BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

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

RESPONDENT'S BRIEF

COMES NOW Respondent, Aqua Missouri, Inc., by and through counsel, and for its Respondent's Brief states as follows:

The Complaint filed by Complainants presents no justiciable action before this Commission. Simply put, there is no jurisdiction for this Commission to enter any relief for Complainants based upon the Complaint which has been filed before the Commission in this matter. A review must be conducted by the Commission to determine jurisdiction, as a threshold issue, prior to taking other action. Being that there is no jurisdiction, the Complaint should be dismissed.

In addition to this Commission lacking jurisdiction to address the issues raised in the Complaint, the issues raised in the Complaint do not present any violation of law, rule or regulation, or of Aqua Missouri's Tariff, or Order of the Commission. The facts of this case and the Tariff under which Aqua Missouri operates, clearly demonstrate there is no violation and thus no relief for Complainants should be entered in this matter. For these reasons, more fully outlined herein, this

Commission should dismiss the Complaint and enter such other relief for Respondent as this Commission deems appropriate.

STATEMENT OF FACTS

Quail Valley subdivision began in 1983 (First Amended Complaint, ¶ 4a; Tr: 47, lines 12-14). The original agreement was that Mr. Storey would build 40 homes with septic tanks before the wastewater facility would be installed (Tr: 22, lines 16-22; Tr: 50, lines 10-15)

On May 27, 1992, E.A. Mueller, Mr. Storey's engineer, signed and sealed the Design Criteria Summary for Quail Valley Subdivision. Using the Design Criteria of the Department of Natural Resources in 10 CSR 20-8.010, and the fact that each home had garbage grinders, Mueller concluded the system's capacity was 80 homes. (Exh. A; Exh. 25; Tr: 96, lines 1-15; Tr: 97, lines 2-19). [1] Accordingly, the original DNR permit dated 1992-1993 allows for a "wastewater treatment facility...to treat a population of 296" to which Mr. Storey had no objection (Tr: 93, lines 13-22, Tr: 94 lines 8-19). In a letter dated September 1, 2004 the Department of Natural Resources confirmed that the capacity based on design guidelines of the Quail Valley wastewater treatment facility without garbage grinders is 254 person or 69 homes. (Exh. 32).

In 1993, the waste water facility plant began being operated by Capital Utilities, Inc. the predecessor to Aqua Missouri. (First Amended Complaint, ¶ 4c). On September 28, 1993 Capital Utilities, Inc. sent Mr. Storey a letter informing him that "[t]he facility is designed to accommodate the wastewater loading generated by the complete development of your subdivision" (Exh. 3). The original (1992) design of the subdivision and its waste facility was for 80 homes (Tr: 33, lines 4-9).

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[1] This is the only signed and sealed report of an engineer submitted by Mr. Storey at any time related to Quail Valley and its plant capacity.

At the time Storey received the letter from Capital Utilities, the original plotted development did not show 120 lots. (Tr: 106, lines. 20-22). In fact, 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, October 30, 2007 (Tr: 515, lines 22-25).

In 2003, Aqua Missouri acquired ownership of the sewer system by Warranty Deed. (First Amended Complaint, ¶ 4d). Aqua Missouri is a private sewer company that is regulated by the Missouri Public Service Commission. (Exh. 32). Aqua Missouri is responsible for any risks associated with a possible permit violation. (Tr: 580, lines 8-11).

According to the permit issued by the Department of Natural Resources, the Quail Valley facility's design daily flow is 22,000 gallons per day (Exh. 8; Tr: 488, lines 13-14). As evidenced by the letter from the Department of Natural Resources on September 1, 2004 (Exh. 32), the Quail Valley waste water treatment facility is governed by 10 CSR 20-8.020, as its daily flow is not in excess of 22,500 gallons per day. This rule reflects the *minimum* requirements of the Missouri Department of Natural Resources. (Exh. A, 10 CSR 20-8.020).

Currently, 78 homes have been connected (Tr: 32, lines 17-18). Aqua Missouri had offered to allow ten additional connections to the treatment facility in settlement of the matter (Tr: 33, lines 14-15). However, Mr. Storey instead now requests more than triple that number: 32 additional hookups (Tr: 74, 20-21). This request comes when Mr. Storey has never applied to extend the sewer mains for the areas for which he now requests service (Tr: 81, lines 9-14).

Various owners and builders in the Quail Valley subdivision have applied for service several times since its inception, and every application has been approved. (Exh. 5; Tr: 35, lines 17-19; Tr: 77, 22-23). On August 1, 2003 an Application for Service was applied for and granted (Exh. 5). On

October 14, 2003 an Application for Service was applied for and granted (Exh. 5). On June 11, 2003 an Application for Service was applied for and granted. (Exh. 5).

Mr. Storey, the Complainant, himself filed an application for service on November 11, 2005. (Exh. 5). That application was granted. (Exh. 5; Tr: 524, lines 10-12). Since Aqua Missouri informed Mr. Storey that the facility was designed for 80 lots (Tr: 54, lines 7-8), he has not requested nor applied for additional hook ups, in his own words, "he stopped doing anything" (Tr: 56, line 14). Mr. Storey has never applied for and been denied a request for an additional hookup. (Tr: 105, lines 21-25; Tr: 521, lines 17-24; Tr: 524, lines 10-12).

