

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

Jason Becker,)	
Becker Development Company,)	
)	
Complainant,)	
)	Case No. SC-2007-0044 et al.
vs.)	
)	
Aqua Missouri, Inc.,)	
)	
Respondent.)	

APPLICATION FOR REHEARING ON REPORT AND ORDER ISSUED JULY 12, 2007

COMES NOW Respondent Aqua Missouri, Inc., by and through counsel, pursuant to Section 386.500, RSMo and 4 CSR 240-2.160, and respectfully seeks rehearing of the July 12, 2007 Report and Order (a copy of which is attached hereto as Exhibit A) and a Stay of the Order issued in this case on the following grounds:

The Commission's Report and Order (1) fails to identify or state the responsible party if permitted capacity is exceeded; (2) fails to distinguish individuals from a developer; (3) is facially inconsistent with respect to additional connections and developer actions; and (4) fails to clarify whether Aqua Missouri can recover costs of maintenance and repairs through rates.

Each of these four grounds are unlawful, unjust and unreasonable. Pursuant to Section 386.500.1, RSMo (2000), the Commission shall grant an application for rehearing if "in its judgment sufficient reason therefore be made to appear."

I. Order fails to identify responsible party if permitted capacity is exceeded

Aqua Missouri has an operating permit from the Missouri Department of Natural Resources (DNR) authorizing wastewater discharges under the Missouri Clean Water Law and the National Pollutant Discharge Elimination System. As a result, Aqua Missouri is responsible to follow the provisions of Chapter 644, RSMo and the regulations promulgated by the Missouri Department of Natural Resources.

This Commission stated that it “is not clear from the record, and...no one...really knows” how much sewage treatment capacity Aqua Missouri currently has available (Report and Order, p.14-15).¹

However, what remains clear are the penalties “when any provision of section 644.004 to 655.141 or standard, rules, limitations or regulations... or permits...is being, was, or is in imminent danger of being violated.” Section 644.076.1, RSMo. The Clean Water Commission is authorized to “institut[e] a civil action the injunctive relief...or for the assessment of a penalty not to exceed ten thousand dollars per day for each day...the violation occurred and continues to occur, or both.....” Section 644.076.1, RSMo. Further, if the violation is “willful or negligent” the punishment is “a fine of not less than two thousand five hundred dollars nor more than twenty-five thousand dollars per day of violation, or by imprisonment for not more than one year, or both.” Section 644.076.3, RSMo.

¹ Although the Commission criticizes Aqua Missouri for lack of knowledge (“[It] is unfortunate because as a public utility, Aqua Missouri has an obligation to know the capacity of its system and to know how many customers it can serve without violating pollution control regulation” (Report and Order, p.15)) the fact remains, that “the party bringing a complaint...[Becker] has the burden of proving its allegations.” Report and Order, p.11; *State ex rel GS Technologies Operating Co. Inc., v. Pub. Serv. Comm’n*, 115 S.W.3d 680 (Mo. App. W.D. 2003). And, “Becker’s expert testified that restoring the capacity of the lagoons would allow four additional houses to be connected to the sewer system.” Report and Order, p.15.

This Commission's "best estimate" is that ten new houses can be connected, and thus has ordered Aqua Missouri "to connect up to ten new houses to the existing sewer system." Report and Order, p.16. This Commission should not order Aqua Missouri to take an action based upon the Commission's "best estimate." The burden on the Complainant is to prove this issue and if no such proof is before the Commission, the Complaint must fail. There is no provision under Missouri law for a "best estimate" to replace facts and proof. This precision is even more important where, as here, there is a real possibility that in complying with the Order, and connecting ten new houses, Aqua Missouri will be forced to violate the permit issued by DNR and consequently be subject to statutory penalties of up to twenty-five thousand dollars per day.

The Report and Order does not specify what happens if its "best estimate" forces Aqua Missouri to exceed the discharge authorized by its permit. The Report & Order does not make clear, for example, if Aqua Missouri learns that after connecting four houses that a fifth connection will cause it to exceed the discharge authorized by their permit, whether it is thereby excused from connecting any more houses or it must continue to connect an additional six houses (a result which is not only unreasonable and unjust, but also unlawful). If the Commission determines that Aqua Missouri must connect "ten new houses to the existing sewer system," regardless of compliance with Missouri Clean Water Law (which appears to be what the original Report and Order has done), who, then, bears the burden of the penalties to which it will be subject? As a matter of law, only Aqua Missouri can be penalized under the Missouri Clean Water Law; a result that is manifestly unjust, unreasonable and quite probably unlawful.

But for Becker's Complaint and the Commission's Report and Order, Aqua Missouri would be in compliance. According to the Commission, "...the important principle is that a cost causer

should be required to pay for the costs caused”. Report and Order, p. 14. The “cost causer” in this case seems to be either the Complainant or the Commission itself.

The Report and Order of the Commission, in potentially forcing Aqua Missouri to be non-compliant with Missouri Clean Water Law, is unlawful, unjust, and unreasonable and is a sufficient reason for rehearing. At a minimum, a revised Report and Order should be issued specifying that Aqua Missouri may cease accepting additional connections as soon as the discharge approaches the limit in its Permit and that the cost of additional connections must be solely born by Becker.

