

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Complaint of Steve and)	
Tammy Dumeney and Sharon Felix,)	
)	
Complainants,)	
)	
v.)	Case No. 96-397-WW-CSS
)	
Aquameter, Inc.,)	
)	
Respondent.)	

OPINION AND ORDER

The Commission, considering the pleadings, the evidence of record, and being otherwise fully advised, hereby issues its opinion and order.

APPEARANCES:

Terrence W. Lyden, 1630 Grandview Avenue, Columbus, Ohio 43212, on behalf of Aquameter, Inc.

Southeastern Ohio Legal Services Program, by Gary M. Smith, 332 West High Avenue, New Philadelphia, Ohio 44663, and Ohio State Legal Services Association, by Rachel K. Robinson, 861 N. High Street, Columbus, Ohio 43215, on behalf of Steve and Tammy Dumeney, and Sharon Felix.

Betty D. Montgomery, Attorney General of the State of Ohio, Duane W. Luckey, Section Chief, by William L. Wright and Matthew J. Satterwhite, Assistant Attorneys General, 180 East Broad Street, Columbus, Ohio 43215-3793, on behalf of the staff of the Public Utilities Commission of Ohio.

Background

On April 24, 1996, a complaint was filed on behalf of Steve and Tammy Dumeney and Sharon Felix (complainants) against Aquameter, Inc. (Aquameter or respondent). Complainants allege that Aquameter is engaged in the business of supplying water to residential consumers in Ohio, including, at one time, the complainants and, as such, is both a public utility and a waterworks company as defined by Sections 4903.02 and 4905.03(A)(8), Revised Code, and is subject to this Commission's jurisdiction pursuant to Section 4905.04, Revised Code. Complainants contend that Aquameter never explained to the complainants the rules by which late payment charges are assessed and that bills are not written clearly. Also alleged is that the water supplied by Aquameter to the Dumeney's is of such poor quality as to render it unfit for ordinary household use such as drinking and washing clothing. Further, complainants contend that Aquameter damaged the houses of complainants when it installed meters and that Aquameter removed electrical wiring from complainant Felix's home and discarded it without her permission. Complainants request that the Commission find that Aquameter's acts and practices are

unlawful and in violation of Sections 4905.22 and 4905.30, Revised Code, and Chapter 4901:1-15, Ohio Administrative Code (O.A.C.). Complainants also request that the Commission find Aquameter is liable to the complainants for all damages suffered as a result of Aquameter's alleged unlawful acts and practices.

On May 20, 1996, Aquameter filed an answer, which denied the material allegations of the complaint. On August 1, 1996, Aquameter filed a motion to dismiss the complaint. In its motion, Aquameter contends that this case should be dismissed because it claims it is a water submetering company and, as such, is neither a public utility nor an entity subject to Commission jurisdiction. On August 28, 1996, a prehearing conference was held. On June 9, 1997, after receiving extensions of time to file a response, complainants filed a memorandum contra the respondent's motion to dismiss. Similarly, after receiving an extension of time, Aquameter filed a reply to complainants' memo contra on October 21, 1997. A fact finding conference was held on November 18, and 19, 1998, and a hearing was held on August 16, 2000. At the hearing, Steve and Tammy Dumeney, complainants, and Jerry Griener, representing the Wood County Water and Sewer District (Wood County) testified on behalf of complainants. Kathleen Camerucci, Aquameter's director of billing and customer service, testified on behalf of Aquameter. The parties mutually agreed to waive cross-examination and accept as evidence, in lieu of testimony, the depositions or affidavits of Sharon Felix, complainant; William Connell, representative of Troy Villa Mobile Home Park Manufacturing Home Community (Troy Villa); Julie Provan, property manager for Jupiter Realty, Inc. (Jupiter); Kathleen Lyden, representing Aquameter; and Dennis Clapper, service director for the Village of Minerva. Parties were directed to file briefs by October 20, 2000, and reply briefs by November 3, 2000. On October 20, 2000, Aquameter and the staff filed post hearing briefs and on October 23, 2000, complainants filed a post hearing brief. Aquameter and staff each filed their reply brief on November 3, 2000, and complainants filed their reply brief on November 8, 2000.

