

File No. WC-2011-0409

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BEFORE THE PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI

Eric C. Larson,)	
)	
Complainant,)	
)	
v.)	File No. WC-2011-0409
)	
Mona L. Fennema d/b/a)	
Woodland Manor Water Company, ¹)	
)	
Respondent.)	

FINAL DECISION

Issue Date: September 20, 2012

Effective Date: October 22, 2012

The Missouri Public Service Commission is:

- Granting the complaint of Eric C. Larson (“Mr. Larson”), and
- Ordering an improvement to the water system.

Placing a meter on an existing system under the tariff at issue does not, alone, transfer any property or divest any duty of the Company. The Company must have the Commission’s authorization under Section 393.190, RSMo 2000, before disposing of any necessary and useful part of the system. Necessary and useful parts of the system included the pipe that Mr. Larson fixed (“east curve”), and no order authorizing abandonment existed for the east curve, so the east curve remained within the Company’s duty to maintain. This report and order is subject to rehearing² and appeal.³

¹ The Commission is changing the caption of this action to correctly name the water company as discussed below.

² Section 386.500, S.B. 48, 96th Gen. Assem., First Reg. Sess.

³ Section 386.510, S.B. 48, 96th Gen. Assem., First Reg. Sess.

Appearances

For Eric C Larson:

Eric C Larson
31 Holiday Drive,
Kimberling City, Missouri 65686

For Woodland Manor Water Company, LLC:

Gregory R. Gibson, Attorney at Law,
P.O. Box 108
Blue Eye, Missouri 65611

For Staff:

Rachel Lewis and Amy Moore, Deputy Staff Counsel
Amy Moore, Staff Counsel
Missouri Public Service Commission
200 Madison Street, Suite 800, P.O. Box 360, Jefferson City, MO 65102.

Senior Regulatory Law Judge: Daniel Jordan.

Procedure

Mr. Larson began this action by filing the complaint alleging that a public utility committed a violation of statute, regulation, tariff, or Commission order (“violation”).⁴

Mona L. Fennema filed an answer as chief operator of Woodland Manor Water Company, LLC (“the LLC”). The LLC also filed an answer through counsel.⁵ Mr. Larson filed a reply.⁶ The Commission’s staff (“Staff”) filed a recommendation.⁷ Mr. Larson, the LLC, and Staff filed a stipulation.⁸

⁴ On June 27, 2011.

⁵ On August 5, 2011. Because the complaint and answer alleged that the respondent is a limited liability company, the Commission required the LLC to answer through counsel.

⁶ On August 8, 2011.

⁷ On August 11, 2011.

⁸ *Joint Stipulated Facts*, filed on May 23, 2012.

The Commission issued notice⁹ that the Commission intended to conduct this action under the small complaint regulation.¹⁰ The small complaint regulation sets time limits for deciding the case, but the parties¹¹ sought, agreed to, and received extensions of the procedural schedule, which constituted an extension of the time to issue a decision. Those facts also constitute good cause to extend the time for issuing the recommended report and order, so the time for issuing the recommended report and order is extended.

As required by the small complaint regulation, the Commission convened the evidentiary hearing on the merits of the complaint at a location within 30 miles of where the service was rendered.¹² The reporter filed the hearing transcript.¹³ The Commission received briefs from Mr. Larson,¹⁴ the company,¹⁵ and Staff.¹⁶ Mr. Larson also filed a reply¹⁷ to Staff's brief. The last briefs were due on July 11, 2012.¹⁸ The regulatory law judge assigned to this case issued a recommended decision.¹⁹ The Commission received comments from Mr. Larson,²⁰ the LLC,²¹ and Staff.²²

⁹ *Notice of a Contested Case and Orders for Small Contested Case*, issued on June 27, 2011.

¹⁰ 4 CSR 240-2.070(15).

¹¹ The Office of the Public Counsel is a party to every action before the Commission, 4 CSR 240-2.010(10), but opted to enter no appearance, and so is not within the term "party" as used in this decision.

¹² 4 CSR 240-070(15)(E).

¹³ On June 11, 2012.

¹⁴ *Summary Brief*, filed on July 2, 2012.

¹⁵ *Staff's Brief*, filed on July 2, 2012.

¹⁶ *Post-Hearing Brief*, filed on July 3, 2012; *Order Granting Leave to File out of Time*, issued on July 5, 2012.

¹⁷ *Objection to the Lies in the Staff's Brief*, filed on July 3, 2012.

¹⁸ 4 CSR 240-2.140(2) and (3).

¹⁹ *Recommended Report and Order*, issued on August 3, 2012.

²⁰ *Comments on the Recommended Report and Order*, filed on August 6, 2012.

Mr. Larson has the burden of proof.²³ The burden is to show that a violation is more likely than not to have occurred.²⁴ Mr. Larson carries that burden with substantial evidence of probative value or by inferences reasonably drawn from the evidence.²⁵ The Commission resolves any factual dispute by determining the preponderance of the evidence,²⁶ which means the greater weight.²⁷ Applying those principles and the scientific and technical facts within the Commission's competence²⁸ to the record, the Commission independently finds the facts as follows.

Findings of Fact

1. Woodland Manor Water Company, LLC ("the LLC") is a Missouri limited liability company.

2. Mona L. Fennema holds a certificate of convenience and necessity ("certificate") to provide water service in Missouri under the fictitious name of Woodland Manor Water Company²⁹ ("the Company").

3. The Company's service territory includes 31 Holiday Drive, Kimberling City, Missouri 65686, which is the location of Kimberling Oaks Resort ("the resort").

²¹ *Woodland Manor's Comments on Recommended Decision*, filed on August 15, 2012.

²² *Staff's Comments and Response*, filed on August 16, 2012.

