BEFORE THE PUBLIC SERVICE COMMISSION
STATE OF MISSOURI

Jason Becker & Becker Development, Inc.,	)	
	)	
Complainant,	)	
	)	
v.	)	**Case No. SC-2007-0044**
	)	
Aqua Missouri, Inc.,	)	
	)	
Respondent.	)	

STAFF'S POST-HEARING BRIEF

COMES NOW the Staff of the Missouri Public Service Commission, by and through the Commission's General Counsel, and for its Post-Hearing Brief, states as follows:

Introduction

This case concerns two complaints brought by a contractor, Jason Becker, against a sewer utility, Aqua Missouri.[1] Staff will demonstrate in this brief that Aqua Missouri has misread and misapplied its tariff; that it has violated its tariff and the law by refusing service to Becker; that it must immediately connect nine of Becker's lots to its existing sewer system; and that it must upgrade its existing wastewater treatment facility, at its own cost, and then connect as many as 20 more of Becker's lots. Staff will also show that Aqua Missouri is providing safe and adequate service at Lake Carmel and will suggest that it revise its tariff.

[1] For convenience, Staff will treat Jason Becker and Becker Development Company as synonymous.

In his first complaint (Case No. SC-2007-0044), Becker alleges that Aqua Missouri, a certificated public utility, has refused to serve him within its service area despite his repeated requests for service. Aqua Missouri admits that it is a certificated utility and that Becker is located within its service area, but denies that it has ever refused to serve Becker. By way of an affirmative defense, Aqua Missouri asserts that it has complied with its tariff in all respects and alleges that Becker has refused to comply with the tariffed conditions for service to a developer. In the second complaint (Case No. SC-2007-0045), Becker alleges that Aqua Missouri has refused to amend or modify its tariff to facilitate development and that it has failed to provide safe and adequate service at Lake Carmel. Aqua Missouri admits that it is a certificated utility and that it has not amended or modified its tariff, but denies that it has failed to provide safe and adequate services. It raises the same affirmative defense that it did in response to the first complaint. In both complaints, the relief sought is an order requiring Aqua Missouri to provide service to Becker.

Facts

Lake Carmel is a development in rural Cole County (Gaebe Direct, Ex. 2, Sch. ROG-2:1).[2] The development is served by water and sewer systems owned and operated by Aqua Missouri, Inc., a subsidiary of Aqua America (Answers). Aqua Missouri is a certificated public utility in Missouri and its tariffs have been approved by the Commission (Answers; Tr. 49-50). Lake Carmel is only one of

[2] The reference is to page 1 of Sch. ROG-2, which is attached to Ex. 2.

57 facilities owned and operated by Aqua Missouri in the vicinity of Jefferson City (Tr. 139). Aqua Missouri acquired the Lake Carmel systems in August 2003 (Hale-Rush Rebuttal, Ex. 4:2). There are presently 46 occupied homes at Lake Carmel that are connected to the water and sewer systems (Tr. 139).[3] There is also an unoccupied home that is not connected (Tr. 19).[4]

Complainant Becker Development Company is presently the developer of Lake Carmel, having acquired it in 1998 (Becker Direct, Ex. 6:1). Complainant Jason Becker is one of the principals of Becker Development (Becker Direct, Ex. 6:1). Becker owns 65 un-built lots at Lake Carmel, of which 13 are served by water and sewer mains but are not attached to the water and sewer systems (Tr. 9-10, 16-17). Those lots are ready to build on if Becker can get connections to the water and sewer systems (Tr. 16). Becker also owns the unoccupied house at Lake Carmel that is not connected to the water and sewer systems (Tr. 19). There are also some un-built lots at Lake Carmel that Becker does not own (Tr. 73, 104).

The sewer system at Lake Carmel consists of a gravity-fed collection system and a three-cell, facultative aerobic lagoon (Gaebe Direct, Ex. 2, Sch. ROG-2:1; Ex. 3:1; Hale-Rush Rebuttal, Ex. 4, Sch. B (DNR permit); Wells Surrebuttal, Ex. 8:4; Tr. 18, 26, 52-54). The lagoon discharges into an unnamed creek and is licensed by the Missouri Department of Natural Resources ("DNR")

[3] Several different figures for the number of occupied homes at Lake Carmel appear in the record. The Commission should find the figure provided by Tena Hale-Rush, Aqua Missouri's Missouri manager, to be most credible because it is based on her knowledge of billing records (Tr. 139).