II. Order fails to distinguish individuals from the developer

The Order states, “As a public utility, Aqua Missouri, has a general mandate, within reasonable limits, to provide service to members of the public within its designated service area.” The Commission’s Report and Order relies on the fact that Aqua Missouri allowed two individual homeowners access to connect their houses to the sewer system. Report and Order, p.9.² Yet individual homeowners should be distinguished from a developer, such as Becker.

“The purpose of providing public utility regulation was to secure equality in service and in rates for all who needed or desired these services *and who were similarly situated.*” *May Department Stores Co. v. Union Electric Light & Power Co.*, 107 S.W.2d 41, 49 (Mo. 1937) (emphasis added).

The Commission erred in equating the individual homeowners with the developer as they are not “similarly situated.” Individual homeowners do not have a significant financial interest, and potential for significant commercial gain in requesting a connection. The Commission should not have relied on the fact that Aqua Missouri has granted individual homeowners access to connect

² It is important to note, that no new connections have been made. Two individuals have filed applications to be connected to the system. Tr., Page 143, Lines 12-21. Those two individuals have been granted access under those applications, but no connections have yet occurred.

their homes to the sewer system in mandating that the developer be “treated the same as all other applicants” when individual homeowners and developers are not “similarly situated.”

The existing Aqua Missouri tariff also makes a significant distinction between individuals and developers. The tariff sets out additional significant procedures a developer must follow in requesting sewer service. P.S.C. Mo. No. 2, Original Sheet No. SRR 43 (Exhibit 10); Report & Order, p. 11.³ The tariff “has the same force and effect as a statute directly prescribed from the legislature.” Report and Order, p. 11; *State ex rel. Laclede Gas Co. v. Pub. Serv. Comm’n*, 156 S.W. 3d 513, 521 (Mo. App. W.D.2005). The Commission should grant rehearing and/or reconsider the Report and Order to properly reflect that developers do not stand equal to individuals.

Equating developers and individual homeowners is unreasonable and unjust, and is a sufficient reason for rehearing.

III. Order is Facially Inconsistent

The Report & Order states: “Aqua Missouri will be ordered to connect up to ten new houses to the existing sewer system... [which will] be allocated on a first-come, first-served basis, with Becker to be treated on the same basis as any other potential customer.” Report and Order, p.16. This appears to mean that any other potential customer connections plus Becker’s connections must not exceed ten.

However, on the same page, the Order reads: “Becker has done everything necessary to receive service for the ten additional houses” Report and Order, p.16. However, the record clearly

³ Individuals must file an application for service and, if necessary, pay for any main extensions needed to reach their property; whereas Developers must take other steps since they are in the business of passing costs on to future land purchasers and are seeking to profit off of the sewer connections.

demonstrates that Becker has NOT shown any evidence that he has done everything required to receive service. He did not prove that he has filed an application for service with the Company, as required by the tariff. Moreover, no main extensions have been applied for or approved by the Company. On these facts, the Report and Order is inconsistent.

The Report and Order seems to suggest that Becker is entitled to ten connections, notwithstanding any other potential customers, and without regard to a “first-come, first-served basis.” These two conflicting provisions indicate that Aqua Missouri may be required to hook-up fourteen new connections, well beyond the maximum capacity of the facility. This Commission must remove this inconsistency and clarify the Report and Order.

The order is inconsistent, a sufficient reason for rehearing, as it is unreasonable to assume that Aqua Missouri and Becker can take action consistent with an order when the order itself is, inconsistent.

IV. Order fails to clarify whether Aqua Missouri can recover costs of maintenance and repairs through rates

The order makes it clear that “[i]f Becker plans to develop its property in that manner,” by an “expansion of the wastewater treatment plant necessary to serve the new development,” Becker must “agree to pay for the cost of the expansion.” Report and Order, p.17; Report and Order, p.12 (“Rule 12(b)(1)... requires... Becker...[to] at least pay for any new collecting sewer mains and treatment facilities needed to serve the newly developed area..”)

However, the order fails to state with specificity whether Aqua Missouri can recover in rates for maintenance and repairs of the existing sewer treatment facilities. It does state that the costs “to hook up additional homes that can be served by existing sewer treatment facilities... are to be recovered through the rates the utility charges all its customers.” Report and Order, p.12. As

previously noted, “is not clear from the record, and...no one...really knows” how much sewage treatment capacity Aqua Missouri currently has available (Report and Order, p.14-15). The Commission did say “[i]t is apparent that...the sewage treatment lagoons at Lake Carmel are at or near their capacity.” Because the number of “additional homes that can be served by existing sewer treatment facilities” is either zero or unknown, the standard on Page 12 of the Report and Order is unhelpful.

The Order does state, “Aqua Missouri must pay for whatever maintenance or repairs are reasonably necessary to keep its sewer system operating...that means paying the cost of fixing the inflow and infiltration problem and taking appropriate action to restore the wastewater storage capacity of the lagoons to their designed capacity, either by raising the level of the surrounding berms, or dredging and recovering the accumulated sludge.” Report and Order, p.15. But in so stating, it does not clarify whether such costs can be recovered through the rates its charges all its customers.

