

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

Jason Becker,)	
Becker Development Company,)	
)	
Complainant,)	
)	Case No. SC-2007-0044 et al.
vs.)	
)	
Aqua Missouri, Inc.,)	
)	
Respondent.)	

POST-HEARING BRIEF OF RESPONDENT AQUA MISSOURI, INC.

COMES NOW Respondent, Aqua Missouri, Inc., by and through counsel, and for its Post-Hearing Brief states as follows:

On August 7, 2006, Complainant Jason Becker filed a Complaint before this Commission alleging that Respondent Aqua Missouri, Inc., had failed to comply with the terms of the tariff under which it operates in the State of Missouri by not providing service to Complainant. Respondent Aqua Missouri, Inc. denied the allegations contained in that Complaint and also asserted certain affirmative defenses to the Complaint. On April 23, 2007, an evidentiary hearing was held before this Commission in this matter at which time this Commission took testimony from Complainant, Respondent, and the Public Service Commission staff. It is clear, after a review of the Complaint, the Answer and the testimony at the April 23, 2007, hearing that the Complaint is completely unfounded and that Aqua Missouri, Inc. is complying with the tariff approved by this Commission and providing adequate service to the individual customers at Lake Carmel. Accordingly, this

Commission should deny the relief requested in the Complaint and enter an Order dismissing such Complaint and for such other relief as this Commission deems appropriate.

Developer Agreement Requirement

Under the existing tariff, Rule 12-B, a developer, such as Becker Development Company, is required to enter into a Developer's Agreement with Aqua Missouri, Inc. A tariff is deemed to have the force and effect of law and becomes a state law. *State ex rel. Missouri Gas Energy v. Public Service Commission*, 210 S.W.3d 330, 337 (Mo. App. W.D. 2006). *See also, Allstates Transworld Van Lines, Inc. V. Southwestern Bell Telephone Company*, 937 S.W.2d 314, 317 (Mo. App. E.D. 1996). A party may not come before this Commission claiming a violation of the tariff of regulated utility where that complaining party refuses to comply with its obligations under the same tariff. The tariff itself provides the form of such Developer Agreement. The Developer Agreement specifies that the developer shall pay the costs of design and construction of a treatment facility to treat the building lots owned by the developer. The testimony is clear that Complainant in this matter has refused, on multiple occasions, to execute such Developer Agreement. (Tr. 11:7-16.) In fact, Complainant himself has testified that even though Aqua Missouri offered to amend the Developer Agreement (Tr. 11:17-19) that Complainant refused to sign such Developer Agreement as amended. (Tr. 11:20-22.)

Ultimately the issue in this matter comes down to nothing more than a mercurial desire of Complainant to be able to develop this land without incurring any costs to provide the treatment facility necessary for those parcels. As Complainant himself noted, any agreement where the cost was to be paid by Complainant he would refuse to sign. (Tr. 11:23-12:4.)

The PSC witness, James Merciel, also testified that Complainant refused to sign the requisite Developer Agreement, while noting that additional capacity is the developer's responsibility. (Tr. 92:4-12.)

Here Becker has a clear obligation; sign a Developer Agreement and place the proper deposit with Aqua Missouri. He has refused to sign such Developer Agreement in the form contained in the law (the tariff) and thus he may not have relief.¹

The relief sought by Complainant in this matter simply comes down to a request for this Commission to relieve him of his financial obligations that are mandated by the law and the tariff of this Commission. The developer, Complainant herein, has a large number of lots to which sewer service would be necessary to develop. Those lots require capacity that is greatly in excess of the capacity of the existing facility at Lake Carmel. The Developer Agreement and related portions of the tariff clearly envision the situation. They establish a framework whereby a developer may obtain the additional capacity needed for his development and shoulder the costs necessary for that development. This is imminently logical, in that the developer may pass on the cost of the additional treatment capacity to each individual lot holder to whom he sells.

