

**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’ REPLY TO MONEE’S RESPOSE TO MOTION TO DISMISS

Aqua Illinois, Inc. (“Aqua”), by its attorneys Jerry Brown and Edward C. Hurley, hereby submits its Reply to Monee’s Response to Motion to Dismiss, and states as follows:

I. Introduction

In its Complaint, Plaintiff the Village of Monee (“Monee”), requests, *inter alia*, that the Commission compel Aqua to certify two (2) permit applications to the Illinois Environmental Protection Agency (“IEPA”) for sewer main extensions.¹ Monee also

¹ Monee submitted its permit application on April 6, 2006 for an area known as the Ridgeland Avenue Property. Motion at 5, fn. 1; Complaint at 3. V3 submitted its permit application on June 14, 2006 for property owned by V3 Realty Company, LLC and V3 Monee, LLC (collectively “V3 Property”). Motion at 2.

seeks an order compelling Aqua to provide sewage service within Monee, money damages and an accounting of tap-on fees received by Aqua since 1990.

Aqua has moved to dismiss on the grounds that:

- 1) Monee seeks mandamus but has failed to allege the necessary elements;
- 2) that Monee's claims are moot;
- 3) that Monee fails to allege any factual or legal basis for an accounting; and
- 4) that the Commission lacks the jurisdiction to award money damages.

Monee seeks to avoid dismissal of its Complaint by repeatedly mischaracterizing and obscuring the underlying events in this case. Although its request to compel certification of IEPA permit applications is effectively a request for mandamus, Monee argues for the first time in its Response that its claim is for an injunction, and denies that it is seeking mandamus.² In its response, Monee further argues the following:

- 1) that Aqua improperly relies on fact allegations outside of Monee's Complaint;
- 2) that the facts Aqua alleges in its Motion are contrary to the facts Aqua has alleged in another proceeding before the Commission;
- 3) that none of its claims are moot; and
- 4) that Aqua is estopped from claiming that the Commission lacks jurisdiction to award money damages.

Each of these arguments is without merit.³

² In its Complaint, Monee does not identify the form of relief it seeks in connection with the IEPA permit applications.

³ Monee repeats the argument that because V3 is within Aqua's certificated service area, Aqua is obligated to provide service to V3. Aqua disputes this claim, but for purposes of its Motion, it must accept Monee's properly pleaded fact allegations as true. See *Illinois Graphics Co. v. Nickum*, 159 Ill. 2d 469, 486, 639 N.E.2d 1282, 1290 (1994).

II. Discussion

A. Aqua Is Not Obligated to Certify Permit Applications for Sewer Main Extensions That Threaten a Wastewater Flow That Exceeds Aqua's Remaining Service Capacity.

Monee repeatedly claims that Aqua is in violation of its obligation to provide wastewater treatment service because it refused to certify permit applications to the IEPA for sewer main extensions submitted by Monee and V3. This contention demonstrates Monee's confusion of two separate and distinct issues. The question of whether Aqua must provide wastewater treatment service to Monee is entirely separate and distinct from the question of whether Aqua must certify to the IEPA that it has sufficient wastewater treatment capacity for projected sewer main extensions. The second circumstance would require Aqua essentially to lie to the IEPA and ignore whether the sewer main extensions in question would cause a wastewater flow that exceeds the remaining capacity of Aqua's wastewater treatment plant ("WWTP").

By the logic of Monee's argument, Aqua would have to ignore the IEPA's notification that Aqua was on Critical Review Status, and certify that it had sufficient remaining service capacity for new sewer main extensions, whether it did or not. As a matter of law, Aqua cannot be compelled to sign a false certification to the IEPA.

As demonstrated in Aqua's Motion, V3's permit application forecasted a wastewater flow of 3½ of Aqua's remaining wastewater service capacity. Motion at 5. Monee does not dispute that Aqua was, and remains, on the IEPA's Critical Review List, nor does Monee dispute V3's forecasted wastewater flow as determined from its permit application. Complaint, Exhibit H. Instead, Monee wrongly argues that because Aqua

alleged facts outside of its Complaint, and did not provide an Affidavit in support of its Motion, the Motion must be denied.