Although a letter was sent by Mr. Haug reporting findings and making various requests, Mr. Storey is unsure whether he considers Haug's letter to be an application (Tr: 62, lines 18-20). [2] Having previously filed a proper request and application, it should have been clear to Mr. Storey that a letter by neither an owner or a builder, nor someone with clear authority to make such request or application was inappropriate and ineffective. As far as Aqua Missouri is aware, Mr. Storey has completed no steps in the process of requesting and receiving additional hookups for the hookups at issue. (Tr: 491, lines 3-9). Mr. Storey confirmed that he did not fill out an application, saying that he thought it would be "futile." (Tr: 126, lines 21-22).

Storey did however, look into expanding the facility (Tr: 511, lines 3-21; Tr: 512, lines 2-22). In November 2004, Storey received a letter regarding expansion of the facility (Tr: 90, lines 2-21). In March 2005, Storey received another letter addressing expansion (Tr: 87, lines 8-12). In September 2005, the Department of Natural Resources told Storey that he needed to expand the

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[2] At no time did Mr. Haug seal any reports with his engineer seal. Under 20 CSR 2030-3.060(4), any unsealed report is deemed "incomplete" or "preliminary."

facility (Tr: 85, line 16; Tr: 91, lines 5-9). Mr. Storey's exploration of expansion options seems reasonable given that it is the developer's responsibility to pay for excess capacity cause by his lots under the tariff. (Tr: 327, lines 21-23).

On more than one occasion, the Department of Natural Resources has documented its concerns about the maintenance of the septic tanks -- primarily due to the fact that "[t]he septic tanks are the responsibility of each of the homeowners on the system." (Exh. 31 & Exh. 32; Tr: 528, lines 3-5). In May of 2005, the Department noted it had "reservations about the homeowner's association maintaining the septic tanks over the long term." (Exh. 31).

These reservations are explained by a September 2004 Department of Natural Resources letter which reads: "[t]he percent removal of BOD also varies on the operations and maintenance the tank receives...BOD reduction credit for septic tanks is given when a valid continuing authority oversees the septic tank operations and maintenance for all the septic tanks at the owners lots, or when an appropriate sized septic tank is located at the plant site and is operated and maintained by a valid continuing authority."[3] (Exh.32).

In response, on May 1, 2006, the Homeowners Association passed an Addendum to the Declaration of Covenants and Restrictions regarding maintenance of septic tanks. (Exh. 6). However, the Homeowner's Association can rescind an Addendum to the Declaration of Covenants

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[3] 10 CSR 20-8.020 refers to 10 CSR 20-6.010(3) to define "continuing authorities." Under 10 CSR 20-6.010(3), a homeowners association can only be a continuing authority if no superior entity exists (a PSC regulated utility being a superior entity) and if one exists, that a waiver was filed by that entity (none has been executed). If this requirement is met, then the homeowners association must show that it (1) owns the treatment facility and sewers; and (2) has covenants regulating use of the facility, can levy assessments, can convey facility to a superior entity and all members must connect to the facility. None of these requirements are met by the Quail Valley Homeowners Association and thus under DNR's letter it cannot be the continuing authority.

and Restrictions (Tr: 71, lines 21-25; Tr: 72, lines 1-12). Furthermore, Aqua Missouri, although ultimately responsible for any issues that arise from a poorly maintained septic tank, has no authority to enforce this bylaw. (Tr: 529, 9-11).

As recent as May 2006, the Department of Natural Resources noted that "[f]or additional houses to be considered for connection, adequate primary treatment must be provided to reduce the organic loading to the treatment plant." (Exh. 31). This is consistent with the report of Randy Clarkson in September of 2007. The report concluded that "[t]he existing wastewater collections system is over taxed at present. As a result it would not be advisable to connect new sewers serving additional residential areas to this system. It is a gamble to assume the reserve capacity exists in the WWTP for additional flow." (Exh. 35).

It is the position of Aqua Missouri that based on design standards, there is capacity for ten more hookups, assuming monitoring after each connection shows no problems in treatment. Although Complainant disputes the use of the design criteria, Complainant's expert, Mr. Haug admits that DNR uses the standard design criteria, that the 3.7 population equivalent is the number given by Department of Natural Resources, and has been in use for some time. (Tr: 190, lines 12-18). Further, Mr. Haug testified that when using that criteria "a staff engineer at DNR would say the plant doesn't have any more capacity." (Tr: 146, lines 18-22). Randy Clarkson, a former employee of DNR, testified that when the Department of Natural Resources does evaluation of plant capacity through the permitting process, it will use the 3.7 person residential equivalent unless they are aware of any signed and sealed documents from an engineer reflecting a lower number is justified (Tr: 379, lines 9-13). And, no such documents exist. (Tr: 379, lines 14-18).

It is not surprising that the Department of Natural Resources has confirmed (as recently as May 5, 2006) that the Department "would likely agree with Aqua Missouri's analysis of the capacity of the treatment plant, as they are ultimately responsible for the treatment plant and the water quality of the effluent therefrom." (Exh. 31).

I.

COMPLAINT FAILS TO INVOKE JURISDICTION OF THE COMMISSION

In order for the Commission to make any finding, ruling or review based upon a Complaint, the Complaint itself must raise and invoke the proper jurisdiction of the Public Service Commission. The general complaint statute, under which the Public Service Commission may receive complaints, is Section 386.390, RSMo. This provision states as follows:

> Complaint may be made by the commission of its own motion, or by the public counsel or by any corporation or person...by petition or complaint in writing, setting forth any act or thing done or admitted to be done by any corporation, person or public utility, including any rule, regulation or charge heretofore established or fixed by or for any corporation, person or public utility, in violation or claim to be in violation of any provision of law or of any rule or order or decision of the commission... .