²³ *State ex rel. Tel-Central of Jefferson City, Inc. v. Public Serv. Comm'n of Missouri*, 806 S.W.2d 432, 435 (Mo. App., W.D. 1991).

²⁴ *State Board of Nursing v. Berry*, 32 S.W.3d 638, 641 (Mo. App., W.D. 2000).

²⁵ *Farnham v. Boone*, 431 S.W.2d 154 (Mo. 1968).

²⁶ 32 S.W.3d at 641.

²⁷ *Id.* at 642.

²⁸ Section 536.070(6), RSMo 2000.

²⁹ *In the Matter of the Application of Bob Connell d/b/a Woodland Manor Water Company to Sell his Water System in Stone County, Missouri to Stephen T. Fennema and Mona L. Fennema, Husband and Wife*, File No. WM-99-199, *Order Approving tariff in Compliance with Commission Order*, issued April 13, 1999.

4. The resort's owner is Mr. Larson, who is the customer liable on the account for water service to the resort.

5. The resort is within a platted subdivision called Vista Haven Beach ("the subdivision"). The subdivision is entirely north of Holiday Drive ("the street"), which runs east and west. The subdivision consists of nine lots numbered 1 through 9, west to east, of which lots 2 through 9 constitute the resort.

6. When Mr. Larson bought the resort:

- a. On Lot 1 was a house ("yellow house"). The yellow house's water supply has always been, and is, separate from the resort. The yellow house was not part of the resort. On October 23, 2006, Mr. Larson purchased the yellow house. As of the date of the hearing, Mr. Larson lived in the yellow house and leases the rest of the house.
- b. Lots 2 and 9 were empty. On lots 3, 4, 5, 6, and 7, were cabins and a swimming pool. Lot 8 had a residence ("old house").

7. The resort's builder was Bob Connell. Mr. Connell was also the subdivision's developer. Mr. Connell installed and operated a water system ("the system") to serve the subdivision.

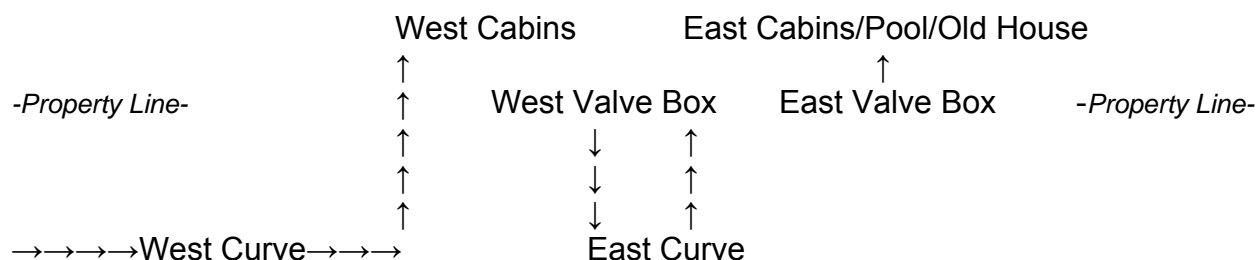
A. Mr. Connell's System³⁰

8. Originally, Mr. Connell did not operate the system as a public service. The system had no meters and Mr. Connell collected a flat fee for water service. As installed

³⁰ Also depicted in the Appendix at paragraph A for comparison with later configurations.

by Mr. Connell, the system included pipe made of one-inch flexible black plastic, gauged to copper tube size³¹ (“old pipe”).

9. The system served the resort as follows.



- a. From the west, under the middle of the street, old pipe ran to the east and curved north (“west curve”) to the subdivision’s boundary. There, Mr. Connell installed a valve box (“west valve box”). The west valve box served the cabins on the west side of the resort (“west cabins”).
- b. From the west valve box, old pipe continued east, dipping south under the middle of the street, then curving north again (“east curve”) to within one foot of the subdivision’s boundary. There, Mr. Connell installed another valve box (“east valve box”). The east valve box served the cabins on the east side of the resort (“east cabins”), the pool, and the old house.

10. In the mid-1970s, the City of Kimberling, Missouri, (“the city”) incorporated. The city’s boundaries included the subdivision and the street. The street now has several layers of pavement and the city has right-of-way to the north and south.

11. Mr. Connell transitioned the system from an unregulated private service to a regulated public service. On December 12, 1992, the Company’s “Rules and

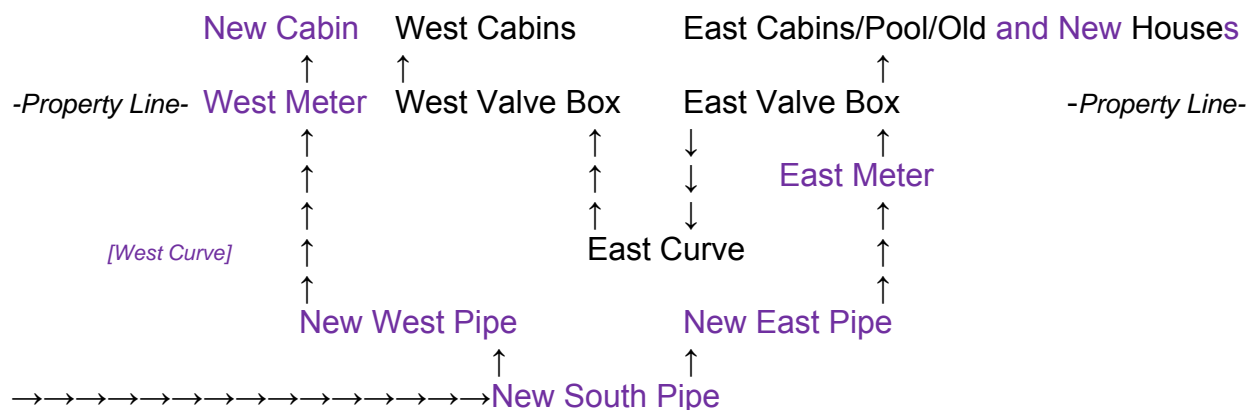
³¹ Called “CTS” in the record.

