

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

Lou DeFeo, )  
 )  
 Complainant, )  
 )  
 v. )  
 )  
 Missouri-American Water Company, )  
 )  
 Respondent. )

**Case No. WC-2021-0075**

**Staff’s Brief**

**COMES NOW** the Staff of the Missouri Public Service Commission, by and through counsel, and for its *Brief*, states herein as follows:

**INTRODUCTION**

***The Issues:***

This matter arises upon the several complaints of Mr. Lou DeFeo of Jefferson City, Missouri, Complainant, against both his water service provider, Missouri-American Water Company (“MAWC”), Respondent, and against the Commission Staff, as follows:

1. Did the Company through its employee fail to correctly bill the Customer by refusing to consider actual evidence of water usage offered by the Customer but rather relied solely on the bias that meters are always accurate?
2. Did the Company through its employee fail to respect Customer’s right to appeal by failing to inform the Customer of his right to file an informal complaint with the PSC which is required?

3. Did the PSC representative handling the informal complaint error by refusing to consider actual evidence of water usage offered by the Customer but rather relied solely on the bias that meters are always accurate?

4. Did the PSC representative handling the informal complaint error by failing to inform the Customer of his right to file a formal complaint? (Complainant realizes that the Respondent is not responsible for the actions of the PSC staff but believes that it is in the public interest to call the need for staff education to the attention of the Commission.)

The Company identified an additional issue, which is in the nature of an affirmative defense:

5. Did MAWC's Notice of Satisfaction filed on July 13, 2021, and the actions described therein, satisfy the Complaint?

The Staff raised still another, threshold issue on November 3, 2021, by filing its *Motion to Dismiss*, questioning the Commission's jurisdiction to proceed:

6. Is Complainant seeking an unlawful advisory opinion in that he has already received the relief he sought in his Complaint?

***Staff's Role in Consumer Complaint Cases:***

The Commission Staff is the Commission's investigative and analytical arm. The sole purpose of the Staff is to provide neutral, expert analysis to assist the Commission in the discharge of its statutory duties. Its role in a consumer complaint case is primarily to level the playing field by providing expert commentary and analysis on the complaint and its circumstances, given that few consumers have the resources to provide expert testimony in support of their complaint in opposition to the expert

assistance available to the Company. Staff does not support either of the parties but assists the Commission in understanding the issues presented by the contentions of the parties and the merits thereof. To protect the Due Process rights of the parties, Staff participates in the case as though it were a party and provides its input via testimony, reports, pleadings, and briefs.

### **ARGUMENT**

Staff will present its argument in three sections: its proposed Findings of Fact; its proposed Conclusions of Law; and a discussion of Staff's proposed resolution of each issue presented for determination.

#### ***Staff's Proposed Findings of Fact:***

1. Complainant is Mr. Lou DeFeo, of Jefferson City, Missouri, a water service customer of MAWC. Company witness Tracy Figueroa testified that MAWC has provided water service to Mr. DeFeo at his premises for many years. *Id.*, p. 5, l. 14.

2. Respondent MAWC is a Missouri general business corporation in good standing, headquartered at 727 Craig Road, St. Louis, Missouri, 63141; its registered agent is CT Corporation System, 120 S. Central Ave., Clayton, Missouri, 63105. MAWC is a wholly-owned subsidiary of American Water Works, Inc., a holding company headquartered at One Water St., Camden, New Jersey, 08102, which, through its subsidiaries, serves approximately 15 million people with drinking water, wastewater, and other water-related services in 46 states. MAWC provides water service to customers in Jefferson City including Complainant DeFeo.

3. Complainant received a bill dated April 3, 2020, covering the service period of March 4, 2020 to April 2, 2020. The amount due was \$129.76, an amount which was twice the amount of recent monthly bills. The usage for the period was 19,100 gallons. *DeFeo Direct*, Ex. 8, pp. 1-2<sup>1</sup>; Tr. vol. 2, p. 27, ll. 1 to 4. Complainant's immediately prior bill, for example, was \$58.49, with a usage of 7,900 gallons. *DeFeo Direct*, Ex. 8, p. 2.

4. On April 21, 2020, Complainant called the Company mainly for advice on how to identify the source of the higher use. Complainant was advised to check toilets for leaks. No leaks were found. Customer paid the bill. *DeFeo Direct*, Ex. 8, p. 2.

5. After Complainant's inquiry on April 21, 2020, it was noted that Mr. DeFeo had indicated to a Company Customer Service Representative that he had had a problem with a toilet two weeks prior and had a plumber visit his premises. A copy of that CSR note is attached as Schedule TF-2. *Figueroa Rebuttal*, Ex. 200, p. 6, ll. 8-11. Two weeks prior to April 21, 2020, was April 7, 2020.

6. MAWC took no further action after Complainant's call on April 21, 2020, because the reported toilet problem seemed to explain the unusually high usage. *Figueroa Rebuttal*, Ex. 200, p. 6, ll. 13-14. A leaking toilet can flow at rates between as little as 6 gallons per hour and as much as 300-400 gallons per hour, depending on various factors. *Id.*, p. 8, ll. 10-11.

7. Subsequently Customer received a bill dated May 8, 2020, covering the service period of April 3 to May 4, 2020. The amount was \$232.62, an amount almost

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<sup>1</sup> Complainant's *Statement of Direct Testimony* lacks page numbers and line numbers, in violation of 20 CSR 4240-2.130(6). Staff notes this minor defect only because Mr. DeFeo has complained of similar minor violations by the Company and by Staff.

four times the March bill. The usage on the May bill was 35,400 gallons. *DeFeo Direct*, Ex. 8, p. 2; Tr. vol. 2, p. 27, ll. 15-21.

8. The bills received by Complainant do not show daily use, but show use for 30 days. Complainant learned later, when he received the Data Log from his meter, that this alleged increase in water use occurred over a 73-hour period over about five days and not over a period of a month. Tr. vol. 2, p. 27, ll. 9-14.

9. Although the Company claims that its system will generate a letter if the usage is two times higher than the same time the previous year, Complainant received no such letter. *DeFeo Direct*, Ex. 8, p. 2.

10. Complainant contacted the Company again on May 19, 2020, and the Company initiated an investigation. A Field Service Representative (“FSR”) visited Complainant’s premises on May 20, 2020. The FSR printed out Complainant’s usage log and went over it with him, noting a high usage spike between April 1 and April 4. The FSR also bench tested the meter at Complainant’s premises and determined that it was 98% to 102% accurate, exceeding the standard required by the Commission. The test record is attached to Ms. Figueroa’s testimony as Schedule TF-3. *Id.*, p. 6, l. 16, to p. 7, l. 15. The meter at Complainant’s premises was installed on July 9, 2019. *Id.*, p. 7, l. 17.

11. The Data Log for Complainant’s meter, attached to Ms. Figueroa’s testimony as Schedule TF-4, is the record of Complainant’s usage from mid-February 2020, to mid-May 2020, along with a line graph that shows “continuous” usage between 1352 hours on April 2, 2020, and 1552 hours, on April 4, 2020.

*Id.*, p. 7, l. 20, to p. 8, l. 3. This is the only instance of continuous usage recorded. *Id.*, p. 8, l. 5. This usage spike affected Complainant's April and May bills. *Id.*, ll. 7-8.

12. The Data Log revealed that the alleged service of 40,000 gallons occurred over a brief period and not over a month. On the line graph developed from the Data Log by Complainant (Ex. 3), a very sudden spike going from 30 or 40 gallons to 500 to 600 gallons within a one-hour period is visible and all of this spike occurred in a time of 73 hours consecutively. Tr. vol. 2, p. 28, ll. 16-25; and Ex. 3.

13. To illustrate the amount of water constituting 40,000 gallons, Complainant testified that to save 40,000 gallons of water, he would need over 700 55-gallon barrels and would spend 73 hours consecutively to fill them. Tr. vol. 2, p. 29, ll. 11-14.

14. On May 21, 2020, Complainant again called the Company and spoke to FSR Cook. Mr. Cook interviewed Complainant, asking such questions as does the customer have an automatic irrigation system. *DeFeo Direct*, Ex. 8, p. 2. Complainant does not have an automatic water use system. *Id.* Complainant has no irrigation system, no water adding system, no system that automatically turns water on except humidifiers on furnaces and an ice maker on a refrigerator. *DeFeo Direct*, Ex. 8, p. 3.

15. Complainant has an indoor swimming pool, which is 36' by 18' and averages 4.1 feet in depth, with a capacity of 20,000 gallons of water. The pool has no automatic equipment to add water and the only way to add water is manually, with a garden hose. The pool water is continuously recirculated through a filter system. *DeFeo Direct*, Ex. 8, p. 3; Tr. vol. 2, p. 29, l. 20, to p. 30, l. 8.