By dredging or raising the berms, it is likely that the capacity of the facility will exceed the immediate demands on the facilities. These repairs are likely to be capitalized and thus a component of rate base. Since the testimony indicates that Becker only has one house ready to be connected (after applying for a main extension and service), the capacity will exceed current needs, beyond what is used and useful. Unless this Commission specifies that any such repairs will be fully recoverable through rates from the start, Aqua Missouri will be unfairly saddled, with non-recoverable costs due to this Commission’s Order.

Without clarifying whether Aqua Missouri can recover through the rates it charges all its customers the costs of raising the level of the surrounding berms or dredging and recovering the

accumulated sludge the Order and Report is unjust and unreasonable. The issue necessitates clarity and is a sufficient reason for rehearing.

Stay of Report and Order

This Commission should stay the effect of its Report and Order pending its resolution of this Application for Rehearing. If the current Report and Order becomes effective on August 11, 2007, as specified, the Company will suffer immediate and irreparable injury. As the Report and Order allows Becker to connect to the system at Lake Carmel and the Report and Order contains the problems referenced in this Application, actions taken under the Report and Order could cause injury to Aqua Missouri, including fines from the Department of Natural Resources.

This Commission has the explicit, under Section 386.500, and inherent authority to stay its Report and Order pending resolution of this Application and should do so.

WHEREFORE, Respondent prays that this Commission sustain its Application for Rehearing, grant a rehearing on the matters raised herein, stay the Report and Order's effective date and for such other relief as this Commission may deem appropriate.

Respectfully submitted,

BLITZ, BARDGETT & DEUTSCH, L.C.

By: 

Marc H. Ellinger, #40828
308 East High Street
Suite 301
Jefferson City, MO 65101
Telephone No.: (573) 634-2500
Facsimile No.: (573) 634-3358
E-mail: mellinger@blitzbardgett.com

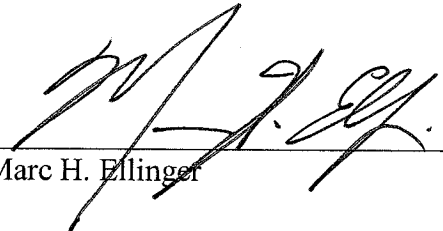
CERTIFICATE OF SERVICE

I hereby certify that true and accurate copies of the foregoing Motion for Rehearing were sent by U.S. Mail, postage prepaid, this 3rd day of August, 2007, to:

Keith Krueger
Missouri Public Service Commission
P.O. Box 360
Jefferson City, MO 65102-0360

Louis Mills
Office of Public Counsel
P.O. Box 2230
Jefferson City, MO 65102-2230

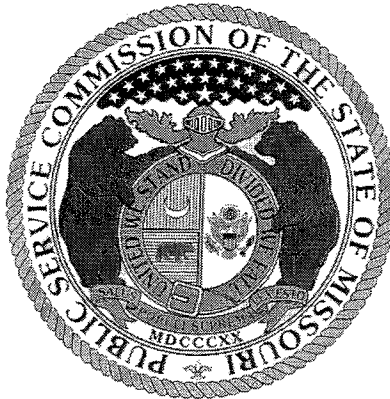
Keith Wenzel
Hendren & Andrae
P. O. Box 1069
Jefferson City, MO 65102-1069



Marc H. Ellinger

JUL 13 2007

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Jason Becker,
Becker Development Company,

Complainant,

v.

Aqua Missouri, Inc.,

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Case No. SC-2007-0044 et al.

REPORT AND ORDER

Issue Date: July 12, 2007

Effective Date: August 11, 2007

EXHIBIT

A

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Appearances

Keith A. Wenzel, HENDREN ANDRAE, LLC, 221 Bolivar Street, Jefferson City, Missouri 65102, for Jason Becker and Becker Development, Inc.

Marc H. Ellinger, BLITZ, BARDGETT & DEUTSCH, L.C., 308 E. High Street, Suite 301 Jefferson City, Missouri 65101, for Aqua Missouri, Inc.

Christina Baker, Assistant Public Counsel, Post Office Box 2230, Jefferson City, Missouri 65102, for the Office of the Public Counsel.

Kevin A. Thompson, General Counsel, P.O. Box 360, Jefferson City, Missouri 65102, for the Staff of the Missouri Public Service Commission.

REGULATORY LAW JUDGE: Morris L. Woodruff, Deputy Chief Regulatory Law Judge

REPORT AND ORDER

Syllabus: After considering Jason Becker and Becker Development Company's complaint against Aqua Missouri, Inc., the Commission finds that Aqua Missouri must allow ten additional houses to be connected to its existing sewer system at Lake Carmel. If Becker wishes to build additional houses that would require an expansion of the existing sewer system, it must enter into a developer agreement with Aqua Missouri as required by the company's tariff.