While Monee objects that Aqua alleged facts in its Motion that were not included in Monee's Complaint, the IEPA's Critical Review Status notification letters to Aqua, along with the IEPA's Critical Review Lists are public records⁴ of which the Commission can take judicial notice, and may therefore consider in a motion to dismiss, without an affidavit. *See In re Marriage of Lyons*, 508 N.E.2d 458, 462, 155 Ill.App.3d 300, 305 (2nd Dist. 1987); 83 Ill. Admin. Code 200.640(a).

For these reasons, Monee's claim with respect to V3's permit application must be dismissed.⁵

B. Aqua Has Not Made Contradictory Allegations in Other Proceedings Before the Commission.

According to Monee, Aqua alleges in its Motion that it no longer has the capacity to serve Monee, while simultaneously requesting permission from the Commission in Docket No. 06-0655 to expand its certificated service area, alleging that "it had sufficient capacity for such expansion." Response at 5.

First, Aqua did not claim that it lacked capacity to service Monee. In its Motion, Aqua argues, without comment or challenge from Monee, that it lacked the capacity to

⁴ 5 ILCS 140/2(c) provides that:

"Public records" means all records, reports, forms, writings, letters, memoranda, books, papers, maps, photographs, microfilms, cards, tapes, recordings, electronic data processing records, recorded information and all other documentary materials, regardless of physical form or characteristics, having been prepared, or having been or being used, received, possessed or under the control of any public body.

⁵ As established in Aqua's Motion (at p. 7, Exhibit M), the issue of the Ridgeland Avenue Property/Bailly Ridge Permit Application ("Bailly Ridge Permit Application") is moot. The Bailly Ridge Permit Application is a public record of the IEPA, and it was executed by Aqua. Monee does not comment on or challenge Aqua's argument with respect to the Bailly Ridge Permit Application.

service the wastewater flow projected on the V3 permit application. Aqua did not make this argument with respect to Monee's permit application.

Second, Monee's quotation of testimony from Aqua's President Terry Rakocy takes his remarks out of context to create the appearance of a conflict with Aqua's positions in its Motion. In Docket No. 06-0655, Aqua requests a Certificate of Public Necessity to expand its certificated service in Will County. Monee purports to quote Mr. Rakocy as stating that Aqua "can accommodate growth in residential units in both the Original and Certificated Area for the next 17 years." Response at 7; Rakocy Testimony at 2. Monee further quotes Aqua as stating that "it can accommodate an increased demand through a rerating of its facilities." Response at 7; Rakocy Testimony at 3. Monee takes portions of Mr. Rakocy's testimony and rearranges it to arrive at a conclusion that is unsupported by the original text, which states as follows:

There is sufficient capacity at the University Park WWTP currently, however, and **when combined with the rerating as discussed in my supplemental rebuttal**, the WWTP's capacity can accommodate growth of residential units in both the Original Certificated Area and the Expanded Area for the next 17 years (emphasis added).

Rakocy Testimony at 2.

Monee misquotes Mr. Rakocy by separating the proposed rerating of the WWTP from Aqua's ability to increase its capacity to treat additional wastewater flow. The proposed rerating has not been approved to date.

In short, Mr. Rakocy's statement that with rerating, Aqua can accommodate anticipated wastewater treatment demand for the next 17 years in no way contradicts Aqua's position that as of now, before the rerating has been approved (and at the time V3's permit application was submitted) Aqua's remaining service capacity, as

determined by the IEPA, was and remains insufficient for the projected wastewater treatment demand from the V3 project.

Monee also argues that Aqua's claimed lack of capacity to serve Monee (a claim that Aqua never makes) is contradicted by its development of plans to increase its treatment capacity, and alleged failure to implement those plans. Specifically, Monee cites the Direct Testimony of Commission witness William Johnson from Docket No. 06-0655, and claims that Aqua had developed interim improvement plans for increasing WWTP capacity, which, if implemented, could have resulted in completed construction by August 2008. Johnson Testimony at 9.

In making this argument, Monee completely overlooks the fact that according to Johnson's testimony, and its own Response, part of Aqua's wastewater treatment assets were under the threat of condemnation by the Thorn Creek Basin Sanitary District ("Thorn Creek"), and that Monee and Aqua were in negotiations with Thorn Creek for the sale of the Aqua WWTP. Johnson Testimony at 7-10; Response at 3. Because the parties expected Thorn Creek to take over the responsibility for providing wastewater treatment service to Monee, Aqua reasonably chose not to invest in expansion of the WWTP only to have it condemned by Thorn Creek during the expansion.

