

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

ROB LEE,

Complainant,

v.

MISSOURI AMERICAN
WATER COMPANY,

Respondent.

File No. WC-2009-0277

**ORDER GRANTING MOTION FOR RULINGS,
GRANTING MOTIONS TO COMPEL, AND
DENYING MOTION TO SEGREGATE**

Issue Date: May 29, 2009

Effective Date: May 29, 2009

The Missouri Public Service Commission is:

- granting the “Motion to Rule on Request on Information March 23, 2009 and 2nd Request for Information”¹ (“motion for rulings”);
- denying the “Motion to Segregate Complaint WC-2009-0277 and St. Louis County Civil Case #08SL-CC01242” (“the motion to segregate”);
- granting the “Motion to Compel 2nd Request for Information from MAWC”; and
- granting the “Motion to Compel,” which relates to Mr. Lee’s request for information filed on March 23, 2009.

Procedure on those motions is as follows.

I. Procedure

Mr. Lee’s complaint—filed on January 27, 2009, and supplemented several times—alleges that MAWC’s pipes are leaking as evidenced by the appearance of surface water in

¹ Sic.

several locations in his neighborhood. On April 20, 2009, the Commission convened a pre-hearing conference on the complaint. Mr. Lee is presenting his case without counsel.

On March 23, 2009, Mr. Lee filed an untitled document (“first request”) requesting information from Missouri American Water Company (“MAWC”). MAWC filed its objections on April 6, 2009. On April 20, 2009, Mr. Lee filed the Motion to Compel, addressing the first request, and MAWC filed its response on May 1, 2009. On May 7, 2009, the Commission heard the parties’ oral argument on the Motion to Compel. The reporter filed the transcript of that argument on May 19, 2009. On May 21, 2009, MAWC filed a First Supplemental Responses to Complainant’s First Data Requests.

On May 5, 2009, Mr. Lee filed the motion to segregate and another request for information (“second request”) from MAWC. MAWC filed “Respondent’s Objections to Complainant’s 2nd Request for Information from MAWC” on May 15, 2009. On May 18, 2009, Mr. Lee filed the Motion to Compel Second Request for Information and the motion for rulings. MAWC filed “Respondent’s Response to Complainant’s 2nd Request for Information from MAWC” on May 26, 2009. That document shows compliance with Second Request Nos. 1, 4 and 5, which moots the Motion to Compel 2nd Request for Information from MAWC and Motion to Compel (“the motions to compel”) as to those items.

II. Motion for Rulings

The motion for rulings asks us to resolve Mr. Lee’s motions to compel”, which test MAWC’s objections to the first and second requests (“the requests”). Mr. Lee cites the lack of production in response to his requests and the shortness of time before the hearing.²

² The hearing is set for June 9 and 10, 2009. That was date Mr. Lee requested in his Motion to Set Date. Mr. Lee filed the Motion to Set Date on April 28, 2009.

The Commission will grant the motion for rulings except for Second Request Nos. 1, 4 and 5, which are moot.

III. Motion to Segregate

The title of the motion to segregate asks the Commission to “segregate” this file from a civil suit pending in circuit court. The motion does not elaborate on what constitutes such segregation, but the motion’s arguments suggest that Mr. Lee wants no evidence of the civil suit to figure in any ruling of the Commission. In support, Mr. Lee argues that evidence of the existence of the civil suit will be harmful, not helpful, to determining the facts underlying this action:

[The civil suit] is irrelevant to [this administrative action] and the present problems, which is water continues to flow from the ground in number of different areas near my home.

* * *

These are two different entities. MAWC has attempted to dilute both of them by commingling them [.]

* * *

For MAWC to continue to bring up [the civil suit] can only be an attempt to blur the focus and deny the problem and distort the effort to correct the problems[.]