FINDINGS OF FACT

The Missouri Public Service Commission, having considered all the competent and substantial evidence upon the whole record, makes the following findings of fact. The positions and arguments of all of the parties have been considered by the Commission in making this decision. Failure to specifically address a piece of evidence, position, or argument of any party does not indicate that the Commission has failed to consider

relevant evidence, but indicates rather that the omitted material was not dispositive of this decision.

Procedural History

On August 7, 2006, Jason Becker and Becker Development Company (Becker) filed two complaints against Aqua Missouri, Inc. The complaints, assigned Case Numbers SC-2007-0044 and SC-2007-0045, allege that Aqua Missouri has refused to provide water and sewer utility service to multiple lots that Becker owns in the Lake Carmel subdivision served by Aqua Missouri. By a notice issued on August 8, pursuant to Commission Rule 4 CSR 240-2.070(7), the Commission served a copy of both complaints on Aqua Missouri. Aqua Missouri timely responded to both complaints by filing their answers on September 7. The two complaints were subsequently consolidated into Case Number SC-2007-0044.

The Commission established a procedural schedule requiring the parties to prefile written direct, rebuttal, and surrebuttal testimony. An evidentiary hearing was held on April 23, 2007. Post-Hearing briefs were submitted on May 31.

The Development at Lake Carmel

Aqua Missouri currently holds a certificate of convenience and necessity from this Commission and provides regulated water and sewer service to approximately 46 homes at Lake Carmel, a housing development located in rural Cole County, Missouri. An additional three homes receive only water service.¹ The sewer treatment facility serving Lake Carmel was originally built by the developer of the subdivision and in 1973 was contributed to a regulated sewer utility known as Lake Carmel Development Co., Inc.² In 1998, that

¹ Transcript, Page 139, Lines 22-24.

² Memorandum, Commission Case No. WM-98-130. The memorandum is attached to the testimony of Hale-Rush Rebuttal, Ex. 4.

company sold the sewer system to Capital Utilities, Inc. Capital Utilities subsequently became AquaSource/CU, Inc., which was in turn purchased by Aqua America, Inc., effective August 1, 2003, to do business as Aqua Missouri, Inc.³

Becker Development Company, LLC, of which the other complainant, Jason Becker, is a principal, purchased the undeveloped portion of the Lake Carmel development in 1998.⁴ Becker owns a total of 65 lots in the development.⁵ Beginning in 2003, Becker demanded that Aqua Missouri extend water and sewer service to the previously unplatted portion of the Lake Carmel subdivision. That extension would serve an additional 47 homes.⁶ Aqua Missouri agreed to the extension of its water and sewer system to serve the new homes, but would do so only if Becker signed a Developer Agreement, by which Becker would be required to pay for the expansion of the system, including an expansion of the capacity of the sewer treatment facility.⁷ Becker contends that Aqua Missouri, not the developer, should be required to pay for expansion of the existing sewer treatment facility and has refused to sign a developer agreement that would require the developer to pay for such expansion.

In addition to the proposal to plat a new development area, Becker currently owns 13 lots at Lake Carmel that are ready to build, except for the lack of available sewer service.⁸ Aqua Missouri has refused to provide service to Becker's building lots, contending that its sewer treatment plant is already above its allowed capacity. Until this


³ Hale-Rush Rebuttal, Ex. 4, Page 2, Lines 9-11.

⁴ Becker Direct, Ex. 6, paragraph 2.

⁵ Transcript, Page 9, Lines 22-24.

⁶ Id. at paragraph 10.

⁷ Hale-Rush Rebuttal, Ex. 4, Page 4, Lines 3-11.



dispute is resolved, Becker will be unable to build houses on the lots that he owns at Lake Carmel.

The Sewage Treatment Facility at Lake Carmel

The existing sewage treatment facility at Lake Carmel includes a gravity-fed collection system emptying into a three-cell lagoon. In other words, the wastewater flows through collecting mains by force of gravity and is collected in a series of three ponds. While the wastewater is retained in the ponds it is treated through natural biological action.⁹ Eventually, the treated water flows through each of the three treatment cells and is discharged into a creek.¹⁰

The sewage treatment plant at Lake Carmel operates with a current permit from the Missouri Department of Natural Resources (DNR). The operating permit indicates that the sewage lagoons are designed to handle a flow of 12,600 gallons of wastewater per day. Using a DNR standard of 100 gallons per person, per day, the operating permit is based on an assumed population of 126 persons served by the plant. Assuming 3.7 persons per household, the operating permit is based on the assumption that 34 houses can be served by the existing lagoons.¹¹

The Service Provided by the Lake Carmel Sewer System

Aqua-Missouri currently uses the sewage lagoons to provide service to 46 houses in the Lake Carmel subdivision. Again, assuming 3.7 persons per household, producing 100 gallons of wastewater per day, current usage would produce an expected total flow of

⁸ Transcript, Page 15, Lines 20-22.

⁹ Transcript, Page 52, Lines 18-24.

¹⁰ Transcript, Page 53, Lines 8-19.

¹¹ Gaebe Direct, Ex. 2, Attachment ROG-2.

17,020 gallons per day into the lagoon system.¹² By that measure, the sewage lagoons are already substantially over their designed capacity.

