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.	)	

REPORT AND ORDER

Issue Date: **March 4, 2008**

Effective Date: **March 14, 2008**

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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.	)	

APPEARANCES

Mark Ludwig, Carson & Coil, 515 East High Street, Jefferson City, Missouri 65101, Attorney for Greater Jefferson City Construction Company, Inc., and Edward P. Storey.

Marc H. Ellinger, Blitz, Bardgett & Deutsch, L.C., 308 East High Street, Suite 301, Jefferson City, Missouri 65101, Attorney for Aqua Missouri, Inc.

Keith R. Krueger, Missouri Public Service commission, Post Office Box 360, Jefferson City, Missouri 65101, Attorney for the Staff of the Commission.

REGULATORY LAW JUDGE: Kennard L. Jones, Judge

REPORT AND ORDER

Syllabus: In this Report and Order, the Commission finds that the wastewater treatment facility serving Quail Valley subdivision has the capacity to handle an additional 32 hook-ups. The Commission also directs Aqua Missouri to seek any necessary permits from the Department of Natural Resources.

Background

Edward P. Storey and his company, Greater Jefferson City Construction Company, Inc., began Quail Valley subdivision in 1983. Mr. Storey built 40 homes with septic tanks but prior to building more, installed a sewage system and treatment plant. In 1993, Mr. Storey completed the collection system and turned the plant over to Capital Utilities. Capital Utilities later became Aqua Missouri.

There are currently 78 homes in Quail Valley and two additional lots sold to which hook-ups have been promised. Complainants seek an additional 32 hook-ups to the facility; making a total of 112 homes. Aqua Missouri, however, contends that the treatment facility will need to be expanded in order to accommodate an additional 32 hook-ups. Complainants and the Staff of the Commission agree that the plant is operating well below capacity and that expansion is not necessary. Mr. Storey, who still owns portions of the subdivision, seeks to sell the remaining lots.

In order to resolve this dispute, Complainants and Respondent filed a Statement of the following issues:

1. Is the Quail Valley Waste Water Treatment Facility capable of handling an additional 32 homes?

2. If the Facility is incapable of handling an additional 32 homes, how many more can it handle and who is responsible for expanding the plant to handle an additional 32 homes?

3. Did Complainants apply for additional hook-ups and, if so, did Respondent deny such applications?

4. If Complainants did apply for additional hook-ups, how many were applied for?

5. If Respondent did deny such application, was Respondent's denial of additional hook-ups wrongful, intentional, and without just cause or excuse?

6. What was the original design capacity of the Facility?

Jurisdiction of the Commission

Complainants filed their complaint alleging a number of facts. For their relief, Complainants request;

> An order from the Missouri Public Service Commission ordering Aqua Missouri, Inc., to allow hookups for an additional 32 lots so that Quail Valley Lake Subdivision can be completely developed or, in the alternative, to expand the waste water treatment facility to handle the additional 32 lots that are platted in the subdivision.

Respondent contends that under the Commission's general complaint statute[1], Complainants must "specifically reference [in the complaint] a violation of law, rule . . . or order of the Commission in order for the Commission to have jurisdiction." In support of its position, Respondent cites four cases.[2] Before discussing those cases, the Commission will first look to the language of the statute itself, which states:

> Complaints may be made . . . by any corporation or person . . . , in writing, setting forth any act or thing done or omitted to be done by any . . . 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. . . .* [emphasis added].

[1] Section 386.390.1 RSMo (2000).

[2] *State ex rel., St. Louis – San Francisco Railway Company v. Public Service Commission,* 53 S.W.2d at 871, (Mo. App. W.D. 1932); *Friendship Village of South County v. Public Service Commission,* 907 S.W.2d 339, 345 – 346 (Mo. App. W.D. 1995); *State ex rel,. Ozark Border Electric Cooperative v. Public Service Commission,* 924 S,W,2d 597, 600 (Mo. App. W.D. 1996) and *Deaconess Manor Association v. Public Service Commission,* 994 S.W.2d 602 (Mo. App. W.D. 1999).