[4] There are also three "water-only" customers at Lake Carmel (Tr. 139). The nature of such service or such customers is not explained.

(Gaebe Direct, Ex. 2, Sch. ROG-2:last page (DNR permit); Hale-Rush Rebuttal, Ex. 4, Sch. B (DNR permit)). The license is current and valid and testing shows that the lagoon's discharge is presently within acceptable limits (Gaebe Direct, Ex. 2, Sch. ROG-2:2; Tr. 103). The lagoon treats sewage by natural biological action over a 120-day detention period (Tr. 32, 52-54, 116). The three cells are interconnected by pipes and effluent flows successively through each cell during treatment (Tr. 52-54). The lagoon is permitted for a flow of 12,600 gallons per day and was designed to serve a population of 126 persons in 34 houses (Gaebe Direct, Ex. 2, Sch. ROG-2:2 and last page (DNR permit); Hale-Rush Rebuttal, Ex. 4, Sch. B (DNR permit); Tr. 32-33).[5]

While the biological loading of the lagoon discharge is within acceptable levels, the measured flow rate is greatly in excess of the permitted flow, reaching 29,904 gallons per day in March 2006, a very wet month, and 17,836 in June 2006, a very dry month (Gaebe Direct, Ex. 2, Sch. ROG-2:1 and ROG-2:Page 5 of 8 and Page 8 of 8; Wells Surrebuttal, Ex. 8:2; Tr. 100, 132). Based on water sales records, the average daily sewage contribution per residence at Lake Carmel is 170 gallons per day, or a total of only 7,820 gallons per day, a figure well-within the permitted level of 12,600 (Wells Surrebuttal, Ex. 8:2).[6] Thus, the much greater measured average daily flow reveals that the system is subject to

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[5] The figure of 126 persons is obtained by dividing 12,600 (the permitted daily flow) by 100 (the assumed daily sewage contribution per person). Based on biological loading rather than flow, the system was designed to support 119 persons (Gaebe Direct, Ex. 2, Sch. ROG-2:2).

[6] The importance of the water sales data cannot be overstated, because the water that enters the residences at Lake Carmel through water sales is the source of the water that leaves those residences as sewage. DNR's design assumption is 370 gallons per household per day (Gaebe Direct, Ex. 2, Sch. ROG-2:1; Tr. 37). However, rural populations produce only 60 to 70 gallons of sewage per person per day (Tr. 35).

quite significant inflow and infiltration ("I&I") of water from other sources (Wells Surrebuttal, Ex. 8:1, 2; Tr. 35-36, 126, 128). While I&I can never be entirely eliminated, the amount measured at Lake Carmel is well in excess of the amount reasonably to be expected (Wells Surrebuttal, Ex. 8:1; Tr. 127-128). The sources of the I&I are probably the collection system manholes and the nearby dam, which leaks (Hale-Rush, Amended Surrebuttal, Ex. 5:3; Tr. 16, 117).

One effect of the I&I at Lake Carmel is to dilute the biological loading of the effluent, contributing to the acceptable tests of the lagoon discharge (Gaebe Direct, Ex. 2, Sch. ROG-2:2; Tr. 36, 132-133). Indeed, dilution was once the standard technique for treating sewage (Tr. 125). However, the I&I also reduces the design detention period (Merciel Rebuttal, Ex. 1:3; Tr. 54-55). The engineers who testified all agreed that the I&I is a matter of concern and should be addressed (Merciel Rebuttal, Ex. 1:3; Tr. 56, 116, 126).[7] Aqua Missouri has already taken steps to reduce I&I through its system manholes and the remaining I&I is from the dam (Hale-Rush, Amended Surrebuttal, Ex. 5:3-4; Tr. 146-147). Aqua Missouri does not own the dam at Lake Carmel (Hale-Rush, Amended Surrebuttal, Ex. 5:3-4; Tr. 16). The reduction of the I&I will tend to concentrate the biological loading of the effluent and testing will be necessary to determine whether, with the I&I largely eliminated, it will remain within acceptable levels (Gaebe Direct, Ex. 2, Sch. ROG-2:2; Tr. 127, 133).

