

On January 27, 2009, Mr. Lee initiated this proceeding by filing a complaint. The complaint alleges that that MAWC's infrastructure is leaking as evidenced by surface water. Mr. Lee supplemented the complaint several times, with additional allegations of surface water at several locations in Mr. Lee's neighborhood ("additional allegations"), after MAWC filed its answer on February 27, 2009.

The Commission convened a pre-hearing conference on April 20, 2009. On May 1, 2009, MAWC filed the motion. The motion addresses actions of the Commission and seeks no relief affecting any other party.

Therefore, the Commission dispenses with any response to the motion from Mr. Lee and the Commission's staff.

B. Clarification

The motion addresses a Commission ruling at the pre-hearing conference ("the ruling").

The ruling disposed of all but one of the "affirmative defenses" in the answer of MAWC. MAWC seeks direction as to whether:

1. the remaining "affirmative defense" was subject to the ruling; and
2. further pleading is needed to raise such defense to the additional allegations.

The Commission will grant the motion and further elucidate the ruling as follows.

The ruling is as MAWC describes it. It addressed the following portion of MAWC's answer:

AFFIRMATIVE DEFENSES

1. Complainant'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 St. Louis County Circuit Court styled *Robert Lee v. Missouri-American Water Company*, bearing Cause No. 08SL-CC01242.

* * *

3. Complainant's claim is barred by Missouri's statute of limitations.

4. Complainant's claim is barred by Missouri's doctrine of laches.

In arguing that “Complainant’s claim is” or “should be” “barred,” those paragraphs suggest a defect in jurisdiction. Jurisdiction means lawful authority.¹

Every agency should examine its jurisdiction in every action.² Therefore, the Commission treated each of those paragraphs as a motion to dismiss. As of the date of the ruling, MAWC had offered no fact or law in support of any of those paragraphs, so the Commission denied each such deemed motion.

The ruling did not address the following portion of MAWC’s answer:

AFFIRMATIVE DEFENSES

* * *

2. Complainant fails to state a claim against Respondent in that the water allegedly “running out of the ground and driveway in front of 11334 Larimore Ave.” originated from a source not owned by or under the control of Respondent.

That paragraph (“the paragraph”) is the subject of the motion.

1. Scope

The ruling intentionally omitted the paragraph because—despite the paragraph’s words—it does not constitute a motion to dismiss for failure to state a claim.

“A motion to dismiss for failure to state a claim is solely a test of the [complaint]’s adequacy[, which] assumes the truth of all facts alleged, . . .to decide if the pleaded facts invoke a recognized or potential cause of action.”³ In other words, such a motion argues that the Commission lacks jurisdiction. And it does so even assuming that everything alleged in the complaint is true.

¹ *Scott County Reorg'd R6 School Dist. v. Missouri Comm'n on Human Rights*, 872 S.W.2d 892 (Mo. App., S.D. 1994).

² *Greene County Nursing & Care Center v. Department of Social Servs.*, 807 S.W.2d 117, 118-19 (Mo. App., W.D. 1991).

³ *Haney v. Fire Ins. Exch.*, 277 S.W.3d 789, 790 -91 (Mo. App., S.D. 2009).

That is not the argument in the paragraph. The paragraph does not challenge the Commission's jurisdiction and does not assume that everything alleged in the complaint is true. On the contrary, the paragraph expressly denies that an element of Mr. Lee's claim, which is an argument on the claim's merits, not the Commission's jurisdiction:

The tendency to call matters "jurisdictional" that are really only assertions of legal error greatly confuses the notion of jurisdiction in civil cases. It can also create the potential for great mischief because calling legal errors "jurisdictional" could be used years later to void settled judgments. The label "jurisdictional defect" is seldom appropriate outside the context of lack of jurisdiction of the subject matter or of the person [and] has no application to mere legal errors.⁴

For that reason, the Commission did not treat the paragraph as a motion to dismiss and did not deny it in the ruling.

2. Further Pleading

For the same reason, no further pleading is needed to raise paragraph 2's defense as to the additional allegations.

The answer must state any grounds for defense against the complaint.⁵ In circuit court, specific pleading and proof are necessary to raise an affirmative defense.⁶ But the paragraph—again despite its words—does not constitute an affirmative defense. "An affirmative defense declares that even if the allegations in the plaintiff's petition are

⁴ **Hendrix v. Hendrix**, 183 S.W.3d 582, 590-591 (Mo. banc 2006).

⁵ 4 CSR 240-2.070(8).

⁶ Missouri Supreme Court Rule 55.08. The Missouri Supreme Court's Rules do not control the Commission's procedure unless expressly incorporated. **Wheeler v. Board of Police Comm'rs**, 918 S.W.2d 800, 803 (Mo. App., W.D. 1996).

established, the plaintiff cannot prevail because additional facts exist which avoid the legal responsibility of the defendant."⁷

That is not the argument in the paragraph. The paragraph does not assume that everything alleged in the complaint is true. On the contrary, the paragraph expressly denies that any leaks are from MAWC's system. For that reason, paragraph 2 is simply a denial. It need not have been pled as an affirmative defense.

Also, at the pre-hearing conference, the parties agreed to treat all such allegations as part of the complaint because MAWC simply denied them generally, to waive any further answer from MAWC, and to waive any further report and recommendation from the Commission's staff. Moreover, the Commission determined to conduct a single hearing on Mr. Lee's allegations.⁸ That includes the allegations in the complaint and the additional allegations, all of which MAWC is deemed to have denied.

Therefore, MAWC need not plead its denial as to every location of surface water that Mr. Lee has alleged as proof of leaks in MAWC's system.

3. Summary

Unlike the other paragraphs designated as "affirmative defenses," the Commission has not disposed of the paragraph. The paragraph constitutes a simple denial, and such denial applies to the additional allegations of surface water. At the hearing, the Commission will hear evidence on the source of surface water in all locations alleged by Mr. Lee.

⁷ *Day Advert. Inc. v. Devries & Assocs., P.C.*, 217 S.W.3d 362, 367 (Mo. App., W.D. Mar. 27, 2007), quoting *Rodgers v. Czamanske*, 862 S.W.2d 453, 459 (Mo. App. W.D. 1993).

⁸ Section 386.390.2. Sections are in the 2000 Revised Statutes of Missouri.

C. Oral Argument

The motion includes a request for oral argument. Oral argument is within the Commission's discretion to grant or deny.⁹ Because the motion makes no argument, and our disposition of the motion does not disfavor MAWC, the Commission denies MAWC's request for oral argument.

THE COMMISSION ORDERS THAT:

1. The Motion to Clarify Order Regarding Pre-Hearing Procedure and Request for Oral Argument is granted.
2. This order shall become effective immediately upon issuance.

BY THE COMMISSION



Colleen M. Dale
Secretary

(S E A L)

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

Dated at Jefferson City, Missouri,
on this 5th day of May 2009.

⁹ 4 CSR 240-2.140(1) and 4 CSR 240-2.120(1).