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, and National Water & Power, Inc.	)	**Case No. WC-2010-0227**
Respondents.	)	

REPLY TO STAFF AND OPC'S OPPOSITION TO
JOINT MOTION FOR SUMMARY DETERMINATION

COME NOW Respondent Aspen Woods Apartment Associates, LLC (Aspen Woods), and Respondent National Water & Power, Inc. (NWP), together referred to as "Movants", and submit the following Reply to the Opposition of Staff and the Office of Public Counsel to Aspen Woods and NWP's Joint Motion for Summary Determination.

Introduction

The Respondents' Motion for Summary Determination should be granted for three reasons: First, this case presents an effort by Staff to obtain, for the first time ever, an order from the Commission in which the Commission asserts jurisdiction over apartment complexes. If Staff wants to pursue this unprecedented theory, it should do so by a rulemaking procedure that treats all landlords the same and gives all interested parties the opportunity to provide input. Second, the Staff has admitted facts sufficient to warrant granting the Motion. Third, the Staff's legal position relies mainly on a series of

Commission proceedings where jurisdiction was never adjudicated, and on a court of appeals case that is distinguishable.

The Magnitude of the Issue

It is hard to estimate the ramifications of the Commission asserting jurisdiction over an apartment owner that passes through utility costs to tenants. How far would such a ruling open this door? There are a multitude of situations where owners or occupants have tenants or co-occupants pay for their share of utilities. At one end of the gamut we have the Aspen Woods situation, a complex of 400+ apartments. At the other end we could have a house or apartment leased by college students where the utility bill is in one student's name with co-occupants reimbursing him/her for their share. In between these extremes there are commercial business leases where the building does not have separate meters for every space, smaller apartment buildings without individually metered apartments, and even houses converted to two or more apartments without separate meters for each apartment. These examples are not exhaustive. The Commission can doubtless think of more. These examples are offered to illustrate the possible depth and murkiness of the waters the Commission is being asked to navigate in a Complaint proceeding.

Consequences of Asserting Jurisdiction

As best Movants understand Staff's position on jurisdiction, it is Movants' activity in billing tenants for utilities as an item separate and discrete from the rental charge that moved Staff to lodge this Complaint. It appears that an apartment complex that does not separately and discretely bill for utility usage, but instead includes utility costs with all

other costs included in the rent pricing, would not be subjected to a Staff Complaint. It is not clear whether an apartment complex that does separately meter and bill individual apartment usage would be subjected to a Staff Complaint.

If the Commission asserts jurisdiction on this basis Staff requests, that would incent Aspen Woods to stop the separate and discrete billing, and raise its rent prices. If that happens, little will have been achieved in this case, other than incenting apartment owners not to separately pass through utility costs, and recouping that cost in some other way. Assuming the total tenant bill would be equal either way, such an exaltation of form over substance would result in tenants not knowing their individually allocated water and sewer cost amounts. Movants believe such an assertion of jurisdiction would be poor public policy. Government regulation, not the marketplace itself, would end up limiting the ways in which the market structures lease pricing.

The apartment industry is competitive. Like so many other offerings in this day and age, this market is very price sensitive. The advertised "basic" price for a product or service is often the most important ingredient in purchase decisions. There is a general perceived need to be able to advertise a low basic price. This is the way it is for travel, lodging, telecommunications, credit cards, banking, and on and on. The first consideration prospective tenants consider is price. Once the basic price is deemed attractive, the prospective tenants can consider other factors, such as whether apartments are separately metered, whether utilities are allocated and passed through according to square footage, or whether they are just generally lumped into the owner's costs. By structuring its lease so that utility costs are separate from the basic rent price, Aspen

Woods has exercised its right to construct the marketing approach it deems best. Aspen Woods believes it pricing structure is consistent with that of its competitors.

A significant driver for complex owners to allocate and separately bill usage estimates to tenants is to provide a price signal that encourages conservation. Absent this price signal, a tenant can leave his/her heating or air condition on high, with water running continuously for the duration of the lease and not be adversely affected. All tenants would pick up this non-conserving usage in a uniform rental amount. Of course the owner's operating expenses increase, and valuable resources may be wasted. Allocation sends the correct pricing signal to each tenant.