The general consensus is that the Lake Carmel sewage treatment plant, while adequately serving the current number of customers, is now at or near

[7] Staff expert witness Merciel suggested that the Company might just choose to live with the excessive I&I (Tr. 56).

capacity (Merciel Rebuttal, Ex. 1:2; Gaebe Direct, Ex. 2, Sch. ROG-2:1; Tr. 68, 72, 92, 103).[8] Consequently, the addition of a significant number of new homes likely will require a capacity expansion (Tr. 30-31), either through repair and modification of the existing plant, the construction of a second, parallel plant, or replacement of the existing plant with a larger one (Merciel Rebuttal, Ex. 1:5). Aqua Missouri takes the position that the necessary capacity expansion is the developer's responsibility. Aqua Missouri has been willing to add individual consumers to the system as new customers and, in fact, approved two for service over the past year (Tr. 143). But, Aqua Missouri refuses to allow Becker to hook up any of his lots unless he signs a Developer Agreement and pays over a substantial deposit (Hale-Rush Rebuttal, Ex. 4:Sch. X).

Becker has sought for several years to connect several of his lots to the water and sewer system so that he can build and sell houses (Hale-Rush Rebuttal, Ex. 4:3 ff.). In view of Aqua Missouri's position that capacity expansion is the developer's responsibility, Becker has paid for at least three engineering studies in an effort to move forward with his development (Becker Direct, Ex. 6:3). None of these has been acceptable to either DNR or Aqua Missouri (Becker Direct, Ex. 6:2-3; Tr. 95). It may be inferred that Becker finds it frustrating that Aqua Missouri will hook up individual consumers but will not hook up any of his lots, not even the house that he has completed (Becker Direct, Ex. 6:*passim*). Without sewer service, Becker cannot sell that house (Tr. 16).

[8] Aqua Missouri's Missouri manager, Tena Hale-Rush, testified that the Company does not know whether the Lake Carmel plant is at or over capacity due to the significant I&I problem (Tr. 145, 163).

An important question is whether any additional lots can be connected to the existing system. The engineers differed on this question. Wells, testifying for Becker, stated that four more houses could be added if the berms were raised (Tr. 28). Gaebe, testifying for Aqua Missouri, opined that 10 to 12 more houses could be added if the system were restored to its permitted capacity, the I&I was controlled and the testing of the effluent discharge remained within acceptable limits (Tr. 129). However, the fact is that the credible evidence shows that several more houses can be added right now without doing any work on the system. Based on the water sales data referred to above, the existing system as permitted can serve as many as 74 houses,[9] which would allow 28 more houses to be connected. However, the record shows that the system is not now operating at its permitted capacity. The system is a retained sludge system that has been operating for about 20 years (Tr. 26, 118-119, 131). Sludge builds up in the lagoon at a rate of about two dry tons a year, resulting in a progressive loss of capacity (Gaebe Direct, Ex. 2, Sch. ROG-2:last page (DNR permit); Ex. 4, Sch. B (DNR permit); Ex. 8:3; Tr. 131-132). At present, due to sludge build-up, the lagoon has only three-quarters of its permitted capacity (Tr. 32-33, 99). However, that capacity is sufficient to allow nine or ten more houses to be connected, assuming that the biological loading of the discharge remains within acceptable levels (Tr. 129).[10]

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[9]The permitted daily flow of 12,600 gallons per day, divided by 170 gallons per day per household, equals 74 houses. The water sales figures show average usage per house to be well below (45.9%) the DNR planning figure of 370 gallons per household per day (Wells Surrebuttal, Ex. 8:2). With existing systems, actual flow data and population figures are used rather than the DNR planning guidelines (Tr. 34).

[10] Seventy-five percent of 74 houses is 55.5 houses, leaving 9.5 when the existing 46 are

The planning assumptions used by DNR contain a generous safety margin,[11] which explains why the effluent discharge tests at Lake Carmel continue to be acceptable although the design number of homes has been exceeded by 35 percent (Tr. 132).[12] However, as sludge continues to accumulate, the safety margin will slowly erode, until it is eventually exceeded (Tr. 132). Like everything else, sewage treatment plants wear out and must be replaced (Tr. 135-136).

Two solutions were discussed for restoring the existing Lake Carmel sewage treatment plant to its design capacity: sludge dredging and raising the berms of the lagoon. Sludge dredging is an expensive process, which is complicated by the need to find a way to dispose of the sludge (Tr. 39-40, 40-41, 148). However, raising the berms of the lagoon by 18 to 20 inches would not be very expensive and would restore the original system volume or even add capacity (Wells Surrebuttal, Ex. 8:4-5; Tr. 27-28, 30, 39, 58, 118).[13] Another possibility is the addition of aerators (Tr. 18, 58

The history of relations between Aqua Missouri and Becker is lengthy and convoluted. The important point is that Aqua Missouri refuses to move forward with Becker unless and until he signs a Developer Agreement as provided in Aqua Missouri's tariff (Tr. 159-160). Becker has repeatedly refused to sign such

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subtracted.

