

**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI**

Paul Schaefer,

Complainant,

vs.

I.H. Utilities, Inc.,

Respondent.

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File No. WC-2013-0357

STAFF'S COMMENTS

COMES NOW the Staff of the Missouri Public Service Commission, by and through counsel, and for its *Comments on the Recommended Order* issued on July 5, 2013, states as follows:

Introduction:

Staff reads the *Complaint* to state a *prima facie* claim that the tariff prohibition on service to vacant lots is not just and reasonable. Staff believes that the undisputed facts filed by the parties show that this allegation is correct and, now that the Company has moved for summary determination, the Commission should grant summary determination to the Complainant. For this reason, Staff respectfully suggests that the *Recommended Order* is incorrect and should be changed.

The Commission's Authority:

Respondent is a water corporation and a public utility subject to regulation by this Commission. *Memorandum*, p. 2; §§ 386.020, (43) and (59), 386.250, Chapter 393, RSMo. The Commission's general complaint authority at § 386.390.1, RSMo, authorizes the Commission to hear and determine complaints that a water utility tariff is

unjust or unreasonable in violation of § 393.130.1 and .3, RSMo. Pursuant to Rule 4 CSR 240-2.117(1)(E), the Commission may grant summary determination to any party (not just the moving party) “if the pleadings, testimony, discovery, affidavits, and memoranda on file show that there is no genuine issue as to any material fact, that **any party** is entitled to relief as a matter of law as to all or any part of the case, and the commission determines that it is in the public interest” (emphasis added).

The Complaint and Answer:

Paul Schaefer, Complainant herein, has been unrepresented throughout this matter. His *Complaint* consists of a form supplied by the Commission with Mr. Schaefer’s sparse handwritten entries and three pieces of attached correspondence. What is clear from the *Complaint* is that Mr. Schaefer wants a 1” meter, yoke and tap installed on his lot and the fact that, despite the prohibition in the tariff, water service is presently being supplied by I.H. to several vacant lots within its service territory.

Respondent’s *Answer* reveals that Respondent was not certain of the gravamen of the *Complaint* as it states: “Respondent shall respond to what it surmises to be Complainant’s allegations of material fact” *Answer*, ¶ 2. Therein, Respondent states that she offered to amend the tariff and install a ¾ inch meter and tap on Mr. Schaefer’s lot on the condition that he agree that he would not pump the water to property that he owned outside of I.H.’s service area. Complainant evidently declined that offer and this litigation ensued.

The Motion for Summary Determination:

On May 28, the Company moved for summary determination.¹ The *Motion for Summary Determination* characterized the *Complaint* as “seeking water service to a vacant lot he owns” *Motion for Summary Determination*, ¶ 1. However, such service is prohibited by Respondent’s tariff, P.S.C. Mo. No. 3, Cancelling P.S.C. Mo. No. 2, Original Sheet 12, Rule 5(f): “The Company will not install a service connection to a vacant lot.” In her *Motion*, Respondent admits that the tariff previously permitted service to vacant lots and that several vacant lots presently receive water service.

Company relies, first, on the tariff prohibition described above and, second, on Complainant’s admitted intention to divert the water supplied to his vacant lot for use at a point outside the Company’s service area. Company argues that it has a right to prevent the proposed diversion and that it cannot be compelled to provide service outside of its service area. *Memorandum*, pp. 4-6. These points are correct, but do not go to the issue actually raised by the *Complaint*, namely, the reasonableness of the prohibition in the tariff.

The undisputed facts relied on by the Company make it clear that Complainant desires the service that his neighbors are receiving and provide no justification whatsoever for the prohibition relied on to deny him that service.² If service to a vacant lot is undesirable for technical or safety reasons, then such service would presumably not be permitted to continue where it already exists. In the absence of any such

¹ The out-of-time filing of a dispositive motion, only 43 days prior to the evidentiary hearing date of July 10, 2013, was expressly authorized by the *Order Setting Procedural Schedule* issued on May 23, 2013. See Rule 4 CSR 240-2.117(1)(A).