If the Commission asserts jurisdiction over Aspen Woods as a regulated utility, there may be other unanticipated, or unintended, consequences. For example, if Aspen Woods is deemed a public utility, will it be empowered with eminent domain and condemnations rights, as other regulated utilities are? Will the Commission be authorized to require Aspen Woods to build additional facilities to expand its services to additional areas, as regulated utilities can be required to do? By asserting jurisdiction the Commission may discourage water conservation. One positive aspect of passing through water costs in a separately billed amount is that tenants are incented to conserve water usage, which also conserves sewer usage.

Discriminatory Enforcement

Throughout this proceeding, and in their Motion of Summary Determination, Movants have attempted to bring to Staff's attention that being singled out in a Complaint proceeding puts Aspen Woods and NWP at a disadvantage compared to their respective

competitors. If the Commission is to assert jurisdiction, common sense notions of fairness would seem to dictate that it be done generically, and not via individual complaint proceedings. The rulemaking process provides stakeholders an equal opportunity for comment, providing the Commission with the input necessary to contemplate all of the consequences of extending its jurisdiction to apartments. Movants have suggested that either legislation, or a rulemaking, in which all stakeholders have an opportunity for input, and the prospect of equal burdens, makes more sense than proceeding by Complaint.

In its Opposition to Summary Determination, Staff ignores these concerns. Staff seems to prefer reserving to itself the discretion as to whom to pursue. Does the Staff intend to bring a Complaint each time it discovers a landlord passing through utility costs by an additur to the tenant's rent? Who will police Staff to see that its enforcement attempts are uniform and fair?

Staff Has Not Properly Denied Any of Movants' Enumerations of Material Fact

The October 15 affidavit of James Mathes set forth facts specifically directed to the devotion to public use question. Movants' enumerated factual paragraphs were keyed to this affidavit. If Staff had any dispute with these facts, it was incumbent upon Staff to support any dispute with facts of its own.

Staff's Response to the Motion for Summary Determination admitted some of Movants' enumerated paragraphs of factual statements[1], partially admitted and partially

[1] Paragraphs 1, 2, 3, 4, and 15.

denied others[2], stated Staff was without sufficient information to form a belief as to others, therefore denying them[3], and denied one paragraph.[4]

Staff's Response did not comply with 4 CSR 240-2.117 (1) (C) or (D). Subpart (1)(C) required Staff to do the following: "admit or deny each of movant's factual statements in numbered paragraphs corresponding to the numbered paragraphs in the motion for summary determination", "state the reason for each denial", "set out each additional material fact that remains in dispute", and "support each factual assertion with specific references to the pleadings, testimony, discovery or affidavits."

Staff's Response fails to comply. First, the Staff did not support any factual assertion or denial with any reference to the pleadings, testimony, discovery or affidavits. Second, Staff did not state the reasons for the denial of paragraph 10, or for the partial denials of paragraphs 5, 6, 7, 8, 11, 14, 16, and 19. Third, with respect to paragraphs 9, 12, 13, 17, 18, part of 19, and 20 Staff's Response simply stated that Staff is without sufficient information to form a belief as to the truthfulness, and therefore denied them.

Movants do not believe such a response complies with the rule. Saying it is "without sufficient information" is not an adequate response under the rule. The rule requires that Staff "state the reason for each denial." Staff was responding to a motion for summary determination, not filing an answer to a pleading. Subpart (1)(D) permitted

[2] Paragraphs 5, 6, 7, 8, 11, 14, 16, and 19.

[3] Paragraphs 9, 12, 13, 17, 18, and 20.

[4] Paragraph 10.

Staff to request additional discovery for factual allegations staff was without sufficient information to admit or deny. Staff did not request additional time to conduct discovery.

Given that Staff failed to present any facts differing from those submitted by Movants, failed to specify why they denied certain facts, and failed to request additional discovery in order to properly respond to Movants' Statement of Material Facts, Movants' Statement of Material Facts should be accepted for purposes of ruling on the Motion for Summary Determination.