However, measurement of the amount of water Aqua Missouri sold to the residences in the Lake Carmel subdivision indicates an average water usage of only 170 gallons per house, per day.¹³ That means that either the average population in those homes is less than the assumed 3.7 residents, or those residents use less than the assumed 100 gallons of water per day. Since the amount of wastewater flowing out of a house, should not be more than the amount of fresh water flowing in, the amount of wastewater flowing into the sewage lagoons should be approximately 7,820 gallons per day,¹⁴ which is below designed capacity.

Aqua Missouri has, on occasion, actually measured the amount of water flowing into the sewage lagoons. For March 22 through 29, 2006, a wet period, the average daily flow was measured at 29,904 gallons per day, varying from a maximum of 49,999 gallons to a minimum of 10,077 gallons. For June 8 through 19, 2006, a dry period, the average daily flow was measured at 17,836 gallons per day, varying from a maximum of 39,113 gallons to a minimum of 9,941 gallons.¹⁵

Those numbers indicate that Aqua Missouri's sewer system at Lake Carmel has an inflow and infiltration problem. In other words, outside water is entering the wastewater system and draining into the sewage lagoons. Inflow and infiltration can occur when rainfall enters the system through manholes, or it can result from ground water leaking into the

¹² 46 houses x 3.7 persons per house x 100 gallons per person = 17,020 gallons per day.

¹³ Wells Surrebuttal, Ex. 8, Page 2.

¹⁴ 46 houses x 170 gallons per day = 7,820 gallons per day.

¹⁵ Gaebe Direct, Ex. 2, Attachment ROG-2.

sewer mains. For this system a possible source of such ground water is leakage from the lake that gives the Lake Carmel subdivision its name. Aqua Missouri has taken steps to reduce the amount of inflow and infiltration into its system by repairing manholes, but at the time of the hearing, was still looking at possible solutions to further address the problem.¹⁶

The effect of the inflow and infiltration problem on the Lake Carmel sewage lagoons is mixed. The increased amount of water flowing into the lagoons causes the water to flow through the lagoons more quickly, reducing the amount of time water is retained in the lagoons. Since the water flows through the lagoons more quickly, less time is available to allow natural biological action to clean the water.¹⁷ On the other hand, the clean water flowing into the system tends to dilute the wastewater. As a result, the water flowing out of the lagoons is cleaner than it would otherwise be.¹⁸ So, despite the increased flows, the water flowing out of the lagoons, which is monitored by DNR, has met pollution control standards and has not caused DNR to issue any notices of violation to Aqua Missouri.¹⁹

Inflow and infiltration is not the only problem affecting the Lake Carmel sewage lagoons. The lagoons are designed to retain some solid waste as sludge, which accumulates at the bottom of the ponds. Over the 35 years that the lagoons have been operating, several feet of sludge have accumulated, reducing the volume of wastewater that can be retained in the lagoons.²⁰ Because of the buildup of sludge, the lagoons are

¹⁶ Transcript, Pages 146-147, Lines 16-25, 1-4.

¹⁷ Transcript, Page 116, Lines 8-14.

¹⁸ Transcript, Page 36, Lines 11-21.

¹⁹ Transcript, Page 56, Lines 13-16.

²⁰ Transcript, Pages 131-132, Lines 19-25, 1-3.

now able to treat only about three-quarters of its designed wastewater flow capacity.²¹

Eventually, even if no more houses are added to the system, the lagoons will fill with sludge and will need to be upgraded or replaced.²²

Two possible solutions were offered to increase the flow capacity of the lagoons to restore the sewage treatment facility to its designed capacity. One solution would be to simply use earth moving equipment to raise the berms surrounding the lagoons by about 18 inches, thereby increasing the depth of the lagoons and increasing their capacity.²³ Thomas Wells, the consulting engineer engaged by Becker, who offered this solution, testified that he had not calculated the cost required to raise the berms.²⁴ The other solution would be to dredge the lagoons to remove the accumulated sludge and restore their original depth and capacity. Wells also did not calculate the cost to dredge the lagoons.²⁵ However, Tena Hale-Rush, Regional Manager for Aqua Missouri, testified that the cost of dredging a similar lagoon would exceed \$100,000.²⁶

Even if the inflow and infiltration problem is corrected and the lagoons are restored to their designed capacity, the sewage treatment facility serving Lake Carmel is still at or near its capacity. Thomas Wells, Becker's expert, testified that raising the berms to restore full capacity for the lagoons would allow perhaps four additional houses to be connected to the system.²⁷ To connect any additional houses would require a "significant upgrade of

²¹ Transcript, Pages 32-33, Lines 23-25, 1-5.

²² Transcript, Pages 135-136, Lines 22-25, 1.

²³ Wells Surrebuttal, Lake Carmel Lagoon Volume Confirmation, Transcript, Pages 27-28, Lines 21-25, 1-2.

²⁴ Transcript, Page 28, Lines 12-17.

²⁵ Transcript, Page 40, Lines 7-11.

²⁶ Transcript, Page 148, Lines 10-20.