The phrase "in violation, or claimed to be in violation, of . . .", shows that a complainant need not allege any violation. Rather, the complainant need only set forth acts that may constitute a violation. To hold Complainants to the standard posited by Respondent would bar many, if not all, pro se complainants from successfully bringing a matter under the Commission's jurisdiction. For instance, consider a violation concerning a tariff provision. Under Respondent's argument, a complainant would not only have to know that a tariff exists, but know how to access, read it and determine where a possible violation occurred. This is unreasonable and the plain language of the statute does not necessitate this requirement. The primary rule of statutory construction is to ascertain the intent of the legislature by giving the language used its plain and ordinary meaning.[3] In this statute it is clear that a violation may be claimed by a complainant or simply that the Respondent in fact be in violation of a statute or rule or order of the Commission. Thus, if that same complainant alleges only that a utility is charging too much for service, this allegation allows the Commission to question whether the utility is following its tariff provisions.

The Commission is a regulatory body whose function is not only to resolve disputes concerning sewer companies but also to hold them to certain standards. In this case, the sewer company must provide safe and adequate service in all respects.[4] The Commission would be remiss in its duty were it to ignore facts, which if proven would constitute a violation of this standard, because the Complainants did not specifically set forth a standard that may have been violated. The Commission will now review the cases cited by Respondent in support of its position.

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[3] *United Pharmacal Co. of Missouri, Inc. v. Missouri Bd. of Pharmacy*, 208 S.W.3d 907, 909 (Mo. banc 2006)

[4] Section 393.130.1 RSMo 2000

First, *State ex rel, St. Louis – San Francisco Railway Company v. Public Service Commission*: This case states that "[a] complaint under 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." This holding is consistent with the Commission's discussion above that the Commission need only look to the facts plead that if true may constitute a violation. Of particular note, is the phrase "fairly presents." An indication of whether the complaint was fairly presented is the Respondent's answer. The issue in the case is generally, whether Respondent should allow additional hook-ups to the sewer system without expansion. In its answer, Respondent discussed the design capacity of the facility and its offer to Complainants for an additional 10 hook-ups. Nowhere in the Answer did Respondent state that it did not understand what Complainants were talking about. From its answer, Respondent appears to understand what the complaint is about. Respondent's understanding of the complaint supports a conclusion that complaint was fairly presented.

This court goes on to state that it is "not so much concerned with the form and substance of the complaint as with the nature and extent of the order made and consideration upon which it was based." From this language, the court is more concerned with whether the Commission acted within its authority. The court was not concerned with the form of the complaint that prompted the Commission to act.

The second case cited by Respondent is *Friendship Village of South County v. Public Service Commission*. The court in this case cites to *State ex rel., St. Louis – San Francisco Railway Company v. Public Service Commission,* applies the same standard but further concludes that it is necessary to ask "whether a complaint is sufficient enough to

place an issue before the Commission in a manner requiring specific findings of fact and conclusions of law." The Commission concludes that the complaint in the present case satisfies this requirement. The court goes on to conclude that "the Commission's order's lawfulness turns on whether the Commission had the statutory authority to act as it did." Again, it is the action of the Commission, rather than what prompted the Commission to act, that is of importance.

The third case upon which Respondent rests its position is *State ex rel. Ozark Border Electric Cooperative v. Public Service Commission*. To fully understand this case, some background is necessary. A city and an electric company requested approval of a territorial agreement. Notice of the request was issued by the Commission and no one intervened. The Commission thereafter approved an agreement between the parties. Later, Ozark Border Electric Cooperative filed a complaint challenging the validity of the order approving the agreement. The Commission dismissed the complaint finding that (1) the complaint did not allege a violation of law, rule or Commission order as required by Section 386.390; and (2) it failed to allege a substantial change in circumstance since the approval of the territorial agreement that would invoke the Commission's jurisdiction under Section 394.312.6. Ozark appealed.

