

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

Eddie Shepherd,)	
)	
Complainant,)	
)	
v.)	File No. EC-2011-0373
)	
KCP&L Greater Missouri Operations Company,)	
)	
Respondent.)	

**ORDER GRANTING CLARIFICATION AND
DENYING RENEWED MOTION TO DISMISS**

Issue Date: September 2, 2011

Effective Date: September 2, 2011]

The Missouri Public Service Commission is granting in part and denying in part *KCP&L Greater Missouri Operations Company's Request for Clarification and Renewed Motion to Dismiss*.¹ The Commission is granting the request for clarification ("request") and denying the renewed motion to dismiss ("motion"). In both the request and the motion, GMO recites the standard for failure to state a claim, but does not argue it.

A. Procedural History

Eddie Shepherd filed the complaint.² KCP&L Greater Missouri Operations ("GMO") filed a motion to dismiss ("earlier motion") with its answer.³ The Commission issued an order partially granting the motion ("earlier order").⁴ GMO filed the request and motion,⁵ and the Commission received no response to that filing.

¹ On August 9, 2011.

² On May 16, 2011.

³ On June 16, 2011.

⁴ On July 13, 2011.

⁵ On August 9, 2011.

B. Clarification

In the request, GMO states that it seeks clarification of a ruling in the earlier order. In the earlier order, the Commission denied dismissal of the meter inaccuracy charge, stating:

Therefore, at least as to months after March 10, 2011, the complaint states a violation as to meter accuracy.

That statement, GMO argues by negative implication, required dismissal as to months before March 10, 2011:

2. . . .GMO interprets this statement to mean that the Commission has found that Mr. Shepherd has failed to state a claim for meter accuracy for the time before March 10, 2011. This would mean that **meter no. sa40172754 was found by the Commission to be accurate** and under Rule 5.04(C) of GMO's tariffs, Mr. Shepherd is not entitled to a refund

3. If GMO's understanding of the Commission's **determination regarding meter no. sa40172754** is correct, then GMO seeks clarification of how Mr. Shepherd has stated a valid overbilling complaint for the time period before March 10, 2011. The Commission states after the chart at page 6 of the Order that "for all but two months, the complaint alleges higher readings despite significantly lower use, which states a claim for overbillings" But since GMO understands that **the Commission has found that meter no. sa40172754 to be accurate** and that Complainant is not entitled to a refund under GMO's tariffs for the period of time before March 10, 2011, then it follows that there can be no action based on Mr. Shepherd's allegation of a discrepancy between usage and the meter readings. Because **the meter has been found to be accurate by the Commission**, Mr. Shepherd's claim that he consumed less electricity than recorded by the meter is not valid and does not state a claim for which relief can be granted.

But GMO's interpretation of the statement, and understanding of the Commission's ruling, is not correct.

As to meter no. sa40172754's accuracy, the earlier order contains no finding of fact. No finding of fact as to the complaint's allegations can occur on a motion to dismiss for failure to state a claim. On a motion to dismiss for failure to state a claim, as GMO quoted in the earlier motion:

“[T]he petition is reviewed in an almost academic manner, to determine if the facts alleged meet the elements of a recognized cause of action, or of a cause that might be adopted in that case.” [6]

Indeed, further reading of GMO's cited paragraph shows the following:

“A motion to dismiss for failure to state a cause of action is solely a test of the adequacy of the plaintiff's petition.” “It assumes that all of plaintiff's averments are true, and liberally grants to plaintiff all reasonable inferences therefrom.” “No attempt is made to weigh any facts alleged as to whether they are credible or persuasive.” [7]

On GMO's earlier motion, no finding as to the allegation's truth occurred, as explained in the paragraph that GMO cites:

In other words, no court has determined that [plaintiff]'s allegations are true [.]

Therefore, no finding of fact supports the result that GMO demands.

Also, GMO sought dismissal based on its assertion of “fairly consistent billing.” But in support, GMO cited a table⁸ showing that usage for eight out of ten months read higher than the previous year, without (according to the complaint) operation of a furnace, hot water heater, air conditioner, and stove. How those allegations fail to allege meter inaccuracy, GMO does not say.

⁶ *Richardson v. Richardson*, 218 S.W.3d 426, 428 (Mo. banc 2007).

⁷ *Id.*

⁸ The complaint's attachment A.

Further, the earlier motion sought no relief on any distinction based on March 10, 2011. The Commission's regulation provides:

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 [⁹]

May means an option, not a mandate.¹⁰ Having done the math on GMO's earlier motion, the Commission was under no obligation to re-draft it.

To summarize, the Commission was under no obligation to issue an order not sought, on a finding not made, on citations that did not support it.

C. Dismissal

In the motion, GMO states that it renews the earlier motion. GMO cites the standard applicable to a motion to dismiss for failure to state a claim, and discusses the complaint's content. But the motion does not seek dismissal based on the complaint's contents.

GMO cites matters outside the complaint—an affidavit offered to establish meter accuracy—and seeks a decision on the merits. The Commission:

. . . may not grant a motion to dismiss for failure to state a claim based on a conclusion that the plaintiff is not entitled to relief on the merits of that claim. [¹¹]

The only motion that seeks a decision on the merits without a hearing, based on matters outside the pleadings, is a motion for summary determination.¹²

⁹ 4 CSR 240-2.070(6).

¹⁰ *S.J.V. ex rel. Blank v. Voshage*, 860 S.W.2d 802, 804 (Mo. App., E.D. 1993).

¹¹ *Chochorowski v. Home Depot U.S.A., Inc.*, 295 S.W.3d 194, 198 (Mo. App. E.D. 2009).

¹² 4 CSR 240-2.117(1).

Even if the Commission treated the motion as a motion for summary determination, the Commission would not grant it. For summary determination, the Commission's regulations provide:

[A] motion for summary determination shall not be filed less than sixty (60) days prior to the hearing except by leave of the commission. [¹³]

GMO did not meet that standard because it filed the motion on August 9, 2011, which was less than 60 days before hearing date of September 15, 2011. Therefore, the Commission will deny the motion.

THE COMMISSION ORDERS THAT:

1. The request for clarification is granted as set forth above.
2. The remainder of *KCP&L Greater Missouri Operations Company's Request for Clarification and Renewed Motion to Dismiss* is denied.
3. This order is effective on immediately upon issuance.

BY THE COMMISSION



Steven C. Reed
Secretary

(S E A L)

Daniel Jordan, Senior Regulatory Law Judge,
by delegation of authority pursuant
to Section 386.240, RSMo 2000.

Dated at Jefferson City, Missouri,
on this 2nd day of September, 2011.

¹³ *Id.* at subsection (A).