Regulations Governing Rendering of Water Service,” P.S.C. MO No. 1 (“tariff”) became effective. The tariff is based on template tariff language. Mr. Connell began installing meters and pipe made of metal (“new pipe”), including new pipe parallel to the street on the street’s south side (new south pipe”).

12. Effective April 19, 1999, Mr. Connell transferred the system to Stephen T. Fennema³² and Mona L. Fennema as husband and wife (“the Fennemas”) doing business as Woodland Manor Water Company, and the Fennemas adopted the tariff.

B. Alterations by Company and Mr. Larson³³

13. The Company installed more new pipe and more meters. As to the resort, the Company’s intention was to develop service in a manner that would be most economical for Mr. Larson. The Company did not act with willful misconduct.



i. New West Pipe

14. In 2000, Mr. Larson built a cabin (“the new cabin”) on subdivision lot 2 (at the west end of the resort), and requested water service. The Company installed a meter (“the west meter”) at the subdivision boundary, ten feet from the west valve box.

³² The record is otherwise silent as to Stephen T. Fennema.

³³ Also depicted in the Appendix at paragraph B for comparison with other configurations.

The company ran new pipe (“new west pipe”) from the new south pipe to the west meter, and Mr. Larson connected the new cabin to the west meter.

ii. New East Pipe

15. In November 2001, Mr. Larson added a new building on lot 9 (“new house”). The new house includes space for a residence, office, and laundry facility. The old pipe of the east curve and east valve box was not adequate to supply the new house,³⁴ so the Company installed new pipe (“new east pipe”) from the new south pipe to the east valve box.

16. On the new east pipe, the Company installed a meter (“east meter”) within the city’s north right-of-way, twelve feet south of the east valve box.

17. At the Company’s direction, Mr. Larson connected the new house to the new east pipe. Incident to that project, Mr. Larson also upgraded the connection to the old house, to which the supply was a separate old pipe that also ran under the street. Mr. Larson ran the connection for the old house and new house to the new east pipe between the east meter and east valve box. This arrangement was in lieu of installing a third meter, which Mr. Larson had originally requested, but would have cost him more.

iii. The Leak

18. With the new west pipe serving the new cabin and the new east pipe serving the rest of the resort through the east curve, the west curve was of no more use. The west curve was severed twice, during street-related work by the Company and the city, and each time the Company fixed it. The second time, the Company capped the

³⁴ Transcript vol. III, page 109 line 10, to page 111 line 10.

west curve's severed ends so that water no longer flowed through it from the west to the resort.

19. The east curve could be eliminated from the system, if the west cabins connected to the west meter, which the Company assumed that Mr. Larson would do. But Mr. Larson did not believe that he had any right or duty under the tariff to cap off the east curve, and did not know the system's details, so he did not connect the west cabins to the west meter. Therefore, the west cabins continue to receive their supply from the east curve.

20. In June 2011, beneath the street, the east curve leaked. The leak cut off water to the west cabins, and threatened the resort's structures and threatened the resort's water supply. Mr. Larson called the Company.

21. When the Company responded to Mr. Larson's service call, Mr. Larson turned off the water at the east meter, and the leak stopped, which proved that the leak was on the far side of the east meter from the Company. Relying solely on the tariff, the Company concluded that placing a meter divested the Company of all duties ("abandoned") as to any pipe beyond the meter. On that basis, the Company refused to fix the leak.

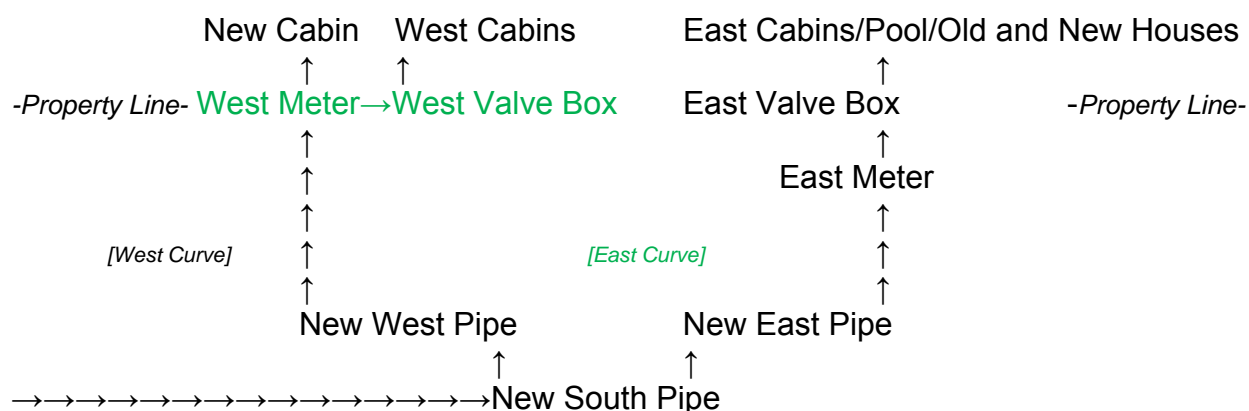
22. Mr. Larson dug up the street and fixed the leak at his own expense. Mr. Larson sought reimbursement from the Company, in the form of a credit against his water bill, in the following amounts:

<i>Item</i>	<i>Detail</i>	<i>Amount</i>
Labor	nine man-hours @\$35.00/hour	\$315.00
Materials	one compression fitting @ \$3.49	\$ 3.49
Total		\$318.49

Those amounts are reasonable.³⁵ The Company denied liability. This complaint followed.

