

**STATE OF MISSOURI
PUBLIC SERVICE COMMISSION**

At a session of the Public Service
Commission held at its office in
Jefferson City on the 7th day of
August, 2013.

Paul Schaefer,

Complainant

v.

I.H. Utilities, Inc.,

Respondent

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File No. WC-2013-0357

ORDER

Issue Date: August 7, 2013

Effective Date: September 6, 2013

The Missouri Public Service Commission is denying any relief on the complaint because I.H. Utilities, Inc. ("the company") did not commit any violation of any statute or Commission regulation, tariff or order ("violation") as to Paul Schaefer. 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.

Procedure

On January 17, 2013, Mr. Schaefer filed the complaint.¹ On February 19, 2013, the company filed an answer.² On May 1, 2013, the Commission's staff ("Staff") filed the

¹ Electronic Filing and Information Service ("EFIS") No. 1, *Formal Complaint*.

² EFIS No.6, *Answer of Respondent*.

results of its investigation.³ On May 17, 2013, Staff filed a stipulation of facts⁴ on behalf of Mr. Schaefer and the company, with a correction filed on May 28, 2013.⁵

On May 28, 2013, the company filed a motion for summary determination⁶ with a supporting memorandum.⁷ The Commission's regulations provide that the Commission may decide the merits of any part of a complaint without hearing when (i) doing so is in the public interest, (ii) admissible evidence supports the facts determinative of a claim or defense ("material facts") and (iii) no counter-evidence raises a genuine dispute as to any material fact.⁸ The regulation states:

The commission may grant the motion for summary determination 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 . . . any part of the case, and the commission determines that it is in the public interest. [⁹]

The material facts depend on (i) the claim or defense on which the motion stands and (ii) the burden of proof. The burden of proof on any complaint is with the complainant¹⁰ to show that a public utility has committed a violation.¹¹

³ EFIS No.11, *Staff Report and Recommendation*.

⁴ EFIS No.16, *First Stipulation of Material Facts*.

⁵ EFIS No.23, *Joint Notice of Material Error Contained in First Stipulation of Material Facts*.

⁶ EFIS No.25, *Respondent's Motion for Summary Determination*.

⁷ EFIS No.24, *Memorandum in Support of Respondent's Motion for Summary Determination*.

⁸ *ITT Comm. Fin. Corp. v. Mid-Am. Marine Supply Corp.*, 854 S.W.2d 371, 380-82 (Mo. banc 1993). That case discusses Missouri Supreme Court Rule 74.04. That rule is similar to the Commission's regulation. Therefore, case law interpreting the rule is helpful in understanding the regulation. *Johnson v. Mo. Bd. of Nursing Home Admin'rs*, 130 S.W.3d 626 (Mo. App., W.D. 2004).

⁹ 4 CSR 240-2.117(1)(E) (emphasis added).

¹⁰ *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).

On June 25, 2013, Staff filed a notice in lieu of further stipulations of fact on behalf of Mr. Schaefer and the company.¹² On June 25, 2013, Staff filed an issues list on behalf of Mr. Schaefer and the company.¹³ On July 1, 2013, the company filed a position statement.¹⁴

On July 5, 2013, the Commission issued notice of a recommended decision based on the motion for summary determination. On July 11, 2013, Staff filed comments to which the company filed a response on July 29, 2013.¹⁵ The Commission has modified the recommended order to address Staff's comments.¹⁶

The complaint and the stipulation establish the following facts. As to the facts so established, Mr. Schaefer filed no response within the time provided by regulation, so Mr. Schaefer raises no genuine dispute as to those facts. Therefore the Commission determines that it is in the public interest to decide this action by summary determination.

Findings of Fact

1. The company supplies water at retail.¹⁷
2. The company's service territory includes, but is not limited to, Indian Hills subdivision ("Indian Hills"), near Cuba, Missouri.¹⁸ Indian Hills is a recreational

¹¹ Section 386.390.1, RSMo 2000.

¹² EFIS No. 26, *Notice in Lieu of Second Stipulation of Material Facts*.

¹³ EFIS No 27, *Issues List*.

¹⁴ EFIS No 29, *Respondent's Position Statement*.

¹⁵ EFIS No 31, *Staff's Comments*.

¹⁶ 4 CSR 240-2.070(15)(H).

¹⁷ EFIS No. 16, *First Stipulation of Material Facts*, page 2, paragraph 7.

