

**STATE OF MISSOURI
PUBLIC SERVICE COMMISSION**

At a session of the Public Service
Commission held at its office in
Jefferson City on the 2nd day of
December, 2015.

Michele Westmoreland,

Complainant,

v.

Missouri American Water Company,

Respondent.

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File No. WC-2015-0171

ORDER GRANTING MOTIONS TO DISMISS

Issue Date: December 2, 2015

Effective Date: January 2, 2016

The Commission is granting the requests of Missouri American Water Company ("MAWC") and Staff to dismiss this action. Michelle Westmoreland agrees to the dismissal of her action. Michelle Westmoreland alleges that MAWC was negligent in working on a water main and causing damage to her house. But Michelle Westmoreland does not plead a violation, of a provision of law, rule, order, or decision of the commission as required by statute, and only seeks relief that the Commission cannot grant, so she has failed to state any claim on which the Commission can grant relief.

Filings

Michelle Westmoreland initiated this action using the Commission's complaint format.¹ Missouri American Water Company ("MAWC") filed an answer.² The Commission's staff ("Staff") filed a recommendation,³ to which MAWC filed a response.⁴ Staff filed an amended recommendation,⁵ which drew responses from MAWC⁶ and Michele Westmoreland.⁷

Analysis

The Commission is a creation of statute and so has only the powers "expressly conferred by statute[. ⁸]" MAWC's answer asks the Commission to dismiss this action for failure to state a claim on which the Commission can grant relief. Those grounds support dismissal under the Commission's regulations:

The commission, on its own motion or on the motion of a party, may after notice dismiss a complaint for failure to state a claim on which relief may be granted or failure to comply with any

¹ Electronic Filing Information System ("EFIS") No. 1 (January 21, 2015) *Complaint*.

² EFIS No. 4 (February 18, 2015) *Entry of Appearance and Answer of Missouri-American Water Company*.

³ EFIS No. 8 (March 27, 2015) *Staff Recommendation to Grant Partial Relief*.

⁴ EFIS No. 10 (April 6, 2015) *MAWC Response to Staff Recommendation*.

⁵ EFIS No. 36 (November 10, 2015) *Amended Staff Recommendation*.

⁶ EFIS No. 37 (November 11, 2015) *Support of Missouri-American Water Company to Staff's Amended Recommendation*.

⁷ EFIS No. 38 (November 11, 2015) *Complainant Michele Westmoreland's Support of Staff's Amended Recommendation*. Michele Westmoreland's response in support of the amended recommendation is ambiguous. It is subject to construction as a notice of voluntary dismissal, which would be effective when filed on November 11, 2015, without any order of the Commission. 4 CSR 240-2.116(1). But the Commission reads her response as seeking, and the Commission deems it more instructive to issue, an order explaining why this action constitutes neither a complaint nor any other claim for relief that the Commission can grant.

⁸ *Pub. Serv. Comm'n of State v. Missouri Gas Energy*, 388 S.W.3d 221, 230 (Mo. App. W.D. 2012).

provision of these rules or an order of the commission, or may strike irrelevant allegations.^[9]

MAWC renews that request in MAWC's response to the initial recommendation, and in MAWC's response to the amended recommendation.

To state a claim in a complaint requires charging that a public utility violated a statute or a Commission regulation, order, or tariff:

Complaint may be made by . . . any . . . person . . . in writing, setting forth any act or thing done or omitted to be done by . . . public utility . . . claimed to be in violation, of any provision of law, or of any rule or order or decision of the commission^[10]

The initial pleading does not argue that MAWC violated any law, or any rule or order or decision of the commission; and cites no statute or Commission regulation, order, or tariff.

Staff's initial recommendation cited a provision in MAWC's tariff describing MAWC's liability for property damage to MAWC customers and third parties. But that provision neither requires nor forbids any conduct. It provides only that the elements of a claim for property damage include a specified mental state:

The Company shall not be liable for damages resulting to Customer or 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."^[11]

Therefore, that provision is not subject to violation, and does not support the statement of a claim in a complaint.

⁹ 4 CSR 240-2.070(7).

¹⁰ Section 386.390.1, RSMo 2000.

¹¹ MAWC's tariff: PSC MO No. 13, Sheet R11, *Liability of the Company*, Rule 3(E). Staff's amended recommendation suggests that the tariff provision is subject to constitutional challenge under Pub. Serv. Comm'n of State v. Missouri Gas Energy, 388 S.W.3d 221, 230-31 (Mo. App., W.D. 2012). But, while both MAWC and Michele Westmoreland support dismissal as Staff recommends, neither MAWC nor Michele Westmoreland raise any challenge to the constitutionality of the tariff provision.

As to any other claim, Staff's amended recommendation supports dismissal because the only relief sought is an award of damages. Both MAWC and Michele Westmoreland agree with that amended recommendation. Those parties are correct because an award of damages is outside the Commission's jurisdiction.¹²

Essentially, this action is neither a complaint, nor any other claim for relief that the Commission can grant, but an action seeking damages for negligence, over which the Commission has no subject matter jurisdiction.¹³

Ruling

Michele Westmoreland has neither stated a complaint nor claimed any other relief that the Commission can grant, and agrees to the dismissal of her action, so the Commission will dismiss this action.

THE COMMISSION ORDERS THAT:

1. This action is dismissed.
2. This order shall be effective on January 2, 2016.

¹² State ex rel. GS Techs. Operating Co. v. Pub. Serv. Comm'n of State of Mo., 116 S.W.3d 680, 696 (Mo. App., W.D. 2003).

¹³ Staff also asks the Commission to state that Michele Westmoreland has exhausted her administrative remedies. But the exhaustion of administrative remedies is a matter of circuit court authority. Coleman v. Missouri Sec'y of State, 313 S.W.3d 148, 151 (Mo. App., W.D. 2010). That matter is not among the Commission's powers to determine under any law that the parties cite. Pub. Serv. Comm'n of State v. Missouri Gas Energy, 388 S.W.3d 221, 230 (Mo. App. W.D. 2012).

3. This file shall close on January 3, 2016.



BY THE COMMISSION

A handwritten signature in cursive script that reads "Morris L. Woodruff".

Morris L. Woodruff
Secretary

Hall, Chm., Stoll, Kenney, Rupp, and
Coleman, CC., concur.

Jordan, Senior Regulatory Law Judge