Preliminary Issues Raised in Briefs

Complainants request that three rulings made by the attorney examiner be reconsidered. First, complainants' request that late-filed answers to admissions made by Aquameter be deemed admitted. Complainants argue that, on October 20, 1999, it filed and served upon Aquameter a request for admissions and that Aquameter had until November 9, 1999, to respond. Complainants state that Aquameter failed to timely respond with a written answer or objection. As a result, complainants claim that, pursuant to Rule 4901-1-22, O.A.C., the matters alleged in their requests for admissions should have been deemed admitted. At a July 10, 2000 prehearing conference, the attorney examiner granted Aquameter an extension of time until July 14, 2000, to provide its written answer or objections to the complainants' request for admissions. At the hearing, Aquameter stated that it had provided a reply to the complainants' request for admissions and had no objection to any of that information being introduced as evidence.¹

Rule 4901-1-22(B), O.A.C., provides that a matter is admitted unless within 20 days after the service of the request, or within such shorter or longer time as the attorney examiner assigned to the case may allow. In this case, the examiner granted Aquameter an

¹ The service date on the answers to the request for admissions was July 14, 2000.

extension of time to file its responses, which is permitted under the rule. The complainants have not alleged that the extension of time granted to Aquameter caused undue prejudice to their ability to present their case. We believe the examiner's ruling was reasonable under the circumstances. Accordingly, we find no error.

Complainants also request that the transcript of the November 18, 1998 fact finding conference be admitted into evidence. Complainants contend that the examiner's decision at the hearing to deny admitting the transcript of the fact finding conference be reconsidered. Complainants argue that the statements made by Mr. Lyden and other participants are rightfully admissible as testimony by a party opponent and admissions against interest. Complainants claim that there was no legal basis for excluding this document as evidence.

The record shows that the November 18, 1998 fact finding conference took place over a two-day period; but that only one of the day's proceedings was transcribed. Further, no persons who made statements, including counsel for the parties, gave sworn testimony. Moreover, the complainants were afforded ample opportunity to conduct subsequent discovery, including taking depositions of relevant witnesses. The complainants were also afforded the opportunity, during the evidentiary hearing, to present witnesses and to cross-examine opposing witnesses. Clearly, the sworn testimony of witnesses presented at the hearing is preferred over the partial transcript of unsworn statements made at an informal fact-finding conference. We find no error in the examiner's ruling to disallow admission of this document.

Finally, complainants request that the Commission reopen the hearing to allow the cross-examination of Mr. Terrence Lyden, president of Aquameter. Complainants contend that the examiner's ruling to disallow complainants' call for Mr. Lyden's testimony at the hearing was in error. The facts show that, at the hearing, Mr. Lyden was present in his capacity as counsel for Aquameter. Further, while his name had appeared on witness lists of both complainants and Aquameter, the complainants did not subpoena him, nor did Aquameter choose to call him to testify at the hearing. Further, another witness testified regarding matters related to Aquameter's operations. Upon review of this issue, we find no error in the examiner's ruling.

Facts of the Case

Many of the facts of this case are undisputed. Between 1987 and 1997, Steve and Tammy Dumeney were residents of Minerva Mobile Park Village (Minerva Park), a 55-lot mobile home park located in Carroll County, Ohio. Minerva Park is owned and operated by Jupiter, a management company. At the time the Demeneys moved into Minerva Park, fees for water and sewer service were included in their rental fee. Beginning in September 1995, Minerva Park decided that, in order to reduce water consumption, it would bill its residents separately for water usage. At that time, Minerva Park contracted with Aquameter to install water meters on individual homes in the park, and to read the meters and bill individual home sites in the park. The Village of Minerva Park supplies water to the master meter at the park. From the master meter, water is transported to Minerva Park residents through a distribution system that is owned, maintained, and controlled solely by Minerva Park.