Monee also overlooks that fact that its Complaint was in part premised on its claim that Aqua had not submitted any plans for upgrading its WWTP as of September 22, 2006, and that, as a result, Aqua had "limited additional capacity to provide sewage service to property within Monee..." Complaint at 5. Simply put, Monee first alleges that Aqua had not planned for necessary expansion of its WWTP, thereby resulting in Aqua's limited service capacity, and then in its Response, argues that Aqua's service

capacity is not an issue at all (Response at 5) and that Aqua had in fact developed plans for expanding the capacity of the WWTP. Johnson Testimony at 9; Response at 5.

Most significantly, Monee overlooks the fact that its current difficulties were caused by its decision to terminate its service contract (“Agreement”) with Aqua in 2003, thereby causing Aqua to believe that the wastewater treatment capacity it had reserved for Monee would become available for use with other customers as of October 2006, and that Monee failed to successfully arrange for wastewater treatment service once the Agreement with Aqua had terminated. Motion at 1-2, 4.

For these reasons, Monee’s arguments on this point should be rejected.

C. Monee’s Request For an Order Compelling Aqua to Provide Service is Moot.

Under 220 ILCS 5/8-508,⁶ Aqua is obligated to continue providing wastewater treatment service until the Commission gives permission for termination or abandonment of service.⁷ Aqua has never terminated or threatened to terminate wastewater treatment service to Monee, and Monee does not allege otherwise. Nonetheless, Monee includes in its Complaint a confusing request that Aqua be compelled to “provide sewage service to property within Monee.” Complaint at 6. With respect to Aqua’s continued treatment of

⁶ 220 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.

⁷ Monee’s Complaint was based in part on its service contract with Aqua. Monee terminated the service contract on August 23, 2003, effective October 16, 2006. The service contract has not been in effect since October 2006 and cannot be the basis of any rights claimed by Monee. Motion at 4. Monee filed its Complaint on October 12, 2006 – 4 days before the service contract expired.

Monee's wastewater, this obligation already exists under 220 ILCS 5/8-508, and Monee in no way alleges an actual or threatened violation of this obligation. Thus, a request for the Commission to create by order an obligation that already exists by statute, and which is being honored by Aqua, is moot.⁸

Monee argues that its prospective request for service from Aqua is necessary because "Aqua indicates that it does not intend to provide service to new customers located in Monee, despite its obligation to do so." Response at 10. Monee is requesting that the Commission compel Aqua to certify permit applications for sewer main extensions, from any applicant, regardless of Aqua's remaining service capacity, and regardless of the IEPA's determination of Aqua's status on the Critical Review List. Monee does not identify any outstanding permit applications for sewer main extensions, other than V3's and its own. Monee's fear that Aqua might deny certification to other prospective permit applications is plainly insufficient as a basis for mandamus or injunctive relief against Aqua. Moreover, as neither the Commission nor the parties have any way of knowing at this time the capacity demands projected in future permit applications, the order requested by Monee would potentially require Aqua to certify falsely as to its ability to treat the projected wastewater flow from proposed sewer main extensions.

For these reasons, Monee's request must be denied.

⁸ Aqua alleged in its Motion that on July 25, 2006, the IEPA issued an oral directive that Aqua continue service to the Village of Monee. Although Aqua acknowledges that there is no public record of the IEPA oral directive, the Commission can rule on this issue without reference to it. Thus, for purposes of this Motion, Aqua withdraws its references to the IEPA oral directive.

D. Neither Monee nor V3 Have Requested Waivers From the Illinois Pollution Control Board.

Whether Monee presents its claim as a request for mandamus or injunction, it overlooks the fact that it has an adequate legal remedy for Aqua's refusal to certify V3's and Monee's permit applications – a request to the Illinois Pollution Control Board (“IPCB”)⁹ for a waiver of the certification requirement. Monee claims that its failure to request a waiver improperly relies on disputed facts outside of the Complaint. Once again, Monee misstates and mischaracterizes the text of Aqua's Motion. In its Motion, Aqua states that “nowhere in its Complaint does Monee allege that either it or V3 ever requested a waiver of the certification requirement.” Motion at 10. *See* 35 Ill. Admin. Code 104.204; *C&F Packing Company Inc. v. Illinois Environmental Protection Agency*, PBC 06-53 (Sept. 21, 2006) (2006 WL 2839833 at 2).

