BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

The Staff of the Missouri Public Service Commission,	)	
Complainant,	)	
v.	)	
Aspen Woods Apartment Associates, LLC, Barry Howard, Aspen Woods Apartments, Sapal Associates, Sachs Investing Co., Michael Palin, Jerome Sachs, and National Water & Power, Inc.	)	**Case No. WC-2010-0227**
Respondents.	)	

LEGAL MEMORANDUM IN SUPPORT OF JOINT MOTION FOR SUMMARY DETERMINATION

COME NOW Respondent Aspen Woods Apartment Associates, LLC (Aspen Woods), and Respondent National Water & Power, Inc. (NWP), pursuant to 4 CSR 240-2.117, and in support of their Joint Motion for Summary Determination, set forth the following legal memorandum in support of that Joint Motion:

Introduction

By its Complaint herein, the MoPSC Staff attempts to extend the PSC's jurisdiction over utilities to include apartments where the landlord divides its utility bill between tenants. The Commission has never attempted to exercise regulatory authority over owners of apartments in Missouri, or to assess them for the costs of the Commission resources dedicated to regulating apartments. The ramifications of making apartment owners regulated utilities are substantial. It could have a significant impact upon thousands of apartment owners, and upon hundreds of thousands of apartment tenants.

Any such extension of PSC jurisdiction should be accomplished through the legislative process, or at a minimum through the PSC's rulemaking process, so that interested stakeholders would have proper notice, equal opportunity for participation, and equitable, competitively-neutral sharing of the benefits and burdens of such regulation.

Instead of even-handed legislation or rulemaking, Staff seeks to exert jurisdiction by a complaint against Aspen Woods, one owner of a single apartment complex under the present complaint, and NWP, its billing and collection vendor. This attempt at extending the Commission's jurisdiction by Complaint against only one of hundreds of apartment owners is inappropriate. It creates a disparate competitive impact upon Aspen Woods and NWP, which must stand the expense of defending this action, while other landlords and billing vendors do not.

Aspen Woods and NWP seek an order of Summary Determination to the effect that the Commission has no jurisdiction over them, or that the Commission will not assert jurisdiction, assuming *arguendo* that the Commission possesses such jurisdiction.

Aspen Woods and NWP recognize that there could be disputes of fact as to whether Aspen Woods and NWP, its tenant utility billing and collection vendor, meet the statutory definition of a water corporation[1], a sewer corporation[2], or a public utility[3]. Aspen Woods and NWP recognize that there could be disputes of fact as to whether Aspen Woods own facilities that meet the statutory definitions of a water system[4] or sewer system[5]. Therefore their Motion for Summary Determination does not focus upon those statutory definitions.

Instead, the Motion for Summary Determination focuses upon the lack of any public use inherent in the landlord-tenant relationship in a private apartment complex. The Missouri courts,

[1] 386.020 (59) RSMo
[2] 386.020 (49) RSMo
[3] 386.020 (43) RSMo
[4] 386.020 (60) RSMo
[5] 386.020 (50) RSMo

and ensuing decisions of this Commission, have recognized that, in addition to meeting statutory definitions giving rise to PSC jurisdiction, to be subject to Commission jurisdiction the service in question must be "devoted to public use". Aspen Woods and NWP do not believe a private apartment complex can be considered devoted to a public use. Their Motion for Summary Determination is focused upon the lack of the devotion to public use element necessary for jurisdiction of, and regulation by, the Missouri Public Service Commission.

Standard for Granting Summary Determination (Summary Judgment)

Summary judgment should be granted in favor of the moving party as a matter of law when there is no genuine issue of material fact. *Allied Mutual Ins. Co. v Brown,* 105 SW3d 543, 545 (Mo App E.D. 2003).

The Missouri Public Service Commission Does Not Have Explicit Jurisdiction over Apartment Owners

The Missouri Public Service Commission is a creature of statute and its jurisdiction is controlled by statute.[6] The Commission is not a court. It is a creature of the Legislature. Its jurisdiction, powers, and duties are fixed by statute.[7] A basic tenet of administrative law provides that "an administrative agency has only such jurisdiction or authority as may be granted by the legislature.[8] If the Commission lacks the statutory power, it is without subject matter jurisdiction, and subject matter jurisdiction cannot be enlarged or conferred by consent or agreement of the parties.[9]

There is no statute conferring jurisdiction to the Commission to regulate the manner in which apartment owners "pass through", divide, or allocate water and sewer costs among

[6] State ex rel. Smithco Transport Co. v. PSC, 307 SW2d 361, 374 (Mo App 1957).
[7] State ex rel. Doniphan Tel. Co. v PSC, 369 SW2d 572, 575 (Mo 1963).
[8] Carr v North Kansas City Beverage co., 49 SW3d 205, 207 (Mo App 2001).
[9] Carr, supra, at p 207.

tenants. §386.250 RSMo, while it confers jurisdiction over water companies and sewer companies, makes no mention of such jurisdiction.