It is this method that this Commission has selected, and the company has worked under for a number of years, as the means by which new treatment facilities and additional capacity upgrades have been implemented for developers. Complainant seeks a paradigm shift. By switching the

¹ If, however, he were to place the deposit down, which has been estimated by Aqua Missouri, Inc. and execute a Developer Agreement and then would not have compliance of the Developer Agreement by the company, he may be able to sustain a complaint against the company. However, that is not the case before us today. The sole issue in this case is the Complainant, not the Respondent, has failed to comply with the tariff and now seeks relief from this Commission. Such relief should not be granted.

burden of new capacity for increased development from the developer to the company, the Complainant seeks to relieve himself of all financial burdens related to the development of the treatment facility and yet profit from the sale of lots which now have sewer service. Simply put, the developer is trying to get something for nothing. The current tariff is designed to require a developer to pay as he goes and put investment in to obtain returns on that investment. This Commission should uphold the intent and spirit of the tariff, as well as the plain language thereof, and reject the Complaint of the Complainant in this matter.

Existing Tariff Clearly Applies to Expansion of Treatment Facilities

A review of the existing tariff under which Aqua Missouri operates demonstrates that treatment and collection systems are in fact different. There is no question that the collection system does not treat sewage; it merely transports that sewage to a treatment facility. Similarly, a treatment facility does not collect or transport sewage. The definitions contained in the tariff reinforces this conclusion. *See* Rule 1(G), Sheet SRR2, which defines a “collecting sewer” as:

“A pipeline, including force mains, gravity sewers, pressure piping, wyes tees, clean-outs, manholes, lamp holes, and necessary appurtenances, which is owned and maintained by the company, located on public property or on company or utility easements, and used to transport sewage waste from the customer service sewer connection to the point of disposal.”

Aqua Missouri Tariff, Sheet SRR2, Rule 1(G) (emphasis supplied.)

This definition clearly reflects that a collecting sewer is not the same as a treatment facility.²

² Similarly, the point at which a customer sewer connection occurs is after the septic tank which each customer privately owns. Since those septic tanks are owned by the customer, and not by the company, they are not to be considered part of the collecting sewer, the treatment facility, or the sewer system in general.

The definition of a sewer system, on the other hand, is much more expansive and is defined as follows:

“A ‘sewer system’ shall refer to the collecting sewer piping, wyes, manholes, clean-outs, lamp holes, lift stations, pumps, treatment facilities, components and appurtenances either in part or whole, used for the purpose of collecting, transporting, or treating sewage.”

Aqua Missouri Tariff, Sheet SRR8, Rule 1(AE) (emphasis supplied.)

This definition clearly demonstrates that a sewer system is far more in depth and complex than just the collecting system and represents both the collection system and the treatment system plus other appurtenances thereto. It is for this reason that when this Commission defined extension, it made the language far more in depth than just relating to a piece of piping in the collection system.

“Extension” is defined as:

“A sewer system ‘extension’ may refer to continuation of piping or an addition to the existing company-owned system, reconstruction, or the construction of an entirely new wastewater collection/treatment system.”

Aqua Missouri Tariff, Sheet SRR4, Rule 1(P).

It is this definition of extension that is then related to Rule 10 of the Aqua Missouri Tariff, which was discussed extensively during the hearing. Rule 12 of the Aqua Missouri Tariff states that it shall:

“govern the construction of new treatment facilities and/or extension of new collecting sewers requested by developer in areas within the company’s certificated service area where the company does not serve.

(1) A developer shall enter into a contract (see Exhibit B) with the company....The developer shall contribute said sewer collection/treatment system to the company with a detailed accounting of the actual cost of construction (excluding income taxes).

(3) The company, or its representative, shall have the right to inspect and test the sewer extension prior to connecting it to the company's collecting sewers.

(4) Connection of the extension to existing company collecting sewers shall be made only by a duly authorized representative of the company."

Aqua Missouri Tariff, Sheets SRR43-44, Rule 12(B)(1, 3 and 4) (emphasis supplied.)

Clearly the language contained in Rule 12, which applies to developers, reflects that the full extension is the subject of the Developer Agreement and Rule 12(B) and not merely the collecting sewers as may have been inferred.

