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.	)	

STAFF'S REPLY BRIEF

COMES NOW the Staff of the Missouri Public Service Commission and, for its Reply Brief, states to the Missouri Public Service Commission as follows.

INTRODUCTION AND OVERVIEW

In its Brief, Complainant Aqua Missouri, Inc. essentially makes three main points. They are: First, the Commission does not have jurisdiction to hear this case, because Edward P. Storey's Complaint does not specifically reference a violation of law; Second, Complainant Storey failed to exhaust his remedies before filing the Complaint; and Third, Aqua has not violated any law, because it is now providing safe and adequate service.

In this Reply Brief, the Staff will address each of these contentions in turn, and will then apply its analysis to the issues that the parties identified in this case.

Mr. Storey's Complaint Properly Invokes the Jurisdiction of the Commission

In its first point, Aqua argues that Mr. Storey's Complaint fails to invoke the jurisdiction of the Commission, citing § 386.390, RSMo,[1] which provides in relevant part:

[1] Unless otherwise indicated, all statutory references are to RSMo, as currently supplemented.

> Complaint may be made … 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 … in violation or claimed to be in violation of any provision of law or of any rule or order or decision of the commission …

(Aqua's emphasis.) Aqua then construes this statute to require that "the Complaint must *specifically* reference a violation or law or rule of the commission, or order or decision of the commission."[2]

One can only guess why Aqua states that the Complaint must "specifically" reference a violation. The statute does not contain the word "specifically," and Aqua's paraphrase is not accurate. There is simply nothing in the statute that requires a "specific" reference to a violation. Nor has Aqua cited any case law holding that the reference to a violation must be "specific." Nor is there anything in the statute or case law that requires the Complainant to identify the statute violated, or to use any particular "magic words" that appear in the statute. According to the statute and the case law, a complaint is sufficient is it describes conduct that constitutes a violation of the law.

The Staff contends that Mr. Storey's Complaint does just that. It alleges that Aqua has violated a statute – specifically § 393.130.1. This is all that is required to invoke the jurisdiction of the Commission. Because Mr. Storey alleged that Aqua violated a law, there is no need for Mr. Storey to allege also that it has violated a rule, or order, or decision of the Commission. The Staff will therefore address only the question of whether the Complaint alleges that Aqua has violated § 393.130.

Friendship Village of South County v. Public Service Commission of Missouri, 907 S.W.2d 339, on which Aqua relies, supports the Staff's conclusion that the complaint must only describe conduct that constitutes a violation of the law. The *Friendship Village* court held that if

the complaint fairly presents for determination a matter that is within the Commission's jurisdiction, the complaint is sufficient. The court said the Commission did not have jurisdiction in that case, because the complaint failed to raise an issue that was essential to finding jurisdiction. But the court did not say that the complaint must cite a statute, or quote from a statute, or use the same words that are used in the statute.

The Western District affirmed this position with its decision in *Deaconess Manor Association v. Public Service Commission,* 994 SW.2d 602 (Mo. App. 1999), also cited by Respondent. The court said the issue in *Deaconess Manor* was identical to the issue in *Friendship Village*. The court said the complaint was not sufficient to place the narrow issue of the 1987 denial of the request for reclassification before the Commission, and it therefore failed to raise an issue that was essential to finding jurisdiction. But the court did not say that the complaint must cite a statute, or quote from a statute, or use the same words that are used in the statute.

In both *Friendship Village* and *Deaconess Manor,* the complaint failed to raise the issue that formed the basis for jurisdiction. Mr. Storey's Complaint does not suffer from the same infirmity.

The Complaint says that: Aqua is a public utility providing service to Quail Valley Lake Subdivision[3]; that since 2002, Complainants have sought approval from Aqua to attach more homes in Quail Valley to the sewer system[4]; that Aqua's permit does not prohibit it from attaching additional homes to the sewer system[5]; that the Missouri Department of Natural

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[2] Respondent's Brief, page 7. The emphasis is supplied by Staff. Staff has also changed "claim" to "claimed," to comport with the actual language of the statute.
[3] Amended Complaint, Paragraph 3.
[4] Amended Complaint, Paragraph 4.g.
[5] Amended Complaint, Paragraph 4.h.

Resources ("MDNR") does not object to the hookup of additional homes to the sewer system[6]; that engineering tests show that the sewer plant is operating well below capacity[7]; and that Aqua has repeatedly refused to allow Complainant to connect additional homes to the sewer system.[8]

These allegations clearly make out a claim that Aqua has failed and refused to provide adequate sewer service to Mr. Storey in the Quail Valley Subdivision. Section 393.130 requires a sewer corporation, such as Aqua, to "provide such service instrumentalities and facilities as shall be safe and adequate." Case law provides that a regulated utility, such as Aqua, must render service within its service territory to all those who request it, on a reasonable basis. As noted above, case law also provides that if the complaint fairly presents for determination a matter that is within the Commission's jurisdiction, it is sufficient to invoke the jurisdiction of the Commission.