It does not appear that the Commission has, during its existence, attempted to regulate the manner in which apartment owners charge tenants for water and sewer usage. The Commission 2009 Annual Report reports contain no such regulatory information. The Commission's website guide, "A Snapshot of What We Do", lists Missouri's regulated utilities as Electric Companies, Natural Gas Companies, Water Companies, Sewer Companies, Telephone, Manufactured Housing Companies, and Steam/Heat Companies. The Commission's 2009 Annual report discusses regulatory activities with those same six categories of regulated utilities. The annual operating information of the Commission does not list owners of apartments as regulated utilities.

The Commission's Assessment Order for Fiscal year 2011 allocates the Commission's estimated upcoming operational expenses based in part upon prior fiscal year activities.[10] The assessment, exclusive of federal gas safety reimbursements and prior year unexpended fund balance, is allocated between six groups of regulated utilities, electric, gas, steam/heating, water, sewer, and telephone. There is no assessment provision for apartment owners.

If the PSC did assume jurisdiction of apartment owners, there would definitely have to be a change in the nature of its regulatory activities. There would need to be a change in the way its assessments are allocated, among other things.

If the Missouri Public Service Commission obtains or asserts Jurisdiction Over Apartment Owners, it should be done by Legislation or Rulemaking

There may be differences of opinion as to whether there is a need for the state to regulate apartment owners, apartment complexes, tenants, and the "passing through" the costs of utility

[10] June 17, 2010 Order, AO-2010-0366.

service by landlords to tenants. However there should be no dispute that the preferred manner of doing so be deliberate, fair, and even handed. Logic, common sense, and good governance dictate that such an important assumption of state police power should be done via the legislative process.

If the Commission believes it presently possesses statutory jurisdiction over landlords and tenants sufficient to regulate the "passing through" of utility service charges, the appropriate method for the Commission to exercise this jurisdiction is to promulgate rules and regulations equally applicable to all.

The Complaint process is not the correct method of asserting jurisdiction over landlords and tenants. It is not even handed. Today, Aspen Woods appears to be the only landlord having its costs of doing business increased by the attempted exercise of PSC jurisdiction.

A Private Apartment Complex is not devoted to the public use, and is therefore not subject to Regulation by the Missouri Public Service Commission

Since the inception of the Missouri Public Service Commission, the statutes conferring regulatory jurisdiction to the Commission incorporate a threshhold requirement that the utility explicitly professes to have dedicated its private property to public use. *State ex rel M.O. Danciger & Co. v MoPSC*, 205 SW 36, 40; 275 Mo. 483 (Mo 1918). In this 1918 case of first impression in Missouri, the *Danciger* court, at page 42, after a review of decisions of other jurisdictions, determined:

> "The fundamental characteristic of a public calling is indiscriminate dealing with the general public. As Baron Alderson said in the leading case: 'Everybody who undertakes to carry any one who asks him is a common carrier. The criterion is whether he carries for particular persons only, or whether he carries for every one. If a man holds himself out to do it for every one who asks him, he is a common carrier; but if he does not do it for every one, but carries you and me only, that is a matter of special contract.'"

Danciger, at page 40, also stated:

> "for the operation of the electric plant must of necessity be for a public use, and therefore be coupled with a public interest; otherwise the Commission can have no authority whatever over it. The electric plant must, in short, be devoted to a public use before it is subject to public regulation."

The *Danciger* court held that a company owning an electric plant which entered into private contracts to supply certain entities with excess power production was not subject to PSC regulatory authority, as the offering was not devoted to the public use.

In *State ex rel. Buchanan County Power Transmission Company v Baker*, 9 SW2d 589 (Mo App 1928), a company purchased electrical power at a supply point in Buchanan County, delivered the power to a different delivery point, also in Buchanan County, via a transmission line the company owned, and at the delivery point sold the power to a single customer. The issue was whether this company was a public utility subject to the centralized taxing authority of the State Tax Commission, or whether the company was not a public utility and therefore taxable by the local assessor. Applying the *Danciger* devotion to public use requirement analysis, Baker held that merely purchasing, transmitting, and selling a commercial product (here electricity), without more, contained no implication of public service. It was held the company was not a public utility.