Section 386.390.1, RSMo 2000 (emphasis supplied). Based upon the plain language of the complaint statute under which this Commission is constrained to operate, the Complaint must specifically reference a violation of law or rule of the Commission, or order or decision of the Commission. In the absence of such an allegation, this Commission has no jurisdiction under Section 386.390. It is not sufficient to have raised in evidence or in argument, as the Staff of the Public Service Commission has done, new issues not raised in the Complaint. The review is what is raised in the Complaint and nothing else. As the Western District noted:

> Appellants would have this court rule that because complaints filed with the commission are to be liberally construed, any issue on which there was pre-filed or hearing testimony must be addressed by the commission in its order regardless of what was set forth in the complaint. We do not believe this is a reasonable interpretation of the law as it currently stands. Appellants overlook the fact that the *complaint* must fairly present an issue for determination which falls within the jurisdiction of the commission. *State ex rel. St. Louis - San Francisco Railway Company,* 53 S.W.2d at 871. Therefore, the question is whether appellants' complaints fairly present an issue for determination.

Friendship Village of South County v. Public Service Commission of Missouri, 907 S.W.2d 339, 345-346 (Mo. App. W.D. 1995) (emphasis in original). The Court in *Friendship Village* held that the failure of the complaints to raise a question of reclassification, removed from the Commission the jurisdiction to review reclassification in its order. *Id.* at 346. The Western District reaffirmed its position again four years later in *Deaconness Manor Association v. Public Service Commission*, 994 S.W.2d 602 (Mo. App. W.D. 1999) stating:

> This court stated "appellants overlooked the fact that the *complaint* must fairly present an issue for determination which falls within the jurisdiction of the commission." *Id.* at 346. (Emphasis in original). We therefore focus our inquiry on the complaint itself.

Id. at 612. The Western District Court of Appeals has uniformly and consistently held that to determine jurisdiction of this Commission, the complaint itself must be reviewed, not the facts, not the arguments presented post complaint, but the complaint itself.

The Amended Complaint filed by Complainants, the document which forms the basis for this case, was filed on June 11, 2007 by counsel for Complainants.[4] That Complaint contains a number

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[4] Complainants had previously filed a Complaint and then sought leave to file an Amended Complaint at a later date. The allegations, as are relevant to jurisdiction, have no variance between the original Complaint and the Amended Complaint.

of factual allegations, none of which are relevant to the determination of jurisdiction by the Commission. The final two numbered paragraphs, number 5 and 6, contain the fundamental complaints of the Complainants. These paragraphs state as follows:

> 5. Refusal of Respondent to grant the request of Complainant for additional hookups is arbitrary, capricious and totally unsupported by any objective data.
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> 6. Furthermore, Aqua Missouri, Inc., has refused to expand the existing wastewater treatment facility if, in fact, it believes that the existing facility does not have the capacity to handle the additional proposed hookups when it is the Respondent's responsibility to do so.

Amended Complaint, page 3.

The prayer clause of the Complaint then follows which states:

> Wherefore, Complainant now requests the following relief: An order from the Missouri Public Service Commission ordering Aqua Missouri, Inc., to allow hookups for an additional thirty-two (32) lots so that Quail Valley Lake Subdivision can be completely developed or, in the alternative, to expand the wastewater treatment facility to handle the additional thirty-two (32) lots that are platted in the subdivision.

Amended Complaint, page 3.

Under the provisions of Section 386.390, a complaint on its face must contain an allegation of a violation of a statute, rule or regulation, or order or decision of this Commission. The language contained and noted above (and for that matter all other language in the Complaint) contains no allegation of any such sort.

Complainants do not allege a violation of any statute. There is no statute that reflects a violation for the allegations contained in paragraph 5 or paragraph 6 of the Amended Complaint. For that matter, any other paragraph in the Complaint does not rise to allege any allegation of a

statute. The Complaint is utterly silent to any statutory citation.

Similarly, there is no allegation contained in paragraphs 5 or 6, or any other provision of the Complaint, that alleges any rule or regulation of the Public Service Commission, including Respondent's Tariff, which was properly adopted by the Commission, was violated. The allegations contained in paragraphs 5 and 6 allege no violation whatsoever. Finally, there is no order or decision of the Commission which the allegations contained in the Complaint generate a violation thereof.

As the Western District Court of Appeals noted the complaint itself must allege a violation. See e.g., *Friendship Village, supra.* It is not sufficient that at a later date another party may assert some type of violation.

Moreover, the Complaint itself at no point references **any** statute, rule or regulation, including the Tariff of Respondent, or any order or decision of the Commission on its face. The absence of such allegation mandates that this Commission dismiss the Complaint for lack of jurisdiction.[5]

The Western District Court of Appeals referenced this Commission's Order in a similar situation:

> Since Ozark (complainant) has not alleged facts indicating a substantial change in circumstances (a requisite under a alternative jurisdictional method, section 394.312.6), and has not alleged a violation of law, rule or commission order, the commission is of the opinion that its complaint should be dismissed.