16. The pool is not like a bathtub with a drain in the bottom with a stopper. With a bathtub when you open the stopper, the tub will empty. The pool has no drain. The only way to empty the pool is to pump the water out. The pool has never been emptied since it was constructed in 2000. The pool will lose some water by evaporation and through small leaks in the vinyl liner. About once every five days, the pool is topped off by adding one-inch of water with a garden hose. *DeFeo Direct*, Ex. 8, p. 3; Tr. vol. 2, p. 29, l. 20, to p. 30, l. 8.

17. Customer's pool has the capacity to hold 20,000 gallons of water. If 43,000 gallons of water were added, the water would be 12 feet deep, not 4 feet deep. The result would be a flood; the water would run out the patio doors onto the ground outside, creating a pond. Like any flood, any material subject to damage by water, such as sheet rock, would show it. There is no such damage. *DeFeo Direct*, Ex. 8, p. 3; Tr. vol 2, p. 30, ll. 9-15.

18. Each of the three visits by the Company's Field Service Representative were interviews and not inspections. So far as Complainant recalls, the Field Service Representative made no inspection of either the house or pool house at Complainant's premises. The only inspection mentioned in his report to the Company was of the meter. *DeFeo Direct*, Ex. 8, p. 2.

19. On June 9, 2020, Company FSR Cook informed Complainant that the meter was tested in place and was found to be accurate. *DeFeo Direct*, Ex. 8, p. 2.

20. On June 9, 2020, Mr. Cook provided an electronic copy of the Data Log covering the water service in bi-hourly units from March 5, 2020, to June 9, 2020. The Data Log showed that the alleged usage was not a steady leak over a 30-day period,

but a sudden spike that lasted 73 hours, over a four-day period, and which disappeared as suddenly as it started. The spike started on Wednesday, April 1, 2020, at 14:53 and ended on Saturday, April 4, 2020, at 14:52. To visualize this, Customer read the electronic version of the Data Log into Excel Spreadsheet and had Excel turn it into a line graph. (Ex. 3.). *DeFeo Direct*, Ex. 8, p. 2.

21. Complainant worked from home due to the COVID-19 pandemic beginning March 1, 2020, and was therefore at home during the days of the spike and noticed no large water flow. *DeFeo Direct*, Ex. 8, p. 2.

22. Mr. Cook returned on June 10, 2020, and stated that he could not explain where the 43,000 gallons went. He suggested that Complainant contact his supervisor with any further questions or concerns. *DeFeo Direct*, Ex. 8, pp. 2-3; Tr. vol. 2, p. 29, ll. 11-14.

23. Complainant consulted with Robert E. Criss, an internationally-recognized hydrologist at Washington University, St Louis. Mr. Criss studied the Data Log provided by the Company, supervised tests on Complainant's water flow, and analyzed the situation. His affidavit is in evidence. (Ex. 1). *DeFeo Direct*, Ex. 8, p. 3.

24. Complainant called Company FSR Cook's supervisor, Nate Hart. Mr. Hart advised Complainant that the meter reading was accurate. *DeFeo Direct*, Ex. 8, p. 3.

25. Complainant stated that Mr. Hart was not interested in seeing the affidavit of expert hydrologist Robert E. Criss (Ex. 1) or hearing Complainant's explanation of the physical evidence that challenged the meter reading. *DeFeo Direct*, Ex. 8, p. 3.



26. Mr. Hart did not inform Complainant of his right to make an informal complaint to the PSC. *DeFeo Direct*, Ex. 8, p. 3.

27. On July 13, 2020, Complainant filed an informal complaint (C202100024), stating that MAWC had excessively billed him for water usage that allegedly occurred over four calendar days.<sup>2</sup>

28. After filing an informal complaint with the PSC's Consumer Services Department,<sup>3</sup> Complainant spoke by telephone with Consumer Services Supervisor Justin Edwards, who advised Complainant that the meter reading was accurate. *DeFeo Direct*, Ex. 8, p. 3.

29. According to Complainant, Mr. Edwards refused to consider the opinion of expert hydrologist Criss or the physical evidence contradicting the meter reading. *DeFeo Direct*, Ex. 8, p. 3.

30. Mr. Edwards did not inform the customer that he had the right to file a formal complaint. *DeFeo Direct*, Ex. 8, p. 3.

31. MAWC offered a bill adjustment to Complainant prior to his filing of a formal complaint. Tr. vol. 2, p. 60, l. 25, p. 61, l. 6.

32. On September 18, 2020, Complainant filed his formal complaint, alleging that "MISSOURI AMERICAN WATER (the Company) claims that Complainant (the Customer) received over 40,000 gallons of water which he did not."<sup>4</sup>

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<sup>2</sup> The Informal Complaint process is set out at 20 CSR 4240-2.070, (2) and (3), and 20 CSR 4240-13.070.

<sup>3</sup> Although the Consumer Services Department is not part of the Commission Staff organizationally, it is part of the Commission Staff for purposes of this proceeding pursuant to 20 CSR 4240-2.010(5).

<sup>4</sup> The Formal Complaint process is set out at 20 CSR 4240-2.070, (4) – (14).

Customer requests that Company remove any charge base [sic] on this alleged use.”

Complainant stated “The amount at issue is about \$250.00 but the more important issue is fairness to the customers.”

33. Complainant further alleged that:

a. The Company violated 20 CSR 4240-13.020 (2) Billing and Payment Standards because the billing statement rendered by a utility shall be computed on the actual usage during the billing period.

b. The Company violated 20 CSR 4240-13.025(1) Billing Adjustments by failing to consider all related and available information including physical evidence offered by the Customer and the analysis of a professional hydrologist.

c. The Company violated 20 CSR 4240-13.045(9) Disputes and 20 CSR 4240-13.070(3) Commission Complaint Procedures by failing to inform the Customer of right to make an informal complaint to the commission, and of the address and telephone number where the customer may file an informal complaint with the commission.

d. According to Company’s Data Log (Exhibit A), on April 1, 2020, at 1:52:00 PM, the hourly consumption was 23.6 gallons. One hour later, at 2:52 PM on the same day, the hourly consumption was 567.8 gallons. For 73 hours ending April 4, 2020, at 2:52:00 PM, the consumption averaged 559.4 gallons per hour totaling 40,838 gallons. One hour later, the consumption was 18.3 gallons. The hourly consumption rate, both before April 1, 2020, at 1:52:00 PM and after April 4, 2020, at 2:52:00 PM, was consistent with the 23 to 18-gallon rate. The 40,838 gallons in 73 hours is clearly a very large spike.

e. No modification in the Customer’s water system occurred before or after the 40,838 gallons spike.

f. Exhibit B is a line graph showing how the alleged use spiked quickly and ended as quickly after the 73 hours.

g. If you do not include the 40,838 gallons in 73 hours spike, Customer’s total six-month total usage from January through June 2020 was only 3,561 gallons. The Company is claiming that Customer used over 11 times as much water in three days as he did in six months!

h. The Company did not test the water meter during the 73-hour spike. The Company’s test was done in May, weeks after the hourly

consumption rate, according to Company's Data Log, returned to normal. This test is no proof that the Company's metering equipment did not malfunction during the 73 hours in question.

i. The Company at no time informed the Customer of the 73-hour spike.

j. The alleged use was claimed in Customer's April and May statements. Upon discovering the overcharge Customer called the Company requesting an explanation. Customer met with Company's field inspector on three occasions to resolve the matter. Together we reviewed Company's Data Log of use and all aspects of the Customer's water system. Together it was determined that there are no automatic water devices (e.g. a lawn sprinkling system). Further it was determined that there are no leaks or anything else in Customer's water system which would be consistent with 40,838 gallons consumption within 73 hours. Both the Company and the Customer tested for underground leaks between the meter and the buildings. There are none. The Company's field representative found no physical evidence of 40,838 gallons of water being provided on the Customer's property.

k. To visualize 40,838 gallons: Customer has an indoor swimming pool. The pool is 36 feet long and 18 feet wide. It holds 20,000 gallons of water. 40,838 gallons is more than twice the capacity of the pool. If 40,838 gallons were added to the pool, the water would have flowed out the doors and created a pond. If the customer attempted to save 40,838 gallons of water in 55-gallon drums, it would take 743 drums. You can't hide 40,838 gallons of water!

l. Customer consulted an internationally-recognized professional hydrologist at Washington University. His analysis concluded that Customer did not receive the 40,838 gallons as alleged by the Company. Exhibit C is the Affidavit of the professional hydrologist.

m. After thoroughly analyzing the situation with the Company's field inspector, Customer spoke with the Company's Senior Supervisor Operations. He refused to listen to any evidence that Customer offered including the analysis of the facts by an internationally recognized professional hydrologist at Washington University. He merely asserted that the Company's meter was correct.

n. After attempting to resolve the matter with the Company, Customer requested help from the PSC's Consumer Services Department. Customer received an unsigned letter from an unknown person that the Department was investigating the matter and that the investigation would take up to 30 days. After hearing nothing for 30 days, Customer called and talked to the investigator and learned that his investigation consisted of talking to the Company the day before and the investigator refused to listen to any of the

evidence of the Customer including the analysis of the expert hydrologist. How can there be an “investigation” without hearing from both sides? He did not inform the Customer of his right to file a formal complaint. The PSC investigator failed to comply with 20 CSR 4240-13.070(4), Commission Complaint Procedures.