²⁷ Transcript, Page 27, Lines 11-20.

capacity”²⁸ Similarly, Robert Gaebe, the civil engineer who testified for Aqua Missouri, indicated that even if the entire inflow and infiltration problem were corrected, at most an additional 10 to 12 houses could be connected to the current system without a major upgrade to the system.²⁹

Staff’s witness, James Merciel, who is also a civil engineer, testified that there are three primary options available for making a major upgrade to the current sewer system.

Those options are:

- 1) expand or modify the existing treatment facility, such as by adding a fourth lagoon cell, or adding mechanical equipment such as surface aerators, mechanical aeration units or clarifier units;
- 2) construct a ‘parallel’ treatment facility that would operate in addition to, but separate from, the existing facility; or
- 3) abandon the existing treatment facility and construct a replacement facility with sufficient capacity to serve existing customers as well as a reasonable level of future customers.³⁰

Neither Becker nor Aqua Missouri disagree with Merciel’s description of the available options. However, they do not agree upon any particular solution.

While Aqua Missouri has refused to allow Becker to connect any further houses to the sewer system because of the alleged lack of capacity, it has not prevented other individual homeowners, who are not associated with a developer, from connecting their homes to the sewer system. In the past year, Aqua Missouri has granted two such individual homeowners access to connect their houses to the sewer system.³¹ In fact, Aqua Missouri has never denied an individual homeowner access to the Lake Carmel

²⁸ Transcript, Page 30, Lines 20-23.

²⁹ Transcript, Page 129, Lines 7-15.

³⁰ Merciel Rebuttal, Ex. 1, Page 5, Lines 6-12.

³¹ Transcript, Page 143, Lines 12-21.

sewer system.³²

CONCLUSIONS OF LAW

The Missouri Public Service Commission has reached the following conclusions of law:

1. Aqua Missouri is a "Public Utility" and a "Sewer Corporation", as those terms are defined at Section 386.020 (42) and (48), RSMo Supp. 2006. As such it is subject to regulation by this Commission.

2. Section 393.140(1), RSMo 2000 gives the Commission general power to investigate the quality of sewer service furnished by a sewer corporation and to order such reasonable improvements "as will best promote the public interest, preserve the public health and protect those using such ... sewer system".

3. Section 393.130.1, RSMo Supp. 2006 requires every sewer corporation to "furnish and provide such service instrumentalities and facilities as shall be safe and adequate and in all respects just and reasonable."

4. Section 393.130.3, RSMo Supp. 2006 states:

No ... sewer corporation shall make or grant any undue or unreasonable preference or advantage to any person, corporation or locality, or to any particular description of service in any respect whatsoever, or subject any particular person, corporation or locality or any particular description of service to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

5. Section 386.390.1, RSMo 2000 gives the Commission authority to hear a complaint alleging "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."

³² Transcript, Page 144, Lines 1-7.

6. As the party bringing a complaint, Becker has the burden of proving its allegations.³³

7. Aqua Missouri holds a certificate of convenience and necessity to provide sewer service in the Lake Carmel area. Missouri's courts have established as a general principle that "[t]he certificate of convenience and necessity issued to the utility is a mandate to serve the area covered and it is the utility's duty, within reasonable limitations, to serve all persons in an area it has undertaken to serve."³⁴

8. A utility tariff that has been approved by the Commission becomes Missouri law, and has "the same force and effect as a statute directly prescribed from the legislature".³⁵ In interpreting a tariff, the Commission is required to "ascertain the intent of [the utility and the Commission] from the language used, to give effect to that intent if possible, and to consider the words used in their plain and ordinary meaning."³⁶

9. Rule 12(b) of Aqua Missouri's applicable, approved, tariff states:

This Rule shall govern the construction of new treatment facilities and/or extension of new collecting sewers requested by a Developer in areas within the Company's certificated service area where the company currently does not serve.³⁷

This is the section of Aqua Missouri's tariff that sets out the procedures to be followed by developers in requesting sewer service for a newly developed area.

10. Rule 12(b)(1) of the same tariff states:

³³ *State ex rel GS Technologies Operating Co., Inc. v. Pub. Serv. Comm'n*, 116 S.W.3d 680 (Mo. App. W.D. 2003).

³⁴ *State ex rel Missouri Power and Light Co. v. Pub. Serv. Comm'n*, 669 S.W. 2d 941, 946 (Mo. App. W.D. 1984).

³⁵ *State ex rel. Laclede Gas Co. v. Pub. Serv. Comm'n*, 156 S.W. 3d 513, 521, (Mo. App. W.D. 2005).

³⁶ *Id.*

³⁷ P.S.C. Mo. No. 2, Original Sheet No. SRR 43. A copy of this section of the tariff was admitted into

A Developer shall enter into a contract (See Exhibit B) with the Company. The contract shall provide that the Developer may construct said collecting sewers to meet the requirements of all governmental agencies and the Company's Rules and Regulations, including the Company's Technical Specifications. The Developer shall contribute said sewer collection/treatment system to the Company with a detailed accounting of the actual cost of construction (excluding income taxes).