Accepting Mr. Mathes' affidavit establishes the facts necessary for the Commission to rule on the summary determination motion. Among the most important undisputed facts are these:

At the Aspen Woods Apartments Complex water service is supplied to the complex by the Missouri American Water Company. *Motion, ¶ 5.*

At the Aspen Woods Apartments Complex sewer or wastewater service is provided to the complex by the Metropolitan St. Louis Sewer District. *Motion, ¶ 6.*

There are no meters measuring individual apartment water usage or wastewater usage at individual apartments in the Aspen Woods Apartments Complex. *Motion, ¶ 9.*

Aspen Woods only leases individual apartments at Aspen Woods Apartments Complex to persons who sign a lease agreeing to the specified arrangements. *Motion, ¶ 17.*

Aspen Woods only obtains reimbursement for water and sewer bills from tenants at the Aspen Woods Apartments Complex. *Motion, ¶ 18.*

The Aspen Woods Apartments Complex is private property belonging to Aspen Woods, subject to the leasehold interests of tenants. *Motion, ¶ 19.*

With respect to leasing individual apartments at the Aspen Woods Apartments Complex, Aspen Woods does not offer the apartments to the general public indiscriminately. Aspen Woods only leases individual apartments at the Aspen Woods Apartments Complex to persons meeting eligibility criteria of Aspen Woods. This eligibility criteria includes a credit/financial responsibility check of applicants, a background check, employment verification for verification of ability to pay for the lease term, payment of an advance month's rent and a security deposit equal to one month's rent, and entering into a lease contract in a form approved by or acceptable to Aspen Woods, wherein the tenant agrees to the terms and conditions of leasing an apartment from Aspen Woods. *Motion, ¶ 20.*

Prior Commission Cases

Movants seek an order of Summary Determination to the effect that the Commission has no jurisdiction over them, or, assuming the Commission believes it does have jurisdiction, an order that the Commission will assert such jurisdiction even-handedly by rulemaking, as opposed to a complaint proceeding imposing the costs of regulation only upon Aspen Woods.

In its Opposition, Staff and OPC rely upon a few Commission proceedings to support the notion that the Commission has actively endeavored to regulate the manner in which property owners charge tenants for utility usage. Staff's Opposition appears to

rely on these cases as constituting some type of precedent applicable here. Such is not the case. Staff's attempt goes too far.

A review of these cases reveals that the jurisdictional issue Movants raise here was not not necessarily decided in these cases. Some were complaint cases in which the respondent consented to jurisdiction by requesting a certificate rather than contest jurisdiction. The *Hurricane Deck Holding Company* case involved an attempted takeover of regulated utility operations by an entity professed not to be subject to regulation. The *Blue Acres Mobile Home Park* case was dismissed after the City of Columbia by ordinance authorized Blue Acres' resale of water with rate ceilings. The other cases cited by Staff involved applications for certificates where the applicant actively sought regulated utility status. A chronological review of the proceedings cited by Staff, and one cited by OPC, is summarized below.[5]

---

[5]WC-2006-0303, *Staff v Hurricane Deck Holding Company, et al*. This was a complaint proceeding institute by Staff against Hurricane Deck Holding Company. Osage Water Company served several residential subdivisions pursuant to a certificate of convenience and necessity. PSC jurisdiction existed for Osage Water Co. When Osage Water was placed into receivership by the Commission, Respondent Hurricane Deck, who claimed to own the water and sewer facilities, attempted to take over billing the residents for water service by sending a letter and bills to all residents. The Commission determined Hurricane Deck has subjected itself to the regulatory jurisdiction of the Commission. This decision was later appealed, and the final Opinion, *Hurricane Deck Holding Company v PSC*, 289 SW3d 261 (Mo App WD 2009), will be discussed later in this Reply.

WC-2008-0079, *Staff v Universal Utilities and Nancy Croasdell*. This was a complaint proceeding instituted by Staff against a company and its principal for providing water and sewer service to 114 pads in the Blue Acres Mobile Home Park in Columbia, Missouri without a certificate of convenience and necessity. The Commission entered a default judgment against respondents on December 13, 2007.