¹⁸ EFIS No.16, *First Stipulation of Material Facts*, page 2, paragraph 8.

development.¹⁹ The company provides service to approximately 700 customers in Indian Hills.²⁰ Most of those Indian Hills customers have single family residences.²¹ Other Indian Hills customers own lots, and use the subdivision's lake and other subdivision amenities, but do not have permanent residential structures.²²

3. Since at least 1985, under a tariff now superseded ("old tariff"), the company has provided service to vacant lots, including a $\frac{3}{4}$ inch connection to a vacant lot, which provides service to a house outside of Indian Hills, but inside the company's service territory.²³

4. In February 2012, Mr. Schaefer sought a service connection from the company.²⁴ Mr. Schaefer owns a vacant lot at 2322 Itawamba in the Indian Hills subdivision,²⁵ in the company's service territory.²⁶ Mr. Schaefer also owns an adjacent 100 acres outside the company's service territory.²⁷

5. Mr. Schaefer's plan is to construct a water service line along his driveway through his vacant lot.²⁸ Initially, Mr. Schaefer intends to use the water for irrigation to vegetation and water service through an outdoor hydrant, and at a recreational shelter he

¹⁹ EFIS No.16, *First Stipulation of Material Facts*, page 2, paragraph 9.

²⁰ EFIS No.16, *First Stipulation of Material Facts*, page 2, paragraph 8.

²¹ EFIS No.16, *First Stipulation of Material Facts*, page 2, paragraph 9.

²² EFIS No.16, *First Stipulation of Material Facts*, page 2, paragraph 9.

²³ EFIS No.23, *Joint Notice of Material Error Contained in First Stipulation of Material Facts*, page 2, paragraph 6.

²⁴ EFIS No. 1, *Formal Complaint*, attachment, page 1.

²⁵ EFIS No.16, *First Stipulation of Material Facts*, page 1, paragraph 2.

²⁶ EFIS No.16, *First Stipulation of Material Facts*, page 1, paragraph 24.

²⁷ EFIS No.16, *First Stipulation of Material Facts*, page 1, paragraph 5.

²⁸ EFIS No.16, *First Stipulation of Material Facts*, page 2, paragraph 11.

constructed which is approximately 1000 feet from the lot.²⁹ Later, Mr. Schaefer intends to use the water for residential service to a home that Mr. Schaefer is proposing to build on the 100 acres.³⁰

6. Mr. Schaefer requested a one-inch meter,³¹ which has a flow capacity of fifty (50) gpm.³² On December 14, 2012, the company submitted an installation agreement to Mr. Schaefer.³³ The agreement proposed that the company would provide service to the vacant lot via a three-quarter inch service connection to Mr. Schaefer's vacant lot and a three-quarter inch meter at a cost of \$650.³⁴ In return, the agreement proposed, Mr. Schaefer would not extend water service off the vacant lot.³⁵

7. Mr. Schaefer did not sign the installation agreement.³⁶

Conclusions of Law

The Commission has authority to hear the complaint.³⁷ The complaint's allegations bring it within the Commission's procedure for small formal complaints.³⁸ Mr. Schaefer has the burden of proof.³⁹

²⁹ EFIS No.16, *First Stipulation of Material Facts*, page 2, paragraph 11.

³⁰ EFIS No.16, *First Stipulation of Material Facts*, page 2, paragraph 11.

³¹ EFIS No.16, *First Stipulation of Material Facts*, page 2, paragraph 12.

³² EFIS No.16, *First Stipulation of Material Facts*, page 4, paragraph 23.

³³ EFIS No.16, *First Stipulation of Material Facts*, page 3, paragraph 20.

³⁴ EFIS No.16, *First Stipulation of Material Facts*, page 4, paragraph 21.

³⁵ EFIS No.16, *First Stipulation of Material Facts*, page 4, paragraph 21.

³⁶ EFIS No.16, *First Stipulation of Material Facts*, page 4, paragraph 21.

³⁷ Section 386.390.1, RSMo 2000.

³⁸ 4 CSR 240-2.070(15).

³⁹ *State ex rel. GS Technologies Operating Co., Inc. v. Public Service Commission*, 116 S.W.3d 680 (Mo. App. 2003).

A. Mr. Schaefer's Argument

Mr. Schaefer argues that the company must supply his vacant lot with service. Service is subject to the company's tariff, which—effective October 27, 2009⁴⁰—provides:

The Company will not install a service connection to a vacant lot.^[41]

Mr. Schaeffer made his application after the effective date of that tariff provision, so the company's denial of service to Mr. Schaefer's vacant lot is no violation of the tariff. On the contrary, providing service to Mr. Schaefer's vacant lot would be a violation of the tariff. The undisputed facts entitle the company to a favorable decision.

