

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

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|-------------------------|---|-----------------------|
| SUMMIT INVESTMENT, LLC, |) | |
| |) | |
| Complainant |) | |
| |) | File No. SC-2014-0214 |
| v. |) | |
| |) | File No. WC-2014-0215 |
| OSAGE WATER COMPANY, |) | |
| |) | |
| Respondent. |) | |

INITIAL BRIEF OF RESPONDENT OSAGE WATER COMPANY

Comes now the Respondent, Osage Water Company ("Osage"), and for its Initial Brief, states to the Commission as follows:

INTRODUCTION

Resolution of this Complaint case turns upon the interplay between the jurisdiction of the Camden County Circuit Court and the jurisdiction of the Commission.

Summit Investment, LLC ("Summit") claims that Osage failed to provide adequate water and sewer services to the Eagle Woods Subdivision in Camden County ("Eagle Woods"). Summit sued Osage in Circuit Court for breach of a contract that Summit and Osage signed in 1999. In that lawsuit, Summit seeks money damages and a Court Order requiring Osage to provide the water and sewer services described in the 1999 contract.

To prevail in its lawsuit, Summit must prove that Osage failed to comply with its water and sewer tariffs. But the Circuit Court has no jurisdiction to decide whether Osage complied with its tariffs. The Commission has the exclusive jurisdiction to decide such issues. Therefore, the Circuit Court stayed the proceedings in Summit's lawsuit, so that the Commission could first decide the matters within its jurisdiction. In response, Summit filed this Complaint case.

Summit's lawsuit cannot proceed until the Commission decides whether Osage failed to provide adequate service to Eagle Woods, and if so, when each such failure occurred. This Brief will address those issues.

This Brief will also address two other issues raised at the Hearing in this Complaint case, specifically: how to resolve conflicts between Osage's tariffs and the contract that the parties signed; and whether Osage is obliged to provide water and sewer service to all lots in Eagle Woods or only to the customers that it now serves in Eagle Woods.

Osage contends that if it failed to provide adequate service to Eagle Woods, any such failure occurred within a few years after the parties signed their contract, and it requests that the Commission so find.

FACTUAL BACKGROUND OF SERVICE TO EAGLE WOODS

The Contract. Complainant Summit is owned by Ron Westenhaver and his wife. Summit is the developer of Eagle Woods. Affiliates of Summit include Eagle Woods L.L.C. and Eagle Woods Homeowners Association.

Respondent Osage was owned and operated primarily by Greg Williams ("Williams") and Pat Mitchell until October 2005, when Gary V. Cover ("Cover") was appointed as Receiver for Osage. Williams and his wife are also the owners and developers of Golden Glade Subdivision ("Golden Glade"), which adjoins Eagle Woods. Williams and his wife also own Environmental Utilities, LLC ("EU").¹

Summit began to develop Eagle Woods, and Williams began to develop Golden Glade at about the same time. In January 1999, Summit and Osage signed a contract ("the Contract"), by terms of which Osage agreed to provide water and sewer services to Eagle Woods.² When the Contract was signed, Osage did not have authority from the Commission to provide water and sewer service to Eagle Woods. Nor did it have authority from the Department of Natural Resources ("MDNR") to operate a wastewater treatment facility there.

Wastewater Treatment Facility. Osage obtained a permit to construct a wastewater treatment facility, and then built that facility. In October 2000, Osage obtained a permit from MDNR to operate this wastewater treatment facility near Eagle Woods. The permit authorized Osage's facility to serve 25 lots, but it did not identify the specific lots the facility could serve.³ In January 2001, the Commission issued a certificate of convenience and necessity authorizing Osage to provide water and sewer services to Eagle Woods.⁴

Later in 2001, with the approval of MDNR, Osage expanded the wastewater treatment facility. MDNR authorized the expanded facility to serve 25 lots in Eagle Woods and 25 lots in Golden Glade. However, there were 100 lots in the two subdivisions -- 53 lots in Eagle Woods and 47 lots in Golden Glade. Osage did not have the authority to serve the other 28 lots in Eagle Woods or the other 22 lots in Golden Glade.⁵

¹ Although this fact is not supported by the record, Osage believes that all parties agree it is true, and that this will facilitate the Commission's understanding of the case.

² See Exh. A.

³ See Exh. AA, Partial Stipulation of Facts, ¶9.