WC-2008-0126, *Staff v Delmic, et al*, also involved the Blue Acres Mobile Home Park in Columbia. Staff brought complaint against the owners and operators of the trailer park for

With the exception of *Staff v Hurricane Deck Holding Company*, none of these cases involved a Commission decision resolving a dispute as the Commission's jurisdiction.

The Devotion to Public Use Element of Utility Service is imposed by Judicial Decisions

The Joint Motion for Summary Determination of Aspen Woods and NWP addresses the "devotion to public use" element of the Commission's jurisdiction. It does

---

providing water and sewer service without a certificate of convenience and necessity. The case was placed in abeyance until the City of Columbia passed an ordinance authorizing the owners of the Blue Acres Mobile Home Park to resell water to tenants at the same rates the city charges its customers. Staff voluntarily dismissed its Complaint.

WC-2008-0405, *Staff v Dale Whiteside and Whiteside Hidden Acres, LLC.* Staff filed a complaint against the owners of a water and sewer system serving 150 lots, who had issued bills to the lot owners. After initiation of the Complaint, the owners filed separate applications for a certificate of convenience and necessity, WA-2009-0261, and SA-2009-0262. Staff later dismissed its Complaint as the sewer system had less than 25 outlets, and did not qualify for regulations as a sewer corporation.

WA-2009-0031, *Application of Jerry Reed, d/b/a Woodland Acres Wtaer System, for Certificate of Convenience and Necessity*. After developing a subdivision, DNR informed the PSC that Mr. Reed was operating a water system without PSC authorization. Staff so informed Mr. Reed, who filed an application for such a certificate. Pursuant to a stipulation, the certificate and tariffs were approved.

WA-2009-0316, SA-2009-0317, *Application of Highway H Utilities for Certificates* to operate water and sewer systems. Applicant requested certificates for a development in the unincorporated area of Northern Heights Estates, Pulaski County. Staff filed a favorable recommendation. The certificates were approved, and tariffs filed.

SC-2010-0161, *Staff v Box Canyon Watershed Association, et al*. Staff brought complaint for unlawful provision of sewer service without a certificate of convenience and necessity. Subsequently, one of the Respondents, Canyon Treatment Facility, LLC, applied for a certificate in Case No. SA-2010-0219.

not address the statutory definitions of a water corporation, a sewer corporation, a water system, a sewer system, or of a public utility. This is intentional.

It is by judicial decisions that the "devotion to public use" element has been incorporated into these statutory definitions. Since the inception of the Missouri Public Service Commission, the statutes conferring regulatory jurisdiction to the Commission have been held to incorporate the requirement that the utility explicitly professes to have dedicated its private property to public use. *State ex rel M.O. Danciger & Co. v Mo PSC,* 205 SW 36, 40; 275 Mo. 483 (Mo 1918*).* *Danciger* held, at page 40, that although the statutory definitions did not express the words "for public use", it was apparent those words are to be understood and read into those statutory definitions.

The Parameters of the Public Use Element Remain Unclear

Despite having the public use element read into the statutes since 1918, 92 years later the precise parameters of "devotion to public use" remain unclear. The Commission and court decisions announcing and applying these parameters are not necessarily consistent. There is no bright line capable of consistent application.

Descriptions or tests for public use versus private activity have been offered by court decisions. These attempted tests range from three word phrases to entire paragraphs. One phrase is whether the activity is "public in character".[6] Another is whether it involves "indiscriminate dealing with the general public"[7] as opposed to

[6] *Danciger*, at page 41.

[7] *Danciger*, at page 42.

"merely offering services to a few friends",[8] or as opposed to "matters of private contract".[9] Another is "undertaking the responsibility to provide service to everyone within its capability, not merely for particular persons".[10] Another is "held themselves out as willing to sell to all comers who desired service in the immediate vicinity of their plant."[11]

Decisions have also attempted to refine the "private contract" aspect of the devotion to public use concept. One attempt was "entering into special contracts upon its own terms".[12] One decision described it as "sale to the public generally and indiscriminately, and not to particular persons upon special contract".[13] That case went on to state that "to constitute a public use all persons must have an equal right to the use, and it must be in common, upon the same terms, however few the number who avail themselves of it".[14] It has been stated that the contract service must be "given to all those who apply" to make the service subject to Commission jurisdiction.[15]

---

[8] *Hurricane Deck Holding Company v PSC*, 289 SW3d 261, 262 (Mo App WD 2009).