[11] DNR assumes 3.7 persons per home and 100 gallons of sewage per person per day, or 370 gallons per day per home (Gaebe Direct, Ex. 2, Sch. ROG-2:1). The actual figure at Lake Carmel is only 170 gallons per home per day (Wells Surrebuttal, Ex. 8:2). The actual population of Lake Carmel is unknown (Tr. 20).

[12] The present number of connected homes, 46, is 135% of the permitted number, 34.

[13] DNR requires that lagoon berms maintain 2 feet of freeboard (Tr. 39). The Lake Carmel lagoon is not in compliance with this requirement at present (Wells Surrebuttal, Ex. 8:4-5).

an agreement (Ex. 4:12; Tr. 11). Becker won't sign because he believes that the agreement would obligate him to bear the full cost of any system improvement required to support his development (Tr. 12).

I. Service to Becker:

1. Has Respondent violated its obligation as a public utility by refusing to serve Complainant despite repeated requests?

2. Has Respondent violated its tariff by refusing to provide service to Complainant unless Complainant enters into a Developer Agreement with Respondent?

3. What steps, if any, must Complainant take in order to receive service from Respondent?

4. If an expansion of Respondent's wastewater treatment plant is necessary in order for Respondent to serve Complainant, who is responsible for the cost of the expansion?

The first issue is a matter of tariff construction. Contrary to Aqua Missouri's position, the plain language of its tariff imposes no duties or obligations upon a developer with respect to the upgrade or expansion of an existing wastewater treatment facility. Consequently, the Commission must find that Aqua Missouri has violated both its tariff and the law in its refusal to serve Becker.

Pursuant to the Filed Tariff Doctrine, a Commission-approved tariff is the law of the land, binding upon Complainants, Respondent and the Commission.[14]

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[14] The "Filed Tariff Doctrine" or "Filed Rate Doctrine" is a court-created principle that is intended to regularize the relations between utilities and their customers by prohibiting any deviation from the rates, terms and conditions of service approved by the appropriate regulatory body and maintained there for public inspection. ***Louisville & Nashville R.R. v. Maxwell,*** 237 U.S. 94, 97, 35 S.Ct. 494, 495, 59 L.Ed. 853, ___ (1915). For Missouri sewer utilities, the doctrine is codified by the several subsections of § 393.130, RSMo. Supp. 2006.

Midland Realty Co. v. Kansas City Power & Light Co., 300 U.S. 109, 114, 57 S.Ct. 345, 347, 81 L.Ed. 540, ___ (1937), *rehearing den'd,* 300 U.S. 687, 57 S.Ct. 504, 81 L.Ed. 888. The same rules that are used in statutory construction are used in construing a tariff:

> The construction of a printed railroad tariff presents a question of law and does not differ in character from that presented when the construction of any other document is in dispute. The four corners of the instrument must be visualized and all the pertinent provisions considered together, giving effect so far as possible to every word, clause, and sentence therein contained. The construction should be that meaning which the words used might reasonably carry to the shippers to whom they are addressed, and any ambiguity or reasonable doubt as to their meaning must be resolved against the carriers. But claimed ambiguities or doubts as to the meaning of a rate tariff must have a substantial basis in the light of the ordinary meaning of the words used and not a mere arguable basis.

Pennsylvania R. Co. v. Chromcraft Corp., 424 S.W.2d 104, 107 (Mo. App. 1967). Where a tariff is ambiguous, it is construed against the company that wrote it. *Id.*

Turning to Rule 12 of Aqua Missouri's tariff, titled "Extension Of Collecting Sewers And Acquisition Of Existing Sewer System," we see that it provides in pertinent part as follows (Exs. 9 and 10):[15]

* * *

> (b) **This Rule shall govern the construction of new treatment facilities and/or extension of new collecting sewers requested by a Developer in areas within the Company's certificated service area where the Company currently does not serve.**
>
> (1) A Developer shall enter into a contract (See Exhibit B) with the Company. The contract shall provide that the

[15] Omitted section (a) of Rule 12 governs the extension of collecting sewers (except to developers); omitted section (c) of Rule 12 governs the acquisition of existing systems.