A review of Monee's Complaint confirms Aqua's statement on this point. Aqua simply cites Monee's failure to allege specific facts necessary to state a cause of action. Monee has attempted to characterize Aqua's citation of this failure to plead facts as an improper introduction of extrinsic evidence. Monee's argument is without merit and must be rejected. Moreover, in its Response, Monee tacitly confirms that neither it nor V3 ever filed a waiver request. Monee states that V3 “did in fact inquire with the IEPA regarding such a waiver and the IEPA informed Monee that such a waiver would not be provided.” Response at 12. Monee interestingly declines to state why the IEPA allegedly stated that it would not provide a waiver. In both its Complaint and Response, Monee omits any allegation that it or V3 ever filed formal requests with the IPCB for

⁹ In its Motion, Aqua cited the waiver provision 35 Ill. Admin. Code 104.204, and incorrectly stated that the waiver request is to be made to the IEPA. The waiver request is to be made to the Illinois Pollution Control Board.

waiver of the certification requirement. V3's informal inquiry to the IPCB regarding a waiver of the certification requirement is not a substitute for filing a formal waiver request.

By asking the Commission to compel Aqua to certify permit applications to the IEPA, Monee is effectively requesting relief from the Commission on a matter that belongs before the IEPA and the IPCB. The issuance of permits for wastewater main extensions is a matter committed to the IEPA and the IPCB, as is the question of available remedies when an applicant is unable to secure the necessary certifications for a permit application. The course prescribed by the Public Utility Act and the Illinois Administrative Code is to request either a waiver of the certification requirement or appeal the denial of the permit applications. Ignoring this legally required course of action, Monee instead seeks to compel Aqua to give a "rubber stamp" certification, without regard to the factual content to the certification. The Commission however, does not have the authority to dictate the content of certifications to the IEPA in permit applications.

More importantly, the ultimate decision to approve the permit applications is made not by the Commission, but by the IEPA. The IEPA reviews permit applications based on whether approval would result in a violation of the Illinois Environmental Protection Act ("Environmental Protection Act"). *See Joliet Sand and Gravel Co. v. Illinois Pollution Control Bd.*, 516 N.E.2d 955, 958, 163 Ill.App.3d 830, 833-34 (3rd Dist. 1987). Even if the Commission were to compel Aqua to certify the permit applications at issue in this case, Aqua would still be compelled to provide the IEPA with truthful

information about its wastewater treatment capacity during the evaluation of the permit applications.

If the IEPA, in light of its factual determinations as to Aqua's status on the Critical Review List, concluded that an award of the requested permits would result in a violation of the Environmental Protection Act, it would still be required to reject the permit applications. *See Philipsborn Equities, Inc. v. Illinois Pollution Control Bd.*, 419 N.E.2d 470, 471, 94 Ill.App.3d 1055, 1056-57 (1st Dist. 1981) (the IPCB refused to issue variance for construction permits to developer for sewer main connections because overloaded municipal sewage treatment plant had been placed on restricted status). In *Philipsborn*, and in the instant controversy, the IEPA and IPCB are responsible for determining whether, when and under what conditions permits will be issued that potentially effect compliance with the Environmental Protection Act. Accordingly, Monee's effort to evade resolution of this dispute by the IEPA and IPCB should be rejected.

Monee also argues in its Response that a waiver of certification from the IPCB is not an adequate remedy because the certification of the permit application is "a statement by Aqua that it will provide sewage service to the V3 property" and that "[e]ven if V3 could acquire a waiver from the IPCB of Aqua's signature on the permit application, it would still be faced with construction of a new development with no sewage service."

This is speculative and false. First, 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.

Accordingly, Certification of a permit application is not a promise to provide future sewer service.

Second, Monee mischaracterizes the manner in which Aqua provides wastewater treatment service. Wastewater collected in the Monee sewer system is transported to the Aqua WWTP, where it is treated. *See* Wastewater Treatment Agreement at 2, Complaint Exhibit D. As stated above, Aqua has never terminated or threatened to terminate its treatment of Monee's wastewater, and Monee makes no such allegations. Any additional wastewater flow created by new sewer main extensions would be transported to the Aqua WWTP along with Monee's other wastewater for treatment. Monee offers no basis at all for the suggestion that even if it or V3 were connected to the sewer system through sewer main extensions, Aqua would somehow separate the additional wastewater flowing into the WWTP and refuse to treat it. The alleged promise to provide future sewage service to permit applicants is non-existent and unnecessary.