That argument addresses the doctrine of “legal relevance.”³

Evidence is legally relevant if its probative value outweighs its costs. This determination “involves a process through which the probative value of the evidence (its usefulness) is weighed against the dangers of unfair prejudice, confusion of the issues, misleading the jury, undue delay, waste of time or needless presentation of cumulative evidence (the cost of the evidence).” [4]

³ The name distinguishes the doctrine from “logical relevance.” Logical relevance means tending to prove or disprove an allegation. **State v. Freeman**, 269 S.W.3d 422, 427 (Mo. banc 2008).

⁴ **State v. Berwald**, 186 S.W.3d 349, 359 (Mo. App., W.D. 2005).

That doctrine supports Mr. Lee's argument that any evidence entered into the record must be more constructive than confusing.

Whether it will be more constructive or confusing "to continue to bring up" the civil suit we cannot determine until we know the context in which it will arise. Such context is not clear from the parties' arguments. Therefore, the Commission will deny the motion as to future matters.

As to present and past matters, MAWC states that it has raised the civil suit in two instances. In one instance, the Commission's ruling is in this order. In the other instance, the Commission has already ruled.

The first instance is in the past. It consisted of the following paragraphs in MAWC's answer:

AFFIRMATIVE DEFENSES

1. [Mr. Lee]'s claim should be barred in that it involves identical issues, allegations and events that are the subject matter of a civil lawsuit currently pending in [the civil suit].

* * *

WHEREFORE, [MAWC] prays that said Complaint be dismissed [.]

We treated those paragraphs as a motion to dismiss and denied such motion in our April 20, 2009, order. Because no controversy remains as to that instance, it is moot,⁵ so the Commission will deny the motion to segregate as to that instance.

The second instance is before the Commission. It relates to Mr. Lee's Motion to Compel 2nd Request for Information from MAWC" and Motion to Compel ("the motions to

⁵ *State ex rel. Reed v. Reardon*, 41 S.W.3d 470, 473 (Mo. banc 2001) (quoting *Shelton v. Farr*, 996 S.W.2d 541, 543 (Mo. App. W.D. 1999)).

compel”). In that instance also, the Commission will deny the motion to segregate, because the Commission’s rulings on the motion to compel will favor Mr. Lee, as follows.

IV. Motions to Compel

The motions to compel seek enforcement of the requests. Discovery before the Commission is virtually the same as under the Missouri Supreme Court rules for civil actions in circuit court.⁶ Objections to the 13 items of discovery raise issues as to relevance, scope, availability, and production in the civil suit, which is a subject of the motion to segregate.

A. Production in the Civil Suit

MAWC objects that it has already produced, to Mr. Lee’s counsel in the civil suit, the matter sought in the following items.

Item	Matter
First Request No. 1	Repair records for last nineteen (19) years within a 1/4 mile radius of 11119 Carl, St.
First Request No. 2	What testing methods used to locate leaking water mains.
First Request No. 3	The degree of accuracy of each test.
First Request No. 4	How often are these tests performed.
Second Request No. 2	All records of any leak testing performed on the water system in the last 70 years within one quarter mile radius of my home at 11119 Carl, St. Louis Mo 63138. If no records exist please state how MAWC has verified the integrity of [its] aging water system.
Second Request No. 3	A list of all complaints within one quarter mile radius of my home at 11119 Carl, St. Louis Mo 63138 in the last 19 years and the action taken to resolve each complaint.

⁶ Section 536.073.2, RSMo 2000, and our Regulation 4 CSR 240-2.090(1) and (2).

In addition, for First Request Nos. 2, 3, and 4, MAWC specifies that:

said information was provided [in the civil suit] by way of written discovery and the deposition of Derek Linam.

For First Request No. 1 and Second Request Nos. 1, 2 and 3, MAWC adds that:

it has previously produced [in the civil suit] said records for the previous ten (10) year period[.]

MAWC argues that it has thus already satisfied the requests.