Mr. Storey's Complaint meets all of the requirements of the *Friendship Village* and *Deaconess Manor* cases, and is sufficient to invoke the jurisdiction of the Commission. The Commission should reject the argument in Point I of Respondent's Brief.

The Doctrine of Exhaustion of Remedies
Does Not Bar the Complaint in this Case

Aqua argues that the "doctrine of exhaustion of remedies" bars the Complaint that Mr. Storey filed in this case.[9] However, the doctrine of exhaustion of remedies only acts as a bar to judicial actions, and does not govern administrative proceedings, such as the present case.

Aqua's Brief never quotes the "doctrine of exhaustion of remedies," and it never concisely states exactly what the "doctrine of exhaustion of remedies" requires. That is, it does

[6] Amended Complaint, Paragraph 4.i.
[7] Amended Complaint, Paragraph 4.k.
[8] Amended Complaint, Paragraph 4.g, 4.k, and 4.m.
[9] Respondent's Brief, page 14.

not ever explicitly make a black letter recitation of what the doctrine is, nor paraphrase the doctrine, nor cite a statute. Instead, it merely states that "there is no jurisdiction if a party does not exhaust all remedies," citing *Local Union No. 124 v. Pendergast,* 891 S.W.2d 417 (Mo. banc 1995).[10] It is, therefore, instructive to see just what *Local Union No. 124* says about the doctrine of exhaustion of remedies. The Supreme Court there said the following:

> Where an adequate remedy to challenge valuation and equalization is provided … that procedure must be exhausted before resort to circuit court.

Thus the Supreme Court required the claimant to exhaust its *administrative* remedies before seeking *judicial* relief. *Local Union No. 124* did not pertain to an administrative action, and Aqua has cited no case law holding that *Local Union No. 124* has any relevance as a bar to an administrative action, such as Mr. Storey's complaint against Aqua.

Nor does *State ex rel. Scott v. Scearce,* 303 S.W.2d 175, also cited by Aqua, provide any support for the claim that Mr. Storey must exhaust remedies before bringing a complaint to the Commission. The Court in *Scott* held that insofar as an *administrative* body can be prevailed upon to correct its errors, resort to the *courts* becomes unnecessary.

Aqua also relies upon *Paric Corp. v. Murphy,* 903 S.W.2d 285 (Mo. App. E.D. 1995).[11] However, like the two cases mentioned above, *Paric* provides no support for Aqua's argument. The *Paric* court held that a participant in a retirement plan must exhaust his administrative remedies before seeking judicial relief.

In footnote 7, on page 15 of its Brief, Aqua also mentions three other cases, which are entirely inapposite. Those three cases (*Baker, Daniels,* and *Simmons*) all address the question of whether a criminal *defendant* must show he has exhausted his administrative remedies in order to

[10] Respondent's Brief, page 12.
[11] The citation in Respondent's Brief is incorrect. *Paric* is found at 90 3 S.W.2d 285, rather than in Volume 90 as state in Respondent's citation.

support his defense of "necessity" to the offense of escape. They have nothing whatsoever to do with barring the claims of a *plaintiff* who seeks judicial or administrative relief.

Aqua has not cited any case that applies the doctrine of exhaustion of remedies as a bar to an administrative proceeding. The Commission should reject Aqua's claim that Mr. Storey's complaint is barred by the doctrine of exhaustion of remedies.

Aqua Missouri is Obliged to Render Service Within Quail Valley to All who Request it on a Reasonable Basis

Section 393.130.1 provides 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." It is beyond dispute that this statute requires that Aqua provide "adequate service." But what exactly is "adequate service"? The Staff contends that Aqua cannot possibly provide "adequate service" if it does not provide service at all.

Aqua has informed Mr. Storey that it will not provide service to more than 80 lots in the subdivision, but there are 112 lots in the subdivision. Aqua has refused to provide service to the remaining 32 lots. As to those 32 lots, Aqua is not providing any service at all; therefore it cannot possibly be providing *adequate* service to these 32 lots. This is a violation of the requirements of § 393.130.1. Decisions by both the appellate courts and the Commission support this conclusion.

