

STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

Village of Monee)	
vs.)	Docket No. 06-0669
Aqua Illinois, Inc.)	
)	
Complaint as to refusal to provide sewage)	
Service to several parcels of property within)	
Monee, Illinois)	
-----)	Consol.
Aqua Illinois, Inc.)	
)	Docket No. 06-0685
Petition for Emergency Relief)	

RESPONSE TO MOTION FOR INTERLOCUTORY REVIEW

Aqua Illinois, Inc. (“Aqua”), by and through its attorneys, respectfully submits to the Illinois Commerce Commission (“Commission”) this Response to V3 Monee’s (“V3”) Motion for Interlocutory Review (“Motion”).

I.
Introduction

The Administrative Law Judge (“ALJ”) correctly denied V3’s Petitions to Intervene in this consolidated proceeding. The ALJ rightly found that this proceeding relates solely to a contract dispute between Aqua and Monee. V3 is not a party to the subject contract and it is not a third party beneficiary. As such, V3 does not have a direct interest in the contract which is the subject of this proceeding, and its intervention was properly denied.

V3’s Motion to Consolidate this proceeding with Aqua’s Petition for a Certificate of Public Necessity and Convenience in Docket No. 06-0655 was rejected by ALJ Jones. (Docket No. 06-0655 Tr. At 69-70). Based on ALJ Jones’ denial of consolidation in Docket No. 06-0655, ALJ Yoder concluded that V3’s Motion to Consolidate in this proceeding was essentially

moot. (Docket No. 06-0669 Tr. at 30, 32-33, Docket No. 06-0685 Tr. at 24, 26-27) Aqua opposed the Motion to Consolidate all three proceedings on the grounds that they do not share questions of similar law or fact.

V3 now seeks to appeal the ALJ's decision though it fails to provide a compelling basis, legal or otherwise, to reverse the ALJ's rulings. Accordingly, the Commission should affirm the ALJ's decision and deny V3's Petitions to Intervene. To the extent V3's requested relief extends to the consolidation of this proceeding with Docket No. 06-0655, its Motion should be denied.¹

II. **Argument**

A. The ALJ Correctly Denied V3's Petitions To Intervene

V3 provides no persuasive legal or factual argument to support a reversal of the ALJ's decision to deny V3's Petitions to Intervene. V3 is neither a party to the October 16, 1986 wholesale service agreement ("Agreement") between Aqua and the Village of Monee ("Monee"), nor is it entitled to receive service from Aqua in its capacity as a public utility. For the reasons discussed below, V3's motion should be denied.

1. V3 Is Not A Party To The Agreement

The underlying basis of this proceeding is a contract dispute involving the Agreement between Aqua and Monee. V3 argues that it could be injured depending on how this contract dispute is resolved and, therefore, its intervention should be allowed. Whether V3 may be injured is irrelevant to whether it may properly intervene. "[An intervenor] must have an

¹ V3's Motion, in part, seeks a review of the ALJ's decision in Docket No. 06-0655 to deny consolidation. However, V3 failed to file a Petition for Interlocutory Review in Docket No. 06-0655. The Commission's Rules of Practice require a Petition for Interlocutory Review be filed within 21 days after the date of the action that is the subject of the petition. 83 Ill. Adm. Code 200.520. More than 21 days have elapsed since the ALJ denied V3's Motion to Consolidate. As such, V3 is time barred from seeking consolidation of Docket 06-0655 for its failure to seek timely review in that proceeding.

enforceable or recognizable right and more than a general interest in the subject matter of the proceedings.” *University Square Ltd. v. City of Chicago*, 73 Ill. App. 3d 872, 878, 392 N.E. 2d 136, 140 (1st Dist. 1979). As set forth fully in Aqua’s Objection to Petition to Intervene and its Replies to Staff, V3 has neither a direct contract right nor a third party beneficial interest in the bi-lateral contract. Obj. to Pet. to Intervene, pp. 2-3; Reply to Staff’s Resp., p. 2. In its Reply in Support of Petition to Intervene (“Reply”), V3 acknowledges that it does not have a contract interest in these proceedings—“V3 is not pursuing any form of a breach of contract claim.” V3 Reply, p. 3. Despite its admission, V3 has flip-flopped and in its Motion resurrects the claim that it possesses a beneficial interest in the Agreement and, therefore, a sufficient interest to permit intervention. V3’s shifting theories are untenable. V3 simply cannot have it both ways.

Contrary to its earlier position, V3 claims that it is a beneficiary under the Agreement and as such it should be allowed to intervene. Motion, p. 5. In certain circumstances, those who are not a party to a contract may have an interest in the contract. However, a third party must clearly demonstrate that the benefit it seeks from the contract is not purely incidental but that the contract was made for his direct benefit. *Sabath v. Mansfield*, 60 Ill. App. 3d 1008, 1015., 377 N.E. 2d 161, 168 (1st Dist. 1978), citing *Young v. General Inx. Co.*, 233 Ill. App. 3d 119, 337 N.E.2d 739 (1975). V3 failed to make the required demonstration. The Agreement is a bi-lateral contract between Aqua and Monee—no others. No reference or provision within the Agreement indicates the wholesale service is intended for anyone other than Monee. Despite this, V3 claims the Agreement was intended to benefit all citizens and property owners of Monee. Until it filed its Motion, V3 never made such a claim. If Aqua provided service to Monee pursuant to a certificate of public convenience and necessity, V3’s position may have merit. However, in this instance there is a bi-lateral contract that contemplates service to just one customer, Monee.

