

**STATE OF MISSOURI
PUBLIC SERVICE COMMISSION**

At a session of the Public Service
Commission held at its office in
Jefferson City on the 13th day of
July, 2011.

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

**ORDER GRANTING DISMISSAL IN PART
FOR FAILURE TO STATE A CLAIM**

Issue Date: July 13, 2011

Effective Date: July 13, 2011

The Missouri Public Service Commission is granting the motion to dismiss (“motion”)¹ as to Eddie Shepherd’s claim for replacement of household appliances. That is because, even assuming that his allegations about the appliances are true, those allegations show no violation of any statute, or of any tariff, regulation, or order of the Commission (“violation”). The Commission is denying the rest of the motion because the rest of the complaint alleges violations related to meter accuracy and overbilling.

A. Procedure

Mr. Shepherd filed the complaint on May 16, 2011. On June 16, 2011, KCP&L Greater Missouri Operations Company (“GMO”) filed the motion. Mr. Shepherd filed his response to the motion on June 23, 2011. On June 30, 2011, Staff filed its report.

¹ *Answer and Motion to Dismiss of KCP&L Greater Missouri Operations Company.*

In the motion, GMO argues that the complaint states no claim. The claim that must appear in any complaint consists of a:

. . . writing, setting forth any act . . . in violation, of any provision of law, or of any rule or order or decision of the commission [. ²]

If no violation appears in the complaint, the Commission may dismiss the complaint, as Commission regulations provide:

The commission, . . . on the motion of a party, may after notice dismiss a complaint for failure to state a claim on which relief may be granted [. ³]

Simply, if the complaint does not allege a violation, the Commission cannot find a violation. Conversely, the complaint survives the motion if the complaint's factual allegations⁴ and reasonable inferences⁵ describe a violation.

GMO has the burden of showing that the complaint alleges no violation.⁶

B. Discussion

The complaint raises several matters beginning with a lightning strike. On the back of the complaint form ("back page"), Mr. Shepherd alleges:

[Before] 7/28/10 [l]ightning hit the transformer [and GMO] replace[d] it with a new one. [⁷]

On the front of the complaint form, Mr. Shepherd alleges:

² Section 386.390.1, RSMo 2000.

³ 4 CSR 240-2.070(6).

⁴ *Sheehan v. Sheehan*, 901 S.W.2d 57, 59 (Mo. banc 1995).

⁵ J. Devine, *Missouri Civil Pleading and Practice*, section 20-3 (1986).

⁶ *Saidawi v. Giovanni's Little Place, Inc.*, 987 S.W.2d 501, 504 (Mo. App., E.D. 1999).

⁷ That page is headed "In the United States District Court for the Western District of Missouri St. Joseph Division." It was not until an identical heading appeared on Mr. Shepherd's response to the motion that any ordinary reader would consider that such document was related to an action before the Commission. The document requests subpoenas from the Commission, which the Commission will issue under separate cover.

In July 2010, my home was struck by lightning. This has been documented by photos of a burn mark on the meter dial that I sent to you previously.

That event is the genesis of the complaint. In support of his complaint, Mr. Shepherd attached copies of certain documents, including a meter test certificate (“test”) and a table of his monthly readings (“readings”). GMO addresses those charges as follows.

1. Appliance Replacement

In the complaint, Mr. Shepherd alleges:

This incident ruined my furnace, hot water heater, air conditioner and cook stove. All of these appliances were electric and to date have not been replaced.

GMO argues that no violation occurs when GMO fails to replace such appliances.

Replacement is what Mr. Shepherd wants from GMO according to his response to the motion:

[GMO] needs to replace all of my electric appliances [that] were ruined [.]

No authority for such a duty appears in Mr. Shepherd’s filings and Staff cites authority to the contrary.

Staff cites GMO’s tariff, stating that GMO has no duty to protect a customer’s appliances, and that GMO must pay for a loss only if GMO caused the damage by wanton and willful misconduct:

[GMO] does not guarantee but will endeavor to furnish a continuous supply of electric energy and to maintain voltage and frequency within reasonable limits. **[GMO] shall not be liable for damage or losses which the consumer may sustain due to interruptions in service, variations in the service characteristics, high or low voltage,** the single phasing of three phase service, phase reversals, the use of electrical appliances, or the presence of [GMO]’s property on the consumer’s premises **whether such damages are caused**

by or involve any fault, failure, or negligence of [GMO] or otherwise except such damages which are caused by or due to the willful and wanton misconduct of [GMO]. Attachments, devices, mechanisms, or regulators designed to prevent appliances, motors, generators, and other equipment receiving electric current from incurring damage caused by interruptions in service, variations in service characteristics, high or low voltage, the single phasing of three phase service, and phase reversals are available and customers may obtain from [GMO] information as to the manufacturers of such attachments, devices, mechanisms, and regulators. The responsibility for the selection and installation of such attachments, devices, mechanisms, and regulators rests solely with the customer. [8]

Emphasis added.