C. Staff's Solution³⁶

23. The entire system may suffer contamination from a leak,³⁷ which is likely in the east curve because it is almost 55 years old, and subject to the shifting of the rock bed beneath the street. The east curve could be out of the system—disconnected at both ends—if the west meter connected to the west cabins.



Conclusions of Law

The Commission independently concludes as follows.

I. Procedure

The Commission has subject matter jurisdiction because the statutes provide that the Commission shall hear a complaint against any “public utility.”³⁸

³⁵ Section 536.070(6), RSMo 2000.

³⁶ Also depicted in the Appendix at paragraph C for comparison with earlier configurations.

³⁷ Section 536.070(6), RSMo 2000.

³⁸ Section 386.390.1, RSMo 2000. The LLC argues that the passage of time since the placement of meters should bar the complaint but cites no supporting authority.

a. Who the Public Utility Is

The parties assert that the LLC supplies Mr. Larson. That assertion appears in the complaint, in Mona L. Fennema's answer, in the LLC's answer, and in the parties' stipulation. The stipulation names the LLC as respondent and states:

Complainant is provided water service by Respondent,
which is a Missouri public utility [³⁹]

But the identity of the public utility is not subject to the parties' control by stipulation because it is not solely an issue of fact. It is a question of law because the statutes define a public utility.

Public utility:

. . . includes every . . . water corporation [as] defined in this
section.[⁴⁰]

That section defines a "water corporation" beyond general business corporation to include other entities including individuals:

"Water corporation" includes every corporation, company, association, joint stock company or association, partnership and person, their lessees, trustees, or receivers appointed by any court whatsoever, owning, operating, controlling or managing any plant or property, dam or water supply, canal, or power station, distributing or selling for distribution, or selling or supplying for gain any water [⁴¹]

"The parties' stipulation cannot change the words of the statute. Nor can it 'bind or circumscribe a court in its determination of questions of law.'"⁴²

³⁹ *Joint Stipulated Facts*, filed on May 23, 2012.

⁴⁰ Section 386.020(43), RSMo Supp. 2010.

⁴¹ Section 386.020(59), RSMo Supp. 2010.

⁴² *La-Z-Boy Chair Co. v. Director of Econ. Dev.*, 983 S.W.2d 523, 525 (Mo. banc 1999).

Contrary to their stipulation, the parties presented uncontroverted evidence showing that the public utility supplying water to Mr. Larson is Mona L. Fennema. Mona L. Fennema is named on the tariff's adoption notice. Mona L. Fennema holds the certificate that the statutes require for anyone to sell water for gain.⁴³ The LLC appears in neither of those documents. The LLC's only connection to the water business is in the conclusory allegations described, not in any substantial evidence.

Therefore, the Commission concludes that Mona L. Fennema, doing business as Woodland Manor Water Company, ("the Company") is the water corporation supplying Mr. Larson and the public utility subject to the complaint, notwithstanding contrary allegations in the stipulation.

b. Notice

The Commission has personal jurisdiction because it served the complaint as the statutes require:

Service in all hearings, investigations and proceedings pending before the commission may be made upon any person upon whom summons may be served in accordance with the provisions of the code of civil procedure of this state, and may be made personally or by mailing in a sealed envelope with postage prepaid. [⁴⁴]

The Commission's file shows certified mailing to "Woodland Manor Water Company [,]" which is Mona L. Fennema's trade name for selling water service, and the signature of Mona L. Fennema. Mona L. Fennema filed an answer and appeared at the evidentiary hearing. And Mona L. Fennema is the public utility subject to the complaint because, according to the record, she is the water corporation supplying Mr. Larson.

⁴³ Section 393.170.2 and .3, RSMo 2000.

⁴⁴ Section 386.390.4, RSMo 2000.

c. What this Action Is

Also in the stipulation, the parties characterize the complaint as an appeal from an earlier decision:

The Complainant has duly appealed a prior unfavorable determination pursued within the Commission's informal complaint resolution process, and this complaint is therefore properly before the Public Service Commission of Missouri. No other parties have an interest in the dispute which is before the Commission nor are needed for full and final resolution of the dispute. [⁴⁵]

That characterization has no basis in any authority⁴⁶ and is not controlling under the authorities cited above. No determination as to any violation occurs until the Commission makes its final decision as the statutes provide. This decision determines the legal rights and duties of the persons specified only.⁴⁷

II. Merits

A complaint determines whether the Company has committed a violation.⁴⁸ To show a violation, Mr. Larson focuses on the tariff's purpose. As detailed below, the tariff provides the Company's duty to maintain any pipe according to the pipe's classification. Classification of any pipe depends on its relation to geographical features including customer units,⁴⁹ public property lines, and an intervening meter or customer property line.⁵⁰ The property line/meter dichotomy reflects the tariff's context: a developing water system. No meter is necessary for a pipe to carry water so, when no meter is in place,

⁴⁵ *Joint Stipulated Facts*, paragraph 2.

⁴⁶ Including the Commission's regulation 4 CSR 240-2.070(1) on an "informal complaint."

⁴⁷ Section 536.010(4) and (6)(d) RSMo Supp. 2010.

⁴⁸ Section 386.390.1, RSMo 2000.

⁴⁹ Units are the customer's buildings. Tariff, Original Sheet 6, Rule 1(c).