Sharon Felix was a resident of Troy Villa, a 330-lot mobile home park located in Wood County, Ohio. Troy Villa is owned by Troy Villa, Inc. and managed by Uniprop, Inc. When Sharon Felix first moved into the park, her water and sewer services were included as part of the lot rental charge. In April 1995, the owners of Troy Villa, like Minerva Park, contracted with Aquameter for the installation of meters on individual homes, in an effort to reduce water consumption. And like Minerva Park, once meters were installed, Aquameter began reading individual meters and began billing Troy Villa residents for water service. At the time Ms. Felix moved to Troy Villa, its source of water was three wells on its property. In 1996, water lines were extended to Troy Villa and Wood County began providing water to Troy Villa up to a master meter. At that time, Troy Villa entered into a contract to purchase water from Wood County. Sharon Felix, like all residents of Troy Villa, receives water through a distribution system owned, maintained, and solely controlled by Troy Villa. Troy Villa is now billed for its water consumption and sewer treatment by Wood County.

Aquameter is an Ohio corporation, engaged in the business of metering and billing for water consumption. Aquameter has contractual agreements with Minerva Park and Troy Villa to read water meters and send bills for water consumption to residents of Troy Villa and Minerva Park. Aquameter neither owns nor operates any water facilities in Ohio and has no ownership interest in either Minerva Park or Troy Villa. All water meters and remote meter devices installed by Aquameter at Minerva Park and Troy Villa have been purchased or leased by Minerva Park and Troy Villa. Following the initial warranty period, Aquameter does not provide maintenance or service on the meters, unless requested by the meter owners.

Discussion

The primary issue in this case is whether Aquameter is a public utility as defined by Sections 4903.02 and 4905.03(A)(8), Revised Code, and a waterworks company subject to this Commission's jurisdiction pursuant to Section 4905.04, Revised Code. Section 4905.02, Revised Code, states that, as used in this chapter:

“public utility” includes every corporation, company, copartnership, person, or association, their lessees, trustees, or receivers, defined in Section 4905.03 of the Revised Code...

Section 4905.03(A)(8), Revised Code, defines a water-works company:

as engaged in the business of supplying water through pipes or tubing, or in a similar manner, to consumers within this state.

Therefore, in order for the Commission to find Aquameter is a public utility, we must first answer the question whether Aquameter is engaged in the business of supplying water through pipes or tubing or in a similar manner to consumers within this state.

The question raised in this case is similar to the one we addressed in *In the Matter of the Complaints of Melissa E. Inscho, et al. v. Schroyer's Mobile Homes*, Case Nos. 90-182-WSS, 90-252-WSS, and 90-350-WW-CSS (Opinion and Order issued February 27, 1992). In *Schroyer*, the respondent was a mobile home park in Delaware County, Ohio. The respondent installed separate water meters on the lines extending to each resident's home site to decrease the abuse of water usage and to detect leaks, if any. The primary question before the Commission in the *Schroyer* case was whether the respondent became a public utility as defined by Section 4905.03(A)(8), Revised Code, due to submetering the water usage of his mobile home park tenants. The Commission held that the respondent in *Schroyer* was not a water-works company or a public utility, under the statutory definition, because the respondent was not engaged in the business of supplying water. Unlike *Schroyer*, here we are asked to determine only whether Aquameter, a water submetering company, engaged only in metering and billing on behalf of mobile home parks for water service provided to complainants who were residents of manufactured home parks, is a waterworks company as defined by Section 4905.03(A)(8), Revised Code.

The facts show that Aquameter neither owns, leases, or operates any facilities or equipment used to supply or treat water for either Minerva Park or Troy Villa. It does not own any water collection facilities, treatment plants, distribution systems or pipes or trucks used in the transport of water (Tr. 121, 134, 135). Water provided to each park originates from water service districts located outside each mobile home park and is transported to a master meter at each mobile home park through lines controlled by the districts (Complainants' Ex. 22 and Ex. 25). According to the evidence, the Village of Minerva Park is the source for the water supplied to the residents of Minerva Park, and Wood County is the source for the water provided to the residents of Troy Villa (Complainants' Ex. 14 and Ex. 10). The evidence shows that water is provided through water purchase agreements between each mobile home park and the water districts in which the mobile home parks are located. And each mobile home park is the customer of record for its respective water district. There are no contractual agreements between Aquameter and either Wood County or the Village of Minerva Park for the supply and delivery of water. Thus, Aquameter at no time purchases or takes title to the water in the mobile home parks, nor does Aquameter arrange for distribution of water service (Tr. 121, 134, 137, 160, 176; Complainants' Ex. 22 and Ex. 23).