⁴ See Exh. E.

⁵ See Exh. AA, Partial Stipulation of Facts, ¶11 and Exh. G.

Also in 2001, Osage obtained authorization from MDNR to expand the wastewater treatment facility a second time, in order to serve the remaining 50 lots,⁶ but Osage did not again expand the facility.⁷ In July 2006, MDNR authorized Osage to operate the wastewater treatment facility for an additional five years.⁸ This permit specified that service was to be limited to any 50 lots in Eagle Woods and Golden Glade, and that the addition of lots in excess of 50 would require an expansion of the wastewater treatment facility. So Osage currently has authority from MDNR to serve only 50 lots. That is the "capacity" of Osage's existing facility.

Receivership. In December 2002, the Commission issued a Report and Order finding that Osage failed to provide safe and adequate service to its customers.⁹ The Commission directed its general counsel to seek the appointment of a Receiver for Osage. In December 2005, the Camden County Circuit Court found that Osage was unable or unwilling to provide safe and adequate service to its customers, and it appointed Cover as the Receiver for Osage.¹⁰ Cover has served as Osage's Receiver from that time to the present.

Water Service Interruption. At the Hearing in this Complaint case, the Commission inquired about the history of water service that Osage provided to Eagle Woods.¹¹ The facts surrounding that issue are not included in the record for this case, but Osage submits that the following is an accurate statement of facts.

EU (owned by Mr. and Mrs. Williams) obtained a certificate of convenience and necessity from the Commission to provide water service to Golden Glade (then being developed by Mr. and Mrs. Williams), and EU dug a well in Golden Glade for that purpose. Osage did not then own a source of water supply for Eagle Woods, so Osage (which was then controlled by Williams) signed a five-year contract to purchase water at wholesale from EU (which was then also controlled by Williams), for distribution in Eagle Woods. Thus, EU's well served both Golden Glade and Eagle Woods for five years.

When that wholesale water supply contract expired, Williams no longer controlled Osage, and his company, EU, refused to continue selling water to Osage. Osage obtained an injunction requiring EU to continue to provide water for six months, while Osage sought another source of supply. By the time that injunction expired, Osage had developed its own source of supply within Eagle Woods. Osage has continued to provide water service from that time to the present.

Capacity. Since Cover's appointment, Osage has upgraded the water facilities at Eagle Woods, to Summit's satisfaction. However, the wastewater treatment facility only has

⁶ See Exh. AA, Partial Stipulation of Facts, ¶12 and Exh. H.

⁷ See Exh. AA, Partial Stipulation of Facts, ¶13.

⁸ See Exh. AA, Partial Stipulation of Facts, ¶19 and Exh. O.

⁹ See Exh. I.

¹⁰ See Exh. N.

¹¹ See the colloquy between Commissioner Kenney and Cover at Transcript, p. 54, line 12 -- p. 55, line 16.

authorization from the MDNR to serve 50 lots and some of the lots in Eagle Woods still do not have sewer service. But the Staff of the Commission ("Staff") suggested there may be sufficient capacity to serve some additional lots.¹²

PROCEDURAL BACKGROUND OF THIS CASE

Even though Summit was very dissatisfied with Osage's service during the first few years of the Contract,¹³ it never filed a formal or informal Complaint with the Commission during the 15 years between the signing of the Contract and early 2014.¹⁴

The First Lawsuit. Instead, Summit sued Osage in Camden County Circuit Court for damages for breach of contract and for specific performance, in July 2006.¹⁵ Summit complained that Osage failed and refused to provide water and sewer services as required by the Contract.¹⁶ Summit alleged that Osage failed in two ways: first, by failing to provide water main extensions "in accordance with the main extension rules set forth in OWC's Water Tariff on file with the Missouri Public Service Commission"; and second, by failing to make effluent collection sewer extensions "in accordance with the main extension rules set forth in OWC's Sewer Tariff on file with the Missouri Public Service Commission."¹⁷ However, that lawsuit languished, and the Circuit Court finally Dismissed it Without Prejudice in September 2009.¹⁸

The Second Lawsuit. Summit subsequently filed a new lawsuit in Circuit Court, virtually identical to the first, in April 2011.¹⁹ On October 25, 2013, the Court stayed Summit's case, to allow Summit to resolve any issues with the Commission that need to be addressed before conducting its own hearing on Summit's Petition.