The "Exhibit B" referenced in this section of the tariff is a sample of an extension agreement that is also set out in Aqua Missouri's tariff.³⁸ Becker has refused to sign such an extension agreement and Aqua Missouri has refused to provide service to Becker's houses until such agreement is signed.

11. Rule 12(b)(1) and the accompanying extension agreement require a developer, such as Becker, to either construct, or at least pay for, any new collecting sewer mains and treatment facilities needed to serve the newly developed area. After the collecting mains and treatment facilities are built, the developer is required to "contribute" the mains and treatment facilities to the utility, which will then operate the sewer system.

12. Aqua Missouri's tariff does not require Becker, or any other developer, to pay extra to maintain existing sewer treatment facilities. Nor does it require a developer to pay extra to hook up additional homes that can be served by existing sewer treatment facilities. Those costs are to be recovered through the rates the utility charges all its customers.

DECISION

The Commission has reached the following decisions regarding the issues described by the parties in the List of Issues filed before the start of the hearing.

evidence as Exhibit 10.

³⁸ P.S.C. Mo. No. 2, Original Sheet Nos. SE 6-10. A copy of this section of the tariff was admitted into evidence as Exhibit 9.

I. Service to Becker

a) Has Aqua Missouri violated its obligation as a public utility by refusing to serve Becker despite repeated requests?

As a public utility, Aqua Missouri has a general mandate, within reasonable limits, to provide service to members of the public within its designated service area. 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. 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 Aqua Missouri's tariff requires a developer to pay only for *new* treatment facilities, while requiring the utility, and ultimately its existing customers, to pay unlimited amounts for expansion of existing treatment facilities needed to serve new developments. Staff's reading of the tariff is unreasonably narrow, and would unfairly impose development costs on existing customer of the utility. In the context of this case, Staff's interpretation would require Aqua Missouri and its existing customers to fully bear

the cost of doubling the capacity of the existing sewer treatment facilities to serve Becker's new development, so long as the expanded facilities cannot be called a *new* facility. However, the distinction that Staff would draw between a *new* facility and the expansion of an existing facility would be difficult to discern and is essentially meaningless. For example, if Aqua Missouri digs a fourth lagoon cell, is that a *new* facility or an expansion of the existing facility? That distinction should not be the basis for assigning hundreds of thousands of dollars in costs. Rather, the important principle is that a cost causer should be required to pay for the costs caused. Whether providing sewer service to a new development requires a new treatment facility, or a new expansion of an existing facility, it is the responsibility of the developer to pay for the costs of providing that service. Therefore, the Commission finds that in Aqua Missouri's tariff, *new* treatment facilities means any additional treatment facilities required to serve the new development.

That explanation of Aqua Missouri's tariff, does not, however, mean that Aqua Missouri is justified in refusing to provide service to any houses built by Becker. The evidence indicates that Aqua Missouri currently has some available capacity on the Lake Carmel sewer system. The utility has continued to allow individual home builders to hook up to its sewer system; two new homes have been promised connection in the past year. While Aqua Missouri's tariff requires Becker to pay for new treatment capacity, there is nothing in its tariff that would allow Aqua Missouri to discriminate against Becker in the allocation of its existing sewage treatment capacity. To the extent that it has available treatment capacity, Aqua Missouri must make that capacity available to Becker on the same terms that it makes that capacity available to any other potential customer.

The question then becomes: how much sewage treatment capacity does Aqua

Missouri have available? The answer to that question is not clear from the record, and unfortunately, it seems likely that no one, including Aqua Missouri, really knows. That is unfortunate because as a public utility, Aqua Missouri has an obligation to know the capacity of its system and to know how many customers it can serve without violating pollution control regulations.

It is apparent that, as they are currently operating, the sewage treatment lagoons at Lake Carmel are at or near their capacity. It is also apparent that the lagoons are currently operating at less than their designed and permitted capacity because of an inflow and infiltration problem, as well as the natural buildup of sludge during the life of the lagoons. Aqua Missouri must maintain and operate its sewer system in a way that will provide safe and adequate service to its customers. It cannot pass those costs on to a developer or other customer, except through Commission approved rates. Therefore, Aqua Missouri must pay for whatever maintenance or repairs are reasonably necessary to keep its sewer system operating at its designed capacity. In this case, that means paying the cost of fixing the inflow and infiltration problem and taking appropriate action to restore the wastewater storage capacity of the lagoons to their designed capacity, either by raising the level of the surrounding berms, or dredging and removing the accumulated sludge.

Becker's expert testified that restoring the capacity of the lagoons would allow four additional houses to be connected to the sewer system. Aqua Missouri's expert testified that at most ten to twelve additional houses could be served if the inflow and infiltration problem were entirely solved. Becker and other potential customer are entitled to connect new houses to the system up to the capacity of the current system. Since the evidence indicates that some new houses can be served if the existing sewer system is properly

maintained and repaired, and since Aqua Missouri is unaware of the capacity of its system, the Commission will need to make a determination of how many new houses can be added to the system. Based on the evidence presented to it, the Commission's best estimate is that ten new houses can be connected to the system. Aqua Missouri will be ordered to connect up to ten new houses to the existing sewer system. Those ten new houses are to be allocated on a first-come, first-served basis, with Becker to be treated on the same basis as any other potential customer.

b) Has Aqua Missouri violated its tariff by refusing to provide service to Becker unless Becker enters into a Developer Agreement with Aqua Missouri?

