

1 STATE OF MISSOURI  
2 PUBLIC SERVICE COMMISSION  
3  
4 TRANSCRIPT OF PROCEEDINGS  
5

6 Procedural Conference  
7 June 8, 2017  
8 St. Louis, Missouri  
9 Volume 1  
10  
11

12 Bertha Anderson, )  
 )  
13 Complainant, )  
 )  
14 vs. ) File No. WC-2017-0251  
 )  
15 Missouri-American Water )  
Company, )  
16 )  
Respondent. )  
17  
18  
19

20 DANIEL JORDAN, Presiding  
21 SENIOR REGULATORY LAW JUDGE

22 REPORTED BY:  
23 AMANDA N. FARRAR, CCR  
24 MIDWEST LITIGATION SERVICES  
25

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1 P R O C E E D I N G S

2 (The conference commenced at 3:01 p.m.)

3 JUDGE JORDAN: We will go on the record.

4 MS. ANDERSON: You want me to begin?

5 JUDGE JORDAN: I'm starting this  
6 conference now, Ms. Anderson, and I'm going to do  
7 that first by announcing which case we're talking  
8 about.

9 The Commission is calling the action in  
10 File No. WC-2017-0251, and that is the case of  
11 Bertha Anderson, complainant, vs. Missouri-American  
12 Water Company, respondent.

13 My name is Daniel Jordan. I'm the  
14 regulatory law judge assigned to this action and I  
15 am going to -- before anything else, did we lose  
16 someone?

17 Ms. Anderson, are you still there?

18 MS. ANDERSON: Yes.

19 JUDGE JORDAN: Good.

20 Ms. Carter, are you still there?

21 MS. CARTER: I am.

22 JUDGE JORDAN: Ms. Payne, are you still  
23 there?

24 MS. PAYNE: Yes, I am.

25 JUDGE JORDAN: Okay. I don't know

1 what's going on with our line, but it sounds like  
2 we've still got everyone and that's what's  
3 important.

4 Let's turn down our cell phones, if we  
5 may. I won't require anyone to turn them off, but I  
6 am silencing my cell phone right now so that we may  
7 have no interruptions.

8 And with that, I would like to take  
9 entries of appearance and also identify any  
10 representatives of clients that are here. We'll  
11 start with the complainant.

12 Ms. Anderson, will you state your name  
13 for the court reporter.

14 MS. ANDERSON: Bertha Anderson.

15 JUDGE JORDAN: Thank you, Ms. Anderson.  
16 And you are a customer of Missouri-American Water,  
17 are you not?

18 MS. ANDERSON: Yes, I am.

19 JUDGE JORDAN: Very good.

20 Next, for Missouri-American Water, will  
21 counsel, please, enter an appearance.

22 MR. LUFT: Tim Luft for  
23 Missouri-American Water, and the court reporter has  
24 my information.

25 MS. CARTER: And Diana Carter with

1 Brydon, Swearngen & England, 312 East Capitol  
2 Avenue, Jefferson City, Missouri, for  
3 Missouri-American Water Company.

4 JUDGE JORDAN: Thank you, counsel.

5 Are there any representative -- any  
6 other representatives of Missouri-American Water  
7 with us today?

8 MR. LUFT: No.

9 JUDGE JORDAN: Okay. Thank you very  
10 much.

11 Let's go next to staff. Will staff  
12 counsel enter an appearance?

13 MS. PAYNE: Whitney Payne for the staff  
14 of the Missouri Public Service Commission, and it's  
15 P.O. Box 360, Jefferson City, Missouri 65101, and I  
16 have with me here David Pratt and Jonathan Dallas.

17 JUDGE JORDAN: Very good. Thank you.

18 Now, OPC very seldom makes an appearance  
19 in these actions, but I will ask whether OPC is on  
20 the line because I don't see them in this room right  
21 now.

