BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

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

STAFF'S MEMORANDUM IN OPPOSITION TO RESPONDENTS' JOINT MOTION FOR SUMMARY DETERMINATION AND LEGAL MEMORANDUM AND INTERVENOR'S LEGAL MEMORANDUM

COMES NOW the Staff of the Missouri Public Service Commission (Staff), by and through the undersigned counsel, and respectfully states the following to the Commission for its memorandum in opposition to Respondent Aspen Woods Apartment Associates, LLC (Aspen Associates), and Respondent National Water & Power, Inc.'s (NWP), *Joint Motion For Summary Determination* and legal memorandum, and the National Apartment Association's (NAA) memorandum in support thereto:

Introduction

On January 29, 2010, the Staff filed a *Complaint* that alleged that the Respondents have owned, operated, controlled, and/or managed water and sewer corporations and public utilities, subject to the Commission's jurisdiction and without the proper Commission approval. On October 27, 2010, the Commission granted leave for the Staff to amend its *Complaint* to add additional apartment locations that receive the Respondents' utility services. On October 26, 2010, *Aspen Associates and NWP filed a Joint Motion For Summary Determination* and *Legal*

Memorandum In Support Of Joint Motion For Summary Determination. On November 1, 2010, the NAA filed a *Memorandum in Support of Respondents' Joint Motion for Summary Determination*.

The Public Service Commission Law grants the Commission jurisdiction over water corporations and sewer corporations within the state. Section 386.020, RSMo. The Respondents provide services to customers that are necessary for modern living. The Commission's principal interest is to serve and protect ratepayers. *State ex rel. Crown Coach Co. v. Pub. Serv. Com'n,* 179 S.W.2d 123, 126 (1944). The history of regulation over utility monopolies "….has been one of a continued balance between preserving the existence and integrity of the utility so it might continue service to the users, and protection to the users and ultimate ratepayers against unwarranted costs for utility services." *State ex rel. Laclede Gas Co. v. Public Service Commission***,** 600 S.W.2d 222, 228 (Mo. App. W.D. 1980).

In regard to private contracts for service rates, the courts have stated "[p]arties cannot remove their transactions from the reach of dominant constitutional power by making contracts about them." *May Department Stores Co. v. Union Electric Light & Power Co.,* 107 S.W.2d 41, 48 (Mo. 1937), *quoting Norman v. Baltimore & O. R. Co.,* 55 S.Ct. 407, 416 (1923). The Commission's jurisdiction is effective only if the Commission "….possess[es] the power of intelligent visitation and the plenary supervision of every business feature to be finally (however invisibly) reflected in rates and quality of service. *Id*., quoting *State ex rel. City of Sedalia v. Public Service Comm*., 204 S.W. 497, 498 (Mo. 1918). Also:

> Contracts cannot limit this regulation because our Constitution specifically provides: "The police power of the State shall never be abridged, or so construed as to permit corporations to conduct their business in such manner as to infringe the equal rights of individuals, or the general well-being of the State." Section 5, article 12. Therefore "the power of the public service commission…overrides all contracts, privileges, franchises, charters, or city ordinances.

Id., *quoting State ex rel. City of Kirkwood v. Public Service Comm*., 50 S. W. 2d 114, 118 (Mo. 1932). Further, "[i]f it [Commission] was limited by contracts about matters it is authorized to regulate, the certain result would be inequality between consumers. If all consumers similarly situated are to be treated alike, a contract dealing with one on a different basis from others cannot be recognized." *Id*. at 49. As such, the Commission can set rates for service regardless of the private contract between the parties.

Standard For Granting Summary Determination

Commission Rule 4 CSR 240-2.117(1)(E) provides that the Commission may grant a motion for summary determination if the pleadings, testimony, discovery, affidavits, and memoranda on file show that there is no genuine issue as to any material fact, that any party is entitled to relief as a matter of law as to all or any part of the case, and the Commission determines that the granting of summary determination is in the public interest. Commission Rule 4 CSR 240-2.117(F) provides that if the Commission grants a motion for summary determination but does not thereby resolve the entire case, it shall hold a hearing to resolve the remaining issues.