Developer may construct said collecting sewers to meet the requirements of all governmental agencies and the Company's Rules and Regulations, including the Company's Technical Specifications. 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).

(2) The pipe used in making extensions under this rule shall be of a type and size which will be adequate to supply the area to be served. If the area is to be served by conventional gravity piping, an 8-inch minimum diameter shall be required. Such determination as to size and type of pipe shall be left solely to the judgement of the Company. If the Company desires a pipe size, lift station or treatment facility larger than reasonably required to provide service to the lots abutting said extension area, the additional cost due to larger size shall be borne by the Company.

(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.

(5) The Company shall have the right to refuse ownership and responsibility for the sewers until the Developer has met the contractual obligation as provided in Rule 12 (b)1.

(6) The Company reserves the right to connect future extensions to any collecting sewers constructed under this contract.

(7) After the effective date of this rule, pressure sewer system will not be constructed, except existing pressure systems may be extended unless it is not reasonably possible, in the opinion of the Company to Service an area or premise by gravity or with a common lift station.

* * *

EXHIBIT "B"

EXTENSION AGREEMENT – Developer

AGREEMENT between Capital Utilities, Inc., P.O. BOX 7017, 312 Lafayette street, Jefferson City, Missouri 65102, a Missouri corporation, hereinafter called the "Company" and

_____

hereinafter called the "Developer",

WHEREAS, the Developer has requested the Company to extend or expand its system for the expressed purpose of providing sewer service. This system extension is to be constructed in accordance with the Company's Technical Specifications and will generally be routed as depicted on the attached plan or plat, referred to as Exhibit No. 1 attached hereto, and made a part of this Agreement; and

WHEREAS, the Company is willing to make such an extension upon the terms and conditions hereinafter set forth; and

WHEREAS, the Developer is willing and desires to assist in the installation of such extension and desires to bear the cost thereof.

NOW, THEREFORE, in consideration of the premises and the mutual covenants and agreements herein contained, THE PARTIES HERETO AGREE AS FOLLOWS:

1. Developer hereby applies to the Company for the said extension of its system, and the Company agrees to construct, the said extension upon the terms and conditions hereinafter set forth.

2. Upon execution hereof, the Developer shall deposit with the Company the sum of _____ DOLLARS ($_____). Such deposit shall be adjusted, based upon the determination of the actual cost by Company of facilities installed including sewer pipe and appurtenances, property, connection fees, engineering, accounting, and legal expenses plus the cost of obtaining any necessary easements or permits from governmental agencies or other direct costs. If it is necessary to adjust the amount of such deposit, in accordance with the terms of this paragraph, a supplemental memorandum will be prepared setting forth the actual costs and shall be attached hereto and made a part hereof.

3. The amount required for deposit may be reduced by the construction cost provided by the Developer and accepted by the Company. This may only apply in the specific case where the

Developer will be the construction contractor. Such construction cost shall be attached hereto and made a part hereof.

4. The Company will use its best efforts to commence and carry to completion as soon as possible the installation of said extension, having in mind, however, delays which may be occasioned by weather, acts of God, strikes, or other matters not within its control.

5. It is further mutually understood and agreed that the collecting sewers and appurtenances within the limits of the street, avenues, roads or easement areas, whether or not attached to or serving customers but constructed as part of the extension shall be and remain the property of the Company, its successors and any collecting sewers installed by it easements without incurring any liability to Applicant(s) whatsoever.

6. Developer will, upon the request of the Company, grant to it an exclusive and irrevocable easement, at no cost to Company, for the installation, maintenance, operation, repair and replacement of said extension and appurtenances within the limits of any existing proposed street, roadway, or easement area, thereto, in form satisfactory to the Company and duly executed and acknowledge in proper form record. The Company shall also have the right to additional easement area over property owned by the Developer for the purpose of extension of system to provide service to adjacent property.

7. It is further understood and agreed by and between the parties hereto that the Company's agreement to construct the said extension is subject to the Company obtaining all necessary consents, orders, permits, easements, approvals of public officers or public bodies having jurisdiction over or lawful interest in any of the subject matters herein. In the event that the Company, after prompt application and diligent effort, is unable to obtain any necessary consent, order, permit, easement, or approval as aforesaid, or in the event that the Company is enjoined or prevented by lawful action of any such public officer or official body from constructing the said extension, the Company shall have no obligation to the Developer to proceed with the installation until such time as the aforesaid lawful action shall be resolved.