State ex rel. Ozark Border Electric Cooperative v. Public Service Commission, 924 S.W.2d 597, 600

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[5] Jurisdiction is an issue that may be raised by any party at any time or *sua sponte* by this Commission. That it has not been raised in a formal pleading is irrelevant to this Commission's analysis. In the absence of jurisdiction, this Commission cannot take any action on the Complaint.

(Mo. App. W.D. 1996). The Court continued to affirm the Commission's determination that under Section 386.390, since no violation of law, rule or Commission order was alleged there was no jurisdiction pursuant to this statutory provision. *Id.*

The Staff asserts that the Commission has jurisdiction to review and rule on the Complaint based upon the "safe and adequate" service concept. Staff's position is neither supported by the cases it cites nor does it have any application based upon the Complaint filed in this case.

First, there is no question, in the Complaint (or anywhere else for that matter), that the service in Quail Valley is unsafe. Staff does not even address the safety issue; because there is no issue: the service at Quail Valley is safe. Presumably the Staff is focusing on the adequacy of the service at Quail Valley.

As noted above, when looking at jurisdiction, the sole point of inquiry is the Complaint itself. *Deaconness Manor*, 994 S.W.2d at 612. The Complaint makes NO reference to "safe and adequate service." Moreover, the Complaint never references Section 393.130.1, RSMo., the statute from which the "safe and adequate" concept arises from. Even the Staff should support the concept that a Complaint must follow the statutory prerequisites as found in Section 386.390, RSMo. Instead, the Staff looks to their own supposed "gravamen" of the Complaint and conclude, with no language to support the conclusion, that:

> Surely the Complainant has invoked the jurisdiction of the commission by alleging that Respondent Aqua has failed and refused to provide safe and adequate service to the entire Quail Valley Lake Subdivision, which Aqua has undertaken to serve, in violation of Section 393.130.1.

Staff's Initial Brief, page 4. However, there is no such allegation contained in the Complaint itself. Staff's position represents what they would like to see in a Complaint; however, that desire does not

transform the actual allegations and words contained in the Complaint.[6] There can be no discrimination under the facts of this case and in the absence of such discrimination, under the case law cited by Staff and noted herein, there is no violation of the safe and adequate requirement.

II.

TARIFF PROVISIONS REQUIRE APPLICATION FOR JURISDICTION

A review of Aqua Missouri's Tariff on file with this Commission, to which this Commission takes notice and which was also entered as an exhibit during hearing, reflects that not one allegation of fact, if deemed true, contained in Complainants' Complaint represents a violation of any language contained in the Tariff of Aqua Missouri. The Tariff is the document under which Aqua Missouri operates in the State of Missouri. That Tariff adopted by the Public Service Commission has the force and effect of law. Nothing in the Tariff provides that it must pre-approve "requests" by third parties for multiple additional lots owned by another party to be connected to an existing sewer system. Assuming such a request was made, a fact which is denied by Aqua Missouri, the appropriate inquiry from this Commission is does such a request present a violation of the Tariff?

Only if there is a violation of the Tariff alleged, can there be jurisdiction in this Commission. A review of the Tariff reflects that the only way a request for connection or service may be made under the Tariff is through the filing of an Application or the execution of a Developer Agreement. See Tariff Rule 12, Sheet SRR 39, et al. The provisions of the Tariff reflect that an applicant must

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[6] The paragraphs cited to by Staff do not reflect any allegations that rise to the level of a Complaint under Section 386.390. The Complaint seeks to expand the scope of service beyond that which Aqua Missouri is obligated to provide. The design for the treatment is for 80 homes and the seeking of 110 homes is far beyond the design and thus the responsibility of Aqua. When no application for service has been submitted and no developers agreement has been executed; there can be no refusal to extend service. See, point 3, infra.

file an Application for Service or must execute a Developer Agreement.

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 and mandates an application for service. Neither was completed or submitted by Complainant.

In the absence of either document being executed, there can be no violation of the Tariff with respect to the extension of service by Aqua Missouri. A complaint proceeding is a statutory procedure and not a common law procedure; accordingly all the provisions of law must be strictly complied with in order to maintain an action. Accordingly, there can be no jurisdiction of this Commission to hear the Complaint presented. Complainant cites to totally unrelated cases for its proposition that filing an application is a useless act. *State v. Long*, 140 S.W.3d 27 (Mo. banc 2004) is Complainant's primary case. *Long* is a criminal rape case in which testimony and impeachment of witnesses was in question. *Id.* at 32. The Court in a footnote addressed impeachment by cross-examination versus separate extrinsic evidence and held that cross is not required due to the trial court's relevancy determination. *Id.*

Manly v. Ryan, 126 S.W.2d 909 (Mo. App. 1939), related to a question of filing an action in probate court regarding ownership of several rings. *Id.* at 914-915. The Court held that since the ownership of the rings had been adjudicated, filing a useless motion with no relief, other than possible contempt of court, would be available. *Id.* at 915.

None of these cases address the situation herein. In administrative actions, such as under a tariff, procedural steps must be followed under the doctrine of exhaustion of remedies. The Supreme Court has held that there is no jurisdiction if a party does not first exhaust all remedies. See, *Local Union No. 124 v. Pendergast*, 891 S.W.2d 417 (Mo. banc 1995)(requiring a petition to the Board of Equalization be filed prior to any court action).

The Courts of Appeal have been even more specific that exhaustion of remedies is required even when the outcome is predetermined.

