

**STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION**

The Village of Monee,)	
)	
Petitioner,)	
)	
v.)	Docket No. 06-0669
)	
Aqua Illinois, Inc.,)	
)	
Respondent.)	
)	
Complaint as to refusal to provide sewage)	
service to several parcels of property)	
within Monee, Illinois)	
_____)	
)	
Aqua Illinois, Inc.,)	Consolidated
)	Docket No. 06-0685
Petitioner.)	
)	
Petition for Emergency Relief)	
)	

AQUA ILLINOIS’ MOTION TO DISMISS

Respondent Aqua Illinois, Inc. (“Aqua” or “Respondent”), by its attorneys, hereby moves to dismiss The Village of Monee’s Formal Complaint (“Complaint”) filed with the Illinois Commerce Commission (“Commission”) pursuant to 735 ILCS 5/2-619(a)(9) (“Section 5/2-619(a)(9)”). In support of its Motion, Aqua states as follows:

I. Introduction

This proceeding was initiated by The Village of Monee (“Monee” or “Petitioner”) because it regrets its decision to terminate its contract for wastewater treatment services with Aqua and now it wants the Commission to help it avoid the consequences of that decision at Aqua’s expense. In 2003, Monee affirmatively gave notice that it would be terminating its wastewater treatment contract with Aqua, but in the three years between

its termination notice and the expiration of the contract, Monee did nothing to make alternate arrangements for wastewater treatment service. Meanwhile, in reasonable reliance on Monee's termination notice, Aqua conducted its affairs and made other arrangements for the future use of its wastewater treatment capacity that did not involve handling Monee's wastewater. However, due to Monee's glaring negligence in failing to make arrangements for wastewater treatment service, Aqua has been forced to continue providing service to Monee under a directive by the Illinois Environmental Protection Agency ("IEPA"). Now, Monee seeks additional services from Aqua as if Monee had never terminated the contract.

Specifically, Monee alleges that Aqua has refused to provide wastewater treatment service to certain parcels of property in Monee despite a contractual obligation to do so. Monee's claims, however, fail to acknowledge occurrences that make certain of those claims moot and legal standards that render the remaining claims untenable. Accordingly, the Commission should dismiss Monee's Complaint.

In its Complaint, Monee requests that Aqua be ordered to: (1) certify permit applications to the IEPA for sewer line extensions to certain property on Ridgeland Avenue ("Ridgeland Avenue Property") and property owned by V3 Realty Company, LLC and V3 Monee, LLC (collectively "V3 Property"); (2) provide sewage service within Monee; (3) pay damages to compensate Monee for all losses resulting from Aqua's alleged delay in providing sewage service; and (4) account for all tap-on fees received by Aqua over the last 10 years, including how those fees have been used.

All of Monee's claims should be dismissed for the following reasons: First, Monee's request for an order compelling Aqua to certify permit applications to the IEPA

is, in part, now moot because Aqua has certified an IEPA permit application for a sewer main extension in the Ridgeland Avenue Property area on May 8, 2007. Second, Monee's request to compel certification of the permit application for the V3 Property is effectively a request for mandamus, the elements of which Monee cannot establish because the V3 permit application does not meet the IEPA's standards for giving such certification and Monee has an adequate legal remedy which it has failed to pursue directly from IEPA. Third, Monee's request that Aqua be compelled to provide sewer service within the Village of Monee is also moot because the IEPA has already directed Aqua to continue providing wastewater treatment service to Monee after expiration of the Services Agreement between Monee and Aqua on October 14, 2006. Fourth, Monee's claims for losses it has incurred as a consequence of its not certifying the IEPA permit applications for the Ridgeland Avenue Property and V3 Property must be rejected because the Commission lacks the legal authority to award such money damages. Finally, Monee's request for an accounting of tap-on fees collected by Aqua for the last ten years is moot as well because Aqua has already provided Monee with tap-on fees collection data from 1990 to July 2007. Moreover, Monee offers no factual or legal basis for such a request.

For these reasons, Aqua is entitled to dismissal of all of Monee's claims.

II. Factual Background

On October 16, 1986, Aqua's predecessor in interest, Consumers Illinois Water Company ("Consumers") entered into an Agreement whereby it agreed to receive from Monee on a wholesale basis, wastewater collected by Monee for treatment and disposal at its University Park wastewater treatment facility ("Agreement"). (Exhibit A). A First

Amendment (“Amendment”) to the Agreement was entered on November 9, 1988. (Exhibit B). The Agreement and Amendment were approved by the Commission on February 8, 1989 in Commission Docket No. 88-0374. (Exhibit C).