As indicated in the previous discussion, Aqua Missouri's tariffs do not allow the utility to refuse to provide service to any customer, including a developer, so long as that customer can be served using existing capacity. Becker does not need to enter into a developer agreement to utilize that existing capacity. However, Aqua Missouri's tariff does require Becker, or any other developer, to enter into a developer agreement in order to develop additional property that will require the creation of additional sewer capacity, either through the building of new treatment facilities or the expansion of current facilities.

c) What steps, if any, must Becker take to receive service from Aqua Missouri?

Becker has done everything necessary to receive service for the ten additional houses that the Commission has determined can be served through the current capacity of the sewer system.

d) If an expansion of Aqua Missouri's wastewater treatment plant is necessary in order for Aqua Missouri to serve Becker, who is responsible for the cost of

expansion?

As previously indicated any expansion of the wastewater treatment plant necessary to serve new development is the responsibility of the developer who proposes to build the development that necessitates the expansion. If Becker plans to develop its property in that manner, it must sign a developer agreement and agree to pay for the cost of expansion.

II. Safe and Adequate Service at Lake Carmel

a) Is Aqua Missouri presently providing safe and adequate service to its customers at Lake Carmel?

There was no evidence presented that would indicate that Aqua Missouri is not providing safe and adequate service to its current customers. There have been no DNR violations and current sewer customers are well served. With appropriate maintenance and repair of its sewer system to restore that system to its permitted capacity, Aqua Missouri should be able to provide safe and adequate service to ten additional customers.

b) Is the wastewater treatment facility at Lake Carmel presently at or over its permitted capacity?

The wastewater treatment lagoons at Lake Carmel are at or near their current operating capacity. However, with appropriate maintenance and repair of its sewer system to restore that system to its permitted capacity, Aqua Missouri should be able to provide safe and adequate service to ten additional customers.

c) If the wastewater treatment facility at Lake Carmel is not at or over its permitted capacity, how many additional homes or lots may be connected?

Ten additional lots may be connected.

d) If the wastewater treatment facility at Lake Carmel is presently over its permitted capacity, must Aqua Missouri make improvements to its facility to add capacity sufficient to meet its present load?

Aqua Missouri must appropriately maintain and repair its sewer system to restore that system to its permitted capacity.

III. Aqua Missouri's Tariff

Does the public interest or the law require that Aqua Missouri amend or modify its tariff so that individuals and developers will be treated similarly with respect to extensions?

As interpreted by the Commission, Aqua Missouri's tariff is reasonable and is consistent with Missouri law and the regulations of this Commission. It does not need to be changed.

IT IS ORDERED THAT:

1. Aqua Missouri, Inc. shall connect up to ten additional houses to its sewer system at the Lake Carmel subdivision. Applications to connect additional houses shall be granted on a first-come, first-served basis, with Jason Becker and Becker Development Company treated the same as all other applicants.

2. If Jason Becker and Becker Development Company wish to develop additional land and thereby require an expansion of the sewer system, Jason Becker and Becker Development Company must sign a developer agreement as required by Aqua Missouri's tariff.

3. This Report and Order shall become effective on August 11, 2007.

BY THE COMMISSION



Colleen M. Dale
Secretary

(SEAL)

Davis, Chm., Clayton and Appling, CC., concur;
Murray and Gaw, CC., dissent;
and certify compliance with the provisions
of Section 536.080, RSMo 2000.

Dated at Jefferson City, Missouri,
on this 12th day of July, 2007.

STATE OF MISSOURI

OFFICE OF THE PUBLIC SERVICE COMMISSION

**I have compared the preceding copy with the original on file in this office and
I do hereby certify the same to be a true copy therefrom and the whole thereof.**

**WITNESS my hand and seal of the Public Service Commission, at Jefferson City,
Missouri, this 12th of July, 2007.**

A handwritten signature in black ink, appearing to read 'Colleen M. Dale', is written over a horizontal line.

**Colleen M. Dale
Secretary**

MISSOURI PUBLIC SERVICE COMMISSION

July 12, 2007

Case No. SC-2007-0044

General Counsel's Office
P.O. Box 360
200 Madison Street, Suite 800
Jefferson City, MO 65102

Lewis R. Mills, Jr.
P.O. Box 2230
200 Madison Street, Suite 650
Jefferson City, MO 65102

Aqua Missouri, Inc. (CU)
Marc Ellinger
308 E. High Street, Ste. 301
Jefferson City, MO 65101

Becker Development Company
Keith Wenzel
221 Bolivar Street, Suite 300
Jefferson City, MO 65101

Jason Becker
Keith Wenzel
221 Bolivar Street, Suite 300
Jefferson City, MO 65101

Enclosed find a certified copy of an ORDER in the above-numbered case(s).

Sincerely,

A handwritten signature in dark ink, appearing to read 'Colleen M. Dale', written over a light blue horizontal line.

***Colleen M. Dale
Secretary***