Complaint Case. In response, Summit filed its formal Complaint with the Commission on January 30, 2014.

ISSUES FOR RESOLUTION

Relief Sought. Summit seeks two kinds of relief from Osage: money damages and the extension of water and sewer service to the lots in Eagle Woods that remain unserved.

Unfortunately, neither the Circuit Court nor the Commission has jurisdiction to grant all the relief that Summit seeks. Consequently, Summit must first pursue this Complaint before the Commission, and then pursue its civil remedy in Circuit Court.

¹² See Exh. T, Staff Investigation Report, second paragraph of Staff Report of Investigation.

¹³ See Exh. S, Affidavit of Ron Westenhaver.

¹⁴ Transcript, p. 34, line 25 -- p. 35, line 9.

¹⁵ See Exh. Q.

¹⁶ See Exh. Q, ¶7.

¹⁷ See ¶¶ 2 and 4 of the Contract attached to Exhibit Q.

¹⁸ See Exh. AA, Partial Stipulation of Facts, ¶25.

¹⁹ See Exh. R and Exh. AA, Partial Stipulation of Facts, ¶26.

In order to prevail in Circuit Court, Summit must show that Osage has failed to comply with either its Water Tariff or its Sewer Tariff. But the Circuit Court does not have jurisdiction to make such determinations. Only the Commission can determine whether Osage failed to comply with its tariffs. That is why Summit filed its Complaint with the Commission.

Jurisdiction of Court and Commission. The Circuit Court has *general* jurisdiction over disputes in law and equity. *Utilicorp United, Inc. v. Platte-Clay Elec. Co-op, Inc.* 799 S.W.2d 108 (Mo. App. W.D. 1990).

The powers of the Commission, on the other hand, are *limited* to those conferred by statute, expressly or by clear implication as necessary to carry out the powers specifically granted to it. *Utilicorp United, supra*; *State ex rel. Fee Fee Trunk Sewer, Inc. v. Litz*, 596 S.W. 2d 466 (Mo. App. 1980); *State ex rel. and to the Use of Kansas City Power & Light Co. v. Buzard*, 168 S.W. 2d 1044, 350 Mo. 763 (Mo. 1943). The Commission cannot determine damages or award pecuniary relief, and has no authority to construe or enforce contracts, or to declare or enforce any principle of law or equity. *Fee Fee Trunk Sewer, supra*; *Buzard, supra*.

However, matters within the jurisdiction of the Commission *must* first be determined by the Commission before the Circuit Court will adjudge *any part* of the controversy. *Katz Drug Co. v. Kansas City Power and Light Co.*, 303 S.W.2d 672 (Mo. App. 1957); *Cirese, supra*; *Utilicorp United, supra*. The Commission has the *exclusive* -- not concurrent -- jurisdiction, in the first instance, to determine the issues over which it has jurisdiction. *State ex rel. and to the Use of Cirese v. Ridge*, 138 S.W.2d 1012, 345 Mo. 1096 (Mo. 1940); *Buzard, supra*.

Issues for the Commission. The Commission has issued a Certificate of Convenience and Necessity authorizing Osage to provide water and sewer services in the area that includes Summit's development,²⁰ and has approved Osage's Water Tariff and Osage's Sewer Tariff. Osage must comply with the terms of those tariffs. Utilities under regulation by the Commission are obligated to provide their customers with adequate service at only the proper rate and no more. Section 393.130, RSMo 2010. *DeMaranville v. Fee Fee Trunk Sewer, Inc.* 573 S.W.2d 674 (Mo. App. 1978). The Commission has the jurisdiction to determine whether Osage has provided Summit with adequate service and has complied with the tariffs.

To summarize the foregoing, the Circuit Court cannot adjudicate any part of Summit's lawsuit until the Commission decides whether Osage has failed to comply with its tariffs.²¹ Summit cannot prevail in Circuit Court unless the Commission finds that Osage failed to comply with its tariffs.

If Service Was Inadequate, When Did That Occur? But if the Commission finds that Osage has failed to comply with its tariffs, it needs to also determine when any such failure

²⁰ See Exh. E.

²¹ See the first question in Issues 1, 2, and 3 of the List of Issues, regarding water service, and in Issues 6, 7, and 8 of the List of Issues, regarding sewer service.

occurred.²² This is because the statute of limitations is an issue in the Circuit Court, and the Circuit Court needs to know when any failure occurred in order to adjudicate the breach of contract case.