Section II, ¶ 2.1 of the Agreement provides that the Agreement “shall continue in force to and including October 16, 2006...unless either party, on or before Three (3) years prior to expiration of said agreement, ... shall notify the other party in writing that this agreement is to terminate at the end of such 20th year.” ¶ 2.2 of the Agreement provides that “[i]f such notice is reasonably given in the manner herein provided, this agreement shall terminate at the end of such Twenty (20) years...”

On August 28, 2003 Monee notified Aqua by letter of its intent to terminate the Agreement effective October 16, 2006. (Exhibit D). On April 14, 2004, Aqua confirmed by letter that the Agreement would terminate on October 16, 2006 and that Aqua would cease treatment of Monee’s wastewater at the end of the day October 16, 2006. (Exhibit E).

Despite providing notice of its intent to terminate the Agreement over three years in advance and having received confirmation from Aqua of this termination, Monee failed to make arrangements for wastewater treatment service after the Agreement expired. As a result, on or about December 8, 2005 the IEPA served a Violation Notice on Monee stating that Monee had failed to establish a source or method of providing treatment of wastewater after the termination of the Agreement with Aqua on October 16, 2006. (Exhibit F).

On or about November 18, 2005 and January 25, 2006, the IEPA notified Aqua that its plant had reached Critical Review Status. Critical Review Status means that the

IEPA may issue permits for additional load but the loading on the subject treatment works is approaching the maximum for which it was designed. (Exhibit G). In its January 25, 2006 letter, the IEPA determined that the Aqua facility was at 89% of its hydraulic capacity, and that the facility had a daily average flow of 2.17 million gallons per day (MGD). This translates into remaining capacity of 238,700 gallons per day (“GPD”). The January 25, 2006 letter further stated that “Critical Review Status” means that the Agency may issue permits but the loading on the subject treatment works is approaching the load for which it was designed and **proposed sewer projects exceeding plant capacity will be denied.**” (emphasis added).

On April 6, 2006, the first IEPA permit application for the Ridgeland Avenue Property was forwarded to Aqua for certification.¹ (Exhibit H). V3 submitted its IEPA permit application for certification to Aqua on June 14, 2006. (Exhibit I). Pursuant to 35 Ill. Adm. Code 309.222(b) the IEAP permit applications require that the waste treatment plant to which the proposed project will be tributary has the adequate reserve capacity to treat the wastewater that will be added by this project without causing a violation of the Environmental Protection Act or Subtitle C, Chapter I”. *Id.*² V3’s permit application projected wastewater flow of 2492 P.E. (population equivalent) and 874,589 GPD – over 3½ times the remaining capacity determined by the IEPA.

¹ In the first IEPA permit application, Monee proposed to construct improvements (a new sanitary pumping station, force main and interceptor sewer) to connect the Ridgeland Avenue Property to the Monee sewage system. Complaint, p. 3; Exhibit H.

² 35 Ill. Adm. Code 309.222(b) provides:

Permit applications for sewer construction or modification shall be accompanied by signed statements from the owners of all intermediate receiving sewers and the receiving treatment works certifying that their facilities have adequate capacity to transport and/or treat the wastewater that will be added through the proposed sewer without violating any provisions of the Act of this Chapter.

On April 19, 2006, the IEPA gave notification that the Ridgeland Avenue Property permit application had been denied as incomplete, in part, for lack of certification from Aqua. (Exhibit J). On June 22, 2006, the IEPA notified V3 by letter that its permit application had been denied for failure to submit certifications from Aqua. (Exhibit K).

On July 25, 2006, the IEPA orally notified Aqua that it must temporarily serve Monee after October 16, 2006.

On May 3, 2007, Aqua served Monee with a listing of tap-on fees collected from 1990 through July, 2007. (Exhibit L).

On May 8, 2007, pursuant to an agreement that would transfer title to the proposed sewer main extension to be constructed in the Ridgeland Avenue Property area to Aqua, Aqua certified an IEPA permit application for an off site sanitary sewer extension and lift station improvement plans on Ridgeland and Monee Manhattan Road, in the Ridgeland Avenue Property area. (Exhibit M).

III. Procedural Background

Monee filed its Complaint on September 22, 2006. Aqua filed a Petition for Emergency Relief in Docket No. 06-0685 on October 19, 2006. Pursuant to a motion by V3, these dockets were consolidated on March 7, 2007.