The adequacy of Monee's recourse to a waiver request (or appeal of the permit denials) as a remedy in this dispute is not determined by whether it is assured of its desired outcome (guaranteed approval of permit applications for sewer main extension). Such an outcome is not at all certain. Rather, the adequacy of Monee's remedy is demonstrated by the fact that the Public Utility Act and the Illinois Administrative Code have specifically provided for waiver requests as the remedy under these facts, and that Monee has a fair opportunity to present its case on the merits to the IPCB as to why the approval of the requested permits would not result in a violation of the Environmental Protection Act.

Accordingly, Monee's argument that a waiver of the certification requirement is not an adequate remedy must be rejected.

E. Mandamus Can Be Ordered Against a Public Utility.

Monee makes the bizarre claim that its request for relief cannot be construed as a claim for mandamus because mandamus is available only against government bodies. Response at 10. After making this argument, Monee cites 220 ILCS 5/4-202, which itself authorizes the Commission to seek mandamus against **public utilities** to compel compliance with their obligations. Moreover, a cursory review of Commission orders reveals numerous cases in which mandamus has been sought against public utilities. *See, e.g. Illinois Commerce Commission v. Crystal Clear Water Company*, Docket No. 01-0488 (2003 WL 21996359); *Re 21st Century Telecom of Illinois, Inc.*, Docket No. 00-0592 (2001 WL 322609).

Accordingly, Monee's argument is without merit and should be rejected.

F. Aqua is Not Estopped from Citing the Commission's Lack of Jurisdiction to Award Money Damages.

Monee argues that Aqua is estopped from asserting the Commission's lack of jurisdiction to award money damages because in an earlier case in the Circuit Court of Will County, Aqua argued that the Commission has exclusive jurisdiction over the controversy. Monee mistakenly believes that these two positions contradict each other. The Order of Dismissal from Will County does not specifically address the issue of the Court's jurisdiction to award money damages, nor does Aqua's Motion to Dismiss in the Will County case explicitly raise this issue.

The Will County Court found that the subject matter of a public utility's obligations to provide waste water treatment service was within the exclusive jurisdiction

of the Commission. Under the doctrine of primary jurisdiction, the Will County Court's holding required, by operation of law, the dismissal of Monee's claim for damages, not because the Will County Court lacks authority to award money damages, but because the underlying facts on which a money damages award would be premised must be established by the Commission. Illinois courts have applied the primary jurisdiction doctrine "where a claim is originally cognizable in the courts, and ... enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its review." *Village of Roselle v. Commonwealth Edison*, 368 Ill. App.3d 1097, 1111, 859 N.E.2d 1, 14, 307 Ill.Dec. 1, 14 (2nd Dist. 2006).

The primary jurisdiction doctrine notwithstanding, a ruling by the Circuit Court of Will County cannot create jurisdiction in the Commission to award money damages. Thus, Monee's contention that the Will County dismissal bars Aqua from raising the question of jurisdiction is misguided and must be rejected.

G. Monee Has Yet To Allege Any Facts That Would Entitle It To An Accounting of Tap Fees.

In its Response, Monee argues that its request for an accounting is not moot because it has never been presented with a description of how tap-on fees have been used since 1990. As in its Complaint, Monee's Response offers no legal or factual basis for an entitlement to an accounting. Aqua recognizes that the Commission has the authority to demand an accounting of a public utility under appropriate circumstances. The Public Utility Act does not confer this authority to demand an accounting to dissatisfied permit applicants such as Monee or V3. Monee's mere dissatisfaction with Aqua does not

translate into a right to compel an accounting. Absent any cited legal basis or specific factual allegations in support thereof, Monee simply has failed to state a claim for an accounting.

III. Conclusion

In its response, Monee fails to show that it has pleaded the elements for mandamus, or for injunctive relief, or that there are any facts that it could plead that would justify the relief it seeks. It fails to show that it has pleaded elements for an accounting, and makes no argument as to why the Commission would have jurisdiction to award money damages. For these reasons, Aqua's Motion to Dismiss should be granted.

Respectfully Submitted,

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