In *State ex rel.Harline v. Public Service Commission,* 669 S.W.2d 941 (Mo. App. W.D. 1984), cited by Aqua, the court said the utility company had a duty to serve its certificated area, quoting § 393.130 to conclude the company must furnish and provide such service instrumentalities as shall be adequate. The court said it is the utility's duty, within reasonable limitations, to serve all persons in the area. The court said the utility company could perform its duty only by extending and building new lines and facilities as required, which the company had

done almost daily since 1938. That is, the company must provide service, even if it must extend and build new lines in order to do so. Thus, even if Aqua's present sewer plant is not sufficient to serve all 112 lots in the Quail Valley Subdivision, then it must construct additional facilities as required to serve the entire subdivision.

Respondent Aqua, itself, has provided a quote from *State ex rel. Federal Reserve Bank v. Public Service Commission,* 191 S.W.2d 307 (Mo. App. 1945) that also supports the Staff's position in this regard. The court there said a utility is "obliged to serve on reasonable terms, *all those who desire the service that it renders* without unreasonable discrimination."[12] Aqua placed the emphasis in this quote upon the words "reasonable terms," but the Staff suggests the more salient point is that the utility must serve "all those who desire the service it renders." By refusing to extend service to Complainant Storey's last 32 lots, Aqua is not serving "all those who desire the service that [Aqua] renders." The Commission should follow all of the requirements of the court's ruling in *Federal Reserve Bank*, and not only the one that Aqua has emphasized. The Staff agrees, of course, that Aqua must serve "on reasonable terms," and that it must serve without discrimination.

Aqua also cited *State ex rel. Missouri Power and Light Company v. Public Service Commission,* 669 S.W.2d 941 (Mo. App. W.D. 1984), for the proposition that discrimination only occurs if the discrimination is within a class of customers. But Aqua failed to mention the more relevant holdings from *Missouri Power and Light,*that § 393.130 obligates a utility to provide service instrumentalities and facilities that are adequate, that the certificate of convenience and necessity is a mandate to serve the area covered, and that it is the utility's duty,

within reasonable limitations, to serve all persons in an area it has undertaken to serve. Decisions of the Commission are in accord with the appellate cases cited just above.

In *Wagner Water Works,* 8 Mo. P.S.C. (N.S.) 526, the Commission said that since the respondents had constructed the water system then in use, it was respondents' "duty and responsibility to install the necessary facilities to provide an adequate supply of potable water." The owners of the utility were not providing an adequate supply at that time, but the Commission said the matter could not end by the mere statement that the owners were not financially able to provide an adequate supply. The Commission said it would be impractical and unreasonable to require the utility to construct a water system which the public could not use because the rates were prohibitive. But the Commission was of the "firm opinion" that the utility was nonetheless obligated to furnish an adequate supply of water to the public residing in the area in question, and said this could and should be done by obtaining water from the City of Springfield. So the Commission required more than merely allowing a customer to connect; it actually required the utility to seek another source of supply.

The Commission reached a similar conclusion in *Diekroeger, et al.,* 9 Mo. P.S.C. (N.S.) (1960). The Commission said: "When a consumer makes application … to require a regulated utility with authority to serve the area where the patron wants the service and where such utility professes to serve, the mere nature of the public utility where it holds itself out to serve everyone makes it inescapable for it to deny the service requested under its Certificate of Convenience and Necessity and its rules on file that are approved by this Commission." *Diekroeger,et al.,* 9 Mo. P.S.C. (N.S.) (1960). The Commission required the utility in that case to extend electric service to those requesting it, even though the utility had to extend its electric line 1-1/4 miles, and even though the persons requested it were already being served by another electricity provider, a co-

[12] See Respondent's Brief, page 16

operative. The Commission ordered the utility to extend service within 90 days after the customers filed an application for service.

See also *City of Lake St. Louis v. Lake St. Louis Sewer Company,* 24 Mo. P.S.C. (N.S.) 323, 327, where the Commission said: "The Company has an obligation to render service within its service territory *to all those who request it,* on a reasonable basis."

ARGUMENT ON IDENTIFIED ISSUES

Issue No. 1: Is the Quail Valley Waste Water Treatment Facility capable of handling an additional 32 homes?

The Staff believes it has adequately covered this issue in its Initial Brief, that Respondent has not made any points in its Brief that require rebuttal, and that no reply is necessary.

Issue No. 1.a: If not, how many more can it handle?

See the discussion of this issue in the Staff's Initial Brief.

The operating permit that the MDNR issued to Aqua does not place a limit on the number of homes that the plant may serve. Rather, it places limits on the various parameters that are measured to determine the quality of the effluent from the plant. The Staff believes the plant is "capable of handling" the sewage from an additional 32 homes. However, as Staff noted in its Initial Brief, Aqua will need to continue to monitor its effluent to ensure that it complies with the requirements of the DNR's operating permit.