In *State ex rel. Lohman & Farmers Mutual Telephone Company v Brown*, 19 SW2d 1048 (Mo 1929), the telephone company operated a telephone exchange for itself, except for one line it invited the public to use. The company was ordered by the Public Service Commission to file schedules of rates and charges (tariffs). The Circuit Court upheld this order, but the Supreme Court reversed. The single line the public was invited to use was determined to be devoted to public use, and subject to Commission regulation. However the Supreme Court held that the other operations were not subject to public use, and not subject to regulation.

In *City of St. Louis v Mississippi River Fuel Corporation*, 97 F. 2d 726 (8th CCA 1938), the city attempted to apply a gross receipts tax, applicable to entities furnishing gas for public use. The Mississippi River Fuel Corporation supplied natural gas to 14 industrial customers within the city pursuant to special contracts. In holding the tax did not apply to Mississippi River Fuel, the Eighth Circuit Court of Appeals applied the law of Missouri (principally *Danciger*), and held that the ordinance applied to the sale of gas to the public generally and indiscriminately, and not to particular persons upon special contract.

In *State ex rel. and to Use of Cirese v PSC*, 178 SW2d 788 (Mo App 1944), the issue was whether Mr. and Ms. Cirese were unlawfully engaged in selling electricity to the public without a certificate of public convenience and necessity. The Cireses had electrical power generation facilities, provided service to their own properties, provided service to tenants living in the Cirese properties, and also were preparing to extend their provision of service to as 500 additional customers. The Court found that the Cireses were not a public utility "insofar as their facilities and activities are confined to the manufacture, distribution and sale of electrical energy to themselves and to their own buildings ***and tenants thereof***" (emphasis added), 178 SW2d 790. The Cirese activities in soliciting or serving customers other than themselves and their tenants were concluded to be devoted to public use, and subject to PSC regulation.

The applicability of *Cirese* to the facts under review here is readily apparent. *Cirese* held that a landlord selling utility services to its own tenants has not devoted the proper to public use, and is not subject to PSC jurisdiction. Aspen Woods and NWP have done no more than what the Cirese did. Just as the Cireses were not subject to regulation with respect to electricity sold to their own tenants, Aspen Woods and NWP here are not subject to regulation for allocating water and sewer charges to the tenants of Aspen Woods.

In *Khulusi v Southwestern Bell Yellow Pages*, 916 SW2d 227 (Mo App 1996), plaintiff had been wrongfully excluded from a directory. He sued for damages, and suffered an adverse summary judgment. On appeal this result was affirmed. Plaintiff contended that the Southwestern Bell Yellow Pages operation constituted a public utility. The Appeals Court upheld the trial court, finding that the Yellow Pages was a matter of private contract for the publishing of advertisements in the classified section of a telephone directory, not a public service, and note devoted to the public use.

In *Osage Water Company v Miller County Water Authority*, 950 SW2d 569 (Mo App 1997), Osage Water sought to condemn certain real property in order to begin providing water service, even though Miller County Water was already providing that service from the same property Osage Water sought to condemn. The trial court ruled against Osage Water. On appeal, Osage Water challenged the trial court's conclusion that Miller County Water was a public utility not subject to condemnation. In affirming the trial court with respect to the "devotion to public use" element of public utility status, the Court of Appeals relied on the fact that there was no evidence Miller County Water refused to provide service, undertakes to provide water service to everyone within its capability, and not merely for particular persons, and had undertaken the responsibility to provide water service to all.

In its July 24, 1986 Report and Order in the *Matter of the Investigation into WATS Resale by Hotels*, et al., Case Nos. TO-84-222, et al., 29 Mo. P.S.C. (N.S.) 535, this Commission ruled that hotels reselling telephone service to their tenants were not subject to Commission regulation:

> "Based on the above analysis, the Commission finds that hotels and motels which resell telephone service to their own tenants incidental to other terms in a lease are not holding themselves out to provide telephone service to the public generally and indiscriminately. Therefore, the Commission concludes that such hotels or motels are not subject to its jurisdiction and therefore are not required to be certificated pursuant to Section 392.260 RSMo 1978."

