BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

GREATER JEFFERSON CITY CONSTRUCTION COMPANY, INC., and EDWARD P. STOREY,	)	
Complainants,	)	
v.	)	**Case No. WC-2007-0303**
AQUA MISSOURI, INC.	)	
Respondent.	)	

COMPLAINANTS' REPLY BRIEF

INTRODUCTION

This matter is before the Commission on Complainants' request for an order that Respondent grant Complainants 32 additional hookups to the waste water treatment facility at Quail Valley. After Complainants and PSC Staff filed their briefs, Respondent filed its brief. In Respondent's brief, it takes three basic positions:

1. That the Commission does not have jurisdiction of this matter because Complainants did not specifically cite a violation of any law, rule, regulation, tariff, or order of the Commission;

2. Complainants did not exhaust their administrative remedies because they did not submit an application on the Respondent's form; and

3. That the Commission should ignore the actual operational data on the plant and revert to the design criteria in rendering its decision.

Complaints will address these issues in order.

JURISDICTION

Initially, Respondent erroneously states that the "fundamental complaints of the

Complainants" are found in paragraphs 5 and 6 of their Complaint. Respondent ignores the following paragraphs:

4(e) "The waste water treatment facility and collection system was designed to accommodate the waste water loading generated by the complete development of Quail Valley Subdivision."

4(g) "That since 2002 Complainants herein have sought approval from Respondent to attach more homes to the sewer system. Respondent has refused said request. . . ."

4(h) "The permit under which Aqua Missouri, Inc., operates the Quail Valley Lake Subdivision waste water treatment plant has no restrictions as to the number of homes that can be attached, but rather has restrictions for flow, sludge, bio-chemical oxygen demand, and total suspended solids, among other things."

4(k) "At the request of Complainants, numerous tests have been performed by engineers at ReSource Institute which show that the waste water treatment facility is operating well below the capacity set forth in the permit. Complainant has presented these studies to Respondent and has requested permission to attach additional homes, and the Respondent has refused to grant such request."

4(m) "Complainant has met with representatives of Aqua Missouri on several occasions and has attempted to reach an agreement but Respondent has refused."

Certainly, this Complaint raises the issue of whether Respondent's actions violate §393.130.1 that "every . . . sewer corporation shall furnish and provide such service, instrumentalities and facilities as shall be safe and adequate and in all respects just and reasonable." Similarly, the allegations raise the issue whether Aqua Missouri has complied with what this Commission stated

in ***Becker v. Aqua Missouri***, Case No. SC-2007-0044, that "Aqua Missouri has a mandate to serve the area covered and it is the utility's duty, within reasonable limitation, to serve all persons in an area it has undertaken to serve.", citing ***State ex rel. Missouri Power and Light Company v. Public Service Commission***, 669 S.W.2d 941, 946 (Mo. App. W.D. 1984).

It should be noted that the PSC uses the Missouri Rules of Civil Procedure. Respondent had available to it Rule 55.27(d), Motion for More Definite Statement, where Respondent could have requested that a specific statute, rule, et cetera, be cited. Respondent chose not to do so, and in fact did not raise jurisdiction as an issue anywhere in its pleadings, but only at the hearing. Respondent instead chose to join the issues as pled. This is not a complicated case, and each party knew exactly what the other's position was, and continues to be.

There is nothing in the general complaint statute, §386.390, RSMo., that requires a complainant to specifically cite the law, rule, order or decision claimed to be violated; it requires only that facts be alleged which are a violation of a law, rule, order or decision of the Commission. The Missouri Rules of Civil Procedure only require "a short and plain statement of the facts showing the pleader is entitled to relief", Rule 55.05, Missouri Rules of Civil Procedure. In practice before the Commission, the pleadings are liberally construed, and technical rules of pleading are inapplicable. ***Friendship Village of South County v. Public Service Commission of Missouri***, 907 S.W.2d 339, 345 (Mo. App. W.D. 1995). If a complaint fairly presents for a determination some matter which falls within jurisdiction of the Commission, it is sufficient. ***Id***. Certainly, the allegations that Complainants have continually requested additional service and that Respondent has denied same where a plant has excess capacity states facts giving this Commission jurisdiction since such denial would not constitute "adequate, just or reasonable service."