22 And I'm not hearing anything from the  
23 Office of Public Counsel.

24 So, let me make sure everyone  
25 understands what we're doing today. We're just

1    having a conference, a procedural conference. This  
2    part is on the record because when I'm talking to  
3    the parties I always want everything to be on the  
4    record. We will discuss procedure. We could get a  
5    little bit into substance, the substantive issues  
6    that are before the Commission, but we won't be  
7    deciding anything, I won't be taking any evidence,  
8    and I haven't decided, nor will I decide anything on  
9    the basis of what happens today. The parties can  
10   also discuss the possibilities for settlement, which  
11   the law encourages. The law encourages settlement,  
12   and for that reason the line will be open after I'm  
13   done with my on-the-record part and the room is  
14   available till 5:00. I don't remember whether the  
15   line is available till 5:00, but I think it is. So,  
16   you will have some time after I'm gone to talk about  
17   sensitive information you wouldn't really want me to  
18   hear. What else? I will have staff lock up this  
19   room when -- staff here in St. Louis lock up the  
20   room when the parties are done with it.

21                    Remember also that mediation is a  
22   possibility here. The Commission has trained  
23   mediators. All the regulatory law judges are  
24   trained in civil mediation. So, that's a  
25   possibility, if the parties can't work something out

1 themselves.

2                   If the parties don't settle, like,  
3 today, which you don't have to, then I will want the  
4 parties to file -- staff to coordinate and the  
5 parties to file a proposed procedural schedule that  
6 will move this case towards hearing. The reason  
7 being that we don't decide this case without having  
8 a hearing first. This is what we call a contested  
9 case, meaning a formal contest, and it is kind of  
10 like a circuit court trial, a little bit relaxed  
11 since there's no jury, but it is an evidentiary  
12 proceeding and I want to make sure that all the  
13 parties are aware of the rules governing the  
14 evidence that will be admissible at the hearing.

15                   I'm going to give you a citation and if  
16 you're not familiar with it already, definitely  
17 write it down. In the Revised Statutes of Missouri  
18 take a look at Section 536.070. That's 536.070.

19                   Now, I am not an administrative -- I'm  
20 an administrative lawyer. I'm not an engineer. I'm  
21 not an accountant. I'm not an economist. So,  
22 remember those things when you talk to me.

23                   And that's where we're at right now to  
24 begin with. Any questions on what we're doing here  
25 today from anyone?

1 Any questions, Ms. Anderson?

2 MS. ANDERSON: No.

3 JUDGE JORDAN: Very good.

4 And staff, are we clear on where you're  
5 at? Staff, staff counsel?

6 MS. PAYNE: I'm sorry. What?

7 JUDGE JORDAN: Any questions as to what  
8 we're doing today.

9 MS. PAYNE: No, no. Not at all. Thank  
10 you.

11 JUDGE JORDAN: Very good. Very good.  
12 Missouri-American?

13 MR. LUFT: No.

14 JUDGE JORDAN: All right, then.

15 MR. LUFT: Thank you.

16 JUDGE JORDAN: To begin with, discussing  
17 this complaint on the record is a little bit  
18 awkward. It doesn't need to be, but it might be  
19 because the entirety of the staff report is highly  
20 confidential. The cover page is not, but the  
21 contents are. The reason it's highly confidential  
22 is because the statutes require us to keep certain  
23 information about a customer's account confidential,  
24 but I think that's only amounts due, I think that's  
25 only billing. But as to any information we gather



1 from a public utility, we have to keep that  
2 confidential until we decide to release it. So, I'm  
3 going to go ahead and ask Missouri-American do you  
4 mind if I discuss certain things on the record and  
5 that would be the incident, the background incident  
6 that precipitates this complaint?

7 MR. LUFT: I do not.

8 JUDGE JORDAN: Okay. Then let's get  
9 into the substance of this complaint.

10 To clarify, Ms. Anderson, I understand  
11 that you seek an award of damages for what happened  
12 to your basement; is that correct?

13 MS. ANDERSON: That is correct.

14 JUDGE JORDAN: Okay. To begin with,  
15 just so that we're clear, you understand that the  
16 Commission does virtually nothing to control the  
17 Metropolitan Sewer District. Okay? We don't  
18 regulate them because the people who live there vote  
19 for the -- vote for the board. That's their  
20 control. So, we don't have a lot of control over  
21 MSD. Though, looking at the staff report, it looks  
22 like their involvement was marginal or tangential.  
23 I don't really understand that and I'll get into  
24 that later. But we don't regulate the Metropolitan  
25 Sewer District.

