

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

ROB LEE,)	
)	
Complainant,)	
)	
v.)	File No. WC-2009-0277
)	
MISSOURI AMERICAN)	
WATER COMPANY,)	
)	
Respondent.)	

ORDER DENYING RECONSIDERATION OF PROTECTIVE ORDER

Issue Date: June 3, 2009

Effective Date: June 3, 2009

The Missouri Public Service Commission is denying Rob Lee's motion to reconsider ("the motion"), which Mr. Lee filed on June 2, 2009. The motion addresses the Commission's June 2, 2009 protective order. Protective orders are part of the Commission's authority to enforce discovery. Discovery before the Commission is virtually the same as under the Missouri Supreme Court rules for civil actions in circuit court.¹ The Commission has set the hearing on the parties' agreed dates of June 9 and 10, 2009.

a. Background

The motion addresses First Request Item No. 1:

Repair records for last nineteen (19) years within a 1/4 mile radius of 11119 Carl St.

MAWC stated in its written discovery response that:²

. . . it has previously produced to Complainant said records for the previous ten (10) year period in the civil action styled *Rob*

¹ Section 536.073.2, RSMo 2000, and 4 CSR 240-2.090(1) and (2).

² Served on April 6, 2009.

Lee v. Missouri-American Water Co., pending in Division 15 of St. Louis County Circuit Court, Cause No. 08SL-CC001242.[³]

Again, in MAWC's motion for reconsideration or clarification,⁴ MAWC stated that it had ten years of repair records ready to produce, but Mr. Lee's request for an additional nine years would require an extensive manual search of many paper files. The protective order limited discovery under First Request Item No. 1 to ten years.

b. The Motion

Mr. Lee asks the Commission to reconsider the ten year limit and require MAWC to produce the full 19 years of records. In support, Mr. Lee cites the oral argument on his first motion to compel,⁵ at which the following exchange occurred:

[JUDGE JORDAN:] Mr. Noce, you object to Mr. Lee's data requests, you object to his discovery, but I see that in certain cases you have produced what you believe he has asked for.

MR. NOCE: Correct, your Honor. Real quick, I guess just going through them, we've already produced all of our repair records for the last 19 years to Mr. Lee's counsel in the-- in the civil --I'm sorry -- in the civil lawsuit that's pending, so Mr. Lee should have access to those records. I'm sorry?

MR. LEE: This is not the civil lawsuit.

MR. NOCE: Well, Mr. Lee, we provided this -- this information to you. These records have all been produced with regards to No. 1. You know, I mean, I guess we can produce them again. We just -- we're trying to avoid these expenses, your Honor. As you can tell, there's a lot going on in this case, you know, something seems to be filed every day. And if we're going to have to produce records in two separate actions to Mr. Lee, I think it's just redundant[.⁶]

MAWC also stated:

³ Respondents Objections to Complainant's Data Requests, filed on April 6, 2009. Emphasis added.

⁴ Filed on June 2, 2009.

⁵ Convened on May 7, 2009.

⁶ Transcript, volume II, page 35, line 4 to 25.

MR. NOCE: Well, I mean, I guess if we want to go point by point, we -- we have produced all of our repair records for the last 19 years within a quarter-mile radius of Mr. Lee's home to his attorney in the civil lawsuit. [⁷]

Further, the regulatory law judge inquired specifically:

JUDGE JORDAN: Okay. So you're saying that item No. 1, repair records for the last 19 years within a quarter-mile radius of -- here's the address: 11119 Carl Street -- that Missouri American Water Company has produced those in the civil action; is that correct?

MR. NOCE: Yes, sir -- yes, your Honor.[⁸]

Because MAWC stated that it has already assembled repair records for 19 years, Mr. Lee asks the Commission to require production of repair records for 19 years, and hold MAWC to its statements.

c. Ruling

To rely on MAWC's statements should be the right of Mr. Lee and the Commission but, here, the Commission must choose between MAWC's inconsistent statements. MAWC's statements at oral argument favor Mr. Lee, he believes, so he argues in favor of those statements. The Commission will choose among the statements based on which are the more accurate.

The more accurate statements are those in response to discovery. The reason lies in MAWC's motion for reconsideration or clarification, where MAWC states that it:

. . . is prepared to produce its repair records over the past ten (10) years within a quarter (1/4) mile radius as it has previously done so in [Mr. Lee's civil suit]

In support, MAWC attaches three responses to document production requests in the civil suit. Each such response refers to a ten year period. The ten year period is, thus, the more

⁷ Transcript, volume II, page 39, line 15 to 19.

⁸ Transcript, volume II, page 40, line 3 to 9.

consistent response and, in that context, MAWC's statements at oral argument are the aberration.

Therefore, MAWC's statements in written response to discovery and in MAWC's motion for reconsideration or clarification are more likely to be accurate. MAWC's statements at oral argument are less likely to be accurate. For that reason, the Commission will maintain the ten year limitation on First Request Item No. 1 as set forth in the protective order, and deny Mr. Lee's motion to reconsider.

THE COMMISSION ORDERS THAT:

1. Rob Lee's motion for reconsideration filed on June 2, 2009, is denied.
2. This order shall become effective immediately upon issuance.

BY THE COMMISSION



Colleen M. Dale
Secretary

(S E A L)

Daniel Jordan, Regulatory Law Judge,
by delegation of authority under
Section 386.240, RSMo 2000.

Dated at Jefferson City, Missouri,
on this 3rd day of June 2009.