

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

PAUL SCHAEFER,)	
)	
Complainant,)	
)	File No. WC-2013-0357
v.)	
)	
I.H. UTILITIES, INC.,)	
)	
Respondent.)	
)	

**MEMORANDUM IN SUPPORT OF
RESPONDENT'S MOTION FOR SUMMARY DETERMINATION**

COMES NOW Respondent, I.H. Utilities, Inc., by and through counsel, and submits the following Memorandum in Support of Respondent Motion for Summary Determination:

A. STANDARD

Respondent's Motion for Summary Determination is filed pursuant to 4 C.S.R. 240-2.117. The stated purpose for that regulation is to provide for disposition of a contested case by disposition in the nature of summary judgment or judgment on the pleadings. Since Respondent's Motion herein refers to matters outside the pleadings, this motion is analogous to a Motion for Summary Judgment under Mo.R.Civ.P 74.04. Therefore, the standard to be applied by the Commission in ruling upon this motion is similar to that applied for a Motion for Summary Judgment.

A Motion for Summary Judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Larabee v Eichler*, 271 S.W.3d 542 (Mo. Banc. 2008). If the parties disagree on the legal effect and consequences of the facts, and not the facts themselves, there is not a genuine dispute of the facts precluding summary judgment. *Medley v. Valentine Radford Communications, Inc.*, 173 S.W.3d 315, (Mo. App. 2005).

Movant respectfully asserts that the undisputed facts as stipulated by the parties demonstrate that Respondent is entitled to disposition of this Complaint in its favor as a matter of law.

B. FACTUAL BACKGROUND

Complainant, Paul Schaefer, filed his Formal Complaint herein asking the Commission to order Respondent to provide Complainant with "a water connection of 1 in. meter, yoke & tap to lot" on his vacant lot in Indian Hills Subdivision, located at 2322 Itawamba near Cuba, Missouri. Respondent is a regulated water utility which provides service to the Indian Hills Subdivision and a small area immediately adjacent thereto, which lies outside of Indian Hills Subdivision but still within Respondent's certificated area.

Prior to the filing of his Complaint herein, Complainant indicated that he wanted a service connection to his vacant lot through an outdoor "frost free" hydrant. But Complainant also stated that he wanted to direct that water service therefrom to a recreational shelter Complainant had constructed on a property which he owns lying adjacent to the lot at 2322 Itawamba, which lies on approximately 100 acres of property owned by Mr. Schaefer, and is located approximately 1000 feet from his vacant lot. He also indicated that at some point in the future, he wished to also direct Respondent's water service to a home that he proposed to build on that 100 acre tract.

Respondent determined that Complainant's 100 acre tract lying adjacent to his 2322 Itawamba property lies outside of Respondent's certificated area. Respondent also had concerns regarding how the direction of water service to Mr. Schaefer's adjacent 100 acre property, as proposed by Mr. Schaefer would affect service to other customers of Complainant, especially if the installation of a "booster pump" would be required due to the high ground elevation in the area.

After detailed discussions and negotiations, Respondent submitted to Complainant a proposed "installation agreement" in which Respondent offered to install a 3/4" service connection to customer's vacant lot at 2322 Itawamba along with a 3/4" meter at a cost of \$650.00 with the provision that Complainant would make no attempt to extend said water service off of the vacant lot. Such an agreement would have

required a revision to Respondent's tariff sheet, as outlined in Mr. Jim Busch's letter to Respondent dated July 10, 2012.

Complainant refused to agree to the terms of that proposed installation agreement. Instead, Complainant filed his Formal Complaint herein seeking the relief mentioned above.

C. ARGUMENT

I. Respondent's currently effective tariff prohibits a service connection to Complainant's lot at 2322 Itawamba.

The current tariff regulating Respondent's water service states "The Company will not install a service connection to a vacant lot." It is undisputed that Mr. Schaefer's lot, located at 2322 Itawamba is a "vacant lot" within the meaning of the aforementioned tariff language. Therefore, Respondent does not have the authority under its currently effective tariff to provide the water service requested by Complainant.

It is true that at the present time Respondent provides service to a small number of vacant lots within the Indian Hills Subdivision. However, those service connections were initiated under prior tariff language, which allowed for the provision of service to vacant lots. Because of the change in the tariff language under which Respondent is authorized to operate, Complainant cannot argue that Respondent's provision of water service to those vacant lots supports Complainant's claim for service to the vacant lot which he owns, since such service is now prohibited by the tariff currently in effect.

It should be noted that Respondent in fact offered to provide service to Complainant's vacant lot conditioned upon (among other conditions) Complainant's agreement not to direct said water service off of Complainant's lot at 2322 Itawamba and outside of Respondent's certificated area. As mentioned above, such an installation agreement would have necessitated a new tariff sheet as suggested in Jim Busch, Manager – Water and Sewer Unit, Missouri Public Service Commission's correspondence dated July 12, 2012.

However, Complainant refused to agree to those terms. Complainant cannot now ask that Respondent be required to provide service to a vacant lot in violation of its effective tariff language.

II. Respondent is entitled to place reasonable conditions on its offer to seek revisions to its tariff to provide service to Complainant's vacant lot.