1           We also don't actually give awards of  
2 damages to customers, at least we don't do an order  
3 to pay, and I want to get into that later also.  
4 This is a little weird because your remedy might be  
5 in circuit court, and I say might be for a couple of  
6 reasons. Number one, I'm not going to give anyone  
7 legal advice and say, you know, your better strategy  
8 is to do this or do that. That's not what I do.  
9 But the last time I checked this out, and it's been  
10 a few years, the law was split amongst the three  
11 districts of the court of appeals as to where you go  
12 when you have this kind of situation. That is to  
13 say, you may be -- you may be seeking, but the law  
14 may be telling you to come here first, and there are  
15 three ways that this may work out. Maybe you go  
16 straight to circuit court or maybe you come to us  
17 and we make the findings of fact, but we can't give  
18 you a remedy. We make the findings of fact, you go  
19 to circuit court for the remedy. The third  
20 possibility, and this came out of the southern  
21 district, is you take your pick. Now, like I say,  
22 it's been a while since I looked at this law and I  
23 haven't decided and the Commission hasn't decided  
24 which way this is to go, but I want all the parties  
25 to understand that that is kind of an issue.

1           The last time we had a complaint like  
2   this involving the facts, Ms. Anderson, the  
3   complainant ended up dismissing. She had a lawyer.  
4   She dismissed. She went to circuit court. You may  
5   do the same. You may not do the same. I'm not  
6   saying which is right or wrong. I just need to  
7   raise that issue for you.

8           So, I know that's a little confusing.  
9   The state of the law may be very confused. I  
10   haven't looked at it for a while.

11           Ms. Anderson, your desire was for  
12   damages; is that correct?

13           MS. ANDERSON: Yes.

14           JUDGE JORDAN: Including punitive  
15   damages?

16           MS. ANDERSON: Yes.

17           JUDGE JORDAN: Okay. Well, let me turn  
18   now to Missouri-American and the answer that it  
19   filed. We had this discussion recently as to the  
20   content of answer. So, I'm not going to repeat that  
21   discussion. I will say that I would anticipate if  
22   there is a proposed procedural schedule filed, I'd  
23   anticipate that it would have an amended answer  
24   citing all the bases and facts and law for a defense  
25   to the complaint, and those are not in there right

1 now. So, I would anticipate seeing those. So, I  
2 don't want to say anything more than that right now  
3 because we've had that discussion.

4 Any questions from Missouri-American on  
5 where I'm at with that?

6 MS. CARTER: No, Judge.

7 JUDGE JORDAN: All right. Now let's  
8 turn to the staff report. Here's what I noted about  
9 the staff report. What I noted, well, first of all,  
10 that the entirety -- and I must correct myself on  
11 the record here. The cover of the staff report is  
12 also highly confidential, but we've already decided  
13 that we can talk about some of this stuff on the  
14 record.

15 Is that as I look at the staff report, I  
16 don't see any -- I don't see any law. I don't see  
17 any standard that might apply to Missouri-American  
18 Water and, so, there's really no discussion here as  
19 to whether they complied with any law or did not  
20 comply with any law.

21 MS. PAYNE: That's correct, Judge.  
22 Staff determined that, as stated in its report, that  
23 Missouri-American wasn't in violation of any of the  
24 statutes or rules which gives the PSC authority to  
25 make any determination in this.

1 JUDGE JORDAN: Well, what statutes and  
2 other legal authorities might those be? What did --  
3 what is staff looking at here?

4 MS. PAYNE: The entirety.

5 JUDGE JORDAN: Okay.

6 MS. PAYNE: I apologize if I'm  
7 misunderstanding, but we determined that they  
8 weren't in violation.

9 JUDGE JORDAN: Okay. Well, in violation  
10 of what would be my question, and I guess your  
11 answer is going to be anything?

12 MS. PAYNE: Exactly. I mean, I'm sorry  
13 that it's so general, but it basically is that there  
14 is no law or provision that would apply to this that  
15 Missouri-American would be in violation of based on  
16 our investigation.

17 JUDGE JORDAN: Okay. Well, I recall  
18 reading something in the statutes about safe and  
19 adequate service.

20 MS. PAYNE: Correct. And we determined  
21 that they were providing safe and adequate service.

22 JUDGE JORDAN: Okay. Safe and adequate  
23 instrumentalities and facilities, I guess that's  
24 your idea also that they're in compliance with that?