This clear reading of Rule 12 is bolstered by Exhibit B, which is specifically referenced and incorporated in Rule 12(B), which is the Developer Agreement. That is the "Extension Agreement - Developer" which is approved by this Commission in part of the tariff. Aqua Missouri Tariff, Sheets SE6-SE10, Exhibit B. Even the initial "whereas" provisions reference that "the Developer has requested the Company to extend or expand its system for the express purpose of providing sewer service." Aqua Missouri Tariff, Sheet SE6, Exhibit B.

The tariff demonstrates that this Commission understood that there is a distinction between a collection system and a treatment system, but expressly included that an "extension" should be equally applicable to both. Thus the Extension Agreement, contained in Exhibit B, and incorporated by Rule 12(B)(1) clearly reflects that for either an extension of the collecting system, or the treatment system, that a Developer Agreement is required regardless of whether that is a new system, or an expansion of an existing system. Both expansion and new systems are fully encompassed by the definition that this Commission has approved of "extension." As noted previously, a tariff approved by this Commission is state law. *See State ex rel. Missouri Gas Energy, supra*. Where existing law

applies to a situation, it should be applied by this Commission. Thus the Developer Agreement must be executed. The tariff clearly reflects that the Agreement applies both to collecting systems and to treatment facilities, such as that in question here. Becker should be required to pay for the expansion of the treatment facility or the construction of a new treatment facility pursuant to Rule 12(B)(1) of the Aqua Missouri Tariff.

Tariff Does Not Require a Revision

Complainant has not sought a revision of the existing Aqua Missouri tariff in this matter. Accordingly, such relief should not be before this Commission and should not be entertained as an alternative or an option to resolving this matter. *See Burns v. Black and Veatch Architects, Inc.*, 854 S.W.2d 450, 458 (Mo. App. W.D. 1993). The resolution is simple, Complainant's Complaint should be dismissed as the Complainant has failed to follow the existing tariff and refused to enter into a Developer Agreement. *See discussion, supra.*

The staff of the Public Service Commission has taken an interesting tact on this matter by asserting that the tariff should be rewritten through this Complaint. As an initial matter, there has been no request by any of the complaining parties for a tariff revision, and this Commission should not engage in *sua sponte* revisions to a tariff where no party has requested the same. *Id.*

However, the staff does urge a tariff revision. Unfortunately, the tariff revision arguments have been vague and undefined. At any given point Staff has suggested a CIAC charge, or an increase onto the rate base of the company, or a hybrid Developer Agreement, or a case where the company should shoulder the entire burden. None of these options have ever been substantively discussed or fleshed out and thus are not before this Commission. Accordingly, the company is somewhat hamstrung in responding to any specific proposal, because no specific proposal has ever

been advanced. However, it is concerning to hear staff assert that Aqua Missouri should increase its capacity at the Lake Carmel treatment facility on its own volition with no corresponding commitment to support putting such increased capacity into the rate base. (Tr. 93:5-94:3.)

The existing tariff provides the best solution to the current situation. That is a developer should place a deposit with the company for the treatment facility necessary to provide capacity to treat the effluent from the development the developer wishes to build. In this case, Mr. Becker seeks to develop 65 lots, and he should pay the full and complete price for treatment for those 65 lots. Instead of rewriting the tariff to address an issue that is not of real concern, this Commission should simply apply the existing tariff and require that Becker enter into a Developer Agreement if he wishes to have service from Aqua Missouri for his parcels.

The staff's recommendation to change the tariff does not set the proper precedent in these types of cases. Changing the tariff because a recalcitrant developer refuses to pay funds is not the appropriate reason nor the appropriate solution for a situation such as the current one.

Accordingly, this Commission should reject any revision of the existing tariff and instead affirm the existing tariff and compel Complainant to comply with it in its entirety.

WHEREFORE, Respondent prays that this Commission deny the relief requested by Complainant, dismiss the Complaint, and enter such other relief as this Commission deems appropriate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that true and accurate copies of the foregoing Post-Hearing Brief of Respondent Aqua Missouri, Inc., were sent by U.S. Mail, postage prepaid, this 31st day of May, 2007, to:

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