V3's interest in the proceedings is incidental to the Agreement. The ALJ correctly denied V3's Petitions to Intervene and the decision should be affirmed.

Alternatively, V3 claims that it may be adversely effected by the outcome of this consolidated proceeding. Motion, p. 3. However, the mere fact that a third party may be injured as a result of a contract dispute, or that he acted in reliance on the contract, does not create a right to pursue a claim for breach of contract that he otherwise would not have had. *4 Corbin on Contracts* (1951), Sec. 779B. Rather, as fully set forth in Aqua's Objection to Petition to Intervene, a party must first show that it either has a direct contract right or demonstrate the contract was made for its direct benefit. Obj. to Pet. to Intervene, pp. 2-3. V3 was not a party to the Agreement and the Agreement was not made for its direct benefit. Consequently, V3's Petitions to Intervene must be denied.

2. V3's Property Is Not Within Aqua's Service Area

Aqua does not possess a certificate of public convenience and necessity to provide public utility service to V3. V3 does not dispute this fact. In fact, V3 acknowledges that its parcel is located outside of Aqua's service territory. Mot. to Consol., p. 2, ¶ 6. A utility company has no obligation to provide service as a public utility outside the areas in which it is mandated, by a certificate of public convenience and necessity. *Will County Water company v. The Village of Shorewood*, 117 Ill. App. 3d 187, 190, 454 N.E. 2d 12, 14 (3rd Dist., 1983), citing *Chicago District Pipeline Co. v. Illinois Commerce Commission*, 361 Ill. 296, 197 N.E. 873 (1935). Aqua has no right to provide public utility service to V3 and no matter the injury alleged, V3 cannot force Aqua to do so.

Moreover, providing V3 with such service would be unlawful. No public utility may provide service unless it possesses a certificate of public convenience and necessity. 220 ILCS

5/8-406. Consequently, V3 is not entitled to public utility service from Aqua. V3's Petitions to Intervene was properly denied.

3. V3's Petitions To Intervene Are Deficient

V3's Petitions to Intervene must allege specific facts that demonstrate that it has a right to intervene. "Averments that are merely conclusory in nature and that simply recite the statutory language are insufficient..." *People ex rel. Thomas v. Vill. Of Sleepy Hollow*, 94 Ill. App. 3d 492, 495, 418 N.E. 2d 466, 468-69 (2d Dist., 1981). V3's pleadings described its interest as follows:

As a real estate developer in the State of Illinois, Village of Monee and the Facilities Planning Area as designated by NIPC to be serviced by Aqua, V3 has an interest in the provision of wastewater treatment services by Aqua to Monee.

V3 Petitions to Intervene, p. 3.

V3's Petitions to Intervene fails to allege specific facts that demonstrate its right to intervene, and, therefore, is insufficient. Further, the substance of its petitions as it relates to its interest, is conclusory in nature. Consequently, V3's Petitions to Intervene should be denied and the ALJ's ruling affirmed.

B. The ALJ Correctly Denied V3's Motion To Consolidate

V3 has failed to set forth a legally compelling basis for consolidating this proceeding with Docket 06-0655. It should be noted that no party contested the ALJ's decision that dockets relating to the contract dispute between Aqua and Monee, Docket Nos. 06-0685 and 06-0669, be consolidated.

The Commission “may order two or more proceeding involving a similar question of law or fact to be consolidated where rights of the parties or the public interest will not be prejudiced by such procedure.” 83 Ill. Adm. Code 200.600. Where there has been no persuasive evidence or reasoning presented in favor of consolidation, this Commission has denied consolidation. *Illinois Bell Telephone Co.*, Dkt. 96-0273 (1996) (denying consolidation, finding “Petitioner has failed to present a valid reason for consolidation.”). There is no presumption that consolidation is appropriate, but rather the moving party must make an affirmatively showing. V3 failed to make the requisite showing and the ALJ correctly concluded that consolidation of all three dockets is inappropriate.

The subject matter of this proceeding and Docket No. 06-0655 do not share similar questions of law or fact. Aqua distinguished the issues of law and questions of fact that are relevant to the dockets in its previous filings. Verified Resp. to Motion to Consol., p. 2.; Reply to Staff’s Resp. to Motion to Consol., pp. 2-4. While consolidation of Docket Nos. 06-0669 and 06-0685 is appropriate, consolidation of this proceeding with Docket No. 06-0655 is not.

The basis offered by V3 for consolidating the three proceedings is “all three cases directly involve the ability and obligations of Aqua to provide wastewater treatment services in the Will County area.” Motion, p. 7. There is no assertion by V3 that the three proceedings address similar questions of law or fact. Rather, V3 claims the consolidation is warranted because the dockets “are inter-related and would benefit from comprehensive consideration under a consolidated case.” *Id.* Nevertheless, the focus of the Commission’s rule on consolidation is whether dockets share a similar question of law or fact and not whether, if quilted together, they may address the development of a regional policy. V3 fails to allege the existence of a similar question of law or fact, and, therefore, must be rejected.

WHEREFORE, Aqua Illinois, Inc. requests that the Commission affirm the ALJ's Ruling and deny V3's Motion for Interlocutory Review.

Dated: April 4, 2007

Respectfully submitted,

By: _____
An attorney for Aqua Illinois, Inc.

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CERTIFICATE OF SERVICE

I, Phillip A. Casey, hereby certify that I caused a copy of the Response to Motion for Interlocutory Review of Aqua Illinois, Inc. to be served upon the service list in Docket Nos. 06-0669/06-0685 consol. by email on April 4, 2007.

Phillip A. Casey

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