In the complaint, Mr. Shepherd argues only that GMO is liable because he is GMO's customer:

I am paying [for] Elec[trical] Service from [GMO and] that is why [GMO] needs to replace all of my elec[trical] appliances [that] were ruined [.]

Mr. Shepherd alleges no wanton and willful misconduct by GMO, nor any act by GMO causing his loss. Therefore, GMO has shown that the complaint does not describe a violation as to the appliances, and the Commission will grant the motion as to that charge. This ruling does not address any other pleading that Mr. Shepherd may choose to make in any forum.

2. Meter Accuracy

Mr. Shepherd's complaint alleges that his metering and billing are inaccurate.

Accuracy is defined in GMO's tariff:

Where, upon test, a meter error is found to be three percent (3%) or less, no billing adjustment will be made.⁹

⁸ Tariff No. JE-2009-0312, PSC Mo No. 1, Original Sheet No. R-22, Section 3.01.A.

⁹ Tariff No. JE-2009-0312, PSC Mo No. 1, Original Sheet No. R-33, Section 5.04.C.

To show that the complaint states no violation, GMO cites the attached test. The test shows 99.87% accuracy—well within the definition of meter accuracy—as of March 10, 2011, for meter no. sa40172754.

But meter no. sa40172754 was the lightning-struck meter according to the complaint, back page:

Lightning hit my [electric] meter number sa40172754 on
7/28/10 [.]

And in the complaint, front page, Mr. Shepherd alleges:

I had requested that the meter be checked and they claimed
that they did.

In the motion, GMO agrees, and further states that meter number sa40172754 is no longer in use:

[GMO] performed an inspection on March 10, 2011 and found
the meter was testing accurately and usage was in-line with
GMO's overall customer base. However, there were visual
signs of a lightning strike and the meter was exchanged at that
time. [¹⁰]

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

GMO has not shown that the complaint states no violation as to meter accuracy, so the Commission will deny the motion as to that charge.

3. Overbilling

In the complaint, Mr. Shepherd alleges that his bills must be inaccurate because they show higher readings despite the absence of a furnace, hot water heater, air conditioner and stove:

¹⁰ Motion, page 2, paragraph 3.

Even with this significant reduction in usage my bill has usually been higher than the previous month.

In the motion, GMO cites the readings,¹¹ which show the following before and after the July 28, 2010 lightning strike.

<i>Month</i>	<i>Before Lightning</i>	<i>Reading</i>	<i>After Lightning</i>	<i>Reading</i>	<i>Increase</i>
August	2009	1206	2010	1614	408
September	2009	722	2010	986	264
October	2009	1786	2010	1146	(640)
November	2009	2336	2010	3387	1151
December	2009	3963	2010	4299	336
January	2010	4764	2011	4925	161
February	2010	4604	2011	4780	176
March	2010	3450	2011	2545	(905)
April	2010	874	2011	1436	562
May	2010	764	2011	872	108

For all but two months, the complaint alleges higher readings despite significantly lower use, which states a claim for overbilling. GMO has not shown that the complaint states no violation as to overbilling, so the Commission will deny the motion as to that charge.

C. Ruling

The Commission will grant the motion and dismiss the complaint as to appliance replacement. The Commission will deny the rest of the motion. The Commission will address the scheduling of an evidentiary hearing by separate order.

THE COMMISSION ORDERS THAT:

1. The motion to dismiss is granted as to replacement of Mr. Shepherd's appliances.
2. The motion to dismiss is denied as to the rest of the complaint.

¹¹ In its report, Staff offers more billing history but that matter is outside the complaint, is not part of the motion, and does not address the allegation of decreased usage.

3. This order is effective on immediately upon issuance.

BY THE COMMISSION

A handwritten signature in black ink, appearing to read 'S. C. Reed', written in a cursive style.

Steven C. Reed
Secretary

(S E A L)

Gunn, Chm., Clayton, Davis, Jarrett
and Kenney, CC., concur.

Jordan, Senior Regulatory Law Judge