Osage contends, in Circuit Court, that the statute of limitations on Summit's breach of contract case is five years, that the statute began to run more than five years before Summit sued in Circuit Court, and that Summit's lawsuit is barred by the statute of limitations. The critical issue for the Circuit Court is when the statute began to run. This, in turn, depends upon the answer to the following question: when did Osage fail to comply with its tariffs? Only the Commission can answer this question.

ARGUMENT

Summit's attorney admitted during the Hearing that the sewer lines and the water lines at Eagle Woods are adequate, and that Summit's only Complaint is that there is not sufficient capacity.²³ Osage's tariffs and its Certificate of Convenience and Necessity do not include any provisions requiring Osage to construct any specific amount of capacity. Furthermore, neither Summit nor Staff has cited any specific provision of Osage's water or sewer tariff that Osage has violated. And Osage can find none. Nor has Summit or Staff cited any violation of Osage's Certificate of Convenience and Necessity, and Staff can find none.

Adequate Service. The Staff stated in its Investigation Report that Osage has a duty to serve all persons in an area it has undertaken to serve, citing two cases decided by the Missouri Court of Appeals.²⁴ Summit contends that Osage has failed to provide service to all 53 lots in Eagle Woods, which it has undertaken to serve. Specifically, the Staff stated that Osage now serves only 33 customers in Eagle Woods, leaving 20 lots unserved.²⁵

The Circuit Court needs to know -- and the parties need to know -- whether this constitutes a failure to provide "adequate service," as required by Section 393.130, RSMo, and the cases the Staff cited. Was Osage obliged to provide adequate service to all of the lots in Eagle Woods, or only to Osage's customers, or only the customers it could serve with the available capacity?

In *State v. Public Service Commission of Missouri*, 343 S.W.2d 177 (1960), the Court of Appeals said: "The certificate of convenience and necessity is a mandate to serve the area covered by it, because it is the utility's duty, *within reasonable limitations*, to serve all persons in an area it has undertaken to serve." (emphasis supplied.) And in *Videon Corp. v. Burton*, 369

²² See the second question in Issues 1, 2, and 3 of the List of Issues, regarding water service, and in Issues 6, 7, and 8 of the List of Issues, regarding sewer service.

²³ See Transcript, p. 41, line 15 -- p. 42, line 7.

²⁴ See Exh. T, ¶6. The cases Staff cited are: *State ex rel. Missouri Power and Light Co. v. Public Service Com'n*, 669 S.W.2d 941, 946 (Mo. App. 1984) and *State v. Public Service Com'n*, 343 S.W.2d 177, 181 (Mo. App. 1960).

²⁵ See Exh. T, ¶7.

S.W.2d 264 (1963), the Court of Appeals relied upon the following, from CJS Public Utilities §7: "A public utility must furnish its service or commodity to the general public, or *that part of the public it has undertaken to serve*, without arbitrary discrimination, and it must, *to the extent of its capacity*, serve all who apply on equal terms as far as they are in the same class and similarly situated." (emphasis supplied.)

The question remains, however, whether Osage has "undertaken to serve" lot owners in Eagle Woods who never became its customers.

And neither Court explained what it meant by "reasonable limitations" or "the extent of its capacity." In any event, Osage never had authorization from the MDNR to provide sewer service to more than 50 lots.

There is no evidence in this case that Osage has, at any time since Cover's appointment as Receiver in 2005, had the financial ability to construct the facilities needed to serve additional sewer customers, nor that it had ability to borrow the money needed for such construction. If it ever did have the ability to construct such facilities, it was only during the first few years after the Contract was signed, while Williams was operating Osage.

When Did The Alleged Failure to Serve Occur? Osage contends that if it failed to provide adequate service, any such failure occurred many years ago.

Westenhaver's Affidavit lists his many complaints against Osage, all of them arising before 2006. He stated, for example: that, from 2001-2002, Osage failed to make water connections as required by the Contract²⁶; that Summit had to provide its own meter settings prior to the appointment of Cover in 2005²⁷; that, prior to 2006, one-third of Eagle Woods residences were not connected to the water system²⁸; that Osage failed to provide adequate service "since the Contract was executed"²⁹; that he frequently corresponded with legislators and other public officials about Osage before 2006³⁰; and that he complained to Osage between 2000 and 2005. There is no evidence in the Affidavit or in the Stipulation of Facts or in any other document that any failure to serve originated after the appointment of Cover in October 2005.