34. On September 18, 2020, the Commission designated this matter as a Small Formal Complaint and ordered Staff to investigate and file a report of its investigation.<sup>5</sup>

35. After filing his formal complaint, Complainant was visited by David Spratt, Utility Operations Technical Specialist. According to Complainant, Mr. Spratt “thoroughly investigated” Complainant’s complete water system, including his pool. Mr. Spratt measured the rate of flow of the water and photographed the pool house interior. Mr. Spratt authored the *Staff Report* that is in evidence herein (Ex. 100). *DeFeo Direct*, Ex. 8, p. 3.

36. Complainant testified that “the representative for the Commission, Dave Spratt, came out -- talked with me on the phone and came out and physically examined the home, the property around the home, and the inside of the pool, took pictures, measured the flow from the hose as to how fast it went in, et cetera, and was unable to find any evidence of 40,000 gallons of water being received by the premises.” Tr. vol. 2, p. 30, l. 23, to p. 31, l. 5.

37. On October 16, 2020, MAWC timely filed its *Answer and Request for Mediation*, in which admitted that it was a public utility subject to the Commission’s jurisdiction, that Complainant was its customer, to whom it provided water service, and that Complainant disputed “the recorded usage and associated charges.”

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<sup>5</sup> The Small Formal Complaint process is set out at 20 CSR 4240-2.070(15).

MAWC denied all other allegations of the *Complaint*. Additionally, Respondent requested that the matter be referred for mediation.

38. On December 9, 2020, the Staff filed its *Report* (Exhibit 100). Staff concluded “that the Company has not violated any applicable statutes, Commission Rules, or Commission-approved Company tariffs related to the complaint.”

39. Staff’s *Report* stated, in pertinent part:

a. This report provides Staff’s investigation concerning Louis DeFeo’s formal complaint against Missouri-American Water Company. In this complaint, Mr. DeFeo has alleged overbilling of over 40,000 gallons of water that occurred over a seventy-three hour period. Staff was unable to determine a probable cause of the sudden high water usage recorded by the customer’s meter. Based on Staff’s investigation, no violations of statutes, Commission rules or regulations, or Commission-approved tariffs by Missouri-American Water Company were identified.

\* \* \*

b. On September 29, 2020, Water and Sewer Department Staff made contact with the Complainant and made a site visit to Mr. DeFeo’s service address to perform an inspection of the customer’s water system. On October 2, 2020, Staff submitted data requests to the Company. Staff reviewed account notes, recorded phone calls, meter reading records, and billing statements. Staff further reviewed information from Mr. DeFeo’s informal complaint (C202100024). Based on its investigation, as detailed below, Staff did not discover any violation of applicable statutes, Commission rules or regulations, or the Company’s Commission-approved tariff.

c. Based on hourly meter reading logs provided by the Company, the Complaint’s water meter began registering abnormally high usage on April 1, 2020. MAWC obtained a regular monthly meter reading on April 2, 2020, showing 19,100 gallons of water were used by the customer. This monthly usage compares to 7,480 gallons of usage in the year prior billing period ending on April 3, 2019. According to MAWC, its billing system generates a letter if usage is two times higher than the prior year’s monthly usage and generates a service order if the usage is six times higher than normal. However, despite the fact that Mr. DeFeo’s usage for the billing period ending April 2, 2020, was nearly three times higher than the prior year’s monthly usages, MAWC’s billing system did not generate a letter. It is not clear why this reading did not generate a leak notification letter.

d. . . . Mr. DeFeo stated he recently had a plumber clear a stopped up toilet, but there had not been any leaks or other problems found. The customer requested more information regarding the time of the high usage, but detailed data was unavailable to the representative at the time as the customer did not have an AMI (Automated Metering Infrastructure) meter installed that could provide the Company with remote meter reading data. The representative advised [Mr. DeFeo] to check the toilets for any potential leaks, which the customer agreed to do.

e. The high water usage continued into the next billing period, returning to normal water usage rates by April 5, 2020, according to hourly meter reading logs provided by the Company. MAWC obtained a regular monthly meter reading on May 4, 2020, showing 35,400 gallons of water usage in the billing period, which was just under five times the year prior water usage. The customer contacted MAWC again on May 19, 2020, after receiving another high bill for excessive water usage. The Company was unable to provide a recording of this call due to an unknown recording issue. The customer requested to have the meter checked and a technician visit to check the meter was scheduled by the representative. As the chart [omitted] below shows, the usage over the two billing periods in question is about three times the customer's average monthly water usage during the current year.

f. The meter installed at the Complainant's service address during the high usage condition was a Neptune AMR (Automated Meter Reading) type meter with data logging capabilities. The Company provided Mr. DeFeo with a copy of the hourly data logs from the meter by email on May 4, 2020. The chart below [omitted] of the hourly meter readings shows the sudden increase in hourly water usage that occurred beginning on April 1, 2020, around 2pm, and continuing for an approximately seventy-three hour period.

g. A temporary drop in hourly water usage occurred on April 2, 2020, which coincides with a meter reading that was performed that day; however, the AMR type meter would not require any physical contact by the meter reader to obtain a reading. While the sudden spike in usage would typically be indicative of a leak in the customer's water system, Mr. DeFeo stated that he did not observe any leaks or issues with his water service.

h. Staff expert David Spratt visited Mr. DeFeo at the customer's residence on September 29, 2020, to discuss his concerns and examine the home for potential sources of high water use or water leaks. Staff examined the basement of the home and did not see any signs of water leaks from the washing machine or hot water heater. Staff also examined the outside faucets to see if any of them could have been the cause of the leak. Staff asked Mr. DeFeo if it is possible he left a hose running outside while he was watering. Mr. DeFeo said he can hear the water running from inside the home and would not have left it on for that long. Mr. DeFeo indicated that he had an indoor pool in the

back of his detached garage. Staff asked if the pool was metered separately and was shown it was not. Mr. DeFeo showed Mr. Spratt where the water service line from the home is connected in the meter pit. Staff looked for signs of leaks in the connections and signs of leaks. Staff did not see any signs of yard repair where the water line would have been excavated.

i. Staff examined the pool house to look for potential sources of high water use. Mr. DeFeo has an indoor pool which holds approximately 20,000 gallons of water. Mr. DeFeo informed Staff that he does not have an automatic watering system, but rather he uses a water faucet and hose inside the pool house to “top off” the pool manually every three to five days. Staff measured the water flow at the faucet using a five-gallon bucket and a timer. The bucket filled in approximately thirty-five seconds which indicated an approximate flow of one gallon every seven seconds; or 8.57 gallons per minute, which would be about 514 gallons per hour. These measurements indicate that the faucet used to fill Mr. DeFeo’s pool is able to produce nearly the number of gallons per hour the meter readings indicated.

j. Staff asked Mr. DeFeo if it was possible he left the hose on and forgot to check it for three days. Mr. DeFeo said when he turns the hose on he only adds about an inch of water to the pool. He informed Staff that he sets a timer on his phone for forty-five minutes to remind him to go back and turn the water off. Mr. DeFeo included hourly meter reading data as Exhibit A in his complaint which shows a pattern of high water use for about one hour every three to five days but never for a longer period of time.

k. Mr. DeFeo also explained to Staff that if he left the water running for seventy-three hours that the pool would have overflowed and water would have been running out of the pool house. He said he is in the garage almost every day and would have heard the water running or he would have seen it pouring out of the pool house. Staff examined the pool house for any water damage that may have been caused to the drywall but did not see any. The pool does have a trough drain around it to get rid of water that is splashed around the pool but Mr. DeFeo said it drains very slowly because the concrete that was poured around it seeped into the joints. He does not believe that if the pool were overfilled that the drain system could drain away the excess water at the same rate it is filling and he believes it still would have been obvious the pool had ben overfilled.

l. The Company sent a technician on May 20 to check the meter for leaks but none were detected. Staff did not observe any signs of a water leak, or any indication of damage to the walls or landscaping, that would typically be caused by a water leak that would cause the amount of usage billed to Mr. DeFeo during the complained-of period. That being said, Staff is unaware of a situation where a meter speeds up for a period of time and then returns to normal.

m. Reviewing monthly bills provided by the customer in the informal complaint, Staff calculated a monthly water use average each year from 2009 to 2017. The average water use in seven of the nine years was under 8,000 gallons per month. Water use in 2018 was significantly higher than the other years because, according to the customer, he had sod planted and watered it heavily. Mr. DeFeo experienced two months of higher than typical usage in 2019, June and July, the bills for which were estimated based on the previous year's usage. Each high bill experienced by Mr. DeFeo since 2017 can be explained, except for the April and May bills of 2020. The customer, the Company, and Staff are all unable to determine why the water meter showed such high readings for seventy-three hours straight without any trace of water leaks or water damage.