⁵⁰ Property lines that run through a street, and private easements, also feature in those provisions but do not appear in the record.

classification defaults to the customer property line. The reverse of that premise constitutes the Company's and Staff's argument: that placing a meter on an existing pipe alone re-classifies that pipe. That argument is unsupported by the tariff and contrary to statute as follows.

a. Duty to Maintain: Tariff

All parties correctly begin their analysis with a history of the system because that is where the tariff's purpose becomes plain. The system began its life unregulated because it was not a public service and did not have the duties associated with a public utility. There being no such duties, the tariff's purpose was not to divest such duties, but to impose them.

The east curve was in the exclusive care of Mr. Connell because he installed it entirely on public property. Because it was on public property, the tariff classified the east curve as either a main:

A "MAIN" is a pipeline which is owned and maintained by the Company, located on public property . . . , and used to transport water through the Company's service area . . .⁵¹

or as a service connection because it ran to the customer property line:

A "SERVICE CONNECTION" is the pipeline connecting the main to the customer's water service line at the property line, or outdoor meter setting including all necessary appurtenances.

This service connection will be installed, owned, and maintained by the company. [⁵²]

In any event, the east curve was not a customer service line because it did not connect to a building:

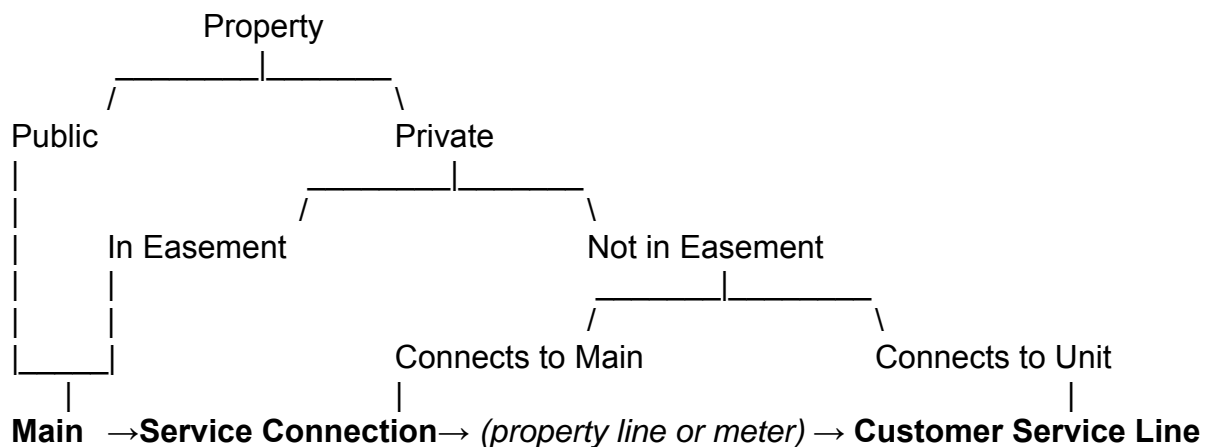
⁵¹ Tariff, Original Sheet No. 5, Rule 1(d).

⁵² Tariff, Original Sheet No. 5, Rule 1(f).

A “CUSTOMER’S WATER SERVICE LINE” is a pipe with appurtenances installed, owned and maintained by the customer, used to conduct water to the customer’s unit from the property line or outdoor meter setting, including the connection to the meter setting.^{53]}

The customer service line was thus the only pipe outside Mr. Connell’s duty to maintain. Without meters, the property line marked the customer service line’s starting point, under the Commission-approved tariff.

The tariff’s classification of water lines was therefore as follows.



Because there were no meters, Mr. Connell’s maintenance duty covered everything south of the resort’s property line.⁵⁴

Those are the duties to which the Company succeeded as the adoption notice provides:

[The Company] hereby adopts, ratifies, and makes its own in every respect as if the same had been originally filed by it [the tariff] filed with the Public Service Commission, State of Missouri, by Bob Connell, d/b/a Woodland Manor Water

⁵³ Tariff, Original Sheet No. 5-6, Rule 1(e).

⁵⁴ That is, unless an easement carried it through private property. The LLC cites a provision allowing the customer service line to extend outside the customer property line. But that applies only when necessary to reach a service connection that is in a utility easement. Original Sheet No. 11, Rule 5(i). Those facts are not present here.

Company currently on file with and approved by the Commission.^[55]

The Commission approved that tariff sheet when it canceled Mr. Connell's certificate and issued a certificate to the Company in 1999. The east curve is south of Mr. Larson's property line. Therefore, the east curve is within the Company's maintenance duty unless something has altered that duty.

The Company, the LLC, and Staff offer an argument that Staff's summarizes in its maxim: anything on the customer side of the meter is the customer's responsibility. That is almost always true because the tariff requires meter placement at or near the property line⁵⁶ and, once pipe reaches from the main to the meter, it seldom turns back. But that is what the east curve does: the east curve is on Mr. Larson's side of the east meter, but not on his property.

The Company, the LLC, and Staff argue that the Company's duty to maintain the east curve ended when the Company placed the east meter because placing a meter changes ("abandons") any pipe beyond that meter into a customer service line, divesting the Company of ownership and associated duties, and transferring the pipe to the customer's involuntary ownership. For example, the LLC cites Staff's analysis as follows:

"[O]ne of the primary purposes of setting meters was to provide a known and consistent point at which a service line became a customer's responsibility, and Mr. Spratt . . . concluded that any line used as a service line by the customer, on the customer's side of the meter (once placed), was the customer's responsibility (Trans. p.139). He noted

⁵⁵ Tariff, Original Sheet No. A.

⁵⁶ Tariff, Original Page 26, Rule 11(f).

that the water, once past the meter, belonged to the customer, so the lines would as well.”^{57]}

The Company, the LLC, and Staff argue that, because the east curve is now between Mr. Larson’s units and the east meter, the east curve is now a customer service line that Mr. Larson must own and must maintain.