² Ignoring the possible future issue of any diversion of service outside of the service area. Staff agrees that such a use would be improper.

concern, what justification is there to grant it to some customers but not to this customer? In fact, it is discriminatory in that persons similarly situated are treated differently. Chapters 386 and 393 prohibit discrimination in the provision of utility services; consequently, it is apparent that the tariff prohibition is contrary to the public interest as formulated by the General Assembly and enacted as the Public Service Commission Law.³

The Recommended Order:

The *Recommended Order* summarizes the issue as follows: “Mr. Schaefer seeks service to his lot. But service to Mr. Schaefer’s lot is contrary to the company’s tariff because his lot is vacant.” *Recommended Order*, p. 2.

Staff suggests that the Commission should have read the inartfully drafted *Complaint* as directed at the reasonableness of the tariff rather than as a prayer for an order directing the Company to install the tap despite the tariff prohibition.

Pleading Before the Missouri Public Service Commission:

In an early case, the Missouri Supreme Court stated that “a complaint under the Public Service Commission Law is not to be tested by the technical rules of pleading; if it fairly presents for determination some matter which falls within the jurisdiction of the Commission, it is sufficient.” ***St. ex rel. Kansas City Terminal Railway Co. v. Public Service Commission***, 308 Mo. 359, 372, 272 S.W. 957, 960 (banc 1925). In that case, the Court was considering an assertion that the Commission had overstepped its

³ The PSC was created on April 15, 1913, by the passage of the Public Service Commission Law, which was borrowed almost word-for-word from the statutes of the state of New York. The Public Service Commission Law is now distributed through several chapters of the Missouri Revised Statutes (RSMo), see Chapters 386, 387, 388, 389, 390, 391, 392 and 393, RSMo. Chapters 387 through 391, RSMo, relate to transportation and were transferred from the Commission’s jurisdiction in 1985 to the former Division of Transportation.

authority and acted as a judicial body by construing and enforcing a contract. The Court noted that the allegations contained in the complaint in that case, as well as much of the evidence received, supported the charge. The Court made the statement in question as it dismissed the significance of these observations, noting that “we are not so much concerned with the form and substance of the complaint as with the nature and extent of the order made and the considerations upon which it was based.” *Id.*

The rule of ***Kansas City Terminal Railway*** means that the factual allegations of an administrative complaint are generally to be judged against the standard of notice pleading rather than the stricter standard of fact pleading. The Eastern District of the Missouri Court of Appeals has said the same thing:

On appeal, petitioner contends that the charges stated for his dismissal in the letter from Chief Heberer were vague and indefinite. In support of this argument, however, he relies upon cases pertaining to criminal indictments and civil pleadings. These cases obviously deal with judicial proceedings, and they are not controlling in administrative proceedings. The charges made against a public employee in an administrative proceeding, while they must be stated specifically and with substantial certainty, do not require the technical precision of a criminal indictment or information. It is sufficient that the charges fairly apprise the officer of the offense for which his removal is sought.

Sorbello v. City of Maplewood, 610 S.W.2d 375, 376 (Mo. App., E.D. 1980).

Mr. Schaefer’s *Complaint*, inartfully drafted as it is, put the Commission and other parties on notice that he desires a tap at his vacant lot, such as other property owners in the service area enjoy, and that the tariff prohibits it. It is Staff’s position that the *Complaint* states a *prima facie* case that the tariff restriction is not just and reasonable. Summary determination for the Company does not lie because the issue actually raised by the *Complaint* is nowhere addressed by the Company’s *Motion* and *Memorandum*. The undisputed facts submitted by the parties do not support a conclusion that the tariff

restriction is reasonable; rather, they show that it is unreasonable because it treats similarly situated persons differently contrary to the anti-discrimination provisions of Chapters 386 and 393. For that reason, Staff believes that summary determination lies for the Complainant.

Conclusion:

The Commission should construe the *Complaint* as directed against the reasonableness of the Company's tariff provision that prohibits service to a vacant lot and, based on the undisputed facts that show that other customers currently enjoy that service and which make no mention of any detriments caused thereby, grant summary determination to Complainant as authorized by Rule 4 CSR 240-2.117(1)(E). Of course, Complainant has no right or privilege to divert water supplied to his lot for use outside the service area.

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 **11th day of July, 2013**, on 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