

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

Michael Brower	)	
	)	
Complainant,	)	
	)	
v.	)	<b><u>Case No. WC-2017-0207</u></b>
	)	
Branson Cedars Resort Utility Company, LLC	)	
	)	
Respondent.	)	

**STAFF SUGGESTIONS NARROWING THE ISSUES**

**COMES NOW**, the Staff of the Missouri Public Service Commission (Staff), by and through counsel, and for its *Suggestions Narrowing the Issues* responding to the motions for summary determination filed by Complainant and Respondents, states the following:

1. On August 14, 2017, both Michael Brower (Mr. Brower or Complainant) and Branson Cedars Resort Utility Company, LLC (Branson Cedars or Respondent) filed motions for summary determination with the Commission, pursuant to the agreed to procedural schedule and 4 CSR 240-2.117. The Motions for Summary Determination are intended to resolve Mr. Brower's *Complaint*, filed February 1, 2017, wherein he alleges that Branson Cedars is incorrectly billing Mr. Brower's structure two flat rate charges for service, when Mr. Brower believes he should be billed only one flat rate charge for service.

2. On April 7, 2017, Staff filed in this case its *Report* that summarized its investigation of the facts of the *Complaint*, and which provides a summary of Staff's analysis. The cover pleading to that *Staff Report* included the conclusion that:

Ultimately, the question before the Commission in this matter relies on the interpretation of the definition of “Unit” and “Living Unit” in BCUC’s tariffs.<sup>1</sup> The definition of living unit is clear that “each rental unit of a multi-tenant rental property are considered as separate units....” However, what is not completely clear is the effect on billing by the language “the premises or property of a single water consumer, whether or not that consumer is the Customer....”<sup>2</sup>

3. Summary determination is appropriate “where the moving party has demonstrated, on basis of facts to which there is no genuine dispute, right to judgment as matter of law.” ***ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp.***, 854 S.W.2d 371, 378 (Mo. 1993). The examination then is two-fold: first, whether the key facts to a claim are in genuine dispute, and second, if those facts are not in dispute, then is there is a right to a judgment as a *matter of law*.

4. Both Complainant and Respondent have alleged numerous facts they state are material facts not in dispute. Staff argues that, of the facts proffered by the parties, the few facts identified below are the only necessary facts the Commission must consider when making a determination. Moreover, and most importantly, Staff argues that the final remaining question before the Commission for determination is whether the Branson Cedars’s tariff language provides enough guidance to provide a decision in favor of either movant as a *matter of law*.

5. Staff files its *Suggestions*, not to argue in favor of one movant over another, but to assist the Commission in narrowing the considerations down to the most salient question.

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<sup>1</sup> P.S.C. MO No. 1, Sheet No. 8, Rule 1.R defines “Unit” or “Living Unit” as “the premises or property of a single water consumer, whether or not that consumer is the Customer. It shall pertain to any building whether multi-tenant or single occupancy, residential or commercial, or owned or leased. Each mobile home in a mobile home park and each rental unit of a multi-tenant rental property are considered as separate units for each single family or firm occupying same as a residence or place of business.”

<sup>2</sup> See, *Staff Reply*, p. 2, ¶ 5.

### **Relevant Facts**

6. Complainant Michael Brower is the owner of the structure at issue in this case.<sup>3</sup> Complainant's *Motion for Summary Judgment (Complainant's Motion)*, p. 2, ¶ 1; Respondent's *Motion for Summary Disposition (Respondent's Motion)*, p. 2, ¶ 1.

7. Branson Cedars provides Mr. Brower's structure water and sewer service. *Complainant's Motion*, p. 2, ¶ 1; *Respondent's Motion*, p. 3, ¶ 2.

8. The structure has one water service line, and one sewer service line. *Complainant's Motion*, p. 2, ¶ 1; *Respondent's Motion*, p. 3, ¶ 2.

9. The structure was originally built to be a duplex. *Complainant's Complaint*, p. 1, ¶ 3; *Respondent's Motion*, p. 3, ¶ 4.

10. Branson Cedars bills Mr. Brower. *Complainant's Complaint*, p. 1, ¶ 3 ("the utility company is charging for two services"); *Respondent's Motion*, p. 3, ¶ 2 ("Respondent provides utility service").

11. Complainant rents out the structure. *Complainant's Motion*, p. 2, ¶ 3; *Respondent's Motion*, p. 3, ¶ 9.

### **Applicable Law**

As laid out in the *Staff Report*, there are several applicable tariff provisions:<sup>4</sup>

Rule 1.D defines "CUSTOMER" as "any person, firm, corporation or governmental body which has contracted with the Company for water service or is receiving service from Company, or whose facilities are

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<sup>3</sup> Respondents in their *Motion* identify that the appropriate identification of the complainants is both Mr. Michael Brower and Ms. Darla Brower, as both own the property in question. Staff agrees, but shall refer to the Complainant as Mr. Brower for the sake of simplicity and consistency.

