

**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI**

The Staff of the Missouri Public Service)
Commission,)
)
Complainant,)
v.)
)
Hurricane Deck Holding Company,)
Chelsea Rose Land Owners Association,)
Inc., Gregory D. Williams, Debra J.)
Williams, and Charles H. Williams,)
)
Respondents.)

Case No. WC-2006-0303

**MEMORANDUM IN SUPPORT OF
STAFF'S MOTION FOR SUMMARY DISPOSITION**

COMES NOW the Staff of the Missouri Public Service Commission (Staff) and in support of its Motion for Summary Disposition pursuant to 4 C.S.R. 240-2.117 respectfully states as follows:

STATEMENT OF FACTS

Respondent Hurricane Deck Holding Company (HDHC) is a Missouri general business corporation in good standing, incorporated on June 6, 1988. Its principal place of business is located at P.O. Box 431, Sunrise Beach, MO 65079. (Answer, paragraph 3).

Respondent Chelsea Rose Landowner's Association (CRLOA) is a Missouri non-profit corporation in good standing, incorporated on December 12, 2005. Its principal place of business is P.O. Box 431, Sunrise Beach, MO 65079. (Answer, paragraph 4).

Respondent Gregory D. Williams is the president, director, and registered agent of Respondent HDHC. (Answer, paragraph 5). Respondent Gregory D. Williams is the

incorporator, a member of the Board of Managers, and the registered agent of Respondent CRLOA. (Attachment A, p. 3).

Respondent Debra J. Williams is the secretary of Respondent HDHC. (Answer, ¶ 6). Respondent Debra J. Williams is listed as a member of the Board of Managers of Respondent CRLOA in the Association's Articles of Incorporation. (Attachment A, p. 3). Respondent Debra J. Williams's address is listed on CRLOA's Articles of Incorporation as P.O. Box 431, Sunrise Beach, MO 65079. (Attachment A, p. 3).

Respondent Charles H. Williams is listed as one of the original members of the Board of Managers of Respondent CRLOA in the Association's Articles of Incorporation. (Attachment A, p. 3). His address as listed in CRLOA's Articles of Incorporation is P.O. Box 431, Sunrise Beach, MO 65079. (Attachment A, p. 3).

Osage Water Company (OWC) is a Missouri general business corporation in good standing. Its registered agent is William P. Mitchell and its registered office is located at 328 Frontage Road, Osage Beach, MO 65065. (Answer, paragraph 8). OWC has certificates of convenience and necessity issued by the Missouri Public Service Commission (Commission) to provide water and sewer services in Camden County, Missouri. (Answer, paragraph 9). OWC's water and sewer tariffs include the Chelsea Rose Service Area. (Attachment B).

On October 21, 2005, the Circuit Court of Camden County, Missouri, at the request of the Commission, appointed Gary V. Cover of Clinton, Missouri as receiver for OWC pursuant to Section 393.145 RSMo. (Answer, paragraph 11). OWC and its officers, agents, representatives, and past contractual agent and representative Environmental Utilities were directed to cooperate with Mr. Cover and to transfer control of OWC to him and to deliver all records and assets to him. (Answer, paragraph 11).

On or about December 30, 2005, Respondent HDHC sent a letter headed “Water and Sewer Issues” to homeowners in the Chelsea Rose Service Area. (Answer, paragraph 18). This letter was dated December 30, 2005 and informed the homeowners that OWC had gone into receivership. (Attachment C, p. 1). The letter also claimed that HDHC’s water and sewer facilities had never been transferred to OWC and that Articles of Incorporation had been filed for Respondent CRLOA. (Attachment C). The letter stated an intention to transfer Respondent HDHC’s interest in the Chelsea Rose Service Area’s water and sewer facilities to Respondent CRLOA. (Attachment C). Respondent Debra J. Williams signed this letter as Secretary of Respondent HDHC. (Attachment C). In a letter dated January 20, 2006, Respondent Gregory D. Williams stated that “[t]he water and sewer system serving the Chelsea Rose development is owned by Hurricane Deck Holding Company.” (Attachment E, p.1).