Argument

I. The Commission's Jurisdiction over the Respondents' Water and Sewer Utilities is Dependent upon the Respondents' Behavior and not the Respondents' Housing Structures Used In The Provision Of Service; Therefore a Genuine Issue Of Material Fact is in Dispute and Summary Determination is Inappropriate

The Respondents' first argument contends that a genuine issue of material fact as to whether the Respondents' behavior is that of a water corporation and/or sewer corporation and public utility still exists. The Respondents' memorandum at page two (2) stated "….that there could be disputes of fact as to whether Aspen Woods and NWP…meet the statutory definition of

a water corporation, a sewer corporation, or a public utility…." or whether Aspen Associates' facilities "….meet the statutory definitions of a water system or sewer system." As such, the Respondents stated they would focus only on the requirement that service be "devoted to the public use"; but, in direct contradiction, Respondents first argued for summary determination based on the assertion that while Section 386.250, RSMo (2000) confers jurisdiction over water corporations and sewer corporations, the statute does not explicitly mention jurisdiction over apartment owners. While Respondents' argue they are only seeking determination on public use, they argue that "apartment owners" are not water or sewer corporations. The Staff's *Complaint* asserts that the apartment owners are operating a water corporation and a sewer corporation and are subject to the jurisdiction of this Commission. As the Respondents acknowledge in their memorandum that a genuine issue of material fact remains, they are not entitled to relief as a matter of law on this point. Therefore, the Commission should deny summary determination on this point.

It remains a disputed fact between the Staff and the Respondents as to whether they are water or sewer corporations, so the Commission should not consider this point in summary determination. However, because the Respondent' raised the issue as to whether "apartment owners" are controlled by the Commission's statute, the Staff will briefly address this argument. The definitions for both a water corporation and a sewer corporation, found in Section 386.020 RSMo (Supp. 2009), include a requirement that the Respondents be a corporation, company, association, partnership or person, as those terms are defined in the statute. The Respondents inaccurately frame the Staff's *Complaint* as an extension of jurisdiction over "apartment complexes" when in fact, both Respondents admitted in their respective answers that they registered as corporations with the Missouri Secretary of State. The Commission's jurisdiction

over the Respondents' water and sewer utilities is dependent upon the *behaviors* as alleged in the *Complaint*, and not that of the housing *structures* used in the provision of service to customers.

The Respondents argue that the Commission does not regulate the passing through of costs of utility services by landlords to tenants. Respondents also argue that NWP is simply a billing agent for Aspen Associates and the Respondents are simply passing through the cost of service to their tenants. Respondents state that "[e]ven regulated utilities subject to the Commission's jurisdiction utilize the services of billing vendors to bill customers for services incurred pursuant to tariff." Respondents' *Legal Memorandum* at 11. The Respondents miss the key to their point; the tariff controls the behavior of the billing vendor, thus holding the monopoly vendor accountable through the review and approval of such fees by the Commission. Such fee arrangement is Commission approved.

Applicable to the Respondents, the Commission's jurisdiction extends to those that conduct business as a public utility through the billing and collection of not only a commodity fee, but additional fees (such as new account fees, late fees, expedited payment fees and an insufficient funds fee), as well as offering service hotlines to answer customers' billing questions and other questions including dispute resolution. In this case, the Respondents use of a billing vendor should be subject to the same review as other public utilities regulated by the Commission. The Respondents' allocation to tenants is not just a simple pass through. For example, Madison at Aspen Woods has 452 units. NWP, through contract with Aspen Associates, bills each tenant an account service fee of $3.02 monthly. Assuming each unit is occupied, the Respondents gain $1,365.04 each month from the tenants solely in this account fee unrelated to commodity costs. This amount does not even consider the amounts collected in the

other stated fees within NWP's letter to tenants of Madison at Aspen Woods, attached as Exhibit D in the Staff's *Complaint*.

The Commission has issued Certificates of Convenience and Necessity (CCN) to other entities engaging in similar behavior in several recent cases. *See* WC-2006-0303 (company providing water and sewage treatment services to homeowners within subdivision); WC-2008-0079 (billing company providing water and sewage treatment services to renters within mobile home park without a CCN from the Commission); WC-2008-0405 and WA-2009-0261 (campground owner providing water service to renters of camp lots and subdivision homeowners); WA-2009-0031 (developer of subdivision providing water service to homeowners in subdivision); WA-2009-0316 (developer of subdivision providing water and sewage treatment services to homeowners in subdivision); SC-2010-0161 (developer of subdivision providing sewage treatment services to homeowners in subdivision). Therefore, the Commission should deny the Respondents' joint motion for summary determination because there remains a genuine issue of material fact for the Commission's decision. The Commission should not treat the Respondents any differently than the entities involved in these cases. The Respondents should be required to obtain a CCN.