<sup>4</sup> The following tariff rules are for water operations. Sewer operation tariffs and rate designs are functionally identical. For the purpose of clarity and simplicity, Staff will reference both in the singular, "tariff."

connected for utilizing such service, and except for a guarantor is responsible for payment for service.”<sup>5</sup>

Rule 1.R defines “ ‘UNIT’ or ‘LIVING UNIT’ ” as “the premises or property **of a single water consumer, whether or not that consumer is the Customer.** It shall pertain to any building whether multi-tenant or single occupancy, residential or commercial, or owned or leased. Each mobile home in a mobile home park and **each rental unit of a multi-tenant rental property are considered as separate units** for each single family or firm occupying same as a residence or place of business.”<sup>6</sup> (Emphasis added).

Rule 1.M defines "SERVICE CONNECTION" is the pipeline connecting the main to the Customer's water service line and includes the curb stop, or outdoor meter setting and all necessary appurtenances located at or near the property line, or at the property line if there is no curb stop or outdoor meter setting. If the property line is in a street, and if the curb stop or meter setting is not located near the edge of the street abutting the Customer's property, the service connection shall be deemed to end at the edge of the street abutting the Customer's property. The service connection shall be owned and maintained by the Company.<sup>7</sup>

Rule 11.C states: “**Domestic water service to any one Customer at a single premises shall be furnished through a single service connection. Individual units of a multi-unit building may have separate connections** and meter installations only if each unit has separate plumbing, ground-level space, an individual service connection and meter installation location, and frontage to a Company-owned main. For multi-unit buildings with one service connection and meter installation, the inside piping may be rearranged at the Customer's own expense so as to separate the units and meter tenants, then divide the bill accordingly.”<sup>8</sup> (Emphasis Added).

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<sup>5</sup> P.S.C. MO No. 1, Sheet No. 6.

<sup>6</sup> P.S.C. MO No. 1, Sheet No. 8. Staff asserts it is the application of this tariff that is the key question before the Commission.

<sup>7</sup> P.S.C. MO No. 1, Sheet No. 7.

<sup>8</sup> P.S.C. MO No. 1, Sheet No. 27.

### **Argument – Suggestions Narrowing the Issue**

Because the facts listed above are not in contention by either the Complainant or Respondent, the question then turns to whether either party is entitled to a decision as a *matter of law*—that is, whether the tariff provides clear guidance as to the outcome of a decision. Therefore, the key question to determine is whether or not Respondent should charge either one or two monthly flat rate charges for service. That question turns on how to apply Rule 1.R defining “Unit.” The specific question, then, is *not* whether the structure in question is factually either one or two units, *but whether the company tariffs authorize the company to charge for service on a per-customer or per-unit basis.*

Unfortunately, nowhere in the tariff language is there an explicit statement that a customer charge should be based on a “per customer” or “per unit / per living unit” basis. The tariff’s schedule of charges only refers to “Residential – monthly flat rates” and “Commercial – monthly flat rates.”<sup>9</sup>

A validly adopted tariff has the force and effect as a statute.<sup>10</sup> Therefore, when reviewing a tariff for its meaning and application, the Commission follows the rules of statutory interpretation. “In the absence of a statutory definition or established judicial interpretation, analysis \* \* \* begins with the proposition that ‘[t]he primary rule of statutory interpretation is to give effect to legislative intent as reflected in the plain language of the statute.’ ” ***Gash v. Lafayette County***, 245 S.W.3d 229, 232 (Mo. banc 2008), *quoting State ex rel. Burns v. Whittington*, 219 S.W.3d 224, 225 (Mo. banc 2007). “[T]o discern legislative intent, the Court looks to statutory definitions or, if none

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<sup>9</sup> P.S.C. MO No. 1, Sheet No. 4.

<sup>10</sup> Any validly adopted tariff “has the same force and effect as a statute, and it becomes state law.” ***State ex rel. Mo. Gas Energy v. Pub. Serv. Comm’n***, 210 S.W.3d 330, 337 (Mo. App., W.D. 2006), ***Public Service Com’n of State v. Missouri Gas Energy***, 388 S.W.3d 221, 227 (Mo. App., W.D. 2012).

are provided, the text's 'plain and ordinary meaning,' which may be derived from a dictionary.”” **Campbell v. County Commission of Franklin County**, 453 S.W.3d 762, 768 (Mo. banc 2015).

Thus, the next step is to review the tariff for guidance based on the provided definitions, and if those are lacking, then review the tariff's plain and ordinary meaning. As shown above, the tariff does define key terms. A “customer” is the person or corporation that contracts for service with the utility.<sup>11</sup> At the very least, then, the Commission knows that the Complainant, Mr. Brower, is the customer. Implicit, further, is the suggestion that the customer is the paying party, considering the exception included in the rule that “except for a guarantor is responsible for payment for service.”<sup>12</sup>

Moreover, the definition of “unit” and “living unit” state that a “water consumer” is different from a “customer.” A “Unit” or “Living Unit” is “the premises or property of a single water consumer, whether or not that consumer is the Customer.”<sup>13</sup> Thus, the renters of the structure in question are clearly “water consumers” but are not the customer. The tariff is silent on whether it is the number of consumers or customers that are the basis for a given charge.