8. It is agreed by Developer that he will not build at any time hereafter on, in or over the said easement any structure, the construction or presence of which will endanger or render ineffective or difficult the access to collecting sewers or

appurtenances of the Company, or lay other pipes or conduits within two (2) feet, measured horizontally or ten (10) feet for water main, measured horizontally, from the said collecting sewers except pipes crossing same at right angles in which latter case a minimum distance of eighteen (18) inches shall be maintained between the pipes. No excavation or blasting shall be carried on which in any way endangers the said collecting sewers. Provided, however, that should the Developer wish to do so, he may at his own expense provide a new location acceptable to the Company for the said collecting sewers and the Company will then move said collecting sewers and appurtenances to said new location, and the whole cost of such moving and altering and any expenses incident thereto, shall be borne by the Developer. It is further understood and agreed that in case of any damage by Developer or caused by neglect of Developer to the collecting sewers or their appurtenances, connection therewith, these facilities will be repaired and brought to proper grade by the Company or Company's contractor at Developer's expense.

9. It is further mutually understood and agreed by and between the parties hereto that this agreement is subject to all the requirements of the Company's Rules and Regulations Governing Rendering of Sewer Service currently on file with the Missouri Public Service Commission be they expressed herein or not. **It is specifically noted that the Company's definition of a sewer system "extension" may refer to either continuation of piping from existing Company owned collecting sewer or the construction of an entirely new wastewater collection/treatment system.**

10. The Company reserves the right to withdraw this proposal at any time before it has been accepted by the Developer. In the event it is not accepted and the payment for the sewer system extension is not in the possession of the Company within sixty (60) days from the date this Agreement is transmitted to the Developer, this proposal will be null and void.

IN WITNESS WHEREOF, the parties hereto have agreed to the above conditions as indicated by their signatures affixed below on this _____ day of _____, _____.

(Emphasis added.)

Rule 12(b) and the form Developer Agreement are set out in full above in order to establish beyond any doubt that treatment facilities are referred to only

twice, each time modified by the adjective "new." Aqua Missouri's tariff applies only to *new* treatment facilities. As with statutes, words in tariffs must be considered in their plain and ordinary meaning. ***Lonergan v. May,*** 53 S.W.3d 122, 126 (Mo. App., W.D. 2001) (*quoting* ***Farmers' & Laborers' Coop. Ins. Ass'n v. Dir. of Revenue,*** 742 S.W.2d 141, 145 (Mo. banc 1987)). As the Missouri Court of Appeals put it, "[t]he construction should be that meaning which the words used might reasonably carry to the shippers to whom they are addressed, and any ambiguity or reasonable doubt as to their meaning must be resolved against the carriers [i.e., the utility]." ***Pennsylvania R. Co. v. Chromcraft Corp.,*** *supra,* 424 S.W.2d at 107. The plain and ordinary meaning of a word is found in the dictionary. ***Preston v. State,*** 33 S.W.3d 574, 578 (Mo. App., W.D. 2000). The word "new" means "never existing before; appearing, thought of, developed, made produced, etc. for the first time[.]" ***Webster's New World Dictionary of the American Language*** 957 (2nd college ed., 1972). A *new* treatment facility is thus one that did not exist before and which has been made for the first time.

The Lake Carmel treatment facility is not "new" within the plain meaning of Aqua Missouri's tariff. Nowhere does either Rule 12(b) or the form Developer Agreement refer to the upgrade, repair, modification, or expansion of an existing wastewater treatment facility. To the extent that the tariff language is ambiguous – which it is not – it must be construed *against the utility.* ***Pennsylvania R. Co. v. Chromcraft Corp.,*** *supra,* 424 S.W.2d at 107. The Commission therefore must conclude that the tariff does not require that Becker pay for any necessary

modification or expansion to the treatment plant. The Commission must also conclude that the tariff does not require that Becker sign a Developer Agreement before he can receive service.

