

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

Erik M. Thomas,

Complainant,

v.

Evergreen Lake Water Company,

Respondent.

Case No. WC-2006-0423

**MOTION TO SET ASIDE DEFAULT ORDER
AND REQUEST FOR STAFF INVESTIGATION**

COMES NOW the Staff of the Missouri Public Service Commission ("Staff"), by and through counsel, and for its motion to set aside default informs the Missouri Public Service Commission ("Commission") that Staff is now aware of information that shows the Order Granting Default ("Default Order") issued on June 13, 2006, is contrary to law in that the relief granted the Complainant is in violation of Evergreen Lake Water Company's tariff. Under the "Filed Tariff Doctrine", the rate contained in an approved tariff is binding on the utility, it's customers and this Commission (*see BPS Telephone Co., v. Voicestream Wireless Corp.*, TC-2002-1077, pg 46, *citing Bauer v. Southwestern Bell Tel. Co.*, 958 S.W.2d 568, 570 (Mo.App., E.D.1997); *Louisville & Nashville R.R. v. Maxwell*, 237 U.S. 94, 97, 59 L.Ed. 853, (1915); *State ex rel. Associated Natural Gas Co. v. PSC*, 954 S.W.2d 520, 531 (Mo.App., W.D.1997)). Therefore, Staff prays the Commission set aside the Default Order and order a staff investigation into the cause of the complaint. In further support, the Staff states as follows:

1. On October 25, 2005, the Commission approved a rate increase and tariff filed by Evergreen Lake Water Company ("Respondent") in case no. WR-2006-0131 and tariff no. JW-2006-0233 ("Tariff"). This tariff went into effect October 27, 2005. In its schedule of rates, this

tariff specified tap-on-fees for 5/8” meters at \$800.00, for those connecting to Respondent’s system (Tariff at Sheet No. 4A). The prior rate was set at \$75.00 for tap-on-fees.

2. On May 2, 2006¹, Erik M. Thomas (“Complainant”) filed a formal complaint against the Respondent because a bill was issued for five taps at the rate of \$800.00 per tap. Complainant claims that the original bid he received from the Respondent was for \$75.00 per tap, but does not dispute “that the “tap on’s” were installed the day of the increase or the day after.” (Complaint at pg 2, 2.).

3. Notice of the Complaint was issued by the Commission on May 4 informing the Respondent of the complaint and directing an answer to be filed by June 5. The Respondent was cooperating with Staff by answering informal inquiries. However, the Respondent failed to formally respond to the complaint by filing an answer.

4. As a result, on June 13 the Commission issued the Default Order, taking effect on June 23, unless the Respondent moved to set aside the Order for good cause within seven days of issuance, pursuant to Commission Rule 4 CSR 240-2.070(9). The Respondent did not file any such motion. Therefore, pursuant to this same rule, the Complainants averments were admitted, consequently ordering the Respondent to charge \$75.00 per tap connection in violation of their tariff and contrary to law under the “Filed Tariff Doctrine”. (*see BPS Telephone Co., v. Voicestream Wireless Corp.*, TC-2002-1077, pg 46, *citing Bauer v. Southwestern Bell Tel. Co.*, 958 S.W.2d 568, 570 (Mo.App., E.D.1997); *Louisville & Nashville R.R. v. Maxwell*, 237 U.S. 94, 97, 59 L.Ed. 853, (1915); *State ex rel. Associated Natural Gas Co. v. PSC*, 954 S.W.2d 520, 531 (Mo.App., W.D.1997)).

¹ Unless otherwise specified, all dates referred herein are in the year 2006.

COMMISSION AUTHORITY TO SET ASIDE THE DEFAULT ORDER

5. The Commission has the authority to set aside this Default Order and cure the disparity between the tariff and the order.

6. Under §386.490.3, RSMo.:

Every order or decision of the commission shall of its own force take effect and become operative thirty days after the service thereof, except as otherwise provided, and shall continue in force either for a period which may be designated therein or **until changed or abrogated by the commission, unless such order be unauthorized by this law** or any other law.... [emphasis added].

This perpetual jurisdiction authorizes the Commission to set aside the Default Order if it is unauthorized by law, which it is under the tariff in this case and pursuant to the “Filed Tariff Doctrine”, as cited above.

7. Under Commission Rule 4 CSR 240-2.015(1), the Commission may waive a rule in this chapter for good cause, including 4 CSR 240-2.070(9). Here, there is good cause to withdraw an order that is contrary to a tariff in effect, order a staff investigation into the complaint, and extend the time allowed for Respondents to answer the complaint.

8. Further discretion for the Commission to withdraw the Default Order is derived from Commission Rule 4 CSR 240-2.050(3)(B). This rule provides that when an act is required to be done by order of the Commission “within a specified time, the Commission, at its discretion, may... after the expiration of the specified period, permit the act to be done where the failure to act was the result of excusable neglect.” Respondent’s failure to file an answer to this Complaint was due to an ignorance of the Commission’s rules, where the Respondent answered Staff’s initial questions and inaccurately believed that this was the response required.

9. In light of the above information, Staff believes a formal investigation into the cause of the complaint, as authorized under Rule 4 CSR 240-2.070(10), is justified, and should be ordered by the Commission.

WHEREFORE, the Staff prays for the Commission to set aside the Order Granting Default and order a staff investigation into the cause of this Complaint.

Respectfully Submitted,

/s/ **Shelley E. Syler**

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Certificate of Service

I hereby certify that a copy of this Motion has been mailed, hand-delivered, transmitted by facsimile or electronic mail to all counsel and/or parties of record this 24th day of July 2006.

/s/ **Shelley E. Syler**