The Commission should not be persuaded to negate this action by granting the Respondents' *Joint Motion For Summary Determination*. The Respondents fail to establish that the issue of "public use" is separate and apart from the issue of whether Respondents are a water and sewer corporation (a fact Respondents readily admit is at issue in this case) and therefore the Respondents should not be allowed to separate that issue from the other issues. As Staff alleged in its *Complaint* and briefly argued herein, the Respondents are acting as water and sewer corporations and are subject to regulation by the Commission.

II. The Public Service Commission Law Vests With the Commission the Duty to Regulate Water and Sewer Utilities

Sections 386.020 (49) and (59), RSMo (Supp. 2009), and 393.170 (1), RSMo (2000), provide that those who engage in the conduct of distributing potable water and providing sewage collection for gain must first seek a certificate of convenience and necessity from this Commission and submit thereafter to regulation pursuant to the Public Service Commission Law. The Respondents attempt to advance the novel theory that Staff's act of bringing this complaint against apartment owners constitutes the unlawful and unauthorized promulgation of a rule. Not so here. The Respondents cannot limit the scope of authority within the Commission's statutes. That is something only the Missouri General Assembly can do.

The Staff's Complaint asserts that the Respondents' conduct as water and sewer corporations in the absence of a certificate from the Commission is unlawful. The Staff discovered the Respondents' activities after receiving complaint calls from customers. The Staff's filing of the Complaint is in accordance with Sections 386.020 and 393.170, RSMo. As Staff's actions are governed by statute, no additional rules are necessary. To find otherwise would replace the need for adjudication under the statute with rulemaking every time.

III. The Respondents' Provision of Water and Sewer Service is Devoted to "Public Use" and is Therefore Subject to Regulation by the Commission

Although the Commission's statutes contain no explicit requirement of "public use" for an entity to constitute a public utility, the Missouri Supreme Court in *State ex rel. M.O. Danciger & Co. v. Pub. Serv. Com'n*, 205 S.W. 36, 38 (1918), held that the relevant statutes intended such requirement. The court also stated "in determining whether a corporation is or is not a public utility, the important thing is, not what its charter says it may do, but what it actually does."

Danciger, 205 S.W. at 39. Here, the Respondents devote their services to the "public use" by extending water and sewer services in a non-discriminatory manner to all tenants residing in the apartment complex. Dispositive to the "public use" issue is *Hurricane Deck Holding Co. v. Public Serv. Com'n*, 289 S.W.3d 260 (Mo. App. W.D. 2009). The court in *Hurricane Deck* held that the Commission did not err in finding that Hurricane Deck was operating as a public utility subject to its regulation. The court reviewed the Commission's order in that case, which stated:

> The key fact in that by sending out bills to the residents, Hurricane Deck Holding Company offered service to all residents of the given subdivisions. It is *not purporting to merely offer services to a few friends*. By offering water and sewer utility services to the public, even if that public is confined to the residents of a few subdivisions, Hurricane Deck Holding Company has made itself subject to regulation as a public utility.

Hurricane Deck, S.W.3d at 262. (emphasis added). Additionally, the court explained that:

> Under *Osage Water* and *Cirese*, Hurricane Deck could constitute a "public utility," even though its services were limited to the two subdivisions in which its water and sewer systems were located, where it offered service indiscriminately to all persons located within that service area. And that is what the PSC found….

The Respondents have provided water and sewer services to all tenants within the apartment complex, not merely a few friends.

While the Respondents did not reference *Hurricane Deck*, they did cite several other cases as applicable including *Osage Water Co. v. Miller County Water Auth., Inc.*, 950 S.W.2d 569, 574 (Mo. App. S.D. 1997), in which Osage Water provided water service to residents of two subdivisions in Camden County. The court in *Osage Water* followed *Danciger's* requirement that one must devote a facility to the public use before they are subjected to the Commission's regulation. The court in *Osage Water* found service to the two subdivisions satisfied the *Danciger* test and stated:

> The record is void of any testimony which suggested that Defendant has refused to provide water service to any of the residents in the two subdivisions at issue.