As noted above, although Respondent offered to provide service to Complainant's vacant lot, that offer did not comply with Complainant's request for service- which was for a 1" service connection, without restriction from extending that service off from his lot onto his adjacent 100 acre property. Instead, Respondent offered to provide a ¾" service connection, conditioned upon Complainant's agreement to make no attempt to extend said water service off of the vacant lot.

Respondent's conditions to on its offer to provide service to Complainant's vacant lot (pending tariff revision) are consistent with its tariff restrictions and obligations, and with its duty to provide the best service possible to all of its customers. It is stipulated that the typical service in Indian Hills subdivision involves a 5/8" meter serviced by a 3/4" line. Respondent's offer to provide a ¾" meter and ¾" service connection is similar to service provided to Respondent's customers generally. Additionally, Respondent's insistence that its service not be extended or directed outside of its certificated service area is designed to protect the integrity of its tariff boundaries and maintain the best service for all of its customers.

Although Respondent is a regulated public utility, this Commission's authority does not include the right to dictate the manner in which the company shall conduct business. *State ex rel. Kansas City Transit, Inc. v. Public Service Commission*, 406 S.W.2d 5 (Mo. App. 1966). Respondent's obligation is to provide the best service it can to all of its customers within the parameters of its tariff. In doing so, Respondent must make business decisions designed to meet that obligation.

Respondent's offer to provide service to Complainant's vacant lot was tendered with conditions designed to meet Respondent's obligations to all of its customers. In arriving at its offer, Respondent considered what is customary to provide such service,

as well as other factors, such as equipment requirements, local topography, the effect of service on other customers, (particularly since a booster pump might be needed)- not to mention the integrity of its tariff boundaries. If Respondent knowingly allowed its customers to direct service outside its the tariff area, it would render those boundaries meaningless, and effectively rob Respondent of its ability to effectively manage service within its certificated area.

Clearly, the restrictions placed upon Respondent's offer to provide service to Complainant's vacant lot are well within Respondent's discretion and business management responsibilities.

III. Respondent cannot be compelled to provide service outside of its certificated service area.

Although Respondent offered to provide service to Complainant's vacant lot under the terms set forth above, Respondent will not agree to provide any service which would then be redirected outside of Respondent's certificated service area. It is axiomatic that Respondent is a regulated utility and as such is only authorized to provide service within its certificated service area. Further, Respondent, in its efforts to provide the highest level service to all of its customers, is entitled to ensure that its service is provided solely for use by its customers within its certificated area.

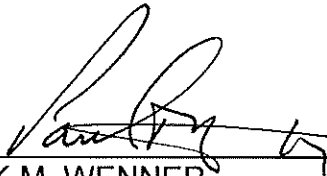
Nor can Respondent be compelled to extend its service area in order to provide water service directed off of Complainant's vacant lot and onto Complainant's 100 acre parcel lying adjacent to said lot. The mere fact that Complainant owns property adjacent to the certificated area and desires water service from Respondent does not provide a basis for the expansion of Respondent's certificated area to include Complainant's adjacent property unless Respondent consents to such expansion.

This issue was addressed by the Missouri Supreme Court in *State ex rel. Southwestern Bell Telephone Company v. Public Service Commission*, 416 S.W.2d 109 (Mo. Banc. 1967). In that case, the Missouri Public Service Commission directed Southwestern Bell Telephone Company ("Bell") to provide service to an area in Montgomery County, Missouri; an area to which Bell did not wish to extend its service.

The Commission noted that an overwhelming majority of inhabitants in the proposed new extended service area wished to have service provided by Bell. The Supreme Court held that Commission is without power to order a telephone company to provide services in an area in which it has not offered, professed or undertaken to serve. *Id.* 416 S.W.2d at 113.

Inasmuch as Respondent has not offered, professed or undertaken to serve Complainant's 100 acre parcel lying adjacent to his vacant lot at 2322 Itawamba, Respondent cannot be compelled to expand its service area to include said parcel or any portion thereof. Without the extension of Respondent's service area to include said 100 acre parcel, Respondent has no authority to provide service thereto; and is entitled to take reasonable precautions to ensure that its water services are not directed outside of its certificated service area.

For all of the reasons set forth herein, and those stated in Respondent's Motion for Summary Determination filed herewith, Respondent urges that the Commission grant Respondent's Motion for Summary Determination.



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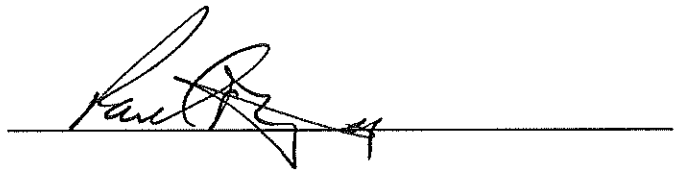
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Respondent's Motion for Summary Determination was filed with the Public Service Commission of the State of Missouri and served on the following by electronic mail and by mailing a copy of same U.S. Post Office first class mail, postage prepaid, this 28 day of May 2013 to:

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A handwritten signature, likely of Paul Schaefer, is written over a horizontal line. The signature is stylized and cursive.