Summit's lawyer wrote to Osage on April 21, 2006 outlining her complaints about inadequate service.³¹ Obviously, all of the matters of which she complained originated before April 21, 2006.

Summit then filed a lawsuit against Osage in July 2006. In this lawsuit, Summit alleged that Osage had failed to comply with its tariffs prior to the date of the lawsuit.³² That lawsuit

²⁶ See Exh. S, Affidavit of Ron Westenhaver, ¶7.

²⁷ See Exh. S, Affidavit of Ron Westenhaver, ¶8.

²⁸ See Exh. S, Affidavit of Ron Westenhaver, ¶10.

²⁹ See Exh. S, Affidavit of Ron Westenhaver, ¶14.

³⁰ See Exh. S, Affidavit of Ron Westenhaver, ¶15.

³¹ See Exh. P.

was dismissed in September 2009,³³ and Summit filed a new one in April 2011.³⁴ But the new lawsuit was virtually a carbon copy of the 2006 lawsuit, it was based upon the same conduct by Osage, and it contained no new facts.³⁵

Osage's failures, if any there were, occurred prior to April 2006. There is not a shred of evidence that any failure to comply with the tariffs, the Certificate of Convenience and Necessity, or Section 393.130, RSMo began after Cover became Osage's Receiver in October 2005.

Osage, therefore, requests that the Commission find the exact dates on which Osage failed to provide adequate service, as required by statute and by its tariffs, and that the Commission find that all such failures occurred prior to October 2005.

Does the Contract Override the Tariff? At the Hearing, the question arose as to whether the provisions of the Contract between Osage and Summit supersede the provisions of Osage's tariff. Missouri law clearly holds that where there is a conflict, the provisions of the tariff must prevail.

A tariff that has been approved by the Commission becomes Missouri law and has the same force and effect as a statute enacted by the legislature. *A.C. Jacobs and Company, Inc. v. Union Electric Co.*, 17 S.W.3d 579 (Mo. App. 2000); *State ex rel. Missouri Pipeline v. Missouri Public Service Commission*, 307 S.W.3d 162 (Mo. App. 2010); *Public Service Commission v. Missouri Gas Energy*, 388 S.W.3d 221 (Mo. App. 2012).

Furthermore, public utilities have no authority to enter into a contract which cannot be modified or revoked by the state. *State ex rel. Capital City Water Company v. Missouri Public Service Commission*, 850 W.W.2d 903 (Mo. App. 1993).

CONCLUSION

Before the Circuit Court can exercise jurisdiction over the dispute between Summit and Osage, the Commission must first decide all issues that are within its jurisdiction. Specifically, the Commission needs to determine whether Osage failed to comply with its tariffs or the provisions of Section 393.130, by failing to provide safe and adequate water or sewer service to Eagle Woods. If it finds that it has, the Commission needs to decide when each and every such failure occurred, so the Circuit Court can determine when the statute of limitations on Summit's claim for breach of contract began to run.

³² See Exh. Q.

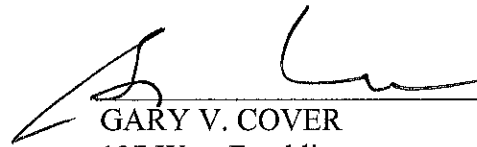
³³ See Exh. AA, Partial Stipulation of Facts, ¶25.

³⁴ See Exh. R.

³⁵ See Exh. R and Exh. AA, Partial Stipulation of Facts, ¶26.

The record in this case clearly shows that if there was any failure to provide adequate service, it occurred during the time when Williams operated Osage (1999-2005), and prior to the appointment of Cover as Receiver for Osage, in October 2005.

COVER & WEAVER, L.L.C.

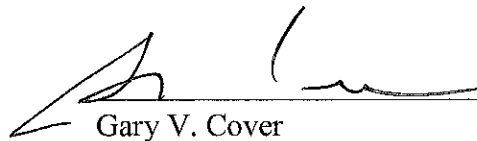


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I hereby certify that a copy of the foregoing was served electronically on this 29th day of August, 2014, on the parties as set out on the official Services List maintained by the Data Center of the Missouri Public Service Commission for this case.



Gary V. Cover