ORDER NO. 16 023

ENTERED: JAN 22 2016

BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UCR 172

C.C.

vs.

AVION WATER COMPANY.

ORDER

DISPOSITION: COMPLAINT DENIED

I. SUMMARY

This case involves a dispute between complainant C.C. and Avion Water Company (Avion) regarding water service to an accessory dwelling unit (ADU).[1] In this order, we resolve how certain provisions of Avion's tariff apply to an ADU. We dismiss the complaint and close the docket.

II. BACKGROUND

On September 28, 2015, C.C. filed a complaint against Avion challenging the company's assertion that it must serve and meter an ADU separately from a primary dwelling. Avion filed a formal response. A prehearing conference was held via telephone. Complainant then filed a letter clarifying that she also disputes the company's conclusion that she must pay the "Woodriver Village System Impact Fee" in Schedule 12 of Avion's tariff. A hearing was held via telephone during which complainant and company president Jason Wick offered testimony, responded to cross-examination, and answered questions from the administrative law judge. The parties entered several exhibits into the record, including a hearing memorandum prepared by Avion's counsel.[2] The matter was submitted at the close of the hearing.

III. FINDINGS OF FACT

Complainant's property is located in Woodriver Village, a Bend subdivision built in the 1970's. The average lot size in this aged subdivision is 9,148 square feet. With its proximity to the popular Old Mill District and the Deschutes River, this is a prime area

[1] An ADU is a small, secondary housing unit on a single-family lot, usually about the size of a studio apartment or small cabin.

[2] Labeled as Avion/100.

for redevelopment and infill, particularly since the current Bend development standards allows residential lots as small as 3,000 and 4,000 square feet.[3]

Complainant is replacing the primary residence on her property (a manufactured house) with a site-built house in the middle of the property and adding an ADU near the road. Both units are on the same tax lot and for mail are designated "Unit 1" and "Unit 2." The one-bedroom, 545-square-foot ADU will have kitchen and bathroom facilities. Complainant plans to use the ADU as a residence for her parents and maybe later as a rental. The existing 3/4 inch service connection runs from the main service line, alongside the ADU, to the primary dwelling.

Avion proposes to serve the ADU with a separate service connection and meter and charge complainant the following fees to connect the ADU:[4]

Fee Description	Amount	Relevant Tariff Provision
Connection charge for new service, including tapping main line, running copper line, setting meter	At cost estimate $1,500	Schedule No. 3 (Miscellaneous Service Charges)
Contribution to fund upgrade to Woodriver Village main line	$4,793.20	Schedule No. 12 (Woodriver Village Tariff – System Impact Fee)

IV. DISCUSSION

A. Separate Water Meter

The parties first dispute whether a new service connection is required to serve the ADU. Complainant contends the ADU could be served by tapping the existing 3/4 inch service connection to the primary dwelling. Avion asserts that it must install a new service connection and meter to serve the ADU.

1. Complainant's Argument

Complainant argues this is an issue of preference not service quality. She prefers a single connection and meter and objects to having two service connections with two base rate charges. If she rents out the ADU she would prefer to include water in the cost of rent, and claims she would disclose the service arrangement if she sells the property. Complainant points to the current emphasis on infill and affordable housing and cautions that the long-term costs of a separate water meter for an ADU seem prohibitive.

Complainant argues that Avion's tariff contemplates that more than one dwelling can be served through a single line. She points to Rule 13 of Avion's tariff Rules and

[3] Audio Tr. at 47:25-34 (Dec 7, 2015).
[4] Audio Tr. at 41:00-17. Complainant will also have to pay a contractor around $5,000 to dig a road crossing because the main line is on the opposite side of the road. Audio Tr. at 34:37.

Regulations, which says a property consisting of more than one residential unit, *if served through one service line*, will be considered equivalent to the number of dwelling units when determining the customer count (emphasis added).

2. *Avion's Reply*

Avion contends that it must install a separate service line and meter consistent with its tariff and to adequately serve the ADU. Avion maintains that an ADU is a "premise" for purposes of its tariff and the company is required to control the supply of water to each individual premise. Avion cites Rule 7 of its tariff Rules and Regulations, which states that "all premises" will be separately served,[5] and Rule 2, which defines "residential customer premises" as a dwelling and its land.[6] Avion attests it has consistently required separate service for ADUs.

Avion claims it must install a separate connection to maintain adequate water pressure.[7] Avion cautions that serving the ADU through the existing connection to the primary dwelling would not provide adequate service. Avion explains that the increased volume may cause pipe friction to reduce pressure below acceptable levels during peak periods. For further support, Avion cites Rule 36 of its tariff Rules and Regulations, which states the utility shall specify the size, character, and location of pipes and appurtenances in any connection with the main line.