The cases cited by Respondent are inapplicable. In ***Friendship Village, supra***, and in ***Deaconess Manor Association v. Public Service Commission***, 994 S.W.2d 602 (Mo. App. W.D. 1999), the issue was whether the Commission had to file specific findings of fact and conclusions of law on a sub-issue that was not specifically pled. In both of these cases, the Commission heard the complaint and rendered a decision on the merits. In both cases, the respondent apparently wanted the grounds of the holding on a sub-issue set forth specifically in order to have a better chance on appeal. The court held that the Commission did not have to do so. These cases do not stand for the proposition that the failure to specifically name a statute, law, rule or order defeats jurisdiction.

Similarly, the facts in ***State ex rel Ozark Border Electric Cooperative v. Public Service Commission***, 924 S.W.2d 597 (Mo. App. W.D. 1996), are so different from the facts herein that it is of no precedential value here. In ***Ozark, supra***, the complainant sought jurisdiction under §394.312.6, RSMo. It had not alleged a substantial change in circumstances, but was in essence protesting a territorial agreement that had been entered a year earlier. The Commission, on its own, examined the petition to see whether it fell within the general complaint statute. Since the complainant had not alleged any facts constituting a violation of law, rule or Commission order (undoubtedly because it wasn't seeking jurisdiction under that statute), the Court affirmed dismissal of the complaint.

It is obvious that the facts alleged in Complaints' First Amended Complaint give rise to jurisdiction, and Respondent's argument to the contrary should be rejected.

EXHAUSTION OF REMEDIES

Respondent argues that Complainant never filled out an application form and therefore has failed to exhaust his administrative remedies. Initially it should be noted that in two places in its

brief, Respondent states that "Aqua Missouri informed Mr. Storey that the facility was designed for 80 lots." (P. 4, P. 22)[1] Respondent not only seems to be endorsing its communication to Mr. Storey, but nowhere in Respondent's brief does it attempt to answer Complainants' argument that Mr. Storey's testimony about what occurred in 2002 (the denial by Aqua of any more hookups) is more credible than Aqua's representative's impeached recollection. (See Complainant's Initial Brief, P. 13.) Further, while Respondent states that "Mr. Storey is unsure whether he considers Haug's letter to be an application", Respondent does not address its regional manager's admission that the September 14, 2006, letter from Greg Haug was a request for approval of ten additional lots. (TR. 560-561.)[2] Lastly, there is simply no evidence that anyone at anytime suggested to Mr. Storey that if he filed a written application, it would be granted.[3]

Respondent does state that individual applications have been granted since 2002. However, the undisputed evidence is that these applications were for lots within the original 80 that were sold and which Aqua Missouri has stated Complainant is limited to. (TR PP. 54-55) The fact that they granted those applications, and undoubtedly would grant two additional applications for the owners of lots in Quail Valley other than Mr. Storey, is irrelevant to this dispute, since 78 of the 80 lots that have been sold have been built upon. It is the lots over 80 that have always been and continue to be in dispute.

The doctrine of failure to exhaust administrative remedies, and the cases cited by Plaintiff,

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[1] The actual transcript says "And they said, well, you only have sewer for 80 lots."

[2] It should be noted that the Random House College Dictionary, copyright 1973, uses "application" and "request" interchangeably. Application - "a written or spoken request or appeal."

[3] Nor did Respondent plead it by way of a motion to dismiss or an affirmative defense.

have absolutely no relevance in this case. Every one of these cases involves a matter filed in the circuit court where the party was seeking judicial relief without having gone through an administrative proceeding. The absence of any citations to any cases where an administrative proceeding was dismissed for failure to exhaust administrative remedies is easy to explain - - there are none. "Failure to exhaust administrative remedies requires that a party seek all available remedies at the administrative levels ***before applying to the courts for relief***." (Emphasis added.) ***Green v. City of St. Louis***, 870 S.W.2d 794 (Mo. banc 1994). The exhaustion doctrine does not apply as between two separate administrative remedies. ***Id***. The cases cited by Respondent would only apply if Complainant had gone straight to the circuit court, bypassing this Commission.