Included with the December 30, 2005 letter was a document entitled “HDHC Quarterly Water and Sewer Assessment.” (Attachment D). This assessment billed homeowners for water and sewer services for the period between September 22, 2005 and December 30, 2005. (Attachment D). Each homeowner was billed \$52.48. (Attachment D). Homeowners were directed to make the payments payable to HDHC. (Attachment D). The total number of homeowners billed was thirty (30). (Attachment D).

None of the Respondents possess a certificate of convenience and necessity issued by the Missouri Public Service Commission authorizing provision of water and sewer services to the public. (Answer, paragraph 27). None of the Respondents possess a current permit from the Missouri Department of Natural Resources authorizing the operation of a sewer system in the Chelsea Rose Service Area. (Answer, paragraph 30).

STATEMENT OF THE LAW

The Missouri Code of State Regulations provides:

(A) Except in a case seeking a rate increase or which is subject to an operation of law date, any party may by motion, with or without supporting affidavits, seek disposition all or part of a case by summary determination at any time after the filing of a responsive pleading, if there is a respondent, or at any time after the close of the intervention period.

4 C.S.R. 240-2.117(1)(A).

(E) The commission may grant the 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 the party is entitled to relief as a matter of law as to all or part of the case, and the commission concludes that it is in the public interest. An order granting summary determination shall include findings of fact and conclusions of law.

4 C.S.R. 240-2.117(1)(E).

ARGUMENT

A. Because Respondent HDHC meets the definition of “water corporation” in Section 386.020(58) RSMo, Respondent HDHC is subject to regulation by the Commission and Staff is entitled to relief as a matter of law on Count I of its Complaint.

Section 386.020(58) RSMo¹ (Supp. 2005) defines “water corporation” as:

every corporation, company, association, joint stock company or association, partnership and person, their lessees, trustees, or receivers appointed by any court whatsoever, owning, operating, controlling or managing any plant or property, dam or water supply, canal, or power station, distributing or selling for distribution, or selling or supplying for gain any water[.]

In its letter of December 30, 2005, Respondent HDHC purports to be the owner of the facility providing water service to the residents of the Chelsea Rose Service Area. Respondent HDHC also claims to have been temporarily managing the facility from 2001 until the facility could be sold. This letter was signed by Respondent Debra J. Williams as Secretary of Respondent HDHC. Included with this letter was a document entitled “HDHC Quarterly Water

¹ All references are to RSMo 2000 unless otherwise noted.

& Sewer Assessment” that billed each of the thirty (30) homeowners of the Chelsea Rose Service Area \$52.48 for water and sewer services from September 22, 2005 to December 30, 2005. The assessment directed homeowners to remit payment to Respondent HDHC.

The undisputed facts demonstrate that Respondent HDHC claimed ownership of and held itself out to be the entity managing the facility providing water services to the residents of the Chelsea Rose Service Area for the period between September 22, 2005 and December 30, 2005. By sending out an assessment to collect money for the provision of water services, Respondent HDHC was managing or operating a water facility for gain within the meaning of Section 386.020(58) RSMo. Because Respondent HDHC meets the definition of a “water corporation” in Section 386.020(58) RSMo, Respondent HDHC is subject to regulation by the Commission under Section 386.020(42) RSMo (Supp.2005). Staff is entitled to relief as a matter of law on the portion of Count I of its Complaint alleging that Respondent HDHC is a water corporation subject to the jurisdiction, regulation and control of the Commission.

Summary disposition of this issue is in the public interest because as a water corporation, Respondents have a responsibility to “provide such service instrumentalities and facilities as shall be safe and adequate and in all respects just and reasonable.” Section 393.130 RSMo (Supp. 2005). It is in the public interest for Respondent to be subject to the jurisdiction, regulation and control of the Commission so that the public can be assured that Respondents are providing a safe and adequate level of service.