> The exhaustion rule has been held to be applicable, even though the litigant may believe that his petition to the administrative agency will be denied and consequently his attempt would be futile. *Alexander v. State Personnel Board, supra*; *Mallory Coal Co. v. National Bituminous Coal Commission*, 69 App.D.C. 166, 99 F.2d 399; *Red River Broadcasting Co., Inc. v. Federal Communications Commission* (Baxter, Intervener), 69 App.D.C. 1, 98 F.2d 282.

State ex rel. Scott v. Scearce, 303 S.W.2d 175, 180 (Mo. App. 1957). Futility is not a justification in administrative proceedings, such as this, to fail to take a jurisdictional action. This doctrine extends to actions of entities governed by law, such as ERISA plans. See e.g., *Paric Corp. v. Murphy*, 90 S.W.2d 285 (Mo. App. E.D. 1995). In *Paric*, the Court of Appeals affirmed a trial court's decision precluding recovery where forms were not filed. *Id.* at 288. The Court stated that futility:

> ...does not and cannot excuse a participant from filing forms required by ERISA and the Plan to obtain a particular distribution; nor does the defense allow a court to grant relief which is predicated upon the filing of those forms.

Id. at 289.

No Missouri Court has found that futility has waived the exhaustion of remedies required.[7]

For these reasons, this Commission has no jurisdiction to hear the Complaint and accordingly this Complaint should be dismissed.

III.

SAFE AND ADEQUATE SERVICE IS PROVIDED, THUS NO VIOLATION

As noted above, when looking at jurisdiction, the sole point of inquiry is the Complaint itself. *Deaconness Manor*, 994 S.W.2d at 612. The Complaint makes NO reference to "safe and adequate service." Moreover, the Complaint never references Section 393.130.1, RSMo., the statute from which the "safe and adequate" concept arises from. Even the Staff should support the concept that a Complaint must follow the statutory prerequisites as found in Section 386.390, RSMo. Instead, the Staff looks to their own supposed "gravamen" of the Complaint and conclude, with no language to support the conclusion, that:

> Surely the Complainant has invoked the jurisdiction of the commission by alleging that Respondent Aqua has failed and refused to provide safe and adequate service to the entire Quail Valley Lake Subdivision, which Aqua has undertaken to serve, in violation of Section 393.130.1.

Staff's Initial Brief, page 4. However, there is no such allegation contained in the Complaint itself. Staff's position represents what they would like to see in a Complaint; however, that desire does not

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[7] In Missouri, the only time futility has been accepted as a reason to waive the exhaustion of remedies doctrine is in the event of an immediate danger or imminent harm that there is no other alternative. See e.g., *State v. Baker*, 598 S.W.2d 540 (Mo. App. W.D. 1980); *State v. Daniels*, 641 S.W.2d 488 (Mo. App. S.D. 1982); and *State v. Simmons*, 861 S.W.2d 128 (Mo. App. E.D. 1993). No such immediate danger or imminent harm has been alleged in this case. Accordingly, the Complaint in this case should be dismissed for lack of jurisdiction.

transform the actual allegations and words contained in the Complaint.[8]

The safe and adequate concept has been interpreted much more narrowly than Staff suggests. The Western District Court of Appeals has reviewed and interpreted this provision. In *State ex rel. Harline v. Public Service Commission*, 343 S.W.2d 177 (Mo. App. 1960), the Court adopted its previous statement in *State ex rel. Federal Reserve Bank v. Public Service Commission*, 191 S.W.2d 307 (Mo. App. 1945) that a utility is:

> obliged to serve on reasonable terms, all those who desire the service that it renders without unreasonable discrimination.

State ex rel Federal Reserve Bank v. Public Service Commission, 191 S.W.2d 307, 313 (Mo. App. 1945). See also, *State ex rel. Harline v. Public Service Commission*, 343 S.W.2d 177, 181 (Mo. App. 1960). 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 any expansion is NOT "reasonable terms." Following the tariff cannot, by definition, be unreasonable.

In *State ex rel. Missouri Power and Light Company v. Public Service Commission*, 669 S.W.2d 941 (Mo. App. W.D. 1984), the Court reaffirmed that discrimination (when looking at the safe and adequate analysis) only occurs if the discrimination is within a class of customers. *Id.* at 946. Under the tariff of Aqua Missouri, individuals are treated as a separate class from Developers. The Complainant is a Developer and he is thus expected to comply with the tariff terms and reasonable terms when seeking to expand his development beyond the original scope of the treatment

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[8] The paragraphs cited to by Staff do not reflect any allegations that rise to the level of a Complaint under Section 386.390. The Complaint seeks to expand the scope of service beyond that which Aqua Missouri is obligated to provide. The design for the treatment is for 80 homes and the seeking of 110 homes is far beyond the design and thus the responsibility of Aqua. When no application for service has been submitted and no developers agreement has been executed; there can be no refusal to extend service. See, point 3, infra.

facility. There can be no discrimination under the facts of this case and in the absence of such discrimination, under the case law cited by Staff and noted herein, there is no violation of the safe and adequate requirement.

IV.

ISSUES PRESENTED

(1) Is the Quail Valley Waste Water Treatment Facility capable of handling an additional 32 homes? 1(a) If not, how many more can it handle?