Although this case appears to support Respondent's exact position, the reviewing court explains that Ozark read the Commission's order as requiring that Ozark allege a violation of law under 394.312.6. Citing the Commission, the court notes that Ozark failed to allege facts indicating a violation of 394.312.6. The Commission reviewed Ozark's complaint to determine whether Ozark asserted actionable allegations under this statute or the Commission's general complaint statute. Ozark did not satisfy this requirement, which

is consistent with the above cases. There was also extended discussion about Ozark's prohibited collateral attack on the Commission's order. In that sense, the Ozark case is distinguished from the matter now before the Commission.

As pointed out by Staff, Section 393.130 requires that a sewer company "furnish and provide such service instrumentalities and facilities as shall be safe and adequate . . . ." The issue raised and the facts presented by the complaint puts before the Commission the question of whether the service is adequate. Complainants have therefore alleged facts that require the Commission to make a determination of adequate service. Again, this case is distinguished from the Ozark case.

Finally, Respondent relies on *Deaconess Manor Association v. Public Service Commission*. This case simply restates the conclusion in *Friendship.* Hence, based on the above, the Commission concludes that jurisdiction must be asserted over this matter and Respondent's argument fails.

Issue 1: Is the Quail Valley Waster Water Treatment Facility capable of handling an additional 32 homes?

Currently, there are 78 homes in the subdivision.[5] Two other lots have been sold and promised hook-ups. With the additional 32 hook-ups, the total number of lots served by Respondent would be 112. Complainants and Staff agree that the actual numbers relating to the capacity of the system and the operating permit issued by the Missouri Department of Natural Resources shows that the system is operating far enough below capacity that it can handle an additional 32 hook-ups. Respondent argues that the system was originally designed to accommodate 80 homes and that it is now operating at, or

[5] Tr. Page 572, Line 18

perhaps above, capacity.[6] Upon review of the record, the Commission makes the following findings of fact:

1. The Department of Natural Resources issued a Missouri State Operating Permit to Aqua Missouri, Inc. for the facility at Quail Valley Lake Subdivision effective February 4, 2005 through February 3, 2010.[7]

2. The design flow of the system is 22,000 gallons/day.[8]

3. The actual flow of the system is 14,400 gallons/day.[9]

4. The design sludge production of the system is 5.3 dry tons/year.[10]

5. The actual sludge production of the system is .375 dry tons/year.[11]

6. The Operating Permit places limitations on the effluent that Aqua Missouri may discharge into an unnamed tributary to the Moreau River.[12]

7. The Operating Permit does not put restrictions on the number of homes or people the facility can serve.[13]

8 Quail Valley subdivision was completely platted in 1983 with areas noted as reserved for future development.[14]

9. A letter dated May of 1992 by E.A. Mueller, the system's engineer, shows that the system will handle 80 homes with garbage grinders @ 3.7 persons per home = 296 persons.[15]

10. The facility was designed to accommodate the wastewater loading generated by the complete development of the subdivision.[16]

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[6] Ex. 35, Letter from Respondent's Expert, Randy Clarkson.

[7] Ex. 8, Missouri State Operating Permit.

[8] *Id.*

[9] *Id*.

[10] *Id*.

[11] *Id*.

[12] *Id*.

[13] Ex. 8, Tr. 139, lines 7-12.

[14] Tr. 48, Ex. 1.

[15] Ex. 25.

[16] Ex. 3, letter dated September 1993 to Ed Storey from Capital Utilities, Inc. (predecessor of Aqua Missouri).

