

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

Bertha Anderson,	)	
	)	
Complainant	)	
	)	
v.	)	<b><u>Case No. WC-2017-0251</u></b>
	)	
Missouri-American Water Company,	)	
	)	
Respondent.	)	

**SUPPLEMENT TO STAFF REPORT**

**COMES NOW** the Staff of the Missouri Public Service Commission, by and through counsel, and for its *Supplement* in this matter hereby states:

1. In relation to Bertha Anderson's *Complaint* filed against Missouri-American Water Company on March 30, 2017, the Commission held a procedural conference June 8, 2017. At that conference, the judge inquired of Staff how certain legal standards applied in this case. Staff now files this *Supplement* to provide legal analysis of the issues.

2. Section 4 CSR 240-2.070 and Section 386.390, RSMo, govern the standards and parameters for complaints before the Missouri Public Service Commission. Staff has verified that this *Complaint* proceeding has met all of these standards. Section 536.070 RSMo, governs the procedure for evidence, witnesses, objections, judicial notice, affidavits and transcripts in administrative proceedings, such as those heard before the Commission. Under this section the Commission should take judicial notice of all matters of which the courts take judicial notice.<sup>1</sup>

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<sup>1</sup> §536.070, RSMo

3. Pursuant to Section 393.130, RSMo, every gas, electric, water and sewer corporation shall furnish and provide instrumentalities and facilities that are safe and adequate. In the case of electrical corporations, safe and adequate has been considered to include that “customers expect uninterrupted service – or nearly so – for their own health and welfare.”<sup>2</sup> Based on Staff’s investigation, Missouri-American repaired the broken pipe in a reasonable time period so as to provide the least intrusion to the customers’ water service.

4. Missouri-American’s tariff contains language under the “Liability of the Company” heading which states, “The company shall not be liable for damages resulting to Customer or to third persons, unless due to contributory negligence on the part of the Company, and without any contributory negligence on the part of the Customer or such third party.”<sup>3</sup> The Western District has ruled previously that the Commission cannot by approving a tariff limit the liability of a public utility.<sup>4</sup> Additionally, the Commission determined in another complaint case before it that this same provision in Missouri-American’s tariff, “neither requires nor forbids any conduct” and “that provision is not subject to violation, and does not support the statement of a claim in a complaint.”<sup>5</sup> Staff finds here that based on the Western District’s ruling and the Commission’s determination in the *Westmoreland* complaint, Missouri-American’s contributory negligence tariff provision cannot limit the Company’s liability or be violated

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<sup>2</sup> *North American Electric Reliability Corporation (NERC): Reliability Criteria and Operating Limits Concepts* 9 (Ver. 4, Draft 11, June 7, 2007).

<sup>3</sup> Missouri-American Water Company Tariff, Form No. 13 Original Sheet No. R11.

<sup>4</sup> “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. **Public Service Comm’n of State v. Missouri Gas Energy**, 388 S.W.3d 221, 230-231 (Mo. App., W.D. 2012).

<sup>5</sup> Michele Westmoreland, Complainant, v. Missouri American Water Company, Respondent, *Order Granting Motion to Dismiss*

and renews the prior statement in its *Staff Report* that Missouri-American has not violated any statutes, Commission rules or Commission-approved tariff provisions.

5. The Commission in its *Report and Order* on a matter involving a proposed tariff revision of Laclede Gas Company's tariff stated that, "Determining whether Laclede was negligent in a particular situation depends on the surrounding circumstances. Actions or omissions which would be clearly negligent in some circumstances might not be negligent in other circumstances."<sup>40</sup> These important fact specific decisions regarding liability, especially with regard to unregulated services, should be left to the judicial system.<sup>6</sup> Staff takes a position based on the Commission's language in that Order that the Commission would prefer to leave determinations of liability to the circuit courts.

6. The Complainant seeks monetary damages in this matter. The Missouri Supreme Court in a prior case stated, "[t]he Public Service has full authority to investigate complaints about rates or service and can make orders to remedy the situation for the future, but it cannot grant monetary relief or compensation for past overcharges or damages."<sup>7</sup> Additionally, "[t]he Commission is a creature of the legislature and has only such powers as are expressly conferred upon it by statute and those powers reasonably incident thereto. It may not perform the judicial function. It has no power to determine damages, award pecuniary relief, declare or enforce any principle of law or equity."<sup>8</sup> Based on these principles, the Commission is unable to award the Complainant the monetary relief she seeks. To that end, Staff would suggest

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<sup>6</sup> In the Matter of Laclede Gas Company's [sic] Tariff Revision Designed to Clarify its Liability for Damages Occurring on Customer Piping and Equipment, 2010 WL342481 (Mo.P.S.C.).

<sup>7</sup> *May Dept. Store Co. v. Union Electric Light & Power Co.*, 341 Mo. 299, 331-332; 107 S.W.2d 41,58 (Mo. 1937).

<sup>8</sup> *State ex. rel. Fee Fee Trunk Sewer, Inc., v. Litiz* 596 S.W.2d 466, 468 (1980) (citing *Straube v. Bowling Green Gas Co.*, 360 Mo.132, 227 S.W.2d 666 (Mo. 1950)).

that the appropriate forum for Complainant to seek monetary relief from Missouri-American is in circuit court.

**WHEREFORE**, Staff prays that the Commission will: 1) accept its *Supplementary Staff Report* as a true and just supplement to its prior report; 2) dismiss this matter to permit Ms. Anderson to bring her claim for monetary relief in the circuit courts; and 3) grant such other and further relief as the Commission considers just in the circumstances.

**/s/ Whitney Payne**

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### **CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing was served by electronic mail, or First Class United States Postal Mail, postage prepaid, on this 12th day of June, 2017, to all counsel of record.

**/s/Whitney Payne**