[9] *State ex rel. Cirese v PSC*, 178 SW2d 788, 791 (Mo App 1944).

[10] *Danciger*, at page 575.

[11] *Cirese*, at page 791.

[12] *Danciger*, at page 41.

[13] *City of St. Louis v Mississippi Fuel Corp.*, 97 F.2d 726, 730 (8th CCA 1938).

[14] *Mississippi Fuel*, at page 730.

[15] *State ex rel. Lohman & Farmers Mutual Telephone Company v Brown*, 19 SW2d 1048 (Mo 1929).

While the concept of devotion to public use may be clear, its application to different fact situations is not. In 1918, the Supreme Court in *Danciger* held that the owner of an electric plant selling electricity to 30-40 customers within a radius of three blocks from the plant pursuant to private contracts had not made an indiscriminate offering making it subject to Commission regulation. In 1928, the Supreme Court in *Buchanan*[16] held that a company owning an electric transmission line and selling electricity to one customer had not devoted its property to public use. In 1938, the Eighth Circuit Court of Appeals in *Mississippi River Fuels*[17] held a company's activities in selling and delivering natural gas to 14 industrial customers pursuant to special contracts did not constitute devotion to a public use.

In 1944, the Court of Appeals in *Cirese*[18] held that the evidence of that case supported the Commission's finding that a company with an electrical plant and distribution lines to deliver power for its own buildings, tenants thereof, and to additional customers the company had indiscriminately solicited, was subject to Commission jurisdiction.

In 1986, this Commission in *WATS Resale by Hotels/Motels*[19] held that hotels and motels that resell telephone service to their own tenants incidental to other terms in a

---

[16] *State ex rel Buchanan County Power Transmission Company v Baker, et al*., 9 SW2d 589 (Mo banc 1928).

[17] *City of St. Louis v Mississippi River Fuel Corporation*, 97 F. 2d 726 (8th CCA 1938).

[18] *State ex rel Cirese v PSC*, 178 SW2d 788 (Mo App 1944).

[19] TO-84-222, et al., Report and Order dated July 24, 1986.

lease were not holding themselves out to provide service to the public generally and indiscriminately, and were not subject to Commission jurisdiction.

In 1995, the Court of Appeals in *Khulusi*[20] held that the Southwestern Bell Yellow Pages, in contracting for yellow page listings, was engaging in a matter of private contract, not a public service.

In 1997, the Court of Appeals in *Osage Water Company*[21] held that the Miller County Water Authority, which pumped groundwater, treated it, stored it, distributed it to homes, held a DNR permit for this, metered usage, charged customers in two subdivisions therefore, never refused water service to any resident of those subdivisions, had devoted its property to public use and therefore was a public utility immune from condemnation by Osage Water. The finding essential to this decision was that the Miller County Water Authority had undertaken to provide water service to all members of the public within its capabilities.

In 2007 this Commission in *Orler*[22] held that a property owners association that provides water service only to its members in a real estate development, and not indiscriminately to the general public, was not a public utility.

[20] *Khulusi v Southwestern Bell Yellow Pages*, 916 SW2d 227 (Mo App 1995).

[21] *Osage Water Company v Miller County Water Authority*, 950 SW2d 569 (Mo App 1997).

[22] WC-2006-0082, Report and Order dated July 14, 2007.

Argument

Staff concludes that by passing through its utility costs via a "billing" procedure authorized in the tenants' lease Aspen Woods subjects itself to Commission jurisdiction. This conclusion is too large a leap.

Recovering costs in the prices for products and services is what every successful business does. Recovering utility costs does not make a business a utility. When the Public Service Commission of the State of Missouri recovers the cost of the Governor Building's natural gas, electric, water, and sewer services by passing them through via its assessment process, it is not acting as a regulated public utility.