11. In March of 2006, there were 229 people, an average of 2.97 persons per home, living in 77 homes in Quail Valley.[17]

12. With Aqua Missouri's acceptance of more connections, DNR would consider a population equivalent lower than 3.7.[18]

13. Actual figures from the water district show that for 75 homes there were 425,900 gallons of water used in the month of January 2006.[19]

14. The homeowner's association requires the homeowners to pump the septic tanks every 3 years.[20]

15. The septic tanks reduce the amount of biochemical oxygen demand (BOD) and total suspended solids (TSS) entering the system.[21]

16. At the request of Capital Utilities, aerators in the septic tanks were turned off because there was not enough loading in the plant to make it run efficiently.[22]

17. Aerators in the septic tanks would reduce the load by almost 50 percent.[23]

18. The permit levels for BOD and TSS are 30 parts per million and, from July 2006 to June of 2007, the actual average BOD was 6.8 and the TSS was 8.7.[24]

19. Aaron Lachowicz, a facility supervisor for Aqua Missouri, testified that the BOD and TSS loads at Quail Valley are relatively light because of the septic tank systems.[25]

20. Respondent's expert, Randy Clarkson's letter dated October 2007, concludes system is presently overtaxed.[26]

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[17] Ex. 9, letter dated March 7, 2006 to the DNR from Greg Haug, Complainants' expert.

[18] Ex. 31, letter dated May 5, 2006 from the DNR to Ed Storey.

[19] Tr. 142.

[20] Ex. 6, Addendum to Declaration of Covenants and Restrictions in Quail Valley subdivision.

[21] Tr. 148-150.

[22] Tr. 164, lines 12-24.

[23] Tr. 165, lines 12-14.

[24] Ex. 8, operating permit, and Ex. 16, test results of effluent.

[25] Tr. 492, lines 22-25.

[26] Ex. 35, Respondent's expert's Report on Wastewater Facility Capacity Evaluation dated September, 2007 and Tr. 453, lines 14-18.

21. Respondent has offered to connect an additional 10 homes as long as Complainants agree that the system can handle no more than 10 additional connections and that Complainants bear the costs of necessary expansion.[27]

22 Greg Haug, Complainants' expert, states that if effluent readings begin to approach the permitted levels, home building can stop, tube settlers can be put in the clarifiers and aerators can be put back into the septic tanks, which would reduce loading by almost 50 percent.[28]

23. Jerry Scheible, Staff's witness, does not know why the system could not serve an additional 32 homes.[29]

Upon review of the record, the Commission makes the following conclusions of law:

1. Every sewer corporation shall provide safe and adequate service.[30]

2. Unless satisfactory justification can be given for using a lower, per-home occupancy, DNR rules require that design criteria be based on an average occupancy of at least 3.7 persons per home.[31]

Discussion

There is overwhelming support in the record that the system at Quail Valley subdivision is operating below its capacity. However, this finding is premised on the use of actual data of the system's effluent and of the population the system now supports. Most telling is the permit issued by DNR showing the system's design flow as 22,000 gallons per day compared to the actual flow of 14,000 gallons per day. Also, the design sludge production is 5.3 dry tons per year while the actual sludge production is .375 dry tons per year. Consistently, the BOD and TSS levels are well below average. This is apparently due to the fact that each homeowner is obligated to maintain a septic system, which treats the waste prior to entering the system. Actual data coupled with the testimony of Staff

[27] Ex. 49, letter from Respondent to Complainant dated December 2006.

[28] Tr. 163-164.

[29] Tr. 239.

[30] Section 393.130(1) (Cum. Supp 2006).

[31] 10 CSR 20-8.020(11)(B)(4).

witnesses, Complainants' witness and at least one Respondent witness show that the system's BOD and TSS level are well below capacity.

Although Respondent argues that the system can not handle an additional 32 homes as requested by Complainants, Respondent has offered to conditionally connect an additional 10 homes. This is inconsistent with Respondent's position that the system is operating at or above capacity as Respondent's expert stated. Under Respondent's position, by adding 10 connections without expansion, Respondent would jeopardize its system, service to its customers, Missouri's natural resources and its operating permit. In light of this inconsistency, the Commission questions the sincerity of Respondent's position that the system cannot handle additional hook-ups.