40. Staff further reported, with respect to the rule violations alleged

by Complainant:

a. **Rule 20 CSR 4240-13.020(2): “Each billing statement rendered by a utility shall be computed on the actual usage during the billing period...”** Staff has reviewed the information and believes the Company used the actual meter readings provided by the meter as it is able to be read remotely. Despite the allegations of rule violations included in the complaint, the Complainant's bills appear to be based on actual meter readings using the available data from a meter that appears to be functioning correctly. Staff does not believe the evidence provided by the customer overwhelmingly disputes the accuracy of the meter.

b. **Rule 20 CSR 4240-13.020(2): “For all billing errors, the utility will determine from all related and available information the probable period during which the condition causing the errors existed and shall make billing adjustments for that period...”** The rule cited above covers billing adjustments when it is determined that a billing adjustment needs to be made to correct a billing error. This rule does not apply to the facts in this case, as no billing error has been identified as needing to be corrected. The bills received by the complainant accurately reflect the meter readings obtained from the meter installed at the Complainant's residence.

c. **Rule 20 CSR 4240-13.040(1): “A utility shall adopt procedures which shall ensure the prompt receipt, thorough investigation and, where possible, mutually acceptable resolution of customer inquiries. The utility shall submit the procedures to the commission for approval and the utility shall notify the commission and the public counsel of any substantive changes in these procedures prior to implementation.”** The above rule is cited in the formal complaint, but the specific violation being alleged is unclear. Staff did not find any facts or evidence during the course of its investigation that



indicate that the Company did not follow its internal procedures for responding to customer inquiries during the Complainant's dispute. Staff concludes that the Company did not violate its tariff knowingly or unknowingly.

d. **Rule 20 CSR 4240-13.045(9): "If the utility does not resolve the dispute to the satisfaction of the customer, the utility representative shall notify the customer that each party has a right to make an informal complaint to the commission, and of the address and telephone number where the customer may file an informal complaint with the commission."** The Company was unable to provide a copy of the call recording from May 19, 2020, due to an unknown recording error. Staff found no other evidence to contradict Complainant's statement that he was not informed of the Commission's informal complaint process.

e. **Rule 20 CSR 4240-13.070(3): "If a utility and a customer and/or applicant fail to resolve a matter in dispute, the utility shall advise the customer and/or applicant of his/her right to file an informal complaint with the commission under 4 CSR 240-2.070 (sic)."**<sup>6</sup> The Complainant cites a similar Chapter 13 rule related to the Commission's informal complaint process. This rule would also require a copy of the call recording that is unavailable in order for Staff to verify the allegation of this rule being violated by the Company.

f. **Rule 20 CSR 4240-13.070(3): "If the staff is unable to resolve the informal complaint to the satisfaction of the parties, the staff shall call the complainant and utility and note such conversation into the commission's electronic file and information system and send a dated letter or email to that effect to the complainant and to the utility. Staff shall also advise the customer of his/her right to file a formal complaint with the commission under 4 CSR 240-2.070 (sic)."**<sup>7</sup> Staff was unable to determine if Mr. DeFeo was properly informed by the Commission's Consumer Services Department of the process of filing a formal complaint. The Consumer Services Department Staff did not notate the informal complaint with closure notes or attach a copy of any closure letters that were mailed to the Complainant. It is not clear what actions were taken by Consumer Services Department Staff when the informal complaint was closed.

41. Also on December 9, 2020, Complainant agreed to the Company's request for mediation and mediation ensued.

42. On December 16, 2020, Complainant responded to Staff's *Report*, stating:

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<sup>6</sup> Now 20 CSR 4240-2.070.

<sup>7</sup> Now 20 CSR 4249-2.070.

a. “[The *Staff Report*] flies in the face of absolutely no physical evidence that 43,000 gallons of water ever was delivered to the customer’s residence. No evidence was found by the Commission’s inspector. No evidence was found by the Company’s inspector. No evidence was found by the customer who was at the premises during the 73 hours that the spike allegedly occurred. The staff report agrees that there is no physical evidence that this occurred. (Page 5.) You cannot hide 43,000 gallons of water.

b. The present meter (Device 091752354E) was installed in July 2019 replacing a meter (Device 27005480) which was not measuring right. See: Company’s response to DR 0004.

c. The test of the present meter was done on June 9, 2020, over two months after the spike in the reading. See: Company’s response to DR 0001.

d. The staff report overlooks the fact that the meter does not print the customer’s bill. This is a process. A chain of events involving the meter, the remote communication of the data which the meter read and the computer program calculating the data. Even if the meter made a correct reading. The remote transmission could have been in error. Have you ever had to call IT because the wi-fi or network failed? Even if the remote transmission was correct, the computer program could have errored. Have you ever received a message on your computer like “Word is not responding? Would you like to send a message to Microsoft to help them fix the error?” Furthermore, the Company admits that their computer program did error. Keeping in mind that the meter is only a part of the metering system which includes remote communication and computer programs and equipment which the Company has **admitted failed** to produce a letter informing the customer of the alleged spike in use. See: DR 0011 which requested “Please detail the Company’s policy for leak notifications for customers with AMR meters” and the Company’s response, “The system will trigger a service order to verify a reading if the usage is six times higher than the same time the previous year. A letter will generate if the usage is two times higher than the same time the previous year.” The Staff found that the alleged use was three times higher. Also see: DR 0003 – which requests “a copy of all correspondence between Mr. DeFeo and the Company from January 1, 2020, to present.” In response the Company produced 7 items none of the 7 includes a leak notification letter. In short, the Company’s computer system failed.

e. The Staff Report does not provide information on the staff’s credentials which would qualify them for provide expert opinion on this matter. Complainant has provided the Commission a sworn affidavit (Exhibit C) of an internationally recognized expert hydrologist which sets forth his credentials qualifying him to provide the opinion of an expert. The Staff apparently failed to

consider the expert's testimony. It is not even mentioned in the Report. After reviewing the evidence and conducting certain tests, the expert expressed the following: "It is not possible that more than 40,000 gallons of water could flow onto a property of modest size without providing any evidence of where that huge amount went. Modern data recording, transmission and processing systems are very good, but given their complexity can never be perfect. It is unreasonable for Missouri American Water to insist that the contrary is true, and insist that remote measurements and computer processing are superior to first-hand knowledge, expert opinion, and obvious realities about the huge quantities of water alleged to have been used at 1700 Green Berry Road, but were nowhere seen." The Affidavit of Robert E. Criss is attached to Complainant's *Response*.

f. **Rule 20 CSR 4240-13.020(2). States: "Each billing statement rendered by a utility shall be computed on the actual usage during the billing period..."** The Staff Report says that the regulation was not violated because "the Company used the actual meter readings." (Page 6.) Note the Rule says "billing ... shall be computed on the **actual use**". While the meter reading is an element of "actual use", it is not the sole determinate of "actual use". As discussed above, the meter is only part of a system including remote transmission and computer equipment and programming. In addition, the determination of "actual use" includes the physical evidence. The review of all factors demonstrates that the Company did not bill based on "actual use" and therefore violated Rule 20 CSR 4240-13.020(2).

g. **Rule 20 CSR 4240-13.040(1). Relates to the Company "adopt(ing) procedures which shall ensure the prompt receipt, thorough investigation and, where possible, mutually acceptable resolution of customer inquiries."** For the same reasons [i.e., those stated above in reference to Rule 20 CSR 4240-13.020(2)], the Company violated Rule 20 CSR 4240-13.025(1) regarding adjusting billing errors.

h. **Rule 20 CSR 4240-13.040(1). Relates to the Company "adopt(ing) procedures which shall ensure the prompt receipt, thorough investigation and, where possible, mutually acceptable resolution of customer inquiries."** DR 0011 requested the Company's policy for leak notifications for customers with AMR meters. The Company's response: "The system will trigger a service order to verify a reading if the usage is six times higher than the same time the previous year. A letter will generate if the usage is two times higher than the same time the previous year." No such letter was generated and sent to the Complainant. The Company violated Rule 20 CSR 4240- 13.040(1).

i. **Rule 20 CSR 4240-13.045(9). "If the utility does not resolve the dispute to the satisfaction of the customer, the utility representative shall notify the customer that each party has a right to make an informal**

**complaint to the commission, and of the address and telephone number where the customer may file an informal complaint with the commission.”**

Apparently, the company’s telephone system is no more accurate than the computer program. In response to the staff’s DR 0002 requesting, “Please provide all recorded phone calls between the Company and Mr. DeFeo.” The Company response was: “Please see the responsive recorded calls attached. Please note that the May 19, 2020 call did not record properly and the cause of the recording error is unknown....” Although the Company cannot provide a recording, had the Company representative informed the Complainant of his rights regarding informal complaints, the Company could have provided the Commission a sworn affidavit of the representative. DR 0003 requests: “Please provide a copy of all correspondence between Mr. DeFeo and the Company from January 1, 2020, to present.” The Company’s response includes 7 items the earliest being 5/22/20. None of the correspondence notifies Complainant of his rights regarding informal complaints. The Company violated Rule 20 CSR 4240-13.045(9).

