

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

Cyndi Nealon,)	
)	
Complainant,)	
v.)	<u>File No. WC-2023-0273</u>
)	
Missouri-American Water Company,)	
)	
Respondent)	

STAFF’S REPORT AND RECOMMENDATION

Comes now the Staff of the Missouri Public Service Commission (Staff), and makes the following report and recommendation. On February 28, 2023,¹ Cyndi Nealon filed a complaint with the Commission against MAWC. On March 3, the Commission issued its Order Giving Notice of Contested Case and Directing Answer to Complaint. Missouri-American Water Company (“MAWC”) filed a request for mediation on April 3. After further Commission orders and party filings concerning mediation, MAWC filed its Answer to the Complaint on April 19. On April 27, the Commission issued its order directing Staff to file either a report and recommendation or a status update no later than May 27. The Commission extended that deadline to June 5.

Staff reports that it has completed its investigation. Staff’s Memorandum, filed contemporaneously with this pleading, sets out fully and in detail the nature of Complainant Cyndi Nealon’s complaint, MAWC’s response, and Staff’s investigation, findings, conclusions and recommendations. To summarize, Ms. Nealon claims that she sustained property damage as a result of MAWC’s negligence and, specifically, a water main break. In defense, MAWC invoked its Tariff rule 3E for the proposition that it is not

¹ All date references will be to 2023 unless otherwise stated.

liable for damages resulting to a customer or third party 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.”² MAWC, then, contends that it was not “negligent in any regard related to the Complaint and further denies that it failed to properly maintain its system.”

As explained in Staff’s memorandum: In the first instance, the tariff which MAWC relies upon cannot abrogate its common law negligence duties or an injured party’s common law negligence rights. *State Public Service Com’n of Missouri v. Missouri Gas Energy*, 395 S.W.3d 540 (Mo. App. W.D. 2013); *Gustafson v. Benda*, 661 S.W.2d 11 (Mo. Banc 1983); and *Children’s Wish Foundation Intern., Inc. v. Mayer Hoffman McCann, P.C.*, 331 S.W.3d 648 (Mo banc. 2011). Second, MAWC’s duties and the Commission’s jurisdiction are prescribed and circumscribed by statute, regulation and tariffs, and not by the common law of negligence. In that regard, the Commission has no authority to declare or apply common law principles of negligence or award the Complainant damages. In this case, the Commission’s duty is to determine whether MAWC violated a statute, regulation, or tariff; and, specifically, whether MAWC failed to provide safe and adequate service. Third, MAWC violated its Section 383.130.1, RSMo duty to provide safe and adequate service, all as described in Staff’s memorandum, which describes its investigation and factual findings.

² The tariff states at 3E:

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.

Staff would here note that MAWC has invoked the same tariff provision in other damages claims and that its insurer, Traveler’s Insurance, is known to be denying MAWC customer’s damages claims based upon the tariff.

Staff makes the following recommendations:

- 1) That the Commission find and declare that MAWC has violated its statutory duty to provide safe and adequate service as mandated by Section 383.130.1, RSMo;
- 2) That the Commission deny, without prejudice, Ms. Nealon's claim for damages because the Commission has no authority to grant it, with a specific finding that the Commission has herewith exercised and exhausted its "primary" jurisdiction over Ms. Nealon's negligence claims, and with a specific finding that Ms. Nealon has exhausted her administrative remedies.

WHEREFORE, Staff respectfully tenders this Report and Recommendation and asks the Commission in compliance with the Commission's orders.

Respectfully Submitted,

/s/ Paul T. Graham #30416

Senior Staff Counsel
Missouri Public Service Commission
P.O. Box 360
Jefferson City, Mo 65102-0360
(573) 522-8459
Paul.graham@psc.mo.gov

Attorney for the Staff of the
Missouri Public Service Commission

CERTIFICATE OF SERVICE

The undersigned by his signature below certifies that the foregoing pleading was served upon all counsel of record on this June 5, 2023, by electronic filing in EFIS, electronic mail, hand-delivery, or U.S. postage prepaid.

/s/ Paul T. Graham