With respect to the nature of Aspen Woods' activity, Aspen Woods does not "originate" water or sewer service itself. Aspen Woods receives water service to its apartment complex from Missouri American Water, itself a certificated water utility. Aspen Woods receives sewer service from the Metropolitan St. Louis Sewer District. Aspen Woods' usage is metered by "originating" utilities. When Aspen Woods pays its bill, as a customer of these utilities it is paying its share of utility costs via the rate design incorporated into those utilities' rate structures.

As Aspen Woods does not have meters at every individual apartment, it allocates and passes through water and sewer usage to its tenants. It excludes common areas from this pass through. By contract NWP performs this function for Aspen Woods. When Aspen Woods passes through these costs, it is simply passing them through. It is not imposing its own utility rate designed in accordance with utility rate-making principles.

With respect to that aspect of the devotion to public use test that involves indiscriminate offerings versus private contracts, Aspen Woods with this Reply has filed a supplemental affidavit of James Mathes. That affidavit quantifies the number of apartment applications received, and the number of those rejected. It shows that a significant number are rejected as they do not meet Aspen Wood's private eligibility criteria. This affidavit is being submitted to the extent it may assist the Commission in determining whether Aspen Woods makes indiscriminate lease offerings to the general public, or instead whether it enters into private contracts with those it chooses to contract with.

Movants believe it is widely accepted that apartment leases are matters of private contract, and do not make the apartment owners a public utility. One case that seems to agree with this belief was a Wisconsin Supreme Court decision cited in *Danciger*.[23] The State of Wisconsin claimed that an apartment owner, by furnishing heat, light, and power to tenants of the owner's building, became a public utility. The Wisconsin Supreme Court rejected the state's contention, as it would constitute the owner of every such building with tenants, even a household that rented a room, to be a public utility.[24]

Aspen Woods' activity differs in scope from that of a developer of residential subdivisions, or of a mobile home park. In a typical development the developer may build the well supplying water, and may build the sewage treatment facility, the distribution or connecting lines, and the usage meters for individual houses or lots. When

[23] *Danciger*, at page 41.

[24] *Wis. River Imp. Co. v Pier*, 118 NW 857.

the developer designs rates and charges, and bills them to customers, the developer is performing the range of functions a traditional utility performs. But Aspen Woods' activity does not match this range.

Staff cites cases for the proposition that parties cannot "remove" their transactions from Commission jurisdiction by making contracts. But this proposition is not helpful, as it assumes the transactions were subject to Commission jurisdiction in the first instance. If Aspen Woods' activities are not devoted to the public use, its lease arrangements cannot be aptly characterized as "removing" jurisdiction that did not exist in the first place.

Staff argues that Movants behave or act as water and sewer corporations, therefore are subject to Commission regulation. Obviously, if tenants are billed a portion of the complex's water and sewer costs, this bill will resemble, in some respects, the bill of a regulated utility. But that semblance alone does not satisfy the devotion to public use element. Also there are undeniable differences. Neither Aspen Woods nor NWP have sought or received a certificate of public convenience or necessity. Neither has a certificated area. Neither has undergone a rate-base/operating costs/return on equity rate-setting proceeding. Neither have tariffs on file with the Commission. Non-tenants cannot approach Aspen Woods or NWP and request that they receive water and/or sewer services from Aspen Woods or NWP.

Staff relies heavily upon the decision in *Hurricane Deck Holding Company v PSC*, 289 SW3d 261 (Mo App WD 2009). That case involved unique circumstances. The case involved several residential subdivisions in Camden County collectively referred to as the

Chelsea Rose Service Area. That service area was being provided water and sewer services by Osage Water Company. Osage Water had provided those services for years pursuant to a certificate of convenience and necessity issued by the Commission. When financial difficulties arose for Osage Water, the Public Service Commission placed this regulated utility into receivership. Presumably the Commission was attempting to restore Osage Water's financial viability, or make arrangements to transfer the operation to a worthy successor. Shortly thereafter Hurricane Deck Holding Company sent a letter notifying all Chelsea Area customers that it actually owned the water and sewer assets of Osage Water, having never transferred them to Osage Water, that it had been operating and maintaining the Osage Water system, and that it had decided to turn the system over to a homeowners association in the future. This letter also billed the customers for two months of water and sewer usage.