B. Staff's Comments

Staff advocates that the Commission construe the complaint as charging that the tariff is unlawful, suggests that the Commission enter summary judgment for Mr. Schaefer, and seeks a Commission order for the company to file a new tariff requiring service to vacant lots. The Commission rejects Staff's position. The reasons are several.

First, Staff's comments violate the Commission's regulation on small complaints, which forbids Staff to advocate a position beyond reporting the results of its investigation:

Staff shall not advocate a position beyond reporting the results of its investigation.⁴²

The results of Staff's investigation favor the company: Staff states that the company committed no violation⁴³ and recommends that the Commission should make its decision in the company's favor:

⁴⁰ *In the Matter of I.H. Utilities, Inc., Small Company Rate Increase*, File No. WR-2008-0408, *Order Approving Disposition Agreement and Tariff*, issued on October 21, 2009.

⁴¹ Tracking No. YW-2010-0068, P.S.C. Mo. No. 3, Original Sheet No. 12, Rule 5 (f), eff. October 27, 2009.

⁴² 4 CSR 240-2.070(15)(D).

Staff recommends the Commission enter an order dismissing this Complaint, or affirmatively finding in favor of [the company].^{44]}

But Staff's comments favor Mr. Schaefer. Staff now advocates a Commission order concluding that the tariff is unlawful and entering summary determination for Mr. Schaefer.⁴⁵ That position is beyond the results of Staff's investigation and so violates the Commission's regulation.

Second, the position that the tariff is unlawful first arose in Staff's comments. The complaint, generously read, does not argue that the tariff is unlawful. Even Staff notes the dubious nature of Staff's reading:

Respondent's Answer reveals that Respondent was not certain of the gravamen of the *Complaint* [. ^{46]}

Also, no citation to any statute, Commission regulation, or Commission order appears in either the complaint or in Staff's comments, to show a violation. Staff's comments only refer generally to "anti-discrimination provisions of Chapters 386 and 393 [,]" RSMo.⁴⁷

Third, Staff does not show any violation even of those provisions generally referenced. Staff argues:

Chapters 386 and 393 prohibit discrimination in the provision of utility services.⁴⁸

Those statutes provide:

⁴³ EFIS No.11, *Staff Report and Recommendation*, page 1, paragraph 2.

⁴⁴ EFIS No.11, *Staff Report and Recommendation*, page 2, paragraph 5.

⁴⁵ EFIS No.31, *Staff's Comments*, fifth page last paragraph, to sixth page second paragraph.

⁴⁶ EFIS No.31, *Staff's Comments*, second page third paragraph.

⁴⁷ EFIS No. 31, *Staff's Comments*, sixth page first paragraph.

⁴⁸ EFIS No. 31, *Staff's Comments*, fourth page first paragraph.

. . . Whenever the commission shall be of the opinion, after a hearing had upon its own motion or upon complaint, that the . . . acts or regulations of any such persons or corporations are unjust, unreasonable, **unjustly discriminatory** or unduly preferential or in any wise in violation of any provision of law, the commission shall determine and prescribe . . . the just and reasonable acts and regulations to be done and observed [⁴⁹]

Staff cites the tariff's discrimination between lots developed and vacant, but does not show that such discrimination is unjust, and does not show that it is just to treat a vacant lot the same as a developed lot.

The tariff filed by the company and approved by the Commission is presumed lawful.⁵⁰ Staff has not shown that, as a matter of law, the tariff violates any statute, Commission regulation, or Commission order. To order relief on a theory unannounced until the close of the comment period, not supported by the record, and in contravention of the Commission's regulations, would not be in the public interest.

C. Rulings

Therefore, the Commission will deny summary determination for Mr. Schaefer and enter summary determination for the company.

THE COMMISSION ORDERS THAT:

1. All relief requested in the complaint is denied.

⁴⁹ Section 393.140(5), RSMo 2000 (emphasis added).

⁵⁰ *Friendship Village of South County. v. Public Serv. Comm'n of Missouri*, 907 S.W.2d 339, 344 (Mo. App., W.D. 1995).

2. This order shall be effective on September 6, 2013.



BY THE COMMISSION

A handwritten signature in black ink that reads "Morris L. Woodruff".

Morris L. Woodruff
Secretary

R. Kenney, Chm, Jarrett, Stoll, and
W. Kenney, CC., concur.

Jordan, Senior Regulatory Law Judge