To show that placing a meter on an existing line transfers the maintenance duty to the customer, the Company, the LLC, and Staff cite tariff provisions relating the customer service line to the meter:

. . . Service Line construction and maintenance from the property line or meter setting . . . to the building shall be the responsibility of the Customer [; ^{58]}

and:

[The customer service line is] a pipe . . . owned and maintained by the customer, used to conduct water to the customer’s unit from the property line or outdoor meter [. ^{59]}

But those provisions say nothing about changing the initial demarcation of duties from the property line to a meter (or vice versa), transferring maintenance duties, or abandoning pipe. And, if it were necessary to construe those provisions, such construction does not include the insertion of additional provisions.⁶⁰ Moreover, the law voids any unauthorized disposition of the east curve as follows.

b. Abandonment: Statute

The statutes provide that a Commission order is necessary before disposing of any necessary or useful part of any system:

⁵⁷ The *Post-Hearing Brief* of the LLC at page 6, first paragraph.

⁵⁸ Tariff, Original Sheet No. 11, Rule 5(b).

⁵⁹ Tariff, Original Sheet No. 6, Rule 1(e).

⁶⁰ *State ex rel. May Dep’t Stores Co. v. Weinstein*, 395 S.W.2d 525, 527 (Mo. App., St.L. 1965).

No . . . water corporation . . . shall . . . transfer . . . or otherwise dispose of . . . any part of its . . . works or system,^{61]} necessary or useful in the performance of its duties to the public, . . . without having first secured from the commission an order authorizing it so to do. Every such . . . transfer [or] disposition . . . made other than in accordance with the order of the commission authorizing same shall be void. ^{62]}

That procedure is also the subject of a Commission regulation describing the application for the order.⁶³

The statute's only exemption is for unnecessary and non-useful parts of the system:

Nothing in this subsection contained shall be construed to prevent the . . . disposition by any [water company] of property which is not necessary or useful in the performance of its duties to the public [^{64]}

For example, the west curve ceased to be necessary and useful as to the resort when the Company installed the new east pipe. Therefore, no authorization was necessary to abandon the west curve.

Also, the statute excludes any pipe that has never been part of the system. For example, the line that Mr. Larson ran from the west cabin to the west meter began as his property, was always a customer service line, and was never part of the Company's system under the tariff. Likewise, when a system is built under the tariff with meters from the beginning, Staff's maxim is correct: anything on the customer side of the meter is the customer's responsibility.

⁶¹ The statutes provide that the system “. . . includes all . . . pipes . . . owned, operated, controlled or managed in connection with or to facilitate the . . . supply, distribution, sale, furnishing or carriage of water for . . . domestic or other beneficial use.” Section 386.020(60), RSMo Supp. 2010.

⁶² Section 393.190.1, RSMo 2000.

⁶³ 4 CSR 240-2.605.

⁶⁴ Section 393.190.1, RSMo 2000.

But neither the exclusion nor the exception applies to the east curve because the east curve has always been part of the system. Also, the tariff does not purport⁶⁵ to replace the statute because the tariff lacks any substitute for the statute's procedure.

That procedure includes the filing of information:

Any person seeking any order under this subsection authorizing the . . . transfer . . . or other disposition, direct or indirect, of any . . . water corporation . . . shall, at the time of application for any such order, file with the commission a statement, in such form, manner and detail as the commission shall require, as to what, if any, impact such . . . transfer . . . or other disposition will have on the tax revenues of the political subdivisions in which any structures, facilities or equipment of the corporations involved in such disposition are located. [⁶⁶]

The statute also requires notice:

The commission shall send a copy of all information obtained by it as to what, if any, impact such . . . transfer . . . or other disposition will have on the tax revenues of various political subdivisions to the county clerk of each county in which any portion of a political subdivision which will be affected by such disposition is located. [⁶⁷]

And, by requiring an order, the statute requires the Commission to make a decision.

The information, notice, and decision-making due under the statute is absent from the tariff, so merely placing a meter does not substitute for the Commission's order.⁶⁸

That reading avoids three unjust and oppressive consequences because it:⁶⁹

⁶⁵ The Commission cannot overwrite Section 393.190 regardless of the passage of time. *Webster v. Joplin Water Works Co.*, 177 S.W.2d 447, 451-52 (Mo., Div. 2 1944).

⁶⁶ Section 393.190.1, RSMo 2000.

⁶⁷ Section 393.190.1, RSMo 2000.

⁶⁸ Staff correctly notes that a tariff has the force and effect of law like the statute. But the statute and the tariff do not conflict so the Commission is reading them in harmony. *Reed v. Brown*, 706 S.W.2d 866, 868 (Mo. banc 1986). The interpretation of a statute is a question of law. *Richard v. Missouri Dept. of Corrections*, 162 S.W.3d 35, 37 (Mo. App., W.D. 2005). No party cites authority contrary to the Commission's reading, nor any Commission decision deciding these issues differently, including the chain cite at *Staff's Comment's and Response*, page 9, footnote 7. As to those cited decisions, the Commission is not giving a different answer, because the question was never asked.

- Ends the respective responsibilities of company and customer at the customer's property line.
- Does not require the customer to enter another's property to maintain his own service.
- Bars unilateral manipulation of maintenance duties by skillful meter placement.⁷⁰

Those results are consistent with the public interest, because the public interest generally includes "substantial justice between patrons and public utilities[.]"⁷¹ and safe water for Mr. Larson, his guests, and other persons using the Company's water.⁷² Substantial justice on these facts appears in the statute: the Company shall not reduce its service without disclosure, notice, and the Commission's decision on the public interest as a whole.⁷³

c. Summary: Tariff and Statute

As the system went from private service to public service the tariff's purpose was to impose public duties. None of the cited tariff provisions say anything about disposing of property or transferring any duty to maintain. After the placement of the east meter, the east curve continued to serve the resort, so it remained necessary and useful in the performance of the Company's duties to the public.