> Indeed, the testimony suggested that Defendant has undertaken the responsibility to provide water service to everyone within its capability, not merely for particular persons.

Id. at 575.

Respondents' also cite *State ex rel. Cirese v. Public Service Commission*, 178 S.W.2d 788 (Mo. App. 1944). In particular, the Respondents provide a partial quote from the case stating Cirese was 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 in Respondents' memorandum). However, the Respondents did not indicate that the quote within the case does not stop there, but goes on to state "….in the manner shown in evidence." *Id*. at 790. The court in *Cirese* cites the language "in the manner shown in evidence" from the case of *State ex rel. Lohman & Farmers' Mut. Telephone Co. v. Brown*, 19 S.W.2d 1048, 1049 (Mo.1929). In *Lohman*, the issue was whether a mutual telephone company operating for its members was subject to regulation if a single line was publicly used. The *Lohman* court held only "the company as an owner and operator of the [public] telephone line…and to that extent only, 'is a public utility…within the whole purview and for all inquisitorial and regulatory purposes of the Public Service Commission Act.'" *Id., quoting Danciger*, 205 S.W. at 36. The non-public part of the company was organized as a mutual telephone exchange with several rural lines. "The owners of each party line have an organization of their own, independent of the company, and as such select one of their number to represent them in their relations to and transactions with the company." *Lohman,* 19 S.W.2d at 1048. In regard to cost the Court stated:

> The actual cost of operating and maintaining the exchange is levied against the 'phones served. There are 195 or 196 altogether, and the average monthly assessment against each is 25 cents. There is no other charge of any kind for the service. The owners of these 'phones constitute the company, and its property was

> acquired with a fund made up of membership fees and special assessments paid in by them.

Id. The non-public utility in *Lohman* was not operated as a monopoly, but governed by the users of the service. Not so here, and as such, the Respondents' argument is inapplicable to the case at hand.

Similar to the mutual telephone company structure in *Lohman* is the Big Island Homeowners Water and Sewer Association, Inc. (Association), discussed in *Orler v. Folsom Ridge, LLC,* 2007 WL 2066385 (Mo. P.S.C.). While the Respondents correctly cite the Commission's findings from the record in the case, they mischaracterize them as applicable to their behavior. Respondents' *Legal Memorandum* at 9. The Commission's decision in *Orler* is premised on the protections afforded to the water and sewer customers through the Association's membership. The Commission in *Orler* states:

> [t]here have been past cases before the Commission where an entity providing water and/or sewer service has changed its corporate structure and the Commission has recognized that it no longer holds jurisdiction over those entities. In the case, *In the Matter of Rocky Ridge Ranch* Property Owners Association for an Order of the Public Service Commission Authorizing Cessation of the PSC Jurisdiction and Regulation Over its Operations, Case No. WD-93-307…the Commission's Staff recommended three criteria for classifying what it termed as being a 'legitimate' property owner's association that would not fall under the Commission's jurisdiction. Those criteria were:
>
> 1) It must have as membership all of its utility customers, and operate the utility only for the benefit of its members;
>
> 2) It must base the voting rights regarding utility matters on whether or not a person is a customer, as opposed to, allowing one (1) vote per lot which would not be an equitable situation if one (1) person owned a majority of the lots irrespective of whether each of those lots subscribed to the utility service; and
>
> 3) It must own or lease the utility system so that it has complete control over it.

Orler, 2007 WL 2066385 at 17. The members of the Association govern the water and sewer systems that provide service to them. In addition, "[t]he rates charged by the Association are

designed to cover the actual costs of operating and maintaining the system." Not so in the Respondents' case; the Respondents do not limit charges to only the actual costs of operating and maintaining the system. The Respondents include other charges.

Further, the Respondents argue that they sold service only on a private contract to their tenants, as in *Cirese*. In Cirese, the court held that the electricity provider was a public utility because it offered its services indiscriminately to all persons within the area it was capable of serving. *Cirese*, 178 S.W.2d at 791. The court stated:

> In arriving at the foregoing conclusion we have not overlooked appellants' contention that they sold service only on private contract. We think the evidence is sufficient to support a finding to the effect that they held themselves out as willing to sell to all comers who desired service in the immediate vicinity of their plant, a district consisting of several blocks, and that they did sell to all such customers.