25 MS. PAYNE: Yes.

1 JUDGE JORDAN: And how about  
2 Missouri-American Water's Tariff, Missouri No. 13,  
3 page R-11 discusses contributory negligence on the  
4 part of the company?

5 MS. PAYNE: Well --

6 JUDGE JORDAN: Here's where I'm --  
7 here's what I'm thinking of. I'm not trying to be  
8 mysterious here, because I have -- I have some  
9 unclarity. I would like clarity on a certain  
10 background here because I see that there's mention  
11 of Metropolitan Sewer District was digging through  
12 its contractor. I mean, its contractor was digging  
13 and then there was this burst pipe, but I also see  
14 that it's -- staff reports it is not the fault of  
15 the contractor. That's what I recall from the  
16 report. Am I correct about that?

17 MS. PAYNE: Well, I mean, what it comes  
18 down to is the actual report that was filed by  
19 Missouri-American stated that the cause of the leak,  
20 the cause of the breakage was from corrosion.

21 JUDGE JORDAN: Okay. A longitudinal  
22 fracture caused by corrosion?

23 MS. PAYNE: Exactly.

24 JUDGE JORDAN: In a pipe?

25 MS. PAYNE: Yes.

1 JUDGE JORDAN: Which got into the storm  
2 sewer and because it's MSD, well, that also goes  
3 into everyone's basement?

4 MS. PAYNE: If you can hold on one  
5 second.

6 JUDGE JORDAN: Sure.

7 MS. PAYNE: Let me confer very quickly.  
8 Okay. I'm sorry about that, Judge.

9 JUDGE JORDAN: No problem.

10 MS. PAYNE: The actual breakage, the  
11 pipe was a Missouri-American pipe.

12 JUDGE JORDAN: Right.

13 MS. PAYNE: However, that water flooded  
14 the storm system and that was why the storm drain  
15 backed up.

16 JUDGE JORDAN: Right, because that's  
17 how --

18 MS. PAYNE: Or at least that's staff's  
19 understanding based on the report that was provided  
20 by Missouri-American.

21 JUDGE JORDAN: Yeah. Because MSD's  
22 system, it's just built that way, if I understand  
23 correctly.

24 So, anyway, here's what I'm getting to:  
25 I see an allegation that the leak was caused by a

1 longitudinal break along the pipe due to corrosion.

2 Okay. Is that safe and adequate service?

3 MS. PAYNE: By staff standards that has  
4 been determined to be normal, yeah, a normal  
5 situation, normal scenario.

6 JUDGE JORDAN: Okay.

7 MS. PAYNE: As long as they repair it,  
8 then staff has always determined that they're still  
9 providing safe and adequate service.

10 JUDGE JORDAN: Yeah, that's my inquiry.

11 MS. PAYNE: Okay.

12 JUDGE JORDAN: That's my inquiry because  
13 I didn't see any of those standards cited in the  
14 report. So, I didn't even know whether staff had  
15 considered the provisions that I've just cited to  
16 you.

17 MS. PAYNE: I apologize, Judge. I will  
18 be more thorough in the future. But that was what I  
19 was getting at with the fact that they were not in  
20 violation is that we determined that they were  
21 providing safe and adequate service based on the  
22 standards of that statute and the nature of this  
23 particular incident.

24 JUDGE JORDAN: Yeah. I haven't decided  
25 anything and I'm not going to decide anything based



1 on what we discuss today. I just need to clarify  
2 that issue.

3 MS. PAYNE: Absolutely. And staff is  
4 happy to provide a more thorough legal analysis if  
5 the Commission would prefer.

6 JUDGE JORDAN: Yeah. That sounds pretty  
7 good. That sounds like a good idea. So, if we get  
8 a proposed procedural schedule out of this and  
9 probably even if we don't, maybe a supplement to the  
10 staff report would be helpful.

11 MS. PAYNE: Absolutely.

12 JUDGE JORDAN: Great. And, you know,  
13 while we're on the -- while we're on the topic, I'll  
14 ask Missouri-American Water whether it's formulating  
15 a position as to these standards and how the facts  
16 apply?