IV. Legal Standard

A claim is properly dismissed under 735 ILCS 5/2-619(a)(9) when “it is barred by affirmative matter avoiding the legal effect or defeating the claim.” An “affirmative matter” is something in the nature of a defense that negates the cause of action completely or refutes crucial conclusions of law or conclusions of material fact contained

in or inferred from the complaint. *Illinois Graphics Co. v. Nickum*, 159 Ill. 2d 469, 486, 639 N.E.2d 1282, 1290 (1994).

In addressing a motion for involuntary dismissal under Section 5/2-619(a)(9), all well-pleaded facts in the complaint are taken as true, and only the complaint's legal sufficiency is contested. *Petty v. Crowell*, 239 Ill.Dec. 872, 306 Ill.App.3d 774, 715 N.E.2d 317 (5th Dist. 1999). A motion to dismiss does not admit alleged conclusions of the pleader, opinions, argumentative matter, irrelevant material, or other parts not properly pleaded. *Harvey v. Mackay*, 109 Ill. App. 3d 582, 586, 440 N.E.2d 1022, 1025 (1st Dist. 1982); *Palier v. Dreis & Krump Mfg. Co.*, 81 Ill.App.2d 1, 5, 225 N.E.2d 67, 69 (1st Dist. 1967). Mootness is a proper grounds for dismissal under Section 5/2-619(a)(9). *Sadler v. Creekmur*, 354 Ill. App. 3d 1029, 1039-40, 821 N.E.2d 340, 349-50 (3rd Dist. 2004).

V. Discussion

A. Because Aqua Has Executed a Permit Application For a Sewer Main Extension In The Ridgeland Avenue Property Area, Monee's Request to Compel Certification is Now Moot.

Aqua has already certified a permit application to the IEPA for a sewer main extension in the Ridgeland Avenue Property area. (See Exhibit M). Thus, Monee's request for relief on this issue is now moot, and no longer proper for consideration by the Commission. Under Illinois law, a matter is moot when a party has secured the relief it sought and a resolution of the issues by the court could not have any practical effect on the existing controversy." See *People ex rel. Newdelman*, 50 Ill.2d 237, 241, 278 N.E.2d 81, 83 (1972). Because Monee has secured the relief requested on this issue, the issue of

certification of the permit application to the IEPA is moot. Accordingly, Aqua is entitled to dismissal on this issue.

B. Monee's Request for an Order Compelling Aqua to Certify the V3 Permit Application is in Effect a Request for Mandamus, Which Must Be Rejected For Monee's Failure to Allege the Necessary Elements.

Monee's requests for orders compelling certification of permits is in effect a request for mandamus. Although Monee does not identify its requested remedy as such, mandamus is the remedy being sought.

Under Illinois law, the remedy of mandamus is available to enforce a clear duty imposed by law involving no discretion in its exercise. *People ex rel. McGrady v. Carmody* 104 Ill.App.2d 137, 243 N.E.2d 19 (4th Dist. 1968); *National Fire Insurance Company of Hartford v. Municipal Court of Chicago*, 28 Ill.App.2d 401, 171 N.E.2d 687 (1st Dist. 1961). There must also be no other adequate remedy. *Patzner v. Baise*, 133 Ill.2d 540, 545, 552 N.E.2d 714 (1990). Monee claims that Aqua has a clear duty under law to certify permit applications to the IEPA to allow for construction of sewer extension lines, and that this duty arises from the Illinois Public Utilities Act, the Agreement, and Commission Orders approving the Agreement.

A person seeking an order of mandamus must show a clear right to the relief requested. *Burnidge Brothers Almora Heights, Inc. v. Wiese*, 142 Ill.App.3d 486, 491 N.E.2d 841, 96 Ill.Dec. 562 (2d Dist. 1986); *Thomas v. Village of Westchester*, 132 Ill.App.3d 190, 477 N.E.2d 49, 87 Ill.Dec. 448 (1st Dist. 1985).

Mandamus will not issue in a doubtful case. If a well-founded doubt exists as to the right of an applicant for the relief requested or as to the duty of the defendant to do the act requested, mandamus will not issue. *Molnar v. City of Aurora*, 38 Ill.App.3d 580,

348 N.E.2d 262 (2d Dist. 1976); *Hiawatha Community Unit School District No. 426 v. Skinner*, 32 Ill.App.2d 187, 177 N.E.2d 15 (2d Dist. 1961).

1. Monee's Has No Legal Right to Compel Aqua To Certify the V3 Permit Applications Because Aqua Does Not Have the Capacity to Serve V3's Project.