Avion notes that, in keeping with its obligation to "operate, maintain, repair, and replace" a service connection between the main line and the customer's service line,[8] Avion would be left to replace an insufficient connection if the use changes or the property is sold. The company stressed that it has to serve the dwelling for the rest of its existence.

Avion further argues that separately metering ADUs is consistent with the public policy of adopting volumetric pricing for customers and sending price signals.

Finally, Avion dismisses complainant's reference to Rule 13 by asserting that this rule is intended only to provide a customer count process and not to govern how customers will be served.[9]

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[5] Rule 7, *Separate Control of Service*, states "[a]ll premises supplied with water will be served through service lines so placed as to enable the Utility to control the supply to each individual premise using a valve placed within and near the line of the street, the Utility right-of-way, or at the meter."
[6] Rule 2, *Definitions*, defines "residential customer premises" as any dwelling and its land including, but not limited to, a house, apartment, condominium, townhouse, cottage, cabin, mobile home, or trailer house.
[7] OAR 860-036-0315 requires maintaining a minimum water pressure of 20 psi for health reasons "to each customer." We note that OAR 860-036-0315(2) clarifies that, for this rule, "customer" means an individual residential dwelling served by the utility. *See also* Rule 40 of Avion's tariff Rules and Regulations.
[8] OAR 860-036-0060(1).
[9] Audio Tr. at 43:00-33.

3. Resolution

We conclude that an ADU is a "premise" to be separately served and metered in accordance with Rules 2 and 7 of Avion's tariff Rules and Regulations. Accessory dwellings are similar to the type of dwellings listed in the definition of "residential customer premises"—house, apartment, condominium, townhouse, cottage, cabin, mobile home, or trailer house. Applying the separate-service rule to ADUs will ensure adequate service levels and avoid billing disputes, consistent with the intent of the rule as Avion explained in testimony and supporting evidence.

B. Woodriver Village System Impact Fee

The parties also dispute whether the ADU is subject to the Woodriver Village System Impact Fee, as set forth in Avion's Schedule 12. This schedule is designed to collect an accelerated system impact fee to upgrade the main line serving Woodriver Village from six to eight inches. Avion proposed this schedule in 2008 to spread the cost of the upgrade among multiple developers.

At the time it proposed Schedule 12, Avion anticipated rezoning and in-filling of lots within Woodriver Village would add 120 lots and triple the population.[10] Under Schedule 12, Avion collects extra funds from the first 20 developers and then upgrades the line. As the next 100 developers pay in, Avion refunds the first 20 developers the excess they paid so that eventually all developers pay the equivalent of the standard (Schedule 7) impact fee of $2,500.[11] We approved Schedule 12 at the February 26, 2008 Public Meeting, agreeing with our Staff that Avion's proposal was consistent with OAR 860-036-0065, which allows a company to charge customers for main line extensions, and noted that current customers would not subsidize new development.

Avion's Schedule 12 uses the following terminology:

> The schedule applies to "developers of projects" in Woodriver Village.
>
> The purpose is to provide money to upgrade the main line without causing undue financial burden "upon any one developer."
>
> The estimated "amount of lots" required to start the project is "20 lots."
>
> The table of fees in the schedule is titled "Residential Unit Equivalents by Service Meter Size." The fee is $4,793.20 "per lot." This is the product of the total upgrade cost divided by "20 lots."
>
> The estimated "amount of new lots that will be added" the 10 years after the upgrade is "100 lots." The fee for those "next 100 lots" is $2,500.
>
> Refunds are given for 10 years "or when 120 units are developed."

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[10] *See* Avion/100, Exh. A.

[11] The first 20 developers pay $4,793.20 (total project cost $95,864 ÷ 20). The next 100 pay $2,500 (Schedule No. 7 one inch meter impact fee). Avion refunds the first 20 developers the difference between the $4,793.20 that they paid and the $2,500 the others paid.

The fee returns to the Schedule 7 rate "after the first 120 lots" or 10 years after the upgrade.

To date, Avion has collected fees from approximately 15 developers, including five or six ADUs. The account is currently at $77,000.

1. Complainant's Argument

Complainant contends that the plain language of Schedule 12 makes clear that the system development charge does not apply to ADUs. She argues that the tariff's use of "lot" and "new lots" cannot be construed to refer to ADUs built on the same lot as a primary dwelling. Complainant contends that, as written, Schedule 12 would only apply if she had divided her lot, and maintains that Avion must first amend its tariff before it can impose the fees on an ADU that shares the same tax lot as a primary residence. Complainant also notes that ADUs were very much a possibility in Woodriver Village when Avion drafted Schedule 12 as they were provided for in the Bend Development Code.

Complainant also argues that ADUs do not create the same demand as a full-size house because their 600 square-foot size limit realistically allows for only one bathroom, laundry facility, and kitchen.