It is easy to imagine the consternation Hurricane Deck's actions created. The Commission had instigated a receivership for a regulated and certificated utility. The Commission was evaluating whether and how to shore up Osage Water, or find a worthy successor. The Commission was simultaneously attempting to assure customer services were maintained. Then the Commission gets word that Hurricane deck is billing the same customers the Commission was attempting to protect, that Hurricane Deck says it owns the utility assets of Osage Water, that Hurricane Deck is establishing an association to take over the utility services, and that Hurricane Deck claims it needs to authority from the Commission. Hurricane Deck was single-handedly undermining everything the Commission was attempting to accomplish in the receivership.

Staff filed a complaint. Staff filed a motion for summary disposition. The Commission rejected Hurricane Deck Holding Company's contention that it had not devoted itself to public use. The Commission relied on the facts stated above, with the key fact being that HDHC sent bills to the customers for water and sewer service.

Staff also argues that the Commission's decision in *Orler v Folsom Ridge LLC*, WC-2007-0277, was premised on consumer protections suggested by Staff. This is not a complete and accurate description of that decision. In *Orler*, Staff had suggested a three prong test for determining if a home owners association was "legitimate", thereby justifying the Commission's relinquishment of jurisdiction. It had previously suggested that same test in the *Matter of Rocky Ridge Ranch*, WD-93-307. But in its *Rocky Ridge* decision the Commission rejected 2 of the 3 factors, holding that only one was pertinent to the determination of whether an entity was providing service to the general public indiscriminately. The *Orler* decision recognized this history, and repeated that conclusion. Both of these cases stand for the proposition that a homeowners association that provides water and sewer services only to its own members is not holding itself out to serve the general public indiscriminately, and is not subject to Commission jurisdiction.

The public policy rationale for regulation does not apply to apartment complexes that pass-through costs to tenants. "The purpose of regulatory laws is to allow a utility to recover a just and reasonable return while at the same time protecting the consumer from the natural monopoly power that the public utility might otherwise enjoy as a provider of a public necessity." *State ex rel. Sprint Mo., Inc. v. PSC*, 165 S.W.3d 160, 161 (Mo. banc

2005), quoted in *Hurricane Deck*, 289 S.W.3d at 268. The consumers here do not require this "protection" because there is no "monopoly." The tenants' relationship with Aspen Woods is determined by a contract that the tenants enter into of their own free will.

If the landlord-tenant relationship is to be subjected to a layer of regulation addressing utility costs recovery, the appropriate location for that regulation should be in statutes addressing Missouri landlord-tenant law, where the entire relationship is currently regulated. It would not be appropriate for such regulation to arise from statutes designed for Commission regulation of traditional utilities. An apartment complex passing through utility costs is not acting as a traditional regulated utility.

Conclusion

Wherefore, on the basis of the Joint Motion for Summary Determination, the supporting affidavits of James Mathes, and the legal memorandums submitted 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 Amended Complaint, together with such other and further relief as is reasonably necessary to conclude this proceeding.

Respectfully submitted,

/s/Lowell D. Pearson
Lowell D. Pearson
MoBar # 46217

Husch Blackwell, LLP
Monroe House
235 E. High St, Suite 200
Jefferson City, MO 65101
(573) 635-9118
(573) 634-7854 fax
Attorney for Aspen Wood

/s/Craig S. Johnson
Craig S. Johnson
Mo Bar # 28179
Johnson & Sporleder, LLP
304 E. High St., Suite 200
P.O. Box 1670
Jefferson City, MO 65102
(573) 659-8734
(573) 761-3587 FAX
cj@cjaslaw.com

Attorney for NWP

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 15th day of December, 2010:

jennifer.hernandez@psc.mo.gov
rachel.lewis@psc.mo.gov
gencounsel@psc.mo.gov
opcservice@ded.mo.gov
christina.baker@ded.mo.gov
Paulb@brydonlaw.com

/s/ Craig S. Johnson