

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

C. M. Lowry, Kenneth Whittaker, and
Joseph Farago, individually and as members
and representatives of groups similarly
situated as property owners of Rocky Ridge
Ranch and as members of the Board of Directors
of Rocky Ridge Ranch Property Owners Association,
a Missouri not-for-profit corporation,

Complainants,

v.

Areaco Investment Company, a Missouri corporation,
Arthur E. Collins, Registered Agent,

Respondent.

CASE NO. WC-81-97

APPEARANCES: Jay E. Sushelsky, Attorney at Law, 830 Paul Brown Building,
St. Louis, Missouri 63101, for Complainants.

W. R. England, III, Attorney at Law, Post Office Box 456,
Jefferson City, Missouri 65102, for Respondent.

John F. Cowling, Assistant Public Counsel, Office of the
Public Counsel, 1014 Northeast Drive, Jefferson City,
Missouri 65101, for the Office of the Public Counsel.

Rory Ellinger, Assistant General Counsel, Missouri Public
Service Commission, Post Office Box 360, Jefferson City,
Missouri 65102, for the Staff of the Missouri Public Service
Commission.

REPORT AND ORDER

On September 25, 1980, C. M. Lowry, Kenneth Whittaker and Joseph Farago,
individually and as members and representatives of groups similarly situated as
property owners of Rocky Ridge Ranch and as members of the Board of Directors of
Rocky Ridge Ranch Property Owners Association, a Missouri not-for-profit corporation,
filed a complaint against Areaco Investment Company with this Commission. Two
parties, Clark M. Burton and Andrew Minardi, were added as complainants at the

hearing without objection from the Respondent. The Complainants assert that the Respondent is operating a water system for gain and is therefore a public utility subject to the jurisdiction of this Commission. The complaint was answered and thereafter set for hearing. The hearing was held on November 20, 1980, at which time it was continued to and concluded on December 10, 1980. The reading of the transcript was not waived, and consequently all parties filed briefs.

Findings of Fact

Areaco Investment Company (hereinafter Areaco or Respondent) is the developer of the Rocky Ridge Ranch (hereinafter RRR). Areaco is a Missouri corporation. Areaco's corporate charter does not specifically state that its purpose is to operate as a public utility, or specifically preclude such. As developer of RRR, Areaco built a water system to supply water to the development. The individual complainants herein are lot owners who presently have homes constructed on lots purchased from Areaco in the Rocky Ridge Ranch development. The corporate complainant is organized to act in and on behalf of the property owners of RRR (hereinafter Homeowners Association). It does not appear in the pleadings or the record of the hearing that the corporate complainant above mentioned was duly authorized to be a party to the instant complaint. No evidence was presented that any kind of resolution or order was voted on by either the stockholders or the Board of Directors directing the corporation to file the complaint herein. Furthermore, the president of the Homeowners Association stated on the record that he did not have any specific authorization to appear and testify on behalf of the Homeowners Association.

RRR is described as a private recreational development. Its original concept was that of a retirement development. Lots were sold with restrictions as part of an overall development scheme. Areaco had developed and was to continue development of certain common facilities as recreational privileges. This included

such things as the use of lakes for fishing and boating, swimming pools, and hunting areas.

Each purchaser of a lot was given access to the common facilities such as lake areas and the swimming pool. Each purchaser, likewise as a part of the purchase, was required to sign a restriction agreement. That agreement sets out the obligations of the lot owners as to common facilities of the development and the developer's obligations to the Homeowners Association. Paragraph 11 of the agreement gives the developer the right to assess property owners at RRR, other than the developer itself, a specific amount of money on a yearly basis for the upkeep and maintenance of certain common items useful to all owners of land in the development, such as roads and, important herein, "wells, pumps and water systems". The assessments collected were to, and do, constitute a trust fund in favor of the lot owners who paid the assessment. Money not disbursed in the year received remains in the trust fund and is carried forward for use in the following year. For the developer's services in administering the trust, it was to receive an annual charge of 10 percent of the amount disbursed from the trust fund for the year charged.

Areaco sold lots at RRR as improved lots, i.e., water availability was part of the purchase. Areaco did not divest itself of ownership of the water system by those sales. Areaco did, through the restriction agreement, provide for the upkeep, maintenance and improvement of the water system to be borne by the property owners. The water system is presently only available to purchasers of improved lots in the development pursuant to the restriction agreement. The developer was an indirect beneficiary of the water system, since it made living at the RRR more desirable and thus helped sell lots, but the lot owners were the ultimate beneficiaries since water usage by the developer was primarily for common facilities made available to the lot owners. A certain amount of water was and is used by the Respondent's offices and guest accommodations used for prospective purchasers. Such usage appeared negligible

when compared to the development as a whole and constituted a benefit to those present homeowners by way of broadening the assessment base for upkeep of common facilities in the way of additional sales.

The title to common areas that were or were going to be developed for the use of lot owners remained in Areaco. The use of those common areas was restricted to lot owners, their guests and invitees, and to the corporation and its guests and invitees subject to the easement of the owners. The restriction agreement specifically set out that RRR was not open to the general public.

After the development was under way and lots had been sold, Areaco began selling what are termed "right-to-use memberships". These are basically country club type memberships that allow purchasers thereof the right to use the RRR as if the purchaser were a lot owner. RRR has campground facilities open to lot owners which were also to be open to right-to-use members. Eighteen of these memberships have been sold. Areaco is presently not offering memberships and is not planning to do so in the future.

The membership contract contains the same restriction agreement entered into by lot purchasers. Consequently, right-to-use members are to pay the same assessment as lot owners for the upkeep and maintenance of the same items lot owners pay for. The assessment goes to the same trust fund developed for the assessments paid by lot owners. Since the right-to-use members are to pay the same assessment fee as the lot owners (or, by the contract, a larger fee until the initiation fee is fully paid) for the same purposes, e.g., the water system, the net effect results in a subsidization by right-to-use members of that portion of the water system used only to supply water to lot owners.