43. On July 13, 2021, the Company filed its *Notice of Satisfaction*, stating “MAWC hereby further provides notice that it has satisfied the Complaint as of July 13, 2021, by providing a credit to Complainant in the amount of \$250.” See also *Figueroa Rebuttal*, p. 5, l. 20, to p. 6, l. 3.

44. On September 2, 2021, the Commission held a scheduled procedural conference, at which Staff and the Company suggested that the case was moot in view of the *Notice of Satisfaction* filed on July 13, 2021. In response, Complainant stated, “. . . the \$250 was not the only matter in issue, and that's enough for me to say at this point. Transcript (“Tr.”) vol. 1, pg. 9, ll. 20-22.

45. On October 15, 2021, Complainant filed his *Statement of Direct Testimony* (hereinafter, “*DeFeo Direct*”) (Exhibit 8). Therein, Mr. DeFeo asserted that experience in other communities has demonstrated that meters, including SMART meters, are not perfect. The City of San Diego, which operates its own water service, converted to SMART meters. The experience was unsatisfactory, such that

the City offered customers the option of returning to their old meter. *DeFeo Direct*, Ex. 8, p. 4.

46. Complainant further testified, “There is a bias among Company staff, some PSC staff handling informal complaints and some staff writing reports for the Commission that meters are always right to the point of refusing to consider contradictory evidence. This bias is contrary to the law and regulations and prior rulings of the Commission. There is also a failure to inform customers of their rights.” *DeFeo Direct*, Ex. 8, p. 4.

47. Tracy Figueroa, a Business Service Specialist—Customer Experience, with 17 years experience as a Customer Service Supervisor, filed Rebuttal Testimony on behalf of the Company. *Figueroa Rebuttal*, Ex. 200, p. 3, ll. 6-12. Ms. Figueroa is ultimately responsible for all customer-driven regulatory or non-regulatory complaints. *Id.*, ll. 14-15.

48. Contrary to Complainant’s testimony, Ms. Figueroa contends that the Company did indeed advise Complainant of his right to file a complaint with the PSC via public notices posted on its website. *Id.*, p. 9, ll. 4-10. The Company also sends an individual notification letter to a complaining customer in those cases where the complaint is not resolved. Such a letter was not sent in this case, however, because MAWC’s believed Mr. DeFeo’s complaint had been resolved by the \$250 bill adjustment. *Id.*, p. 10, ll. 7-23. Had the Company been aware of Mr. DeFeo’s continued dissatisfaction, further efforts would have been made to resolve the matter and, if it remained unresolved, an individual notice letter would have been sent. *Id.*, p. 10, l. 24, to p. 11, l. 14.

49. An evidentiary hearing was convened on November 19, 2021, presided over by Regulatory Law Judge Ross Keeling. Tr. vol. 2, *passim*.

50. Complainant maintains that he never received the 40,000 gallons of water and issue and that it could not have been delivered to his premises without causing conspicuous effects. Tr. vol. 2, p. 30, ll. 9-22.

51. Complainant offered the Affidavit of Professor Robert Criss, which was received without objection (Ex. 1). Professor Criss testified as follows:

a. **Qualifications:** I am Robert E. Criss, Professor Emeritus of Earth and Planetary Sciences at Washington University in St. Louis. I earned my BS (73) in Geology at Case, and my MS (74) in Geology and PhD (81) in Geochemistry at Caltech. I formerly was Chief of the Stable Isotope Geology Project at the United States Geological Survey (1981-1987), Professor of Geology at UC Davis (1987-1994), and then Professor of Earth and Planetary Sciences at Washington University (1994-2018). I was the keynote speaker for the 2019 annual meeting of the Missouri Floodplain and Stormwater Managers Association and am an appointed member of the University City Commission on Storm Water Issues. I am author of Principles of Stable Isotope Distribution (Oxford University Press, 1999) which includes a major chapter on isotope hydrology, and co-editor of several books, including "At the Confluence: Rivers, Floods and Water Quality in the St. Louis Region (MBG Press, 2003) and Observational Hydrology (2019, online). My published papers encompass many disciplines and have appeared in >50 different scientific journals, three government series and as several book chapters. Studies involving quantitative analysis of water issues have been a major focus of my work, and involve flooding and flood recurrence, water quality and quantity, rainfall runoff modeling, alluvial groundwater, springs, reservoir landslides, and water-rock interactions. I have used computers for more than 50 years. Dozens of my studies have involved use of sophisticated electronic equipment, physical and electronic measurement, data recording, use of remote devices, data transfer, file management, data processing, data interpretation, and the problems that can be encountered at each step. I have provided sworn testimony and written expert reports related to flooding and flood damages for several former and ongoing court cases, as well as for many public hearings.

b. **Available Data Related to Alleged Water Usage: [Complainant's premises], Jefferson City, Missouri.** I have examined the detailed, hourly file of alleged water usage at [Complainant's premises] that Missouri American Water provided to the Complainant, for the 96-day period from March 5 to June 9, 2020. Of particular interest is the period of high use for

a nearly continuous, 73-hour period during April 1-4, when alleged flow was very steady at an average of  $568.2 \pm 8$  gal per hour, excepting a two-hour period when the alleged flow sharply dropped to 317 and 386 gal/h, and excepting the 360.7 gal allegedly used during the final hour of this period. This record is the basis for the claim by Missouri American Water that Complainant consumed a total of 40,838 gallons of water during this 73-hour period.

c. Readily available NWS records indicate that cool, seasonal temperatures prevailed during April 1-4, 2020, at Jefferson City, and that some rainfall was recorded on three of these four days.

d. Complainant states that he has a 20,000-gallon pool that he routinely maintains at full level, by intermittently “topping off” by adding small amounts of water when necessary. He provides the areal dimensions of his pool as 18’ x 36’. He states that no lawn irrigation or other large domestic use occurred during April 1-4, 2020. He reports that he saw no leaks, flooding or ponding in his home or yard during the April 1-4 period, nor did he hear running water for any extended period.

e. **Analysis of Available Data:** It would be possible to use-500 gal/h for 3 days straight if a large lawn were continuously irrigated. However, the aforementioned NWS records prove that cool, seasonal temperatures and significant rainfall prevailed at Jefferson City during April 1-4, 2020, and thereby indicate that lawn irrigation at this time would have been both unseasonal and unreasonable. Furthermore, there is no lawn irrigation system on the premises.

f. Complainant’s description of the areal dimensions of his pool is consistent with his reported capacity of 20,000 gallons, if the average depth of the pool is 4.1 feet, which is very reasonable. Thus, the alleged, 40,838-gallon water consumption that Missouri American Water claims that complainant consumed during April 1-4 would have been sufficient to completely fill an empty pool of that size, more than two times.

g. Excepting the anomalous 73-hour period during April 1-4, when total use is alleged to be 40,838 gallons, usage for the remaining, 93-day period was normal for a typical American residence, averaging 10.9 gal/hr. Furthermore, water usage exceeded 100 gal/hr for only 27 hours of that remaining 93-day period, and never exceeded 100 gal/hr for more than 3 consecutive hours, with those brief periods of high usage being consistent with normal activities like washing a car.

h. The graphical pattern of the water use alleged by Missouri American Water is highly peculiar, particularly the 2-hour interruption of the steady high use of  $568 \pm 8$  gal/hr that allegedly prevailed for most of April 1-4. Taken at face value, this pattern of alleged water use would demand that 1) water use by Complainant averaged 11.4 gal/hr from March 5 until