While Respondent argues that the cases cited by Complainant for the "well known maxim that the law does not require the doing of a vain and useless thing", ***Manley v. Ryan***, 126 S.W.2D 909, 915, do not apply, Respondent does not present an argument that filing an application, in fact, would not have been futile. Therefore, the Commission should accept Storey's testimony that he was told he could not have hookups in excess of 80 and that filing applications for hookups over that number would have been futile. Respondent goes so far, in a footnote, as to claim that "the only time futility has been accepted as a reason to waive the exhaustion remedies doctrine is in the event of an immediate danger or imminent harm that there is no other alternative." (Footnote 7, P. 15) and cites three criminal cases. This statement is just flat wrong. See ***C. Bewes, Inc. v. Buster***, 108 S.W.2d 66 (Mo. 1937), where the court held that a rule that only a judgment creditor may maintain an equity suit to set aside fraudulent conveyances need not be followed where the debtor admitted the debt stating that "Neither law nor equity will require doing of a useless act. Why should it be necessary to obtain a judgment to prove the validity of a claim which is admitted?" ***Id***. at 70. Also,

see ***Boillot v. Income Guaranty Co.***, 102 S.W.2d 132 (K.C. App. 1937) where the court held that the insured did not have to provide proof of disability to the insurer because of a prior judgment; and ***Woolery v. Todd***, 139 S.W.2d 1005 (Springfield Ct. Of Appeals 1940) where failure to appoint a personal representative for an estate in order to deliver a note to the plaintiff that was not an asset of the estate was unnecessary. These cases have no "immediate danger or imminent harm," but state the general principle in a variety of fact scenarios.

The facts presented show that Ed Storey was refused additional hookups both in 2002 and in 2006. Based on those denials, Complainant filed this action and the parties joined the issue regarding the plant's capacity. The lack of a form, paper application was never raised until the hearing. Undoubtedly, this was strategic on Respondent's party; had it been raised any earlier, Complainant could have applied for service for all of his lots and been denied and Respondent would literally have no argument to attempt to defeat this complaint except the "design criteria" argument which will be addressed *infra*.

DESIGN CRITERIA - SUBSTANTIVE ARGUMENTS

10 C.S.R. 20-8.020 states that "deviation from minimum requirements will be allowed if sufficient documentation justifies the deviation." In its brief, Respondent completely ignores this regulation except to suggest that "substantial justification" refer "more to something a party would be able to prove would always be truth." (P. 20) Not only does Respondent not provide a citation in support of such a statement, it is patently ridiculous on its face. Under that standard, there would never be sufficient documentation to justify deviation regardless of the amount and quality of data

available.[4] Respondent's entire substantive argument, as it were, ignores this regulation. Every letter, exhibit, and testimony it cites relies on the design criteria. All of these were written before any analysis was done of the actual capacity of the plant. The undisputed testimony was that actual data can be reviewed to determine the capacity of the plant.

Respondent's substantive defense is so weak that, other than defending design criteria, it only mentions its expert's testimony one time. (P. 6) This is a mention of Clarkson's report concluding the "existing waste water collection system is overtaxed." However, Clarkson admitted that the pop-off of the clean-outs, upon which he bases his opinion that the collection system is overtaxed, could be due to solids in the line (Tr. 453) and if new collection lines for the newly platted lots go straight to the plant, it alleviates his concern of the collection system being overtaxed. (Tr. 455) Since that is exactly what Complainants are eventually proposing, there is nothing in Respondent's brief of a substantive nature other than "design criteria" upon which it relies.

Respondent suggests several times that Complainant did not sign a Developer Agreement. (P. 13, 16, 26) However, Exhibit 28 is the Developer Agreement signed by Mr. Storey.[5]

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[4] Since "nothing is certain except death and taxes," Benjamin Franklin.