⁶⁹ *Hyde v. City of Columbia*, 637 S.W.2d 251, 262-3 (Mo. App., W.D. 1982).

⁷⁰ Conduct not alleged and not found as to the Company, but perfectly permissible under Staff's maxim.

⁷¹ Section 386.610, RSMo 2000.

⁷² Section 386.310.1, RSMo 2000.

⁷³ Staff argues that the tariff trumps the statute. *Staff's Comments and Response*, pages 5 through 12. But see: Mo. Const. Art. II, Section 1; and Art. III, Sections 21 and 28.

Disposing of the system is the subject of the statute. The statute addresses precisely these facts and it requires a Commission order before the Company disposes of any water line.⁷⁴ No such order has issued for the east curve.

Absent that authorization, abandonment of the east curve is void. The east curve remains within the Company's system and within its duty to maintain. Therefore, the Commission concludes that the Company violated its duty to maintain the east curve.

III. Remedies

As recompense for that violation, Larson asks for relief in several forms.

a. Street Repair and Billing Refund

Mr. Larson asks that the Commission to order the Company to repair the street and to set off, against his water bill, the labor and expense he incurred. Mr. Larson cites the tariff's requirement that meters shall be at least "near" the customer property line,⁷⁵ alleges that all he wanted out of the east meter was to connect the new house, and argues that placing the meter on the property line would have avoided confusion over the east curve.

The LLC argues that Mr. Larson failed to enter the amounts of his damages into evidence and to testify that those amounts are reasonable. The Commission's expertise in public utilities includes the cost of maintenance, and the Commission concludes that the amounts that Mr. Larson seeks are reasonable. The Commission also concludes

⁷⁴ Staff argues that this reading requires an application for transfer of assets whenever the company places a meter. *Staff's Comments and Response*, page 11, second paragraph. Because placing a meter does not signify a transfer of assets, Staff's argument is incorrect. The statute applies only when a company purports to dispose of property as it has on these facts.

⁷⁵ Tariff, Original Page 26, Rule 11(f).

that it is unfair for the Company retain the benefit that Mr. Larson conferred on the Company without the Company paying the reasonable value of that benefit.

But Mr. Larson did not enter evidence of his damages into the record. The findings of fact must stand on the record.⁷⁶ Also the tariff bars any refund without proof of the Company's willful misconduct.⁷⁷ Mr. Larson states, and the Commission has found, that willful misconduct did not occur.⁷⁸ In any event, no statute provides an action for money damages before the Commission.⁷⁹ Similarly, the street is not part of the system.⁸⁰ Therefore, those matters are outside the Commission's jurisdiction.⁸¹ The Commission has made findings and conclusions on the matter but the Commission will not order a payment or a billing adjustment.

b. Meter Placement

Mr. Larson asks that the east meter be moved to the east valve box's location on the property line because the tariff requires any meter to "be installed at or near the Customer's property line."⁸² But Mr. Larson made that request assuming that the meter's placement determines the Company's maintenance duties and the Commission has concluded otherwise. The problem is not the meter's distance from the property

⁷⁶ *Hartley v. Spring River Christian Village*, 941 S.W.2d 4, 7 (Mo. App., S.D. 1997).

⁷⁷ Tariff, Original Page 20, Rule 9(c).

⁷⁸ For this reason, the Commission is also not directing its Chief Counsel to seek penalties against the Company. Section 386.570.1 and .2, RSMo 2000, allow the Commission to seek "a penalty of not less than one hundred dollars nor more than two thousand dollars for each offense" per day for a violation. But, just as Mr. Larson complains that his difficulties come from following the Company's advice on meter placement, it would be unduly harsh to penalize the Company for following Staff's interpretation of the tariff.

⁷⁹ *State ex rel. Laundry, Inc. v. Public Serv. Comm'n*, 34 S.W.2d 37, 46 (Mo. Div. 1, 1931).

⁸⁰ Section 386.020(60), RSMo Supp. 2010.

⁸¹ 34 S.W.2d at 46.

⁸² Tariff, Original Page 26, Rule 11(f).

line. The problem is that the Company's main reaches Mr. Larson's property line by crossing a third person's land. The Commission will deny that request.

c. New Valves and New Valve Boxes

Mr. Larson further asks for a new east box, a new west valve box, and new valves. The need for new valve boxes and new valves is not apparent from the record so Mr. Larson has not carried his burden of proving that the condition of the valve boxes and valves constitute a violation. Therefore, the Commission will make no order in that regard.

d. East Curve

Mr. Larson and Staff suggest elimination of the east curve from the system. The Commission may order that remedy under the following statutory provisions.

The commission shall:

* * *

(2) . . . have power to order such reasonable improvements as will best promote the public interest, preserve the public health and protect those using such . . . water . . . , and have power to order reasonable improvements and extensions of the works, . . . pipes, lines, conduits, . . . and other reasonable devices, apparatus and property of . . . water corporations [.]

* * *

(5) [W]henever the commission shall be of the opinion, after a hearing had . . . upon complaints, that the property, equipment or appliances of any [public utility] are unsafe, insufficient or inadequate, the commission shall determine and prescribe the safe, efficient and adequate property, equipment and appliances thereafter to be used, maintained and operated for the security and accommodation of the public and in compliance with the provisions of law [.⁸³]

⁸³ Section 393.140, RSMo 2000.

The tariff also addresses old system components:

Pre-existing facilities that do not comply with applicable regulations may remain [if] their existence does not constitute a service problem or improper use, and reconstruction is not impractical.⁸⁴

Those provisions apply to the east curve as follows.