2. Avion's Reply

Avion argues that "lot," "unit," and "residential unit," as used interchangeably in Schedule 12, should be construed to include ADUs. Avion asserts that the tariff was intended to address the additional demand placed on the system due to the addition of any new customer. For support, Avion points to Commission Staff's February 14, 2008 report summarizing the context and purpose of Schedule 12 prior to its approval.[12] Avion maintains that partition and subdivision were the only recognized means of redevelopment when it proposed Schedule 12 and no ADUs existed in Woodriver Village at that time.

Avion reasons that demand drives main line upgrades—and ADUs increase demand, particularly during morning and evening peak hours. Avion argues that a couple living in an ADU create the same demand as a couple living in a 2,500-square-foot-house.

3. Resolution

The resolution of this issue lies with the proper interpretation of Avion's Schedule 12. Because tariffs approved by the Commission have the force of law, we rely on Oregon's rules of statutory construction to determine whether an ADU is a "lot" within the

[12] Avion/100, Exh. A.

meaning of Avion's Schedule 12.[13] Under the principles set out in *PGE v. Bureau of Labor and Industries*[14] and *State v. Gaines*,[15] we review the text of the statute, in context, along with relevant legislative history and settled rules of construction.

Schedule 12 uses the terms "project," "lot," and "unit" interchangeably. We conclude that these terms include a new, small, secondary housing unit built on the same lot as a primary dwelling. Reviewing these terms in context and along with the history of this schedule, we find no reason to exclude new development within a single tax lot.

Staff's 2008 report illuminates Avion's intent in drafting the language at issue and our intent in approving it. As summarized in Staff's report, Avion implemented Schedule 12 because the company anticipated that redevelopment would increase the population and put more demand on the system, necessitating a costly upgrade of the main service line. Applying Schedule 12 to ADUs is consistent with this purpose because ADUs have many of the water-consuming appliances of a small house and ADU residents likely put demand on the system during peak morning and evening hours.

Moreover, we conclude that other customers would be harmed if we were to limit "project," "lot," and "unit" to partitioned or subdivided lots and exclude a new water-consuming ADU with a full suite of appliances.[16] Other developers would be left to pay the full cost of the upgrade, even though ADU projects add demand to the system and augment the need for the main line upgrade.

We need not resort to the maxim of *contra proferentum* (interpret contract terms against the drafter) because the intent is clear from this analysis.[17]

In reaching this decision, we note the figures in Schedule 12 are based on the standard $2,500 Schedule 7 fee for a one inch connection. If Avion runs a 5/8 by 3/4 inch service connection to complainant's ADU, complainant should eventually be refunded the difference between the $4,793.20 she paid and the $1,000 Schedule 7 charge for a 5/8 by 3/4 inch size meter. Avion's witness acknowledged in testimony that the addition of this new meter size will change the calculations for the refund.[18]

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[13] *See e.g., Verizon Northwest, Inc. v. Main Street Development, Inc.*, 693 F Supp 2d 1265, 1272 (D Or 2010) (applying Oregon rules of statutory construction to interpret tariff); *Facaros v. Qwest Corp.*, 2011 US Dist LEXIS 62370, *7 (D Or 2011) (applying principles of statutory construction to analyze tariff).
[14] *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610-12, 859 P2d 1143 (1993).
[15] *State v. Gaines*, 346 Or 160, 170-73, 206 P3d 1042 (2009).
[16] *See e.g., R.P. v. Portland General Elec. Co.*, Docket No. UC 389, Order No. 99-327 at 4 (May 10, 1999) (Commission stating "[t]ariffs approved by the Commission have the force and effect of law" and explaining "[g]enerally laws should be construed to avoid absurd or unreasonable results").
[17] *See e.g., Verizon*, 693 F Supp 2d at 1274 (after applying principles of statutory construction, turning to principles of contract construction, and eventually resorting to *contra proferentum* to resolve the issue); *Facaros*, 2011 US Dist LEXIS 62370, *11 (ultimately resorting to maxim of *contra proferentum*).
[18] Audio Tr. at 29:10.

V. ORDER

IT IS ORDERED that:

1. The complaint filed by C.C. against Avion Water Company is denied.

2. The complaint of C.C. is dismissed; this docket is closed.

Made, entered, and effective JAN 22 2016.

COMMISSIONER ACKERMAN WAS UNAVAILABLE FOR SIGNATURE

Susan K. Ackerman
Chair

John Savage
Commissioner

Stephen M. Bloom
Commissioner

A party may request rehearing or reconsideration of this order under ORS 756.561. A request for rehearing or reconsideration must be filed with the Commission within 60 days of the date of service of this order. The request must comply with the requirements in OAR 860-001-0720. A copy of the request must also be served on each party to the proceedings as provided in OAR 860-001-0180(2). A party may appeal this order by filing a petition for review with the Court of Appeals in compliance with ORS 183.480 through 183.484.