Id. The Respondents have provided service indiscriminately to all those within the area it is capable of serving. Additionally, the Respondents cite *Khulusi v. Southwestern Bell Yellow Pages, Inc.*, 916 S.W.2d 227 (Mo.App. W.D. 1995), for the private contract issue. But, as pointed out by the court in *Hurricane Deck*,

> ….our decision in Khulusi, which found that "[t]he publishing of advertisements in the classified section of a telephone directory" did not render the publisher a "public utility," *relied primarily on the fact that the publisher did "not provide telecommunications service," because it "does not transmit information by wire, radio, optical cable of electronic impulses."*

Hurricane Deck, S.W.3d at 266 (internal citations omitted) (emphasis added). So, regardless of the contract argument, the Commission can find that the Respondents are operating as a public utility engaged in the provision of water and sewer services for the public use.

The NAA also argues that private party relationships govern rental agreements "and as such would include all agreements and valid rules and regulations adopted by the landlord and agreed to by the tenant." NAA *Legal Memorandum* at 7. However, the discussion from *May*

Department Stores makes it clear that NAA's assertion is incorrect: "the power of the public service commission…overrides all contracts." *May Department Stores Co. v. Union Electric Light & Power Co.*, 107 S.W.2d 41, 48 (Mo. 1937). The NAA further argues that because the landlord-tenant law does not define a multitenant dwelling also as a utility corporation, the Commission may only conclude that "….the legislature never contemplated dual treatment of a landlord under both Missouri landlord tenant law and the Public Service Commission Law." NAA *Legal Memorandum* at 7. If true, this argument does not mean that the legislature intended an exception of landlords, but an expectation that a landlord's behavior would not replicate that of a utility and that the landlord would only pass through to tenants the cost of utility service without additional unregulated fees.

The NAA's memorandum provides the statutory definition for "landlords," "rent," and "lease." From the definitions, the NAA makes the assumption that "….the nature of the landlord's business cannot be transformed for that of renting units to tenants to that of "public utility." However, it is clear from *Dancinger* that "in determining whether a corporation is or is not a public utility, the important thing is, not what its charter says it may do, but what it actually does." *State ex rel. M.O. Danciger & Co. v. Pub. Serv. Com'n*, 205 S.W. 36, 39 (1918). Here the Respondents' behavior has replicated that of a public utility. The Staff has presented sufficient support for the position that the Respondents are providing a service for "public use." As such, the Commission should deny the Respondents' *Joint Motion For Summary Determination.*

The Respondents allege three additional cases discussing the contract issue as persuasive, but they are inapplicable to the Commission's decision in this matter; *City of St. Louis v. Mississippi River Fuel Corporation*, 97 F.2d 726 (8th Cir. 1938) (interstate pipe line company

found not to be a public utility); *State ex rel. Buchanan County Power Transmission Company v. Baker*, 9 S.W.2d 589 (electric transmission corporation found not to be a public utility); *Matter of the Investigation into WATS Resale by Hotels/Motels*, 1986 WL 293082 (Mo. P.S.C.) (toll service provided as incidental to the service of the hotel/motel). Therefore, the Staff will not discuss them further.

Conclusion

WHEREFORE, the Staff submits this memorandum for the Commission's information and consideration, and requests that the Commission issue an order denying Aspen Associates and NWP's motion for Summary Determination and allow this matter to proceed to hearing on the remaining issues in dispute, and such other and further relief for the Staff as the Commission finds necessary and proper.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above was served upon the attorneys/parties of record via electronic mail to Lowell D. Pearson, attorney for Aspen Woods Apartment Associates, LLC, at lowell.pearson@huschblackwell.com; Craig S. Johnson, attorney for National Water & Power, Inc., at craigsjohnson@berrywilsonlaw.com; Paul A. Boudreau and John J. McDermott, attorneys for the National Apartment Association at paulb@brydonlaw.com and jmcdermott@naahq.org; and the Office of the Public Counsel at opcservice@ded.mo.gov this 22nd day of November 2010.

/s/ Jennifer Hernandez