The evidence also demonstrates that, beginning at the master meter, water that was then transported to the Dumeneys and Ms. Felix, and that is now transported to all mobile homes in both Troy Villa and Minerva Park, travels through distribution lines owned, maintained, and controlled solely by the mobile home parks (Tr. 120-131, 141). Aquameter has never had, nor does it currently have any authority over water service, nor has it ever sought to exercise power to initiate or disconnect water service to any mobile home (Tr. 122, 138). The testimony of Ms. Camerucci indicated that only the mobile home parks have control over water service as evidenced by the fact that only the mobile home parks turn on water service when new residents move in, and only the mobile home parks turn off water service when mobile home residents move out (Tr. 122). Further, Aquameter does not own the meters or remote metering devices used to register water usage. The evidence shows that Aquameter purchases the meters and sells them to the mobile home

parks. Aquameter only provides maintenance on the meters through the warranty period and, only thereafter, at the request of the mobile home parks (Tr. 120-122, 141).

The evidence also shows that Aquameter's only relationship in the provision of water service is through its metering and billing for the mobile home parks. For each mobile home park, Aquameter has a contract with the mobile home parks to provide metering and billing services (Aquameter Ex. 1 and Ex. 2). For Minerva Park residents, Aquameter reads the meters and sends the bills to Minerva Park residents (Tr. 131). Minerva Park residents, in turn, make payments to either Jupiter or Aquameter. At the request of Minerva Park, Aquameter makes the payment to the Village of Minerva Park for water service (Tr. 123). Aquameter indicated that this arrangement is unique, is done solely for the convenience of Minerva Park, and is not done anywhere else in Ohio. In the case of Troy Villa, Wood County provides the water to the master meter. Aquameter neither reads the meters nor collects the money but only calculates and mails the water bills. Troy Villa reads their own meters and then sends the reading to Aquameter which, in turn, sends the bills to Troy Villa residents (Tr. 130). Ms. Felix testified that she initially paid both Troy Villa and Aquameter and, later, only paid Troy Villa for water service bills.

Based on our review of the pleadings, we find that Aquameter appears to be engaged in business as a water submetering company. As such, it has contractual agreements with the mobile home parks to install water meters, read water meters, calculate water consumption, and bill for water usage. Aquameter has no contractual agreement with the actual supplier of water or with the end user customer. Based on the facts, we find no basis to conclude that Aquameter is in the business of supplying water to the public, or cause Aquameter to fit within the definition of a water-works company, as set forth in Section 4905.03(A)(8), Revised Code. Therefore, we find that Aquameter is not an entity over whom we will, at this time, exercise jurisdiction.

In the alternative, complainants argue in their brief that, even if Aquameter is not construed as a waterworks company under Section 4905.03(A)(8), Revised Code, Aquameter still must be considered a public utility. Complainants contend that, if there is ambiguity in a statute, it must be construed in favor of the interests of the persons that the statute was designed to protect. *State ex rel. Solomon v. Board of Trustees* (1995), 72 Ohio St.3d 62, 65. Further, complainants claim that, since the term "supply" is not defined by Section 4905.03, Revised Code, its ordinary meaning must be applied and that the role Aquameter plays in the provision of water compels the conclusion that Aquameter supplies water to the residents. Thus, complainants further claim that Chapter 4905, Revised Code, is a statute containing remedies to protect utility consumers from unreasonable and unjust charges, rates, and practices by public utilities and to ensure adequate service. Therefore, according to complainants, the statute must be construed in favor of protecting utility consumers such as the Dumenys and Ms. Felix by holding that the Commission has jurisdiction over Aquameter, and Aquameter must be included within the companies in Section 4905.03, Revised Code.

Although the complainants assert in their brief that the usual and customary meaning of the term "supply" is to "give, furnish, or provide", they have failed to present evidence of what specific actions of Aquameter could be characterized as giving, furnishing, or providing water to the complainants. Instead, complainants have provided

evidence of Aquameter's admitted involvement in metering and billing for water service. It is not disputed that Aquameter installs individual water meters in the involved mobile home parks and that it sends bills for water service directly to the residents of those mobile home parks. But, it is also beyond dispute that Aquameter does not engage in any activity that is related to the disconnection of water service. In short, none of the activities ascribed to Aquameter by the complainants provide factual support for a determination that Aquameter is actually engaged in supplying the water that the complainants received.