Certification of permit applications to the IEPA requires more than simply affixing a signature. It requires a declaration from the certifying party that “[t]he waste treatment plant to which this project will be a tributary had adequate reserve capacity to treat the wastewater that will be added by this project without causing a violation of the Environmental Protection Act or Subtitle C, Chapter I.” (Exhibit I).

V3's permit application to the IEPA projected a daily wastewater flow exceeding 3½ times of Aqua's remaining plant capacity as determined by the IEPA in its letter of January 25, 2006. Under these circumstances, as a matter of law, Aqua cannot certify that it has sufficient remaining service capacity when the remaining capacity as determined by the IEPA is exceeded by the flow volume projected by V3. As the statement Monee seeks to have Aqua certify is simply untrue, there can be no possible basis for compelling Aqua issue the certification.

For this reason alone, Monee's request for mandamus to compel certification of V3's permit application must fail.

2. Monee Has Failed to Avail Itself of the Remedy of Requesting a Waiver of the Certification Requirement From the IEPA.

Aqua's refusal to certify V3's permit is not determinative of whether V3 can be issued a construction permit.³ Under 35 Ill. Admin. Code 104.204, either V3 or Monee could have requested a waiver of the certification requirement for permit applications from the IEPA. See *C&F Packing Company Inc. v. Illinois Environmental Protection Agency*, PBC 06-53 (Sept. 21, 2006) (2006 WL 2839833 at 2). Monee thus has a legal remedy available that it failed to pursue. Nowhere in its formal Complaint does Monee allege that either it or V3 ever requested a waiver for the certification requirement from IEPA. As the IEPA has the final word on whether a permit is to be granted, any meritorious claim for a permit could and should have been made to the IEPA. Monee's failure to pursue this legal remedy defeats any claim for mandamus. See *Patzner v. Baise*, 133 Ill.2d 540, 545, 142 Ill.Dec. 123, 552 N.E.2d 714 (1990). Thus, Aqua is entitled to dismissal on this claim.

C. Monee's Request For An Order Compelling Aqua to Continue Providing Service to Monee is Moot Because the IEPA Has Already Directed Aqua to Continue Service to Monee.

Monee repeatedly alleges in its Complaint that Aqua has refused to provide wastewater treatment service in Monee. A review of the facts specifically alleged in Monee's Complaint, however, reveals that Aqua simply has refused to certify certain IEPA permit application *after* receipt of notice from the IEPA of its Critical Review Status. Monee disregards the distinction between refusing to certify a permit application for which the necessary service capacity may not exist, and declining to provide service to a customer already connected to the wastewater system and entitled to service. Monee alleges only the former, not the latter.

³ If the Commission were to find that Monee's request to compel certification of the Ridgeland Avenue Property permit application was not moot as argued above, Monee's request would also be subject to dismissal for failure to pursue a waiver of the certification requirement.

Thus, Monee's request for an order compelling Aqua to provide wastewater treatment service is at best ambiguous. While Monee alleges that it simply wants wastewater treatment service, it appears that Monee actually wants an order compelling Aqua to certify all IEPA permit applications submitted by residents of Monee, regardless of Aqua's remaining plant capacity or Critical Review Status as determined by the IEPA. Such a request is plainly without merit.

On July 25, 2006, the IEPA notified Aqua that it must continue providing service to Monee. Moreover, Illinois law prohibits Aqua from discontinuing service to Monee without prior approval from the Commission. See 220 ILCS 5/8-508.⁴ Aqua has not sought such approval, nor does Monee allege that such approval has been sought. Other than Monee's allegations that Aqua has refused to certify certain IEPA permit applications, there are no factually supported allegations that Aqua has failed to comply with either the IEPA's July 25, 2006 directive or 220 ILCS 5/8-508.

Thus, the relief that Monee requests on this issue has already been granted by the IEPA through its July 25, 2006 directive and by operation of Illinois law. Monee's request, therefore, is moot and should be dismissed.

D. Monee's Request For Money Damages Must be Rejected Because the Commission Lacks Authority to Award Money Damages.

⁴ 220 ILCS 5/8-508 provides in part:

Except as provided in Section 12-306, no public utility shall abandon or discontinue any service or, in the case of an electric utility, make any modification as herein defined, without first having secured the approval of the Commission, except in case of assignment, transfer, lease or sale of the whole or any part of its franchises, licenses, permits, plant, equipment, business, or other property to any political subdivision or municipal corporation of this State. In the case of the assignment, transfer, lease or sale, in whole or in part, of any franchise, license, permit, plant, equipment, business or other property to any political subdivision or municipal corporation of this State, the public utility shall notify the Commission of such transaction.