Aqua appears to argue that, because the plant was originally designed to treat the sewage from 80 homes, Aqua is prohibited from connecting more than 80 homes to the treatment plant. And yet, in its Brief, Respondent argued that an additional 10 homes could be connected. If Aqua's reasoning is as stated in the first sentence of this paragraph, it is impossible to logically reach the conclusion that 10 additional homes can be connected.

Issue No. 2: If not, who is responsible for expanding the plant?

Section 393.130.1 imposes a duty upon the *sewer corporation* (in this case Aqua Missouri) to provide safe and adequate service. It does not impose any responsibility upon Mr. Storey. Aqua Missouri is responsible for expanding the plant.

Issue No. 3: Did Complainants apply for additional hookups and, if so, did Respondents deny such application?

The Staff agrees with Aqua that Aqua's tariff has the force and effect of law, and that both Aqua and Mr. Storey must comply with the terms of the tariff. Staff also agrees that the tariff is reasonable, and that Mr. Storey must comply with the terms of the tariff, if an expansion of the plant is needed.

As Staff stated in its Initial Brief, the law does not require a useless act. The Staff does not believe Mr. Storey must still submit an application for service. That does not mean, however, that the Staff believes, as Respondent suggested in its Brief, that compliance with the tariff is a useless act. Rather, it means that the Staff believes that Aqua has already requested service and the service has been refused, so no additional application is necessary. However, If the Commission disagrees and finds that an application is still needed, then Aqua must complete an application for service.

But if the Commission finds that the tariff requires an application for service and that Aqua has not heretofore filed such an application, that does not mean that Mr. Storeny's complaint should be dismissed. It would not make any sense for the Commission to dismiss this complaint and require Mr. Storey to file a written application that meets Aqua's requirements and wait for Aqua to deny the application, so that Mr. Storey can file a new complaint and go through the whole complaint procedure again.

The Commission should order Aqua Missouri to carry out its statutory duty to provide safe and adequate service, and to expand its plant if that is required. If the Commission finds that Mr. Storey's request for service does not amount to an application for service, then the Commission could condition its order upon Mr. Storey's filing an application for service and otherwise complying with the tariff.

Issue No. 4: If Complainants did apply for additional hookups, how many were applied for?

See the discussion under Issue No. 3, immediately above.

Issue No. 5: If Respondent did deny such application, was Respondent's denial of additional hookups wrongful, intentional, and without just cause or excuse?

See the discussion under Issue No. 3, above, and the discussion under Issue No. 5 in Staff's Initial Brief.

Issue No. 6: What was the original designed capacity of the Waste Water Treatment Facility?

The Staff agrees with Aqua that the waste water treatment facility at Quail Valley Subdivision was originally designed to serve 80 homes, but that is irrelevant to the matter at hand. Aqua holds a certificate of convenience and necessity to serve an area that includes all of Quail Valley Subdivision.

The issue is not how many homes there were in the subdivision in 1992, or how many homes the facility was designed to serve. The issue is: what must Aqua do – today – to provide safe and adequate service to all persons within the area that Aqua has undertaken to serve.

CONCLUSION

Mr. Storey has properly invoked the jurisdiction of the Commission by alleging in his Complaint facts that fairly present for determination a matter that is within the Commission's jurisdiction. The complaint is sufficient and the Commission has jurisdiction.

The "doctrine of exhaustion of remedies" is properly only applied as a bar to the institution of civil proceedings in circuit court. It does not act as a bar to an administrative remedy such as Mr. Storey seeks. Mr. Storey has not failed to exhaust his remedies, and the Commission has jurisdiction over this complaint.

There are 112 residential lots in the Quail Valley Subdivision. The evidence clearly shows that Aqua has refused to provide sewer service to more than 80 homes in the subdivision. As Aqua has refused to provide any service to the final 32 lots, the Commission should find that Aqua has failed to provide adequate service, as required by § 393.130.1.

The Commission should order Aqua to carry out its statutory obligation to provide safe and adequate service to all homes in the Quail Valley Subdivision. The Commission can require Complainants to make formal applications to Aqua and to otherwise comply with the tariff as a condition of ordering Aqua to allow additional connections.

WHEREFORE, the Staff submits its Reply Brief for the Commission's consideration.

Respectfully submitted,

/s/ Keith R. Krueger_____

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Certificate of Service

I hereby certify that copies of the foregoing have been mailed or hand-delivered, transmitted by facsimile or electronically mailed to all counsel of record this 6th day of February 2008.

/s/ Keith R. Krueger_____