskiy, 32 Crabapple Ct. St. Louis MO 63132; electronic mail on Kenneth Jones, attorney for Missouri American Water Company at kenneth.jones@amwater.com; and the Office of Public Counsel at opcservice@ded.mo.gov this 10th day of September, 2010.

/s/ Jennifer Hernandez