As an additional benefit to lot owners and right-to-use members, Areaco placed the development in an organization called Camp Coast-to-Coast. Camp Coast-to-Coast gives members of private resorts that are a part of Camp

Coast-to-Coast the right to stay at member resort campgrounds for a fee of \$1.00 per night.

The Respondent's financial data is represented by Exhibits 12 through 17 and Exhibit 20. Exhibits 12 through 15 depict the operations of the trust fund and Areaco's general fund that was set up for the development. The general fund represents moneys belonging to the Respondent. The trust fund represents the assessments received from RRR lot owners and right-to-use members. From Exhibits 12 through 15, 1966-1976, it appears that Areaco has spent approximately \$1.1 million of its own money on the maintenance, upkeep and improvement of common facilities at RRR. This is in addition to what was spent out of the trust fund.

The data for the years 1966 to 1974 identifies that Areaco spent \$67,750 on capital improvements to the water system and \$18,875 on general maintenance. The data after 1974 does not set out whether any funds were spent by Areaco on capital improvements to the water system. Consequently, the Commission cannot determine how much of the \$1.1 million was spent on capital improvements to the water system by Areaco.

The trust fund accounting data indicates that the assessments did not go to Areaco. The balance at the end of each year was carried forward to the next. In 1979 the first deficit in the trust fund account occurred.

The Complainants introduced the Respondent's 1978 federal income tax return, Exhibit 20, in an attempt to show that Areaco was operating the water system for gain. The tax return indicated that Areaco was taking depreciation and investment tax credits on the water system at RRR. The Complainants alleged that the Respondent was taking depreciation and investment tax credits on parts of the water system paid for out of the trust fund. This allegation was never established by the Complainants. The tax return did have an item listed under Other Income as "water sales" in the amount of \$1,731. The representative for Areaco could not answer why

that item was listed on the 1978 tax return or what it meant. His testimony was that only the accountants would know, and they were not at the hearing. It was never established, or alleged, that Areaco sold water to anyone either outside or inside the development.

This complaint was the result of property owners' dissatisfaction with an additional assessment, or surcharge, made by Areaco on behalf of the trust fund. Areaco sent out bills in the amount of \$150 as a surcharge to fund expenditures necessary for the water system. It appears that the yearly assessment set out in the restriction agreement would not cover the cost of operating the water system. The property owners, believing the surcharge to be unreasonable, filed the instant complaint seeking regulation of Areaco's activities related to the water system.

It is not apparent from the record whether the Complainants understand that should Areaco be forced to submit itself to regulation, Areaco would be allowed to charge an amount that would include a return on its investment in addition to operation and maintenance expenses.

Conclusions

The ultimate question herein is the Commission's jurisdiction. The Commission by Section 386.250 is given jurisdiction over public utilities which specifically includes water corporations. Section 386.020, R.S.Mo. 1978, defines a water corporation as:

"...[E]very corporation, company, association, joint stock company or association, partnership and person, their lessees, trustees, or receivers appointed by any court whatsoever, owning, operating, controlling or managing any plant or property, dam or water supply, canal, or power station, distributing or selling for distribution, or selling or supplying for gain any water."

In State ex rel. Danciger v. Public Service Commission, 205 S.W. 36 (1918), the Supreme Court of Missouri interpreted Section 386.020. The question before the court was one of jurisdiction. The court stated that from the definitions found in Section 386.020, "it is apparent that the words 'for public use' are

understood to be read therein." That is, the subject matter in dispute, herein the water system, must be devoted to a public use before it is subject to public regulation. Danciger, at p. 40.

The definition set out above and the Danciger case establish two elements that must be found before the Commission can assert jurisdiction over the Respondent. First, it must be found that the Respondent has devoted its water system to a public use. Secondly, the Commission must find that the water system is operated for gain. These are the same two elements set out in a prior Commission case similar to the instant case. See Re: Lake Montowese Development Company, Inc., 9 Mo. P.S.C. (N.S.) 699 (1961).

In determining what is a dedication to a public use the Commission looks to Danciger, as it did in Lake Montowese. Danciger examines and quotes several sources, of which the underlying proposition is that for there to be a dedication to public use, the Respondent must engage in indiscriminate dealings with the general public. That is, the Respondent must appear to hold itself out to all who ask and not furnish service only to particular individuals in fulfillment of private contracts.

In the instant case, water is provided only to the purchasers of land within the RRR pursuant to a restriction agreement. Areaco at the time of the hearing was not selling lots. Areaco stated that any lots sold in the future would be sold without water service. Areaco has provided water only pursuant to contracts to purchase land and to no one else. The RRR area is not open to the public, and water is not supplied to anyone outside of the RRR. The Commission is of the opinion that this is not an indiscriminate dealing with the public, and therefore does not find Areaco's water system at RRR devoted to a public use. The Commission finds this to be in accord with its decision in Lake Montowese.


Consequently, the Commission concludes that the operation of the water system at RRR is outside the jurisdiction of this Commission and that the complaint should be dismissed.

It is, therefore,

ORDERED: 1. That the complaint addressed herein be, and hereby is, dismissed.

ORDERED: 2. That this report and order shall become effective on the 8th day of April, 1982.

BY THE COMMISSION



Harvey G. Hubbs
Secretary

(S E A L)

Fraas, Chm., McCartney and Musgrave,
CC., Concur and certify compliance
with the provisions of Section 536.080,
R.S.Mo. 1978.

Dority, C., Not Participating
Shapleigh, C., Absent.

Dated at Jefferson City, Missouri,
on this 29th day of March, 1982.