April 1, a normal amount for a American residence; 2) water use abruptly increased to a rather steady average of 563.6 gal/h for 23 hours, 3) water use was abruptly reduced to an average of 351.2 gal/hr for two hours, suggesting that flow had returned to normal for nearly one hour sometime during that interval; 4) water use abruptly increased back to 570.5 gal/h for the next 47 hours, 5) water use abruptly decreased to 360.7 gal during the final hour of the alleged high flow period, probably indicating that the meter began to record a normal, low flow value sometime during that final hour; and 6) the meter recorded normal levels of use that averaged 10.7 gal/h from the evening of April 4 through June 9, when the record available for my examination terminates. Thus, Missouri American Water alleges that water usage at the Complainant residence abruptly increased by more than 5,000% for nearly a day, abruptly returned to normal for an hour or so, increased again by more than 5,000% for nearly two additional days, and then just as abruptly resumed to normal, and that this normal usage was thereafter maintained for at least two months.

i. The available evidence strongly suggests that the peculiar, two-hour drop then recovery of alleged water use on April 2 is a “spike” in a faulty data stream, when the remote gauging and transmission system temporarily attempted to return to normal. Note that these flow rates of 386 and 317 gal/hr closely resemble the flow of 360 gal/hr recorded at the very end of the high usage interval, on April 4, when the system clearly did return to normal.

j. No other explanation appears to be reasonable to this expert. It is not possible that more than 40,000 gallons of water could flow onto a property of modest size without providing any evidence of where that huge amount went. Modern data recording, transmission and processing systems are very good, but given their complexity can never be perfect. It is unreasonable for Missouri American Water to insist that the contrary is true, and insist that remote measurements and computer processing are superior to first-hand knowledge, expert opinion, and obvious realities about the huge quantities of water alleged to have been used at [Complainant’s premises], but were nowhere seen.

52. Mr. DeFeo, like Professor Criss, suggested that the usage spike reflected a failure of MAWC’s information systems: “The meter measures water flow. And then a pickup truck with antenna on it drives by and receives a transmission of that reading and then transmits that to the computers of the company which in turn in due course print out the bill, and so forth. The interesting fact is that



same computer system failed the Company twice in this matter. Once -- according to the Company's practices, if a reading exceeds twice the amount of prior use, it sends a letter to the customer to alert them that they have a possible leak. I never received such a letter. It was never sent by the computer system. My conversation and all conversations that come to the Company are recorded as part of their computer system. Yet my conversation with the representative for the supervisor of the field person was not recorded. And the reply by the Company to the request for information of all communications from the Company by the staff admits that. So anywhere along this change of computerized processes could have accounted for the spike that the expert found to be as indicating the problem was in the system, not in the actual delivery of water." Tr. vol. 2, p. 22, l. 11, to p. 34, l. 8, p. 57, ll. 11-13.

53. Dave Spratt, of the Commission's Water and Sewer Department, testified that he found no leak, nor any evidence of a leak, at Complainant's premises on September 9, 2020. Tr. vol. 2, p. 56, l. 12, to p. 57, l. 2. While Mr. Spratt did not know what became of the 40,000 gallons of water, he noted that the faucet and hose used to fill the pool were capable of delivering the flow per hour necessary to create the high usage spike recorded by the meter. Mr. Spratt suggested that perhaps the pool was filled and simultaneously drained or that one of the neighbors surreptitiously discharged 40,000 gallons of

water from an outside faucet.<sup>8</sup> Tr. vol. 2, p. 59, l. 5, to p. 60, l. 2. Mr. Spratt testified that he had not heard anything in this case that led him to doubt the accuracy of the meter at Complainant's premises. Tr. vol. 2, p. 60, ll. 3-13.

54. Mr. Spratt testified that a leaking toilet can cause a fairly substantial use of water. Tr. vol. 2, p. 61, ll. 8-11.

55. Tracy Figueroa testified for the Company that Mr. DeFeo's premises does not have an AMI meter or Advanced Metering Infrastructure meter. Mr. DeFeo has a five-eighths inch water meter with an AMR reading device attached. It is not a SMART meter. It can be read manually. Mr. DeFeo's meter was read manually to ensure that the reading through the AMR device was accurate. Tr. vol. 2, p. 65, l. 10, to p. 66, l. 1.

56. Mr. DeFeo and Ms. Beecham<sup>9</sup> have different meters, made by different manufacturers, with different reading devices. Ms. Beecham's meter had been in place for fourteen years, while Mr. DeFeo's meter had been in place for less than a year. Ms. Beecham's high usage occurred over a period of years, in which her meter readings slowly increased, while Mr. DeFeo's high usage was a sudden spike over a period of for days. Mr. DeFeo's meter was tested shortly after the spike occurred and was found to be accurate, while Ms. Beecham's

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<sup>8</sup> This is a situation actually encountered by the Commission in another case. In that case, a contractor used a hose and outside faucet to surreptitiously fill a water tank truck in the middle of the night, leaving the homeowner with inexplicably high bills.

<sup>9</sup> Complainant in *Beecham v. Missouri-American Water Company*, Case No. WC-2020-0181, *Report and Order* issued January 13, 2021, effective February 12, 2021, a Commission decision relied upon by Mr. DeFeo.

meter was tested a longer time after she complained (but was also found to be accurate).<sup>10</sup>

57. While the failure of the Company's system to generate a warning letter to Mr. DeFeo when his usage exceeded twice that of the same month in the previous year was a violation of Company policy, it was not a violation of a tariff or regulation. Tr. vol. 2, p. 71, l. 12, to p. 72, l. 13; p. 73, ll. 18-25.

58. The Company issued a bill credit to Mr. DeFeo in the amount of \$250; Mr. DeFeo contends that he did not accept this credit. Tr. vol. 2, p. 38, ll. 7-10.

59. On July 13, 2021, the Company filed a *Notice of Satisfaction* because it had issued a bill credit to Complainant in the amount of the disputed charges.

***Staff's Proposed Conclusions of Law:***

1. Complainant Lou DeFeo is a "person ... who feels aggrieved by an alleged violation of any tariff, statute, rule, order, or decision within the commission's jurisdiction" and is therefore authorized to bring this *Complaint*. 20 CSR 4240-2.070(1).

2. Respondent MAWC is a "water corporation" and a "public utility" within the intendments of § 386.020, (43) and (59). Consequently, the Commission has jurisdiction over MAWC's services, activities and rates pursuant to § 386.250 and Chapter 393.

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<sup>10</sup> The Commission found in its Beecham decision that her meter had not been tested at all.

3. The Staff of the Commission is a party to this matter pursuant to Rules 20 CSR 4240-2.040(1) and 20 CSR 4240-2.070, (11) and (15)(D).

4. The Commission is authorized to hear and determine complaints by § 386.390.1, RSMo., “Complaint may be made by the commission of its own motion, or by the public counsel or any corporation or person, chamber of commerce, board of trade, or any civic, commercial, mercantile, traffic, agricultural or manufacturing association or organization, or any body politic or municipal corporation, by petition or complaint in writing, setting forth any act or thing done or omitted to be done by any corporation, person or public utility in violation, or claimed to be in violation, of any provision of law subject to the commission's authority, of any rule promulgated by the commission, of any utility tariff, or of any order or decision of the commission; provided, that no complaint shall be entertained by the commission, except upon its own motion, as to the reasonableness of any rates or charges of any gas, electrical, water, sewer, or telephone corporation, unless the same be signed by the public counsel or the mayor or the president or chairman of the board of aldermen or a majority of the council, commission or other legislative body of any city, town, village or county, within which the alleged violation occurred, or not less than twenty-five consumers or purchasers, or prospective consumers or purchasers, of such gas, electricity, water, sewer or telephone service.

5. This is not a complaint concerning the reasonableness of any rates or charges and the *Complaint* thus need not be signed by “the public counsel or the mayor or the president or chairman of the board of aldermen or a majority of the council, commission or other legislative body of any city, town, village or county, within which

the alleged violation occurred, or not less than twenty-five consumers or purchasers, or prospective consumers or purchasers, of such ... service.” Section 386.390.1, RSMo.

6. The *Complaint* “fairly presents ... some matter which falls within the jurisdiction of the Commission ...” and the Commission is therefore authorized to hear and determine it. ***St. ex rel. Kansas City Terminal Railway Co. v. Public Service Commission***, 308 Mo. 359, 372, 272 S.W. 957, 960 (banc 1925).

7. Complainant has the burden of proof. ***State ex rel. GS Technologies Operating Co. v. PSC of Mo.***, 116 S.W.3d 680, 693 (Mo. App. 2003).