The Commission's decision in *WATS Resale* is This Commission decision is of obvious applicability here. Hotels reselling telephone service to their tenants have not devoted the hotel to public use. If that is true, then apartment owners providing service to their tenants also have not devoted their apartments to public use.

This Commission has previously adhered to the statutory requirement that, in order to be subject to the Commission's jurisdiction, the entity concerned must have devoted its private property to public use. In *Orler v Folsom Ridge, LLC*, WC-2006-0082, et al., Report and Order of June 14, 2007, the Commission entertained a complaint by nine individuals that Folsom Ridge, LLC, including its related association ("Folsom Ridge", or "Association"), was illegally operating a water and sewer system without a certificate of convenience and necessity from the Commission. The threshold question was whether the Commission had jurisdiction over Folsom Ridge by virtue of it being a public utility.

The Commission's Order followed the analysis of *Danciger*, stating:

> "The regulation and control of business of a private nature is sustained by reference to the police power, and even then it is sustained only when the courts have been able to say that a business is in character and extent of operation such that it touches the whole people and affects their general welfare. Consequently, the Court articulated the test for determining if a company was devoting its services to the public use when it summarized and stated: "The fundamental characteristic of a public calling is **indiscriminate** dealing with the general public." In a later case, the Court would further cement its interpretation holding that regardless if the statutes defining corporations falling under the jurisdiction of the Commission have expressly written the idea of the public use into them, it is nonetheless a requirement. (emphasis added)

After reviewing the physical circumstances of the area, facilities, and customers or potential customers, the Report and Order concluded that there was no evidence in the record that any non-member of the Association was receiving water or sewer service, and that service was not available without first becoming a member of the Association. The Association did not

offer water and sewer service to all members of the general public within its service capabilities, but rather offers services to a discrete group of people who become members of the Association. Thus, while the water and sewer systems are available to all current Island residents, and to potential future Island residents, they are only being offered on an optional basis to a discrete group of people (members of the Association), not the general public. Therefore Big Island could not be considered a public utility, and the Complaint was dismissed for lack of Commission subject matter jurisdiction.

Looking at the affidavit of James Mathes, it is clear that, with respect to the apartment complex in question, Aspen Woods has not devoted its privately owned apartment complex to public use by indiscriminately offering occupancy and use of water and sewer services therein to the entire general public. The Mathes affidavit establishes that the apartment complex is private property located on 33 acres, has several separate structures with each including many individual apartments. Aspen Woods requires that tenants meet Aspen Woods eligibility criteria, and must sign a written lease wherein they agree to the water and sewer allocation, along with billing and collection services by NWP, for which the tenants agree to pay NWP.

Applying the controlling precedent of *Danciger* and its progeny, in particular *Cirese* and *WATS Resale*, landlords, by passing through utility charges to their own tenants pursuant to private lease, have not devoted their apartment complex water and sewer facilities to the public use. It should be concluded that Aspen Woods and NWP are not subject to the Commission's jurisdiction. Aspen Woods does not hold itself out to provide apartments to every prospective tenant that asks. Aspen Woods only does so for those whom it accepts. The mere ownership and leasing of occupancy in an apartment is in the nature of private commerce. There is no implication of public service in the ownership and leasing of private property. This is a matter of

special or private contract, not an indiscriminate offering to the general public. Like the facts of the Southwestern Bell Yellow Pages case, letting apartments is more akin to the nature of a private contract for the publishing of advertisements in the classified section of a telephone directory. It does not equate to public service. It does not equate to a devotion to public use.

National Water and Power Inc. is merely a billing agent. It does not own or operate the facilities on the apartment complex premises. NWP bills and collects tenants for the allocated amounts, as authorized by the Aspen Woods leases. Even regulated utilities subject to the Commission's jurisdiction utilize the services of billing vendors to bill customers for services incurred pursuant to tariff. Such billing vendors are not subject to the Commission's jurisdiction. NWP should not be subject to this Commission's jurisdiction.

Conclusion

Wherefore, on the basis of the Joint Motion for Summary Determination, the supporting affidavit of James Mathes, and this Legal Memorandum in Support of Summary Determination, Aspen Woods and NWP respectfully request that the Commission enter an order of Summary Determination in favor of Aspen Woods and NWP, and against the Staff of the Missouri Public Service Commission, dismiss the Complaint, together with such other and further relief as is reasonably necessary to conclude this proceeding.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this pleading was electronically mailed to the following attorneys of record in this proceeding this ___th day of _____, 2010:

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