[5] One of the difficulties in responding to Respondent's brief is inaccurate and inappropriate citations to the transcript. For instance, in support of certain facts (particularly that the plant was "designed for 80 homes,") Respondent cites his own opening statement (PP. 2, 3, 25) which is not evidence or a fact. Other examples of an inaccurate quote include page 19 and 20 where it argues that "Mr. Haug testified that if the population at Quail Valley changes, his numbers and his recommendation would change (Tr. 161, Lines 21-25) - - this quote leaves out the word "drastically" after "changes", significantly changing the meaning. Another example appears on page 21 where Respondent states "Mr. Storey is aware that he is responsible for expanding the plant. . . . ." (citing TR. 511, Lines 3-21; TR. 512, Lines 2-22), which is Tena Hale-Rush's testimony, not Mr. Storey's, and therefore does not constitute an admission by Mr. Storey. There are a number of other inaccurate citations but Complainant will not belabor the point here.

Interestingly, while Respondent claims that "the original Developer Agreement signed by Mr. Storey only shows 80 lots (Exhibit 28), a review of the plat attached to the Developer Agreement shows 102 lots, completely undermining Respondent's argument. The plat also shows "future development" and Respondent argues that there is no indicia of development in the "future development" area. (P. 18) What did Respondent think "future development" meant? While Respondent may not have known the exact number of lots that would be platted from the "future development" section, there is simply no other use to which that land could be put. Furthermore, while Respondent argues that "the regional manager of Aqua Missouri testified she had not seen the subdivision plotted with the additional 22 lots until the day of the hearing" (P. 25), the undisputed testimony was that the "future development" area was platted and the plat recorded (showing 16 lots) in 2001, and Rush testified that Aqua Missouri received the deed to the plant in 2002 which it then recorded in 2003. (TR 508, Lines 19-22) "A primary purpose of the recordation of an instrument is to give notice of its existence to those about to deal with the property involved. Such persons are protected by, and charged with, notice of the recorded instrument." ***Dreckshage v. Community Federal Savings and Loan Association***, 555 S.W.2d 314 (Mo. banc 1977). Being on notice of the recorded plat, the manager's self-proclaimed ignorance and surprise is irrelevant.

Respondent several places in his brief claims that Complainant either refused to or has failed to sign a Developer Agreement. First of all, any Developer Agreement would only pertain to the lots platted in 2001 since all other lots were platted in 1992 when the Developer Agreement was signed. Secondly, it would be the height of stupidity for Mr. Storey, having been denied hookups for anything over 80 lots, to go to the time and expense of surveying those lots, preparing easements, preparing plans, and submitting them to DNR through Aqua Missouri when Aqua Missouri would

not allow any of those lots to be hooked up to the existing plant. It is difficult to have a developer "agreement" when the parties do not agree on the terms or the use to which the land which is the subject of a Developer Agreement can be put.

Respondent acknowledges that it has a duty within reasonable limitations to serve all persons in an area it has undertaken to serve. ***State ex rel. Harline v. Public Service Commission***, 343 S.W.2d 177, 181 (Mo. App. 1960). Respondent then suggests that a developer "seeking a dramatic increase in service, above and beyond all design standards while refusing to sign any applications or agreements and further refusing to pay for an expansion is not 'reasonable terms'." Storey has not refused to sign an application. Storey has not refused to sign a new Developer Agreement, but has not reached that stage. Storey has not refused to pay for extension of collection lines; he is willing to do so. Storey has refused to pay for <u>unnecessary</u> expansion of the plant. What is not reasonable is for a utility to do no analysis of the capacity of its plant and refuse further hookups. It is unreasonable for a utility to refuse service when an analysis done by the developer shows the plant at 60 percent of capacity. It is unreasonable to require a developer to spend thousands of dollars on an analysis based on the utility's own data, and then to question that data. It is unreasonable to question that data but do nothing to answer those questions, even something as simple as checking flow readings outside regular business hours. It is unreasonable for a utility to continue to rely on design criteria rather than real world data and continue to fight any additional hookups. Respondent's suggestion that Storey is attempting to evade his responsibility under the tariff in these circumstances is truly a case of the "pot calling the kettle black."