The Quail Valley Wastewater Treatment Facility is not capable of handling an additional 32 homes. It may, however, be capable of handling up to 10 additional homes with adequate monitoring to insure treatment standards are maintained.

On May 27 1992, E.A. Mueller signed and sealed the Design Criteria Summary for Quail Valley Subdivision (Exh. 25). Mueller concluded the system's capacity was 80 homes. (Exh. A; Exh. 25; Tr: 96, lines 1-15; Tr: 97, lines 2-19). Mueller's report is the conclusive evidence of the original design and capacity of the development and the treatment facility. Mr. Storey's testimony about what Mueller meant cannot be used to impeach the written and sealed document from Mr. Mueller.

The documents originally filed only show a 80 lot development with a treatment facility for those 80 lots. (Exh. 25). The original developer agreement signed by Mr. Storey only shows 80 lots. (Exh. 28). The extra land is not shown as lots but instead as " future development." Id. Mr. Storey admitted the same during cross-examination:

Q. Well, let's take a look at this comment about all of the lots in your development. The original platted development does not show 120 lots, does it?

A. No.

(Tr. 22, lines 18-22). Mr. Storey then continued to testify that at the time the plant was dedicated to Aqua Missouri there was no indicia of development in the "future development" area.

Q. Okay. But the original plat back in 1992 when that sewer extension agreement was filed did not show platting of the future development land, did it?

A. It says on here future development on this plat.

Q. And does it show platted lots in that area?

A. No, it doesn't show the platted on that.

Q. And did that area have sewer lines running on it?

A. No it didn't.

Q. Does it have easements already laid out in there for sewer lines?

A. Not to my knowledge.

Q. So at the time that you received your letter from – at that time it was Capital Utilities, I believe, saying that it would treat your entire development. Do you recall that letter?

A. Yes.

Q. I think its Exhibit 3 in front of you.

A. Uh-huh. Yes.

Q. That entire future development area didn't show any lots or sewer lines, did it?

A. No. No, it didn't.

(Tr. 108, line 3- Tr. 109, line 3). Clearly there was never any indication that a huge number of additional lots would be added on to the treatment facility. At the time the plant was accepted, the entire development was 80 lots.

Mr. Storey's testimony and Mr. Mueller's report demonstrate that capacity has always been 80 homes. Mr. Mueller's report is the only, and the unrefuted, engineer's report on the capacity of the facility. For all his letters, comments, etc., Mr. Haug, a professional engineer, has NEVER issued a report contradicting Mueller's sealed report. Under the rules applicable to professional engineers, Mueller's signed and sealed report stands superior to everything produced by Mr. Haug.

The Department of Natural Resources has confirmed that without the septic tanks, the capacity would be lower, at 254 persons or 69 homes. (Exh. 32). Because the septic tanks are primarily under the control of each individual homeowner (Exh. 31 & Exh. 32; Tr: 528, lines 3-5) and Aqua Missouri has no authority to enforce the maintenance of such septic tanks (Tr: 529, lines 9-11) a more conservative estimate of the capacity of the Wastewater Treatment Facility such as that of the Department of Natural Resources is appropriate.

It is for this reason that the original DNR permit dated 1992-1993 allows for a "wastewater treatment facility...to treat a population of 296" (i.e. 80 homes) to which Mr. Storey had no objection (Tr: 93, lines 13-22, Tr: 94 lines 8-19).

According to the permit issued by the Department of Natural Resources, the Quail Valley facility's design daily flow is 22,000 gallons per day (Exh. 8; Tr: 488, lines 13-14). As evidenced by the letter from the Department of Natural Resources on September 1, 2004 (Exh. 32), the Quail Valley waste water treatment facility is governed by 10 CSR 20-8.020, as its daily flow is not in excess of 22,500 gallons per day. This rule reflects the *minimum* requirements of the Missouri Department of Natural Resources. (Exh. A).

Moreover, the Design criteria should be used because it focuses on the long term and not on the immediacy. Even Complainants witness, Mr. Haug testified that if the population at Quail Valley

changes, his numbers and his recommendation would change (Tr:161, lines 21-25). This is exactly the reason that design criteria should be used rather than actual data. While there was some testimony that national data now shows there are fewer people per household now (even less than 3.7) but there is also data to suggest that perhaps the population is swinging in the other direction. See e.g., U.S. Experiences Baby Boomlet in 2006, L.A. Times (January 16, 2007) (noting that births are at a 45 year high and higher than other Western nations.) This is just one more reason why the use of the design criteria is preferable because it is a long-term conservative estimate.

When the regulation in question requires the application of the design criteria unless there is "substantial justification" otherwise it is referring more to something a party would be able to prove would always be truth (a case where perhaps one could prove that it is a gated community/area where only retired couples/only students would allowed to live under restrictions-- so that 3.7 would ALWAYS be inappropriate). Just a showing that the population per home is less than 3.7 at this given time is insufficient to justify using a different number. The use of the current population only presents problems down the line as populations shift. Unfortunately, once the connections are added, there is no recourse for the Company.

