

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

Michele Westmoreland,)	
)	
Complainant,)	
)	
v.)	<u>Case No. WC-2015-0171</u>
)	
Missouri-American Water Company,)	
)	
Respondent.)	

AMENDED STAFF RECOMMENDATION

COMES NOW the Staff of the Missouri Public Service Commission ("Staff"), by and through undersigned counsel, and submits its Amended Staff Recommendation.

1. During the Pre-Hearing Conference on October 7, 2015, Staff Counsel advised that Staff would file an Amended Staff Recommendation that concluded that Missouri-American Water Company did not violate tariff provisions.

2. Staff concludes that Respondent Missouri-American Water Company's conduct caused damage to Complainant Michele Westmoreland's property and residence. However, that conduct did not violate the Company's tariff.

3. The Commission has "primary jurisdiction" over complaints made against a corporation, person or public utility pursuant to § 386.390 RSMo, meaning that matters within the jurisdiction of the Commission must first be determined by it in every instance before the courts have jurisdiction to make judgments in the controversy.¹

¹ ***Tawanda Murphy, Complainant, v. Union Elec. Co., d/b/a AmerenUE, Respondent***, EC-2010-0364, 2010 WL 3616007, at *4 (Mo. P.S.C. Sept. 8, 2010)(citing, ***DeMaranville v. Fee Fee Trunk Sewer***, 573 S.W.2d 674, 676 (Mo. App. 1978)).

4. However, while the Commission has the jurisdiction to hear complaints pursuant to § 396.390 RSMo, the statute does not authorize the Commission to award monetary damages on the basis of a negligence theory.²

5. Moreover, despite the fact that the Commission does not have authority to award damages in complaints based on a negligence theory, Ms. Westmoreland must first bring her complaint before the Commission in order to satisfy the doctrine of exhaustion of administrative remedies.³

6. To exhaust administrative remedies, “[t]he Commission need only determine if there is any relief within its justification and authority to grant [Complainant] in order to satisfy the doctrine.”⁴

7. Therefore, in the instant matter, the Commission need only here determine that there is no relief within its authority to grant to Ms. Westmoreland, so that Ms. Westmoreland may continue pursuit of her cause of action in civil court.⁵

8. Because Ms. Westmoreland’s action is appropriate for civil court, the Commission should dismiss the complaint, and waive the current scheduling order.

² **Tawanda Murphy**, EC-2010-0364, 2010 WL 3616007, at *6 (Mo. P.S.C. Sept. 8, 2010).

³ **DeMaranville v. Fee Fee Trunk Sewer**, 573 S.W.2d 674, 676 (Mo. App. 1978)(“Matters within the jurisdiction of the Public Service Commission must first be determined by it in every instance before the courts have jurisdiction to make judgments in the controversy”).

⁴ **Tawanda Murphy**, EC-2010-0364, 2010 WL 3616007, at *7 (Mo. P.S.C. Sept. 8, 2010).

⁵ While Staff does not believe there is a tariff violation, Staff Counsel notes that the tariff originally called into question, Sheet R11, Rule 3(E) entitled “Liability of the Company,” may likely be considered void as against public policy because there is no authorizing statute granting the Commission to limit a public utility’s negligence liability involving property damage. **Pub. Serv. Comm’n of State v. Missouri Gas Energy**, 388 S.W.3d 221, 230-31 (Mo.App. W.D. 2012)(“We find no statute, and the Commission and MGE do not direct us to any such statute, that grants the Commission the authority to limit a public utility’s negligence liability involving personal injury or property damage. Nowhere do the statutes establish a policy suggesting that a public utility company should be immune from negligence liability when its negligence is responsible for a customer’s death, injury, or damage to property”).

WHEREFORE, Staff respectfully requests the Commission waive the current scheduling order, and issue an order finding that Complainant Westmoreland has exhausted her administrative remedies and dismissing the complaint, so that Complainant may move forward with her negligence action in civil court.

Respectfully Submitted,

/s/ Jacob T. Westen

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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 10th day of November, 2015.

/s/ Jacob T. Westen