

ROB LEE,  
  
Complainant,  
  
v.  
  
MISSOURI AMERICAN  
WATER COMPANY,  
  
Respondent.

MISSOURI AMERICAN )  
WATER COMPANY, )  
 )  
Respondent. )

Issue Date: May 19, 2009

- Rob Lee’s Motion to Enter Expert Testimony,
- Rob Lee’s Motion to Include Testimony and Evidence from Rate Increase Hearing,
- Rob Lee’s Motion to Enter Document Named “Response to Staff Report” into the Record,

### A. Procedure

On January 27, 2009, the Commission received the complaint that initiated this action from Rob Lee. Mr. Lee alleges that MAWC's infrastructure is leaking as evidenced by surface water at several places in Mr. Lee's neighborhood. On April 21, 2009, Mr. Lee filed a:

- Motion to Enter Expert Testimony, and
- Motion to Include Testimony and Evidence from Rate Increase Hearing.

On April 30, 2009, Mr. Lee filed a:

- Motion to Enter Document Named “Response to Staff Report” into the Record.

On May 1, 2009, MAWC and the Commission’s staff (“Staff”) filed their respective responses to those motions. Staff’s response addresses the Motion to Enter Expert Testimony and Motion to Include Testimony and Evidence from Rate Increase Hearing. The Motion to Enter Document Named “Response to Staff Report” into the Record requires no response from Staff for reasons we set forth below.

## B. Motions

The motions ask us to enter items into the record as follows:

<i>Motion to:</i>	<i>Item:</i>
Enter Expert Testimony	Two pages from a website
Enter Document Named “Response to Staff Report” into the Record	Mr. Lee’s written statement, disputing Staff’s report, and describing surface water
Include Testimony and Evidence from Rate Increase Hearing	Mr. Lee’s testimony and exhibits from the local public hearing in file no. WR-2008-0311

MAWC objects that such items constitute hearsay.

Hearsay is a declaration made outside the record, offered into the record, to prove the subject of the declaration.<sup>1</sup> Upon objection, we apply the rule barring hearsay because

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<sup>1</sup> **State v. Davison**, 920 S.W.2d 607, 609 (Mo. App., W.D. 1996) (quoting **State v. Harris**, 620 S.W.2d 349, 355 (Mo. banc 1981)).

it is a fundamental rule of evidence that applies in this action.<sup>2</sup> The problem with hearsay is that, like any testimony, its value depends on the declarant's credibility.<sup>3</sup> Credibility is ordinarily subject to evaluation under cross-examination,<sup>4</sup> so when cross-examination is not available, such credibility evaluation is usually impossible.

Therefore, if an item constitutes hearsay, the Commission will deny the motion unless an exception to the hearsay rule applies.

### *1. Documents*

The website pages and the Response to Staff Report are subject to the rule barring hearsay. Each of those items is an outside-the-record declaration that Mr. Lee is offering into the record to prove the subjects of those declarations and Mr. Lee offers no exception to the hearsay rule. Therefore the Commission will deny, without prejudice, the Motion to Enter Expert Testimony and the Motion to Enter Document Named "Response to Staff Report" into the Record.

The same reasoning applies to Mr. Lee's testimony from the local public hearing in file no. WR-2008-0311. File no. WR-2008-0311's content is subject to the Commission's notice.<sup>5</sup> But such content remains an outside-the-record declaration that Mr. Lee is offering into the record to prove the subjects of that declaration, and Mr. Lee offers no exception to the hearsay rule.

Therefore, the Commission will deny, without prejudice, the Motion to Include Testimony and Evidence from Rate Increase Hearing as to such testimony.

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<sup>2</sup> Even though technical rules of evidence do not apply. ***Speer v. City of Joplin***, 839 S.W.2d 359, 360 (Mo. App., S.D. 1992).

<sup>3</sup> 920 S.W.2d at 609.

<sup>4</sup> Section 536.070(2), RSMo 2000.

<sup>5</sup> Section 536.070(6), RSMo 2000.

## 2. DVDs

Mr. Lee's exhibits from the local public hearing in file no. WR-2008-0311 consist of five DVDs. The DVDs' content, unlike the other items, is not apparent from looking at them. The Commission cannot ascertain whether the DVDs contain declarations. Therefore, the Commission cannot sustain the hearsay objection of MAWC. But MAWC also objects to the DVDs' lack of foundation, meaning evidence showing that an item is admissible.<sup>6</sup> No such evidence describes the DVDs. The Commission will deny, without prejudice, the Motion to Include Testimony and Evidence from Rate Increase Hearing, as to the DVDs, because Mr. Lee has not offered evidence showing that they are admissible yet.

## 3. Summary

The Commission denies the motions without prejudice. Denial "without prejudice" means that Mr. Lee may raise the motions again, offering different or additional facts and law in support, before the close of the hearing on his complaint. If Mr. Lee offers the items again, with further support in fact or law, the Commission may make a different ruling.

## C. Oral Argument

Each of MAWC's responses to Mr. Lee's motions includes a request for oral argument. Oral argument is within the Commission's discretion to grant or deny.<sup>7</sup> But the material before the Commission is sufficient to support its rulings and no such ruling disfavors MAWC. Therefore, the Commission denies MAWC's requests for oral argument.

### **THE COMMISSION ORDERS THAT:**

1. The following motions and requests are denied without prejudice:
  - a. Motion to Enter Expert Testimony;

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<sup>6</sup> The standard for a foundation on which to admit evidence is a preponderance—the greater weight—of evidence. *State v. Long*, 140 S.W.3d 27, 32 (Mo. banc 2004).

<sup>7</sup> 4 CSR 240-2.140(1) and 4 CSR 240-2.120(1).

- b. Motion to Include Testimony and Evidence from Rate Increase Hearing;
  - c. Motion to Enter Document Named "Response to Staff Report" into the Record; and
2. The Commission denies all requests for oral argument on the motions listed in ordered paragraph 1.
3. 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 19<sup>th</sup> day of May 2009.