As a result, the burden falls unfairly, unreasonably, and unjustly upon the Company. If the Commission sustains the Complaint and grants the requested relief, the practical result is that anytime any developer, or owner or builder can prove through a study that the actual flow is at less than capacity, they can bring an action to force a utility to provide service for them. Here a developer is asking for 32 hook ups (a 40% increase over the design capacity). In areas where the service area is much larger perhaps 2000 hookups might be requested. Where does it stop -- if a developer can prove through a study that the waste facility can squeeze out 5 more hook ups or even

1 more...is it appropriate to allow an action to force them to do so? Obviously this pattern will create huge burdens on the Commission and on the DNR. This is another reason why there is the design criteria: so that the Commission and the DNR won't have to go through case by case and prove the capacity of each facility. A capacity which, as noted above, is subject to change depending upon home sales or population trends.[9]

(2) If not, who is responsible for expanding the plant?

The Developer, Complainant Mr. Storey, is responsible for expanding the plant.

Mr. Storey is aware that he is responsible for expanding the plant and thus has communicated with several individuals in the past regarding facility expansion. (Tr: 511, lines 3-21; Tr: 512, lines 2-22). In November 2004, Storey received a letter regarding expansion of the facility (Tr: 90, lines 2-21). In March 2005, Storey received another letter addressing expansion (Tr: 87, lines 8-12). In September 2005, the Department of Natural Resources told Storey that he needed to expand the facility (Tr: 85, line 16; Tr: 91, lines 5-9). Mr. Storey's exploration of expansion options seems reasonable given that it is the developer's responsibility to pay for excess capacity caused by his lots under the tariff. (Tr: 327, lines 21-23). See Tariff, sheets SRR 43-45 and SE 6-10.

The tariff is clear, that a developer must pay to expand a plant beyond its design capacity. Mr. Storey seeks to evade his responsibility under the tariff and he should not be so allowed. The

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[9] The logical extension shows the mischief that Complainants position advocates. A developer could build an undersized plant and dedicate it to a utility. Then build homes and sell to older (couples and singles only). Once the design capacity is reached, the developer could petition for additional connections, since the current population is below actual flow maximums. Once the connections are approved, larger homes could be built for larger families. This would increase the average population. But at some point the older owners would sell to younger owners compounding the problem. One day the system would be overtaxed and the utility would be responsible for the costs of expansion of the plant. This scenario is enough to make a utility seriously question the efficacy of doing business in Missouri.

Commission should hold that he must pay for the additional capacity if he wants to add any new connections to the system in Quail Valley. As the Commission approved, by adopting the existing tariff, new construction must pay for new capacity. There is no question that the 32 lots requested are new lots that were not platted in the subdivision when the plant was built and accepted by Aqua Missouri's predecessor.

Even the Department of Natural Resources has stated, in writing, that Mr. Storey is responsible for the expansion of the plant. (Exh. 21). In that letter, Keith Forck, from DNR, stated that to hook up the new lots, the developer would have to expand the plant. Id.

(3) Did Complainants apply for additional hookups and, if so, did Respondent deny such application?

Complainants have not applied for additional hookups and Aqua Missouri has not denied any applications.

Mr. Storey, the Complainant, personally filed an application for service on November 11, 2005. (Exh. 5). The application was granted. (Exh. 5; Tr: 524, lines 10-12). Since Aqua Missouri informed Mr. Storey that the facility was designed to for 80 lots (Tr: 54, lines 7-8), he has not requested nor applied for additional hook ups, in his own words, "he stopped doing anything" (Tr: 56, line 14). Mr. Storey has never applied for and been denied a request for an additional hookup. (Tr: 105, lines 21-25; Tr: 521, lines 17-24; Tr: 524, lines 10-12).

Although a letter was sent by Mr. Haug reporting findings and making various requests, Mr. Storey is unsure whether he considers Haug's letter to be an application (Tr: 62, lines 18-20). Having previously filed a proper request and application, it should have been clear to Mr. Storey that a letter by neither an owner or a builder, nor someone with clear authority to make such request or application was inappropriate and ineffective. As far as Aqua Missouri is aware, Mr. Storey has

completed no steps in the process of requesting and receiving additional hookups for the hookups at issue. (Tr: 491, lines 3-9). Mr. Storey testimony confirms that he did not fill out an application, when he said that he thought any attempt would be "futile." (Tr: 126, lines 21-22).

Staff argues that following the tariff is a "meaningless" act. It is an audacious argument that a party should not have to comply with the terms of the tariff. A tariff has the force and effect of law. All provisions contained in the tariff must be given meaning and any procedures established therein must be given deference by this Commission. The tariff mandates that an application for service be filled out and submitted to Aqua Missouri before any decision on service can be made. Moreover, the form for the application for service is included in the tariff itself. A tariff and a form adopted by this Commission. There is no question that sewer lines will have to be extended to allow service. Yet no application for extension of sewer lines has been completed either.

Following the procedural requirements of the tariff are mandatory actions that must complied with or no denial, as a matter of law, can exist. Even the issue presented reflects all the parties understanding that an application is required to be submitted. (The issue, stipulated to by all parties, is "Did Complainants Apply for Additional Hookups?") The term apply must have meaning: that is the filing of an application. That application is required by the tariff. See, Tariff, Rule 4 (page SRR 14).

(4) If Complainants did apply for additional hookups, how many were applied for?

Complainants have not applied for additional hookups but are now requesting an additional 32 hookups.

See Discussion of Issue 3.

(5) If Respondent did deny such application, was Respondent's denial of additional hookups wrongful, intentional, and without just cause or excuse?

Because respondents have not denied any application, any claim that a denial was wrongful, intentional and without just cause should be rejected.

Complainants have not applied for any additional hookups and Aqua Missouri has not denied any applications (*See Discussion of Issue 3*).