8. The Public Service Commission “is purely a creature of statute” and its “powers are limited to those conferred by the [Missouri] statutes, either expressly, or by clear implication as necessary to carry out the powers specifically granted.” ***State ex rel. Utility Consumers Council of Missouri, Inc. v. Public Service Commission***, 585 S.W.2d 41, 47 (Mo. banc 1979); ***State ex rel. City of West Plains v. Public Service Commission***, 310 S.W.2d 925, 928 (Mo. banc 1958). While the Commission properly exercises “quasi judicial powers” that are “incidental and necessary to the proper discharge” of its administrative functions, its adjudicative authority is not plenary. ***State Tax Commission v. Administrative Hearing Commission***, 641 S.W.2d 69, 75 (Mo. 1982), quoting ***Liechty v. Kansas City Bridge Co.***, 162 S.W.2d 275, 279 (Mo. 1942). “Agency adjudicative power extends only to the ascertainment of facts and the application of existing law thereto in order to resolve issues within the given area of agency expertise.” ***State Tax Commission, supra***.

9. The determination of witness credibility is left to the Commission, “which is free to believe none, part or all of the testimony.” ***In the Matter of Kansas City Power & Light Company’s Request for Authority to Implement a General Rate Increase for Electric Service and Midwest Energy Consumers’ Group v. Missouri Public Service Commission***, 509 S.W.3d 757, 763 (Mo. App. W.D. 2016).

10. The Commission is without authority to award money, ***American Petroleum Exchange v. Public Service Commission***, 172 S.W.2d 952, 955 (Mo. 1943); nor to declare or enforce any principle of law or equity, ***State ex rel. Utility Consumers Council of Missouri, Inc. v. Public Service Commission***, 585 S.W.2d 41, 47 (Mo. banc 1979); nor to order a refund, because “[d]ue process prevents any court or legislative body from taking the property of a public utility where that property consists of money collected from ratepayers pursuant to lawful rates. ***Lightfoot v. City of Springfield***, 236 S.W.2d 348, 354 (Mo. banc 1951); ***Straube v. Bowling Green Gas Co.***, 360 Mo. 132, 227 S.W.2d 666, 671 (1950).

11. *Stare decisis* does not apply to the Commission. ***State ex rel. Laclede Gas Co. v. Pub. Serv. Comm’n of State***, 392 S.W.3d 24, 36 (Mo. App., W.D. 2012).

12. Section 393.130.1, RSMo., provides: Every gas corporation, every electrical corporation, every water corporation, and every sewer corporation shall furnish and provide such service instrumentalities and facilities as shall be safe and adequate and in all respects just and reasonable. All charges made or demanded by any such gas corporation, electrical corporation, water corporation or sewer corporation for gas, electricity, water, sewer or any service rendered or to be rendered shall be just and reasonable and not more than allowed by law or by order or decision

of the commission. Every unjust or unreasonable charge made or demanded for gas, electricity, water, sewer or any such service, or in connection therewith, or in excess of that allowed by law or by order or decision of the commission is prohibited.

13. Pursuant to its rulemaking authority at § 386.410, RSMo., the Commission has promulgated various rules, including rules of practice and procedure applicable to complaints, codified at 20 CSR 4240-2.070. Because this complaint involves less than \$3,000, the Commission determined that it would proceed under the Commission's small complaint procedure per Rule 20 CSR 4240-2.070(15).

14. Other applicable Commission rules are:

a. Rule 20 CSR 4240-13.020(2), states in pertinent part that each billing statement rendered by a utility shall be computed on the actual usage during the billing period.

b. Rule 20 CSR 4240-13.025(1), provides in pertinent part that for all billing errors, the utility will determine, from all related and available information, the probable period during which the condition causing the errors existed and shall make billing adjustments for that period.

c. Rule 20 CSR 4240-13.040(1), requires in pertinent part that a utility adopt procedures which ensure the prompt receipt, thorough investigation and, where possible, mutually acceptable resolution of customer inquiries.

d. Rule 20 CSR 4240-13.045(9), provides in pertinent part that if the utility does not resolve a dispute to the satisfaction of the customer, the utility representative shall notify the customer that each party has a right to make an informal complaint to the Commission, and of the address and telephone number where the customer may file an informal complaint with the Commission.

15. The rules of a state administrative agency, duly promulgated pursuant to properly delegated authority, have the force and effect of law and are binding upon the agency adopting them. ***State ex rel. Martin–Erb v. Missouri Com'n on Human Rights***, 77 S.W.3d 600, 607 (Mo. banc 2002).

16. MAWC's Commission-approved tariff sheet, No. P.S.C. MO. No. 13, 1<sup>st</sup> Revised Sheet No. R 32 canceling Original Sheet No. R 32 (Ex. 101), provides at Rule 15.A.: "All permanent connections shall be metered. The Company's installed meter shall be the standard for measuring and/or billing water service."

17. Like a duly-promulgated administrative rule, a tariff has the force and effect of law and is binding on the utility, the public and the PSC. This is the "Filed Rate Doctrine" or "Filed Tariff Doctrine." "As developed for purposes of the Federal Power Act, the 'filed rate' doctrine has its genesis in *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246, 251-252, 71 S.Ct. 692, 695, 95 L.Ed. 912 (1951). There, this Court examined the reach of ratemakings by FERC's predecessor, the Federal Power Commission (FPC). \* \* \* [M]any state courts have applied the filed rate doctrine of *Montana-Dakota* to decisions of state utility commissions and state courts that concern matters addressed in FERC ratemakings." *Nantahala Power and Light Co. v. Thornburg*, 476 U.S. 953, 962, 964, 106 S.Ct. 2349, 2354-55, 2356, 90 L.Ed.2d 943, \_\_\_ (1986). Missouri courts have uniformly applied the Filed Rate Doctrine to decisions of the PSC, see, e.g., *State ex rel. AG Processing, Inc. v. Public Service Commission*, 311 S.W.3d 361 (Mo. App., W.D. 2010); *Bauer v. Southwestern Bell Tel. Co.*, 958 S.W.2d 568 (Mo. App., E.D. 1997).

**Discussion:**

Complainant is aggrieved because he was billed about \$250 for some 40,000 gallons of water, metered at his residence, that he nonetheless denies ever receiving. The meter was tested and found to be accurate. Despite having



received a bill credit in the amount of the disputed charges, Complainant insisted on going to hearing and seeking a Commission determination. He contends that this case should be decided in the same manner as ***Beecham v. Missouri-American Water Company***, Case No. WC-2020-0181, *Report and Order* issued January 13, 2021, effective February 12, 2021. As for a remedy, Complainant stated:

The remedies would be I would assume the Commission has authority to enforce its own rules, regulations and the statute. These things are set forth in the statute more generally and more specifically in the regulations. And it is there that the Commission could take action to require the Company to do something to educate their staff that is supposed to be handling these consumer complaints as to what the law is both statutory, regulatory and the decisions, the prior decisions of the Commission. And there are different tools that could be used to provide that education to provide that way of communicating with customers to inform them of their rights and to inform Company staff that there must be actual proof, not merely meter readings. That is the remedy that I would look for.<sup>11</sup>

Complainant stated his argument as follows, “Despite all that physical evidence, the Company and the representative for the informal complaint brought to the Commission refused to consider any of that physical evidence and only would rely on what the meter said. The rules that apply and the statutes make no reference to what meters say. The statute says that the charges must be just and reasonable. The rule says it must be the actual use, not what the meter says.

There is a case that I have referred to which is provided as an exhibit, the Beecham case, that rejected that as being the law. In that case the same company actually here, Missouri Water, only relied on the meter readings and failed to show any actual physical evidence that supported the meter readings whereas, the customer

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<sup>11</sup> Tr. vol. 2, p. 39, ll. 3-17.

Beecham provided actual information and history that contradicted the meter readings. That decision there is provided to everybody for their examination.” Tr. vol. 2, p. 31, ll. 6-24. “[T]he facts in this case are identical to the facts in the Beecham case and that a decision of the Commission [in this case] should be the same [as in the Beecham case,] that the water was not provided to the customer as indicated by the meter. I have indicated in the issues, one of them being that both the Company staff and the staff that did the report seemed to have a bias that [the] only proof of a delivery of water is the meter.” Tr. vol. 2, p. 32, ll. 2-9.

Staff notes that there are certain differences between the **Beecham** case and the instant case. The most significant difference being that the high meter readings in the former case developed over a long period of time, in which the readings slowly increased; while Mr. DeFeo’s meter recorded a sudden spike in usage, lasting only 72 hours. The Commission decided **Beecham** in the Complainant’s favor because it found her evidence that she had not used any more water than usual to be more persuasive than the Company’s evidence that she had, that is, the meter reading. In any event, the principle of *stare decisis* does not apply to agency decisions, including the Commission’s.