Mr. Larson expended considerable toil in fixing the leak. It is fortunate that he did so for the sake of safe and adequate service, because a leak may contaminate the system. The next customer may not know about a leak, possess the resources to fix it, and have urgent commercial interest to do so.

The Commission concludes that the east curve is unsafe, insufficient, inadequate, and constitutes a service problem, and will order the improvement to the system as Mr. Larson and Staff suggest. To promote the public interest, preserve the public health, and protect the people using the Company's water, the Commission will order the Company to improve the system by disconnecting the east curve. That reconstruction is not impractical because it requires only disconnecting the east curve from the west valve box and east valve box and extending the service connection from the west valve box ten feet to the west meter.

e. West Valve Box-West Meter Connection

Mr. Larson asks the Commission to order the Company to install a connection from the west meter to the west valve box to make possible the elimination of the east curve from the system. As to the connection from the west valve box to the west meter,

⁸⁴ Tariff, Original Sheet No. 8, Rule 2(d).

Mr. Larson has not carried his burden of showing that it is not on his side of the property line, so he has not shown that the Company has any duty toward it.

In its comments, the LLC suggests that the Commission order Mr. Larson to connect the west meter to the west valve box. In support, the LLC cites tariff provisions stating that the tariff binds the customer as a contract, and requiring a customer to bring the service line from the meter to the units.⁸⁵ Each unit is already connected to a meter, and the LLC cites no authority for the Commission to supervise customers or enforce a contract. Nevertheless, Mr. Larson has an incentive to supply the west cabins with safe and uncontaminated water, for which the west meter will be the only source once the Company disconnects the east curve from the west valve box. The tariff provides that the property line still marks the end of the Company's duty.

Therefore, the Commission will not order the Company to connect the west cabins to the west meter.

THE COMMISSION ORDERS THAT:

1. The complaint is granted because Mona L. Fennema d/b/a Woodland Manor Water Company ("the Company") violated the duty to maintain the water system.

2. No later than 30 days from the effective date of this decision, the Company shall disconnect the east curve (as described in the body of this order) from the west valve box (as described in the body of this order) and east valve box (as described in the body of this order).

⁸⁵ *Woodland Manor's Comments on Recommended Decision*, fourth page, full paragraph.

3. This order shall become effective on October 22, 2012.

BY THE COMMISSION

A handwritten signature in black ink, appearing to read 'S. Reed', written over a horizontal line.

Steven C. Reed
Secretary

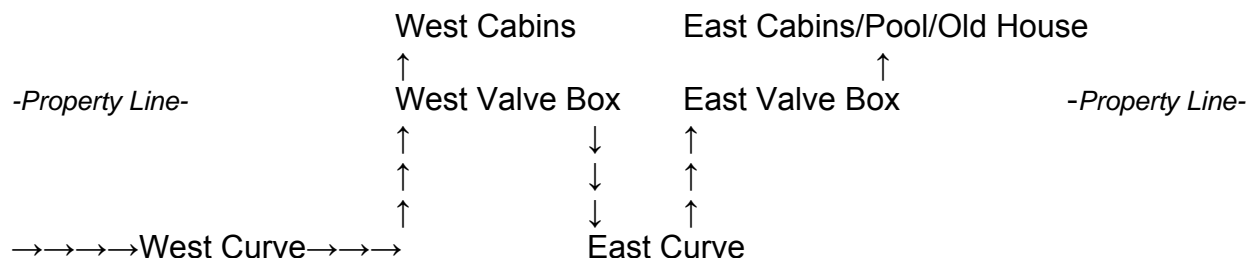
(S E A L)

Gunn, Chm., Jarrett, Kenney, and
Stoll, concur;
and certify compliance with the
provisions of Section 536.080, RSMo.

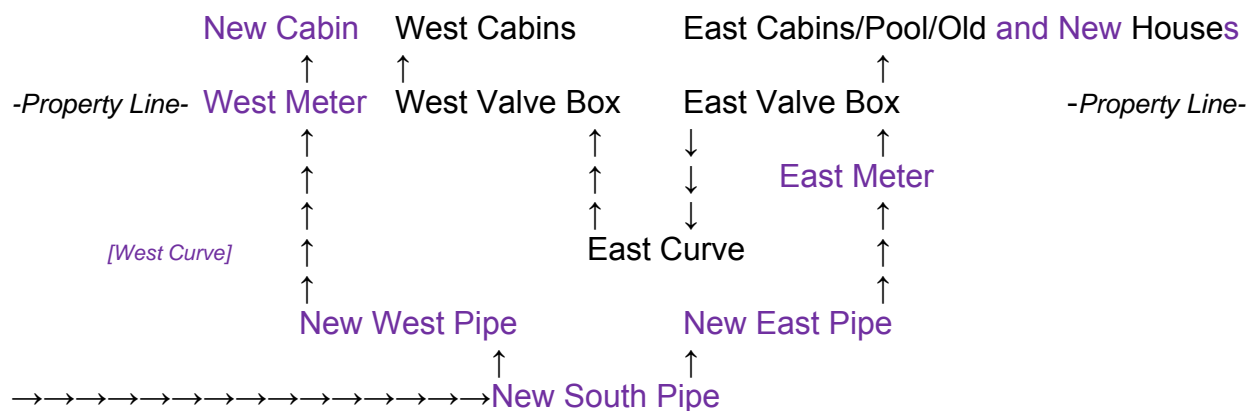
Dated at Jefferson City, Missouri,
on this 20th day of September 2012.

Appendix

A. Mr. Connell's System



B. Alterations by Mr. Larson and the Company (in purple)



C. Staff's Solution (in green)