The common law is that a public utility must serve all the public, without discrimination. ***Overman v. Southwestern Bell Tel. Co.,*** 675 S.W.2d 419, 424 (Mo. App., W.D. 1984).[16] Aqua Missouri admits that Becker has requested sewer service within its certificated service area at Lake Carmel. Because Aqua Missouri's tariff does not in fact include any conditions or limitations on its duty to serve Becker, its affirmative defense must fail. Like Becker and this Commission, Aqua Missouri is bound by the plain language of its tariff. ***Midland Realty Co.,*** *supra.*

For these reasons, the Commission must find (1) that Aqua Missouri has violated its obligation as a public utility by refusing to serve Becker despite his repeated requests; (2) that Aqua Missouri has violated its tariff by refusing to provide service to Becker unless he enters into a Developer Agreement; (3) that Becker need take no steps in order to receive service from Aqua Missouri; and (4) that if an expansion of the existing treatment center is needed, Aqua Missouri must pay for it.

The record shows that several – perhaps as many as ten – of Becker's lots can be hooked up to the system immediately. The Commission should order Aqua Missouri to make these hook ups forthwith. The record makes it clear that the present treatment facility cannot be upgraded sufficiently to serve all of

[16] ***Overman*** also provides for punitive damages where a utility has breached its common law duty.

Becker's 65 lots. However, the record abundantly establishes that an upgrade to the existing facility would permit as many as 28 additional homes to be connected.[17] Aqua Missouri must immediately take whatever steps are necessary, at its cost, to make that upgrade and connect those lots. It is likely that the cost of these improvements will be added to rate base as additions to net plant in service in Aqua Missouri's next rate case.[18] Presumably, Aqua Missouri will select the less expensive alternative of raising the berms – indeed, the evidence is that the berms must be raised in any case to provide the required freeboard of 24 inches ((Wells Surrebuttal, Ex. 8:4-5; Tr. 39). The actual number of additional houses that may ultimately be connected to the existing system will depend upon effluent tests, a matter within the jurisdiction of DNR.

The tariff is equally clear that a *new* facility is Becker's responsibility. To the extent that a new treatment facility must be built to serve any of Becker's remaining lots, Becker must enter into a Developer Agreement and foot the cost. Aqua Missouri need not move forward with respect to a new facility until Becker has done what the tariff requires.[19]

II. Safe and Adequate Service at Lake Carmel:

1. Is Respondent presently providing safe and adequate service to its customers at Lake Carmel?

[17] Including the nine or ten that must be connected immediately.

[18] The Commission cannot determine the ratemaking treatment of those improvements in this case; however, the Commission can assure Aqua Missouri that inclusion in rate base will occur unless the costs are shown to be imprudent or the improvements unnecessary or not useful.

[19] Presumably, Becker will be able to do so because he will by then have built and sold as many as 28 new homes at Lake Carmel.

2. Is the wastewater treatment facility at Lake Carmel presently at or over its permitted capacity?

3. If the wastewater treatment facility at Lake Carmel is not at or over its permitted capacity, how many additional homes or lots may be connected?

4. If the wastewater treatment facility at Lake Carmel is presently over its permitted capacity, must Respondent make improvements to its facility in order to add capacity sufficient to meet its present load?

The second issue is one of fact and turns on the expert testimony. As the fact finder, the Commission may believe some, all or none of the expert and other testimony adduced. *See* ***Dowell v. Dowell,*** 203 S.W.3d 271, 276 (Mo. App., W.D. 2006).

The evidence is that the existing Lake Carmel sewer treatment facility is adequately serving the present ratepayers and poses no threat to them (Tr. 34-35 (Wells); Tr. 68, 72 (Merciel); Tr. 135 (Gaebe)). Despite the opinions of the experts that the facility is at or near capacity, the record shows that nine or ten more houses can be connected immediately, without any expansion or modification to the treatment facility (Wells Surrebuttal, Ex. 8:2). Raising the berms will permit even more houses to be connected (*see* discussion above at pp. 7-8 and citations to the record there).

Based on the record before it, the Commission must find (1) that Aqua Missouri is presently providing safe and adequate service at Lake Carmel; (2) that the existing facility, while over its permitted capacity, is not yet at its functional capacity;[20] (3) that nine or ten additional homes or lots may be

[20] The difference lies in the use of actual flow figures vs. DNR's planning guidelines. The record shows that the hydraulic load at Lake Carmel and the number of occupied houses are both

connected; and (4) that any improvements necessary to serve the existing customer base are the sole responsibility of Aqua Missouri.

III. Respondent's Tariff:

Does the public interest or the law require that Respondent amend or modify its tariff so that individuals and developers will be treated similarly with respect to extensions?