That argument is correct only if the issues in the civil suit and this action are the same, but MAWC has neither offered the petition from the civil suit nor cited anything in the record, to support that premise. Also, for Second Request Nos. 2 and 3, MAWC alleges that:

it has previously produced . . . said records . . . as well as in this action.

But Mr. Lee has alleged that his claim in the civil suit ends in 2006, while his claim in this action is continuing.⁷ Further, MAWC asks for relief from the expenses of duplicative production. But Mr. Lee is acting pro se, and MAWC has not shown that its expense in producing the matters is less than Mr. Lee's obtaining them—more likely copies of them—from his lawyer in the civil suit. That expense is greater for Mr. Lee than for MAWC.

MAWC has not supported any objection based on production in the civil suit. Therefore, the Commission will overrule such objections, which moots the second instance to which the motion to segregate applies. Therefore, the Commission will also deny the motion to segregate.

⁷ At the pre-hearing conference. Transcript, vol. 1, page 9, lines 15-18.

B. Relevance

MAWC raises a relevance objection to the following items:

Item	Matter
First Request No. 1	Repair records for last nineteen (19) years within a 1/4 mile radius of 11119 Carl, St.
First Request No. 5	The number of feet of water pipe maintained by MAWC in this 1/4 mile area.
First Request No. 6	The number of feet of these pipes that have been tested with the ultrasonic type of test.
First Request No. 8	The number of gallons unaccounted for in this water system.
Second Request No. 2	All records of any leak testing performed on the water system in the last 70 years within one quarter mile radius of my home at 11119 Carl, St. Louis Mo 63138. If no records exist please state how MAWC has verified the integrity of [its] aging water system.
Second Request No. 3	A list of all complaints within one quarter mile radius of my home at 11119 Carl, St. Louis Mo 63138 in the last 19 years and the action taken to resolve each complaint.
Second Request No. 6	Convert the total amount of "Non-revenue Water" to the total number of gallons of "Non-revenue Water" for this system.

MAWC' objects that those matters are:

wholly irrelevant and not reasonably calculated to lead to the discovery of admissible evidence.

On an objection to relevance, Mr. Lee has the burden of proof

The party seeking discovery shall bear the burden of establishing relevance.⁸

But the rules further provide:

It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.⁹

⁸ Rule 57.01(b)(1), 2009 Missouri Supreme Court Rules.

⁹ *Id.*

Thus, Mr. Lee needs to show only that the sought information is reasonably calculated to lead to the discovery of admissible evidence.

Each of those matters meets that standard. Mr. Lee alleges leaking pipes in MAWC's system. The length of pipe in the designated area, and gallons of water not accounted for or considered "Non-revenue" in the system, are fundamental to understanding MAWC's system. Complaints, tests, repairs, and records on such pipe show how much MAWC knows about its system. Such matters are reasonably calculated to lead to the discovery of admissible evidence. Therefore, the Commission will overrule MAWC's relevance objections.

C. Scope

Without reasonable temporal and geographic limits Discovery becomes abusive.¹⁰

MAWC objects to the scope of the following items:

Item	Matter
First Request No. 1	Repair records for last nineteen (19) years within a 1/4 mile radius of 11119 Carl, St.
First Request No. 2	What testing methods used to locate leaking water mains.
First Request No. 3	The degree of accuracy of each test.
First Request No. 4	How often are these tests performed.
First Request No. 7	All test records that can substantiate MAWC findings that the water leaking from the ground in my neighborhood is not coming from these pipes.

¹⁰ *State ex rel. American Std. Ins. Co. of Wis. v. Clark*, 243 S.W.3d 526, 531 (Mo. App., W.D. 2008).

As to each of those the following items, MAWC responds:

[MAWC] objects to said data request in that it is overly broad[.]