Several other arguments of Respondent border on the ridiculous. Its suggestion that a Commission order in favor of Complainant will result in "huge burdens on the Commission" (PP.

20 and 21) is one of these arguments. Perhaps a better solution in future cases would be to have Aqua Missouri do an analysis of its plant and, if that analysis based on real world data shows the plant can handle additional hookups, it should work with the developer, allow those hookups, and make itself more money in the meantime. The Commission would not have to be involved.

Similarly, Respondent's argument in Footnote 9 on Page 21 is nonsensical. No developer can pick and choose who he sells to, or dictate to those people when and to whom they can sell. Also, the Commission should note that in this instance, the population at Quail Valley has not changed in the almost two years since the census was first done and the analysis made.[6] Even if the population were to change over time, the 32 additional hookups requested would not be made at once and therefore there would be no unreasonable burden on the company.

Respondent lastly argues that its denial was not wrongful, intentional, and without just cause or excuse. Respondent's argument that several engineers had discussed expansion of the plant and that they were attempting to settle misses the point. The original engineers who looked at expansion were only doing so because Storey had been told that the existing plant was limited to 80 hookups. Once Mr. Haug performed his analysis and informed Aqua Missouri of his findings and requested additional hookups for Mr. Storey, Aqua Missouri had an obligation to do something other than say "no" and fall back on design criteria. Because Aqua did not do so, its "offers" of settlement were based on ignorance. None of these offers were good faith efforts to settle.[7] Clarkson was not hired

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[6] Respondent's reference to a newspaper article on Page 20 that was not put in evidence or the subject of any testimony should be stricken.

[7] In response to Haug's request on Storey's behalf for 10 hookups now with others to follow, Aqua Missouri offered to allow one hookup at a time while the plant was monitored, and finally 10 hookups total with no more to follow. With 32 lots available and an analysis showing the plant could handle an additional 40 homes, it would have been business suicide for Mr. Storey to accept

to analyze the capacity of the plant. He was not hired to do flow studies or answer any of the other questions Aqua raised with its own data. Clarkson was hired, purely and simply, to provide them with a defense. In the almost six years that this matter has been coming to a head, Aqua still has provided no analysis of the capacity of its own plant. Rather, it has let Mr. Storey spend all of the money documenting that substantial justification exists as per the regulations while Aqua sat back and did nothing but say "no". While the design capacity of the plant was 80 homes based on design criteria and assumptions, this is irrelevant at this stage because of the existence of a multitude of data constituting the sufficient documentation contemplated in the regulations. The Developer Agreement showing plats for 102 homes signed by Respondent's predecessor further shows the fallacy of its argument that 80 homes were all that were planned for this plant.

CONCLUSION

Complainant has made sufficient allegations to invoke the jurisdiction of this Commission. Complainant has shown that while he did not sign and submit individual applications for each hookup he was requesting, that he has on more than one occasion requested hookups over and above the 80 and Aqua has continually refused. Aqua has no factual defense to the substantive allegations of the Complaint other than to fall back on design criteria when we are not talking about designing a plant and we have substantial data showing the plant is operating at 60 percent of capacity. In other words, Respondent has no defense to this Complaint. Respondent has gone to great lengths to try to prevent the Commission from ruling on the merits of this action, even so far as to misconstrue legal precedent. The Commission should not reward Aqua for its recalcitrance and bad business decisions. Mr. Storey has spent large sums of money doing studies which Aqua Missouri should

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those offers.

have done (and still has not done), and the parties have taken up a significant amount of the Commission's time to get a ruling on the merits. The Commission should rule on the merits, and should grant Complainants' request for an additional 32 hookups and find that Aqua Missouri's refusal was wrongful, intentional, and without just cause or excuse.

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CERTIFICATE OF MAILING

The undersigned certifies that an exact copy of the above and foregoing was e-mailed on February ____, 2008, to:

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