In the complaint, there were also allegations regarding the rates charged by Aquameter and the quality of water provided to the Dumeneys. Complainants testified that their bills were hard to understand and that the basis for the rates was never fully explained. Complainants maintained that Aquameter's ability to deviate at all from the water district's rate schedule is evidence of Aquameter's ability to set its own rates. Complainants also argued that Aquameter's ability to impose late fees is uncontrolled. Aquameter claimed that it provides a toll-free number on its bills for customer inquiries. It also argues that it does not set the rates, but rather -- unless the mobile home park owner wants Aquameter to charge a different rate -- bills each resident in the same way as the local water district (which is the ultimate source of the water) would bill the consumer for their individual usage. Aquameter also contends that it only imposes late fees when instructed by the mobile home parks owners.

In **Schroyer**, we said that the reasonableness of a charge for water service is only meaningful if the Commission has first established that we have jurisdiction over the entity providing the service. Consistent with the holding in **Schroyer**, we find that, in this case, it would only be meaningful to address the issue of what rates Aquameter charged and how those rates are calculated, if we have first established that we have jurisdiction over Aquameter. Having determined that Aquameter is not a public utility over which we will take jurisdiction at this time, we decline to consider the issue of the reasonableness of the charges for water service billed by Aquameter to the Dumeneys or Ms. Felix, or for each mobile home park. Nevertheless, we encourage Aquameter to establish customer education procedures in order to help customers fully understand their bills.

There were also allegations in the complaint that the water supplied by Aquameter to the Dumeneys is of poor quality and that damage occurred to the mobile homes as a result of Aquameter's installation of meters. As we have concluded that the evidence demonstrates that Aquameter is neither supplying water to the complainants, nor a public utility over which we will exercise jurisdiction at this time, we will not make any findings on the allegations regarding water quality or damage caused by meter installation. However, we believe that the record evidence demonstrates that, because the two mobile home parks have sole control over their respective park water distribution systems that supply water to each mobile home within the parks, only the parks would have the authority to ensure that the distribution systems meet all water quality standards. We would also expect that, if Aquameter had caused damage to any mobile homes during meter installation, Aquameter would ensure that such problems were corrected to the satisfaction of the home owner. We would also expect the mobile home park owner to provide some relief to home owners since Aquameter's actions were conducted on behalf of the park owners.

Accordingly, the complaint should be dismissed and this case should be closed of record. Further, any motions not previously ruled on should be denied.

FINDINGS OF FACT AND CONCLUSIONS OF LAW:

- (1) On April 24, 1996, a complaint was filed in this case on behalf of Steve and Tammy Dumeney, as well as Sharon Felix, against Aquameter.
- (1) On May 20, 1996, Aquameter filed an answer denying the material allegations of the complaint. On August 1, 1996, Aquameter filed a motion to dismiss the complaint.
- (3) On August 28, 1996, a prehearing conference was held.
- (4) On June 9, 1997, complainants filed a memorandum contra the motion to dismiss. Aquameter filed a reply on October 21, 1997.
- (5) A fact finding conference was held on November 18 and 19, 1998, and a hearing was held on August 16, 2000.
- (6) Section 4905.02, Revised Code, provides that a public utility includes every corporation, company, copartnership, person, or association, their lessees trustees, or receivers, defined in Section 4905.03, Revised Code.
- (7) Section 4905.03(A)(8), Revised Code, defines a waterworks company as engaged in the business of supplying water through pipes or tubing, or in a similar manner, to consumers within this state.
- (8) Insufficient evidence was presented to find that Aquameter is a public utility or a waterworks company subject to the jurisdiction of the Commission, or that it is engaged in the business of supplying water through pipes or tubing to consumers within this state.

ORDER:

It is, therefore,

ORDERED, That the complaint be dismissed and this case is closed of record. It is, further,

ORDERED, That a copy of this opinion and order be served upon all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

Alan R. Schriber, Chairman

Ronda Hartman Fergus

Judith A. Jones

Donald L. Mason

SEF:geb