Complainants make much of the hiring date of Respondent's expert. What Complainants fail to acknowledge is that up until the filing of the Complaint, no one had proposed 32 connections. See e.g. Exhs. 12, 22 and 23 (letters of Haug, Kregstad and Murdan, respectively). In fact, until Mr. Storey bartered with Mr. Haug for his services, every engineer retained by Storey looked at plant expansion. (Tr: 87, line 5; Tr: 88, line 23; Tr: 89, line 22 and Tr: 90, line 3). Even in correspondence with DNR, Storey was discussing expansion of the plant. (Tr: 91, lines 5-9).

Clearly, Aqua Missouri was justified in waiting to retain yet another engineer when Mr. Storey's engineers were discussing expansion and Aqua Missouri was cooperating with them. (Tr: 509, line 2; and Tr: 511, line 21). Additionally, Aqua Missouri was attempting to reach a settlement with Storey from the point at which Haug sent his letter, up to and including the date of the filing of the Complaint. (Tr: 570, lines 3-8). The volume of correspondence was large leading up to the filing of the Complaint, all in an attempt to resolve this matter. (Tr: 580, line 17; and Tr: 581, line 15).

The Complaint seeks expansion above and beyond any request, reasonable or not, made prior to its filing. Hiring an engineer at that point not only makes sense, but is eminently a reasonable use of resources.

None of the actions of Aqua Missouri should be considered wrongful, intentional or without just cause as Aqua Missouri relied in good faith on the rules promulgated by the Department of Natural Resources. (*See Discussion of Issue 1*).

(6) What was the original designed capacity of the Waste Water Treatment Facility?

The original designed capacity of the wastewater treatment facility is 80 Homes.

On May 27 1992, E.A. Mueller signed and sealed the Design Criteria Summary for Quail Valley Subdivision. Using the Design Criteria of the Department of Natural Resources in 10 CSR 20-8.010 he concluded the system's capacity was 80 homes. (Exh. A; Exh. 25; Tr: 96, lines 1-15; Tr: 97, lines 2-19).

Complainant points to a September 28, 1993 letter sent by Capital Utilities, Inc. (Aqua Missouri's predecessor) informing him that "[t]he facility is designed to accommodate the wastewater loading generated by the complete development of your subdivision" (Exh. 3). The original (1992) design of the subdivision and its waste facility was for 80 homes (Tr: 33, lines 4-9). At the time he received the letter from Capital Utilities, the original plotted development did not show 120 lots. (Tr: 106, lines. 20-22). In fact, 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, October 30, 2007 (Tr: 515, lines 22-25).

V.

CONCLUSION

The Complaint filed with this Commission does not invoke the jurisdiction of the Commission. Under Section 386.390, a Complaint must allege a violation of statute, rule or regulation, or order or decision of the Commission. The Complaint raises none of these threshold

jurisdictional allegations. In the absence of such allegations, the Complaint should be dismissed as this Commission has no jurisdiction to enter relief based upon the allegations in the Complaint.

Even beyond the lack of jurisdiction by this Commission, the allegations, and the Statement of Issues presented regarding such allegations, clearly and unequivocally demonstrate that there is no basis in the Complaint for any action to be taken against Aqua Missouri.

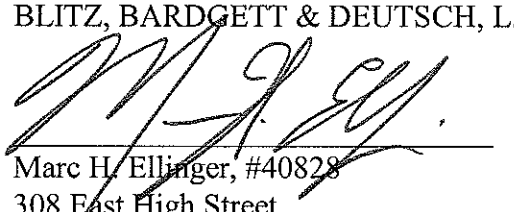
As a threshold issue the Complainants never complied with the Tariff under which Aqua Missouri operates by never filing an Application for Service. Neither did the Complainant, a developer, file a Developer Agreement with Aqua Missouri. Simply put, the Complainants never took the threshold action necessary to require Aqua Missouri to take any action under its Tariff. By failing to do so, the Complainants raise no issue for which relief should be granted.

With respect to the other issues presented in this case, it is clear that at all times Respondent has complied with its Tariff, which has the force and effect of law. Respondent also has complied with the rules and regulations of this Commission and the statutes of the State of Missouri in the execution of its authority to provide safe and adequate sewer service in its certificated area. While the Staff or the Complainants may not like the language contained in the statutes and the rules (including Aqua Missouri's Tariff), the Complainants have not alleged any violation nor has the Staff filed any Complaint of any type in this case. The Staff may feel some blind sympathy for the Complainants, but in the end that sympathy is simply outweighed by the facts, and more importantly, the law which compels dismissal of Complainants' Complaint.

WHEREFORE, Respondent prays that this Commission dismiss Complainants' Complaint and for such other relief as this Commission deems appropriate.

Respectfully submitted,

BLITZ, BARDGETT & DEUTSCH, L.C.

By: 

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CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the above and foregoing Respondent's Brief were sent via electronic mail to the following parties of record on this 22nd day of January, 2008:

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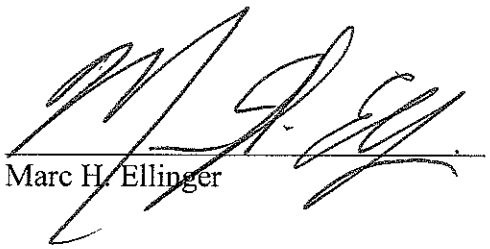

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