Under DNR regulations, the average number of persons per home is 3.7. Using DNR's number, the design criteria calls for service to 80 homes – totaling 296 people.[32] This is the point relied on by Respondent. The actual number of persons per home is 2.97. Consistent with serving 296 people, the number of homes served would be 100.[33] Both Complainants and Staff, however, would increase this number to 112 because each home is required to maintain a septic tank and the use of septic tanks greatly reduces both the BOD and TSS delivered to the system. Staff particularly points out that Aqua's operating permit is based on the effluent rather than the number of homes served. Complainants' expert goes even further to posit that an additional 40 homes could be supported by the system; adding that tube settlers could be put in the clarifiers and aerators could be put back in the septic tanks reducing the load by almost 50%.

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[32] 3.7 x 80 = 296.

[33] 296 ÷ 2.97 = 99.66.

Respondent is concerned that because the maintenance of the septic tanks is left to the homeowners, it has no guarantee that tanks will be properly maintained despite that proper maintenance is required under the Homeowners' Association agreement. DNR expressed this same concern in a letter to Complainants. The Commission notes, however, that if the septic tanks are not properly maintained, system expansion may be necessary; the responsibility of which will be discussed under a separate issue. Considering this possibility and that of the system's capacity being breached even with properly maintained septic tanks, the Commission finds that there is action that can be taken to remedy the situation and that the interest in development outweighs the possibility of having to take those remedial steps; whether it be adding aerators or expanding the system.

Finally, the Commission understands that DNR rules primarily govern this matter and that DNR has the primary interest in preserving our natural resources. During the hearing, testimony was given by Mr. Haug that if the Commission orders Respondent to allow additional hook-ups, construction permits would be required from DNR. Prior to issuing the permits, DNR would conduct its own evaluation of the capacity of the plant.[34] The Commission, however, notes that under DNR rules, a permit is not needed for "service connection to wastewater sewer systems."[35] However, the same rule also allows DNR to take action "if any of the [exempted activities] should cause pollution of waters . . . ."

Conclusion

In light of the overwhelming evidence that the system at Quail Valley is operating below its capacity, the Commission will direct Aqua Missouri to allow up to an additional

[34] Tr. 208, lines 21 – 209.

[35] 10 CSR 20-6.-1-(B)1.

32 hook-ups, subject to DNR regulations and scrutiny. The Commission will also direct Aqua to apply for any necessary permits with DNR to facilitate the additional hook-ups. Finally, the Commission will send a copy of this order to DNR to specifically put the department on notice of the situation at Quail Valley.

Issue 2: If the Facility is incapable of handling an additional 32 homes, how many more can it handle and who is responsible for expanding the plant to handle an additional 32 homes?

For purposes of this discussion, the Commission adopts those facts set out above.

Because the Commission has determined that the facility is capable of handling an additional 32 homes, this first part of this issue need not be examined. However, the Commission realizes that numbers may change in the future. At some point, while adding homes to the system, capacity limits may be approached and it may become necessary to expand the system.

Complainants express their willingness, pursuant to the Developer Agreement, to extend the collection lines to lots which do not have them. However, Complainants posit that any expansion of the plant is the responsibility of Aqua because Capital Utilities, Aqua's predecessor, agreed to accommodate wastewater loading generated by the complete development of the subdivision.

Respondent points to numerous instances where the Mr. Storey has inquired about the necessity to expand the plant. This, Respondent reasons, is evidence of Mr. Storey's understanding of his responsibility to expand the plant if necessary.

Staff argues that because Aqua holds the certificate of convenience and necessity to safely and adequately serve the subdivision, it is Aqua's responsibility to expand "within reasonable limitation." Staff goes on to state that under Aqua's tariff, Complainants may be held responsible.

Discussion

As a public utility, the Commission concludes that Aqua Missouri has a general mandate, within reasonable limits, to provide service to members of the public within its designated service area.[36] A utility tariff has the "same force and effect as a statute directly prescribed from the legislature."[37] Aqua Missouri's tariff imposes additional requirements on developers whose development plans will require the construction of new treatment facilities or the extension of new collecting sewers.[38] Essentially, a developer is required to pay for the extension of sewers needed to serve the new development as well as for any new treatment facilities needed to serve the new development.