In its Complaint, Monee requests money damages for losses allegedly resulting from Aqua's refusal to certify permit applications to the IEPA. Both the Commission and Illinois courts have consistently ruled that the Commission cannot award such consequential money damages. See *Recycling Services v. The Peoples Gas Light and Coke Company*, Docket No. 04-0614, Order, (2005 WL 2750118 at 17); *State of Illinois v. Illinois Bell Telephone Company*, Docket No. 88-0127 (1991 WL 535222 at 6); *Moening v. Illinois Bell Telephone Co.*, 94 Ill.Dec. 103, 108, 139 Ill.App.3d 521, 528, 487 N.E.2d 980, 984 (1st Dist 1985); *Ferndale Heights Utility Co. v. Illinois Commerce Commission*, 67 Ill.Dec. 854, 860, 112 Ill. App. 3d 175, 181, 445 N.E.2d 334, 340 (1st Dist. 1982). See also 220 ILCS 5/5-201.

Notwithstanding the consistent rulings by the Commission and Illinois courts cited above, Monee requests money damages, without alleging any basis for Commission authority to award them. What Monee seeks are not reparations for excessive or unjustly discriminatory charges for services, but rather, lost taxes and increased wastewater treatment costs it claims will be incurred as a consequence of Aqua's actions. (Complaint, p. 4). These are the type of consequential money damages that the Commission does not have the authority to award, as held in the cases cited above. Accordingly, Monee's damages claim should be dismissed.

3. Monee's Request For An Accounting of Tap-On Fees Must Be Rejected As Moot Because Aqua Has Already Provided An Accounting of Collected Tap-On Fees Dating Back to 1990.

In its prayer for relief, Monee requests an accounting for tap-on fees collected by Aqua for the last 10 years. Once again, Monee offers no legal support for its request. Instead, Monee bases its claim for an accounting on the allegation that as of the date of

Monee's Complaint, "Aqua has not submitted any plans to the IEPA or other applicable agencies for upgrading the UP Treatment Plant." (Complaint, p. 5).

In making this allegation, Monee overlooks the fact that three (3) years prior to filing its Complaint, it gave notice of termination of the Service Agreement with Aqua, thereby inducing Aqua to believe that the plant capacity reserved for Monee would be available for other uses, and that there would be no need for planning for additional capacity as to the date of Monee's notification of its intent to terminate the Agreement. On July 25, 2006 (2½ months before Monee filed its Complaint), Aqua learned from the IEPA that Monee had failed to provide for wastewater treatment service after the expiration of the Agreement on October 16, 2006, and that Aqua would be required to continue serving Monee. Thus, the additional plant capacity Aqua believed would be available due to the expiration of the Agreement vanished on 2½ months notice.

In short, Monee: (1) induced Aqua in 2003 to believe that the plant capacity reserved for service under the Agreement would become available in October 2006; (2) received notification from Aqua on April 14, 2004 acknowledging Monee's letter of intent to terminate the Agreement and advising Monee that "[p]lanning for use of [its] sewage treatment capacity after October 16, 2006 has begun. The treatment capacity previously reserved for Monee will not be available after the termination date. Please plan accordingly for Monee's treatment needs."; (3) failed to make arrangements for wastewater treatment service after October 16, 2006, as noted in the IEPA Violation Notice of December 8, 2005; and (4) now seeks relief against Aqua for alleged hardships resulting from Monee's own decision to terminate the Agreement and its failure to plan for wastewater treatment service after the termination of the Agreement.

It would defy logic to require Aqua to have planned for a costly plant capacity expansion based on continued service to Monee after receiving notice that Monee intended to allow the Agreement to terminate on October 16, 2006, thereby reducing anticipated demand on plant capacity. Thus, there is no factual or legal basis for the accounting requested by Monee.

Notwithstanding that Monee has no legal or factual basis for requesting an accounting in this matter, Aqua has previously supplied Monee with a statement of all tap fees collected since 1990. (Exhibit L). Thus, Monee's request for an accounting is both without merit and moot, and should also be dismissed.

D. Conclusion

For the reasons stated above, Aqua is entitled to dismissal of all of Monee's claims.

Respectfully submitted,
AQUA ILLINOIS, INC.

By: /s/ Jerry D. Brown
One of its Attorneys

Edward C. Hurley
Jerry D. Brown
CHICO & NUNES, P.C.
333 West Wacker Drive, Suite 1800
Chicago, Illinois 60606
Telephone: (312) 463-1000
Facsimile: (312) 463-1001
ehurley@chiconunes.com
jbrown@chiconunes.com