**1. Did the Company through its employee fail to correctly bill the Customer by refusing to consider actual evidence of water usage offered by the Customer but rather relied solely on the bias that meters are always accurate?**

It is Staff’s view that the Company correctly billed Mr. DeFeo because the bills were based upon the actual readings of the meter, which measured the amount of water delivered to Mr. DeFeo’s premises. As a matter of law, the Company’s tariff and

the Filed Rate Doctrine did not permit the Company to do anything else. The tariff states, "The Company's installed meter shall be the standard for measuring and/or billing water service." Under the Filed Rate Doctrine, this provision is the law and is binding on the Company, its customer, and the Commission.

Mr. DeFeo is not correct that the Company refused to consider actual evidence of water usage offered by the Customer but rather relied solely on the bias that meters are always accurate. In fact, the Company tested the meter, obviously thereby entertaining the possibility that the meter was inaccurate. The Company demonstrated no bias or pro-meter assumption; once the accuracy of the meter was demonstrated, its tariff required it to charge Mr. DeFeo for the metered usage. Mr. DeFeo clearly believes that his anecdotal evidence that the water was not delivered to his premises should carry the day, but Mr. DeFeo was unable to refute every possible scenario as to the fate of the water. That showing was required by his burden of proof.

A comment on the expert testimony offered by Professor Criss: the witness did not inspect the premises or the plumbing thereon, including the pool and pool house. Consequently, the weight accorded his testimony must be slight.

The Commission should find this issue for the Company.

**2. Did the Company through its employee fail to respect Customer's right to appeal by failing to inform the Customer of his right to file an informal complaint with the PSC which is required?**

Mr. DeFeo denies that the Company advised him of his right to file an informal complaint with the Commission and the Company has not refuted that testimony. The Commission should find this issue for Complainant.

**3. Did the PSC representative handling the informal complaint error by refusing to consider actual evidence of water usage offered by the Customer but rather relied solely on the bias that meters are always accurate?**

For the reasons explained under Issue No. 1, above, the PSC representative relied upon the meter, whose accuracy had been demonstrated. This issue should be found against the Complainant.

**4. Did the PSC representative handling the informal complaint error by failing to inform the Customer of his right to file a formal complaint? (Complainant realizes that the Respondent is not responsible for the actions of the PSC staff but believes that it is in the public interest to call the need for staff education to the attention of the Commission.)**

Mr. DeFeo denies that the Staff advised him of his right to file a formal complaint with the Commission and the Staff has not refuted that testimony. This omission violated Rule 20 CSR 4240-13.070, (4) and (4)(B). However, Staff, which has no legal existence apart from the Commission itself, is not a proper respondent in this matter. Section 386.390.1, RSMo., authorizes complaints against “any corporation, person or public utility.” The Commission Staff is not any of those things and Mr. DeFeo’s complaint against the Staff is therefore not authorized and cannot be entertained.

This issue is better handled within the Commission’s organization by alerting the proper directors and managers, who should take appropriate steps to ensure that these provisions are followed in all cases.

**5. Did MAWC's Notice of Satisfaction filed on July 13, 2021, and the actions described therein, satisfy the Complaint?**

A satisfaction of judgment is a notice that must be filed by a judgment creditor to acknowledge that the judgment has been paid. Rule 74.11(a), Mo. R. Civ. Pro. Under the Commission's formal complaint procedures, Rule 20 CSR 4240-2.070(8) gives a respondent the option of either satisfying the complaint or filing an answer within thirty days of the service of the complaint.

Staff filed a *Motion to Dismiss* in this matter based upon the Company's *Notice of Satisfaction*. Therein, Staff argued that a hearing on the issue of "fairness to the customers" would serve no practical purpose. Like other administrative agencies, the Commission is not authorized to issue advisory opinions. ***State ex rel. Laclede Gas Co. v. Pub. Serv. Comm'n of State***, 392 S.W.3d 24, 38 (Mo. App., W.D. 2012). "The function of [the Commission] is to resolve disputes properly presented by real parties in interest with existing adversary positions." ***Wasinger v. Labor & Indus. Relations Comm'n***, 701 S.W.2d 793, 794 (Mo. App. 1985). The Commission was restricted to determining the complaint before it, and it should not be issuing decisions with "no practical effect and that are only advisory as to future, hypothetical situations." ***State ex rel. Mo. Parks Assoc. v. Mo. Dept. of Natural Res.***, 316 S.W.3d 375, 384 (Mo. App. 2010). "The petition must present a 'real, substantial, presently existing controversy admitting of specific relief as distinguished from an advisory or hypothetical situation.'" ***Akin v. Dir. of Revenue***, 934 S.W.2d 295, 298 (Mo. banc 1996) (citation omitted; emphasis added). Because there is no remedy available for Mr. DeFeo, this case must now be dismissed.

Staff continues to believe that dismissal is appropriate in this case. Mr. DeFeo has identified one rule violation by the Company and has requested only that education and training be provided so that such violations don't occur in the future. He has identified one rule violation by the Staff, which is not even a proper respondent in a formal complaint case before the PSC.

This case is indeed moot. A case becomes moot when the matter presented for review seeks a decision “upon some matter which, if the judgment was rendered, would not have any practical effect upon any then existing controversy” or “when circumstances change so as to alter the position of the parties or subject matter so that the controversy ceases and a decision can grant no relief.” ***Precision Invs., L.L.C. v. Cornerstone Propane, L.P.***, 220 S.W.3d 301, 304 (Mo. banc 2007); ***State ex rel. Intercon Gas, Inc. v. Pub. Serv. Comm'n***, 848 S.W.2d 593, 596 (Mo. App., W.D. 1993). “It is well-settled that Missouri courts do not determine moot cases.” ***In re Estate of Washington***, 277 S.W.3d 777, 780 (Mo. App., E.D. 2009). That goes for Missouri administrative tribunals as well.

Nor does this case fall within the well-known exception to the Mootness Doctrine, “[w]here the issue raised is one of general public interest and importance, recurring in nature and will otherwise evade appellate review unless the court exercises its discretionary jurisdiction.” ***State ex rel. Praxair, Inc. v. Pub. Serv. Comm'n of the State of Mo.***, 328 S.W.3d 329, 334 (Mo. App., W.D. 2010) (citation omitted and internal quotation marks omitted). This exception requires an issue that (1) is of general public interest; (2) which will recur; and (3) which will evade review in future live controversies. *Id.*, at 334–35 (citation omitted). Courts “will exercise this discretionary jurisdiction if

‘there is some legal principle at stake not previously ruled as to which a judicial declaration can and should be made for future guidance.’ ” ***State ex rel. City of Joplin v. Pub. Serv. Comm'n of State of Mo.***, 186 S.W.3d 290, 295 (Mo. App., W.D. 2005) (quoting ***State ex rel. Mo. Pub. Serv. Comm'n v. Fraas***, 627 S.W.2d 882, 885 (Mo.App.1981)); ***Public Service Com'n of State v. Missouri Gas Energy***, 388 S.W.3d 221, 229 (Mo. App., W.D. 2012).

This is not such a case. The issues raised by Mr. DeFeo are not of general interest or importance. Customers will continue to dispute bills and, where the meter is found to be inaccurate or where they can show that the accurate meter ought nonetheless not be believed, as in ***Beecham***, they will get relief. Companies that fail to adhere to the Commission’s billing rules will be reprimanded and perhaps penalized. Erring Staff members will be corrected. So, while recurring, Mr. DeFeo’s issues will not escape review. Therefore, the Commission must dismiss this case

### **CONCLUSION**

Mr. DeFeo has not shown that he was improperly billed because the bills in question were based upon the readings of a meter since tested and found to be accurate. While both the Company and Staff failed to apprise Mr. DeFeo of the next step available to him in seeking resolution of his complaints, he nonetheless took those next steps and so the failures in question amounted to harmless error. Finally, Mr. DeFeo has not shown any bias on the part of Staff or the Company, but rather that the applicable tariff was followed.

**WHEREFORE**, Staff prays that the Commission will dismiss this case as moot or, alternatively, determined each issue as Staff has here urged; and grant such other and further relief as the Commission deems just in the circumstances.

Respectfully submitted,

/s/ Kevin A. Thompson

**KEVIN A. THOMPSON**

Missouri Bar Number 36288

Chief Staff Counsel

Missouri Public Service Commission

P.O. Box 360

Jefferson City, MO 65102

573-751-6514 (Voice)

573-526-6969 (Fax)

[kevin.thompson@psc.mo.gov](mailto:kevin.thompson@psc.mo.gov)

Attorney for Staff of the

Missouri Public Service Commission

### **Certificate of Service**

The undersigned hereby certifies that a true and correct copy of the foregoing has been served, by hand delivery, electronic mail, or First Class United States Mail, postage prepaid, to all parties of record on the Service List maintained for this case by the Data Center of the Missouri Public Service Commission, on this **7<sup>th</sup> day of January, 2022**.

/s/ Kevin A. Thompson