17 MR. LUFT: There have been no allegation  
18 of contributory negligence -- no facts to support  
19 that.

20 JUDGE JORDAN: Right, right.

21 MR. LUFT: So, I don't know how -- it's  
22 difficult to defend, but, you know, main breaks  
23 happen all the time. That's part of having a public  
24 water system. This pipe, I think, was 1950s  
25 vintage. You're going to have main breaks,

1 particularly when you have a large contractor in the  
2 area that's driving trucks up and down the street  
3 doing a ton of work on a major project. And so,  
4 this was an unfortunate incident that was -- but  
5 we've seen this time and time again where, whoa,  
6 there just happens to be a contractor in the area  
7 and next thing you know we have a main break. So,  
8 this is not unusual.

9 JUDGE JORDAN: Okay. Well, that will be  
10 helpful background. If we go to hearing, we can  
11 develop that more perhaps and perhaps in an amended  
12 answer.

13 MR. LUFT: Sure, absolutely.

14 JUDGE JORDAN: That would be helpful  
15 because I think this is the first time that I've  
16 heard anything about a major construction project  
17 that's going on that may have been -- may have  
18 caused this leak. So, that would be helpful. That  
19 would be helpful.

20 Okay. That pretty much wraps up my  
21 inquiry, and I appreciate the parties stepping up to  
22 fill in the facts on this.

23 So, I will most likely put out an order  
24 to file a proposed procedural schedule and I will  
25 probably set a ten-day timeline.

1                   Staff, would that be time enough for you  
2   to coordinate this kind of thing?

3                   MS. PAYNE: Absolutely, Judge. I might  
4   note that based on prior determinations by the  
5   Commission, we do not have the ability to award  
6   monetary damages or determine liability.

7                   JUDGE JORDAN: Well, you know, those are  
8   two different things. An award of monetary damages  
9   I'm pretty sure the Commission cannot do. If there  
10   were a violation, you know, the Commission could  
11   levy a fine, but that would not be damages to  
12   Ms. Anderson, that is correct.

13                  MS. PAYNE: Correct.

14                  JUDGE JORDAN: Now, as to whether we  
15   make a determination of liability, different issue.  
16   Under the case law that I discussed, if you have an  
17   administrative remedy, including the findings of  
18   fact, even if you can't make the conclusions of law,  
19   we may have to do something first. Now,  
20   Ms. Anderson can always dismiss her complaint. And  
21   the last one involving this incident -- I believe it  
22   was this very incident. I think nine houses flooded  
23   from this main break. -- that complainant chose to  
24   dismiss. In any event, I think that the main break  
25   might be something that the Commission wants to hear

1 more about and the Commission has a duty to  
2 investigate these things any way. So, that's where  
3 I'm coming from on that.

4 So, your argument, I note that.

5 MS. PAYNE: Okay. Thank you, Judge.

6 JUDGE JORDAN: Sure thing.

7 Well, what else can I do for the parties  
8 while we're all together on the line here?

9 Ms. Anderson, anything more?

10 MS. ANDERSON: Do you want me to tell  
11 how I feel or get to the end of...?

12 JUDGE JORDAN: It comes through pretty  
13 clearly in your complaint. It sounds like you've  
14 had a lot of damage from the backup that went up  
15 through MSD's system. Is that correct?

16 MS. ANDERSON: That's correct.

17 JUDGE JORDAN: Okay. I think we all get  
18 the picture on that.

19 MS. ANDERSON: Okay.

20 JUDGE JORDAN: Anything more from  
21 Missouri-American?

22 MR. LUFT: I don't have anything.

23 Diana, do you?

24 MS. CARTER: No, Judge.

25 JUDGE JORDAN: Okay. And anything more

1     that staff wants to throw in before we go off the  
2     record?

3                     MS. PAYNE:  Nothing further.

4                     JUDGE JORDAN:  Okay, then.  Well, thanks  
5     very much for your attention and I appreciate your  
6     input.  I think with that I will adjourn this  
7     conference and we will go off the record.

8                     (The conference concluded at 3:21 p.m.)

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## CERTIFICATE OF REPORTER

I, Amanda N. Farrar, a Certified Court Reporter for the State of Missouri, do hereby certify that the foregoing transcript was taken by me to the best of my ability and thereafter reduced to typewriting by me; that I am neither counsel for, related to, nor employed by any of the parties to the action in which this transcript was taken, and further that I am not a relative or employee of any attorney or counsel employed by the parties thereto, nor financially or otherwise interested in the outcome of the action.



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Certified Court Reporter

# PROCEDURAL CONFERENCE, VOL. I 6/8/2017

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