The law does not require that Aqua Missouri treat developers and individuals similarly with respect to extensions. Subject to the Commission's approval, utilities are permitted to group customers into classes according to their characteristics and to treat those classes differently. ***State ex rel. Laundry, Inc. v. Public Service Com'n,*** 327 Mo. 93, 107, 34 S.W.2d 37, 43 (Mo. 1931). However, utilities must treat all customers fairly, with neither undue preferences or undue discrimination. Section 393.130, RSMo. Supp. 2006.

Staff believes that Aqua Missouri should modify its tariff in order to promote development in its service areas. Staff's expert witness, Jim Merciel, testified that Aqua Missouri should add a Contribution-in-Aid-of-Construction (CIAC) charge to its tariff as a device to equitably fund expansions (Merciel Rebuttal, Ex. 1:6-7; Tr. 60-66). Missouri-American, for example, has such a device in its tariff (Tr. 63). While the urgency of that modification will be alleviated if the Commission resolves Issue I as Staff advises in this Brief, the issue remains and must eventually be addressed. New treatment facilities are

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in excess of the figures specified in the DNR permit (*see* Gaebe Direct, Ex. 2, Sch. ROG-2:1-2). The record also shows that the effluent discharge tests are within acceptable limits (Tr. 132) and that the 46 households at Lake Carmel each produces only 170 gallons of sewage each day rather than the 370 gallons in the DNR planning guidelines (Wells Surrebuttal, Ex. 8:2).

the developer's responsibility under the tariff and this rule will stymie development if the developer happens to lack adequate funding to front the money for such a project. Staff continues to believe that Aqua Missouri should modify its tariff in order to facilitate development under all circumstances. For example, the tariff could provide that Aqua Missouri would fund new treatment facilities and recover the money from a combination of connection fees and rate base. Or, the tariff could allow the developer to make periodic contributions as houses are sold rather than be required to make a lump sum deposit.

If the Commission determines that Aqua Missouri has misread and misapplied its tariff in this case, as Staff believes the Commission must, the Company will certainly seek to amend its tariff to impose obligations on developers with respect to the enlargement or modification of existing treatment facilities. At that time, the Commission should carefully scrutinize Aqua Missouri's tariff and direct that desirable changes be made.[21]

Conclusion

The Commission should find, on the evidence adduced, that Aqua Missouri has misread and misapplied its tariff in its dealings with Complainants at Lake Carmel. In fact, the tariff is silent as to the developer's obligations where an existing treatment facility must be expanded to provide additional capacity to serve the developer's needs. Since the tariff is silent, it is necessarily Aqua

[21] The Commission has authority, granted by § 386.490.3, RSMo. 2000, to take up and change any of its orders at any time after they are issued. Thus, the Commission could vacate its order approving Aqua Missouri's tariff, re-open that proceeding, and require Aqua Missouri to make such changes to the tariff as the Commission believes are required by the public interest.

Missouri's sole responsibility to expand its facility so that it can meet its common law obligation to serve the public in its certificated service area. Developers are members of the public as much as are individual consumers.

This may seem a harsh result. It is not. Staff's expert witness, Jim Merciel, testified that most utilities do this sort of work themselves, at their own cost, and recover the money through rates (Tr. 59, 89). Assuming the costs are prudently incurred, they will be added to rate base at the next rate case and Aqua Missouri will realize a return "of and on" the improvements. The evidence suggests that the cost of raising the berms will not be great (Wells Surrebuttal, Ex. 8:4-5; Tr. 27-28, 30, 39, 58, 118).

The Commission must also find that Aqua Missouri has violated its tariffs and the law in its dealings with Complainants. For this reason, and because this matter has gone on for several years, the Commission must peremptorily order Aqua Missouri to supply nine connections to Becker forthwith and to immediately begin the process of expanding the capacity of the treatment plant. If the Commission makes a finding that Aqua Missouri has violated the law and its tariffs, the General Counsel will pursue appropriate penalties in circuit court.

WHEREFORE, Staff urges the Commission to resolve this matter as Staff has advised and to grant such other and further relief as may be just in the circumstances.

Respectfully submitted,

s/ Kevin A. Thompson
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Certificate of Service

I hereby certify that a true and correct copy of the foregoing was served, either electronically or by hand delivery or by First Class United States Mail, postage prepaid, on this **31st day of May, 2007**, to the parties of record as set out on the official Service List maintained by the Data Center of the Missouri Public Service Commission for this case.

s/ Kevin A. Thompson