Next, the tariff contemplate that a structure that receives service from the utility may use more than one “service connection” where “individual units of a multi-unit building” meet certain structural and location requirements. A structure may or may not have more than one service line, depending on the case-by-case circumstances of the structure. Thus, while basing how the company may charge a customer on the number

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<sup>11</sup> P.S.C. MO No. 1, Sheet No. 6.

<sup>12</sup> *Id.*

<sup>13</sup> P.S.C. MO No. 1, Sheet No. 8.

of service connections is one valid approach to determining how a utility may apply a flat rate charge, it is undermined by the fact that the tariff contemplates that structures similar in size and function may receive service differently, and would thus be treated differently for billing purposes.

Because the provided definitions do not yield a clear answer, the analysis turns to the plain and ordinary meanings of the language. Here, Staff reiterates the position stated in its *Staff Report*. Because the tariff language does not provide clear, explicit guidance on whether a flat rate is applied on a per-customer or per-unit basis, the best remaining guidance is the plain and ordinary meaning of the language found in the definition of “Unit” or “Living Unit.”

That definition, again, without emphasis:

“Unit” or “Living Unit” is “the premises or property of a single water consumer, whether or not that consumer is the Customer. It shall pertain to any building whether multi-tenant or single occupancy, residential or commercial, or owned or leased. Each mobile home in a mobile home park and each rental unit of a multi-tenant rental property are considered as separate units for each single family or firm occupying same as a residence or place of business.”<sup>14</sup>

Unfortunately the language is ambiguous—it could have two possible meanings. The language could suggest that, whether or not a property has multiple water consumers, the Customer is the basis of the charge for service. It can also be read to mean that, regardless of who the customer is, it is the number of consumers—and therefore number of living units—that is the metric for the charge.

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<sup>14</sup> P.S.C. MO No. 1, Sheet No. 8.

## **Policy Guidance**

Because the language is ambiguous, ultimately, then, the decision is based upon the Commission's interpretation of the tariff language. While the following two, long-standing Commission policies apply during the ratemaking process, they provide some guidance here. First, the Commission must balance the interests of the company and the customers.

"It is axiomatic that a just and reasonable utility rate is a bilateral proposition. Like a coin, it has two sides. On the one side it must be just and reasonable from the standpoint of the utility. On the other side it must be just and reasonable from the standpoint of the utility's customers. This bilateral aspect of utility rate making, although susceptible of easy expression in theory, is considerably more difficult to achieve. For these very reasons, the court in ***State ex rel. Missouri Water Company v. Public Service Commission***, *supra*, recognized, if not explicitly, certainly implicitly, that rate making bodies, within the ambit of their statutory authority, are vested with considerable discretion to make such pragmatic adjustments in the rate making process as may be indicated by the particular circumstances in order to arrive at a just and reasonable rate. Consistent therewith this court believes that subsection 5 of Section 393.270, *supra*, evidences a legislative intent to imbue the Commission with authority to properly weigh all relevant factors in the sewer utility rate making process in order to achieve the ultimate goal of bilateral fairness."

***State ex rel. Valley Sewage Co. v. Public Service Commission***, 515 S.W.2d 845, 850 (Mo. App. 1974). Second, any difference in charges between customers must be based on a difference in service.

"All individuals have equal rights both in respect to service and charges. Of course, such equality of right does not prevent differences in the modes and kinds of service and different charges based thereon. There is no cast iron line of uniformity which prevents a charge from being above or below a particular sum, or requires that the service shall be exactly along the same lines. But that principle of equality does forbid any difference in charge which is not based upon difference in service, and, even when based upon difference of service, must have some reasonable relation to the amount of difference, and cannot be so great as to produce an unjust discrimination."



***State ex rel. Laundry, Inc. v. Public Service Com'n***, 327 Mo. 93, 111, 34 S.W.2d 37, 45 (Mo. 1931) (quoting ***Western Union Telegraph Co. v. Call Pub. Co.***, 181 U.S. 92, 100, 21 S.Ct. 561, 564, 45 L.Ed. 765, \_\_\_\_ (1901).

### **Conclusion**

The Complainant and Respondent have argued about how the structure is advertised, rented, and constructed, as either one unit or two. However, Staff asserts that such considerations are an unnecessarily complicated factual analysis, regardless of whether there is factual agreement on those points or not. Moreover, such arguments are fruitless if the tariff language itself is unclear—which it appears to be. Therefore, the consideration depends upon the meaning of “whether or not that consumer is the Customer” and “each rental unit of a multi-tenant rental property are considered separate units.”

Staff suggests that the decision before the Commission is one of ensuring the tariffs are internally consistent, and that designed charges continue to provide just and reasonable rates to both the company and its customers, and ultimately, that any difference in charge be based upon a difference in service.

Respectfully submitted,

**/s/ Jacob T. Westen**

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**CERTIFICATE OF SERVICE**

I hereby certify that copies of the foregoing have been mailed, hand-delivered, transmitted by facsimile, or electronically mailed to all parties and or counsel of record on this 18<sup>th</sup> day of August, 2017.

**/s/ Jacob T. Westen**