The additional requirements that Aqua Missouri's tariff imposes are reasonable. The developer, and ultimately the buyer of the developed property, should be responsible for the cost of constructing the sewer facilities needed to serve that property. If the developer and the developer's customers are not held responsible for paying those costs, the costs of serving the newly developed property would be unfairly imposed, through higher rates, upon the homeowners currently served by the existing sewer system, while the developer collects the extra profits.

Staff argues that because Aqua Missouri holds the certificate of convenience and necessity, it has the responsibility to construct any necessary expansion of the plant. However, Staff goes on to state that Aqua, and ultimately the Commission, can require Complainants to comply with the tariff as a condition of any order requiring Aqua to expand its facilities.

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[36] *State ex rel Missouri Power and Light Co. v. Pub. Service Comm'n,* 669 S.W.2d 941,m 946 (Mo. App. W.D.1984).

[37] *State ex re. Laclede Gas Co. v. Pub Serv. Comm'n,* 156 S.W.3d 513, 521, (Mo. App. W.D. 2005).

[38] Rule 12(b) of Aqua Missouri's application tariff.

As the Commission concluded with regard to Aqua Missouri's tariff in *Jason Becker, Becker Development Company v. Aqua Missouri,*[39] the developer is required to bear the cost of new treatment facilities. Reasoning that the important principle is that a cost causer should be required to pay for the costs caused, the Commission drew no distinction between new treatment facilities and expansion of an existing facility to accommodate new development. The Commission therefore concludes, as in the *Becker* case, that Complainants are responsible for any necessary expansion.

Issues 3-5

These issues are irrelevant to the plant's capacity to handle additional hook-ups. The parties appear merely to point fingers at one another as to whose fault it is that this matter has not been resolved. It is evident that both Complainants and Respondent agree that the system can handle an additional 10 hook-ups. Why this has not happened may be the result of bad will on the part of either or both Complainants and Respondent.

Regardless, it would lead to no remedy were the Commission to find one way or the other. The Commission will therefore not satisfy the parties by placing blame with one or the other.

Issue 6: What was the original design capacity for the facility?

The original engineer who designed the plant, E.A. Mueller, wrote a letter dated May of 1992, which shows that the system will handle 80 homes with garbage grinders @ 3.7 persons per home = 296 persons.[40] His assessment was based on the DNR code average of 3.7 persons per household. However, when DNR issued an operating permit, there is no mention of the number of homes or persons to be served. Rather, DNR puts

[39] *See Commission Case No. SC-2007-0044.*

[40] Ex. 25

restrictions on the effluent and flow. The Commission questions what benefit any answer to this issue would bear. As best put by Staff in its post hearing brief: ". . . the original design is essentially a historical artifact that is not relevant to the evaluation of the treatment plant that now exists." The ultimate issue is whether the system has capacity to handle additional hook-ups. That is the issue presented in the complaint and the issue that ultimately resolves this dispute.

IT IS ORDERED THAT:

1. Aqua Missouri, Inc. shall, upon written application and consistent with the company's tariff, allow up to an additional 32 hook-ups to its wastewater treatment facility at Quail Valley Subdivision.

2. Aqua Missouri, Inc. shall apply for any necessary permit(s) with the Department of Natural Resources to facilitate compliance with ordered paragraph 1.

3. If with additional hook-ups, the effluent levels begin to approach those maximums set by the Department of Natural Resources' codes or the company's operating permit, no additional hook-ups shall be made until appropriate remedial action is taken.

4. The Data Center shall mail a copy of this Report and Order to the Department of Natural Resources.

5. This order shall become effective on March 14, 2008.

6. This case shall be closed on March 15, 2008.

BY THE COMMISSION

Colleen M. Dale
Secretary

(S E A L)

Davis, Chm., Murray, Clayton,
Appling, and Jarrett, CC., concur and
certify compliance with the provisions
of Section 536.080, RSMo.

Dated at Jefferson City, Missouri,
on this 4th day of March, 2008.