MAWC adds that each of those items is vague, except First Request No. 1, which it adds is unduly burdensome. But MAWC also states that it produced the requested matters in the civil suit, except as to First Request No. 7. And MAWC offers no argument on those items' breadth, burden or vagueness, except Second Request No. 3. The Commission will overrule the objections to the scope of Second Request No. 3 and First Request Nos. 1, 2, 3, 4, and 7.

MAWC objects to the temporal scope of the following items:

Item	Matter
First Request No. 6	The number of feet of these pipes that have been tested with the ultrasonic type of test.
First Request No. 8	The number of gallons unaccounted for in this water system.
Second Request No. 6	Convert the total amount of "Non-revenue Water" to the total number of gallons of "Non-revenue Water" for this system.

MAWC's responds as follows:

[MAWC] objects to said data request in that it is overly broad and unduly burdensome due to [Mr. Lee]'s failure to limit his request to a specific time period

Nevertheless, MAWC produced records and information for the past ten years in response to the similarly unlimited First Request No. 1 and Second Request Nos. 1, 2 and 3. Insofar as MAWC deems that ten-year period a reasonable time limitation, the Commission will adopt it. The Commission will overrule the time-based objections to Second Request No. 6 and First Request Nos. 6 and 8, subject to a ten-year limitation.

MAWC objects to the geographical scope of Second Request No. 4, which asks:

The year each section [of] the water system was installed.

MAWC responds as follows:

[MAWC] objects to said data request in that [Mr. Lee] fails to limit said request to a specified area.

That objection is well-taken. Second Request No. 4 applies to MAWC's entire system instead of the quarter-mile radius that Mr. Lee otherwise deems reasonable. In such an instance:

the preferred response . . . is to enter an order limiting the scope of discovery to certain matters.¹¹

Therefore, we overrule the area-based objection to Second Request No. 4, subject to a limitation of a quarter-mile radius of Mr. Lee's residence at 11119 Carl, St.

D. Availability

MAWC argues that it does not possess the matter sought in Second Request 6, which asks MAWC to:

Convert the total amount of "Non-revenue Water" to the total number of gallons of "Non-revenue Water" for this system.

MAWC objects as follows:

[MAWC] states the only information available to it with regards to "non-revenue water" is measurements for its system as a whole. [MAWC] is unable to calculate the "nonrevenue water" for [Mr. Lee]'s neighborhood. As such, the information sought by [Mr. Lee] is . . .not discoverable.

But Second Request 6 does not seek the "'nonrevenue water' for [Mr. Lee]'s neighborhood." It seeks the "'Non-revenue Water' for this system," which is exactly what

¹¹ *State ex rel. Wilson v. Davis*, 979 S.W.2d 253, 257 (Mo. App. S.D. 1998).

MAWC says it has. Therefore, the Commission will overrule the availability objection to Second Request 6.

THE COMMISSION ORDERS THAT:

1. The Motion to Rule on Request on Information March 23, 2009 and 2nd Request for Information is granted except as to second request nos. 1, 4 and 5, which are moot.

2. The Motion to Segregate Complaint WC-2009-0277 and St. Louis County Civil Case #08SL-CC01242” is denied.


3. The Motion to Compel is granted. MAWC shall produce all matters requested in Mr. Lee’s request for information filed March 23, 2009, not already produced in this action, including matters related to the period from 2006 to date, subject to a ten-year limitation for First Request Nos. 6 and 8.

4. The Motion to Compel 2nd Request for Information from MAWC is granted except as to Second Request Nos. 1, 4 and 5, which are moot. MAWC shall produce all matters requested in Mr. Lee’s 2nd Request for Information from MAWC, not already produced in this action, including matters related to the period from 2006 to date, subject to a ten-year limitation for Second Request No. 6.

5. MAWC shall comply with this order no later than June 5, 2009.

6. This order shall become effective immediately upon issuance.

BY THE COMMISSION

A handwritten signature in black ink, appearing to read 'Colleen M. Dale', written over a horizontal line.

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 29th day of May 2009.