B. Because Respondent HDHC meets the definition of “sewer corporation” in Section 386.020(48) RSMo, Respondent HDHC is subject to regulation by the Commission and Staff is entitled to relief as a matter of law on Count I of its Complaint.

Section 386.020(48) RSMo (Supp. 2005) defines “sewer corporation” as:

. . . every corporation, company, association, joint stock company or association, partnership or person, their lessees, trustees or receivers appointed by any court owning, operating, controlling or managing any sewer system, plant or property for the collection, carriage, treatment, or disposal of sewage anywhere within the state for gain, except that the term shall not include sewer systems with fewer than twenty-five outlets[.]

In its letter of December 30, 2005, Respondent HDHC purports to be the owner of the facility providing sewer service to the residents of the Chelsea Rose Service Area. Respondent HDHC also claims in the letter to have been temporarily managing the facility from 2001 until the facility could be sold. This letter was signed by Respondent Debra J. Williams as Secretary of Respondent HDHC. Included with this letter was a document entitled “HDHC Quarterly Water & Sewer Assessment” that billed each of the thirty (30) homeowners of the Chelsea Rose Service Area \$52.48 for water and sewer services from September 22, 2005 to December 30, 2005. The assessment directed homeowners to remit payment to Respondent HDHC.

The undisputed facts demonstrate that Respondent HDHC claimed ownership of and held itself out to be the entity managing the facility providing sewer services to the residents of the Chelsea Rose Service Area for the period between September 22, 2005 and December 30, 2005. By sending out an assessment to collect money for the provision of sewer services, Respondent HDHC was managing or operating a sewer facility for gain within the meaning of Section 386.020(48) RSMo (Supp. 2005). Because Respondent HDHC meets the definition of a “sewer corporation” in Section 386.020(48) RSMo (Supp. 2005), Respondent HDHC is subject to regulation by the Commission under Section 386.020(42) RSMo (Supp. 2005). Staff is entitled to relief as a matter of law on the portion of Count I of its Complaint alleging that Respondent HDHC is a sewer corporation subject to the jurisdiction, regulation and control of the Commission.

Summary disposition of this issue is in the public interest because as a sewer corporation, Respondents have a responsibility to “provide such service instrumentalities and facilities as shall be safe and adequate and in all respects just and reasonable.” Section 393.130 RSMo (Supp. 2005). It is in the public interest for Respondent to be subject to the jurisdiction, regulation and control of the Commission so that the public can be assured that Respondents are providing a safe and adequate level of service.

C. Because Respondent HDHC does not have a Certificate of Convenience and Necessity issued by the Commission, its provision of water and sewer services to the public is unauthorized under Section 393.170 RSMo and Staff is entitled to relief as a matter of law on Count II of its Complaint.

Section 393.170 RSMo provides:

1. No . . . water corporation or sewer corporation shall begin construction of a . . . water system or sewer system without first having obtained the permission and approval of the commission.
2. No such corporation shall exercise any right or privilege under any franchise hereafter granted, or under any franchise heretofore granted but not heretofore actually exercised, or the exercise of which shall have been suspended for more than one year, without first having obtained the permission and approval of the commission. Before such certificate shall be issued a certified copy of the charter of such corporation shall be filed in the office of the commission, together with a verified statement of the president and secretary of the corporation, showing that it has received the required consent of the proper municipal authorities.
3. The commission shall have the power to grant the permission and approval herein specified whenever it shall after due hearing determine that such construction or such exercise of the right, privilege or franchise is necessary or convenient for the public service. The commission may by its order impose such condition or conditions as it may deem reasonable and necessary. Unless exercised within a period of two years from the grant thereof, authority conferred by such certificate of convenience and necessity issued by the commission shall be null and void.

Respondents have admitted that none of them has a Certificate of Convenience and Necessity issued by the Commission. Respondent HDHC did not comply with the requirements of Section 393.170 RSMo before it began provision of water and sewer services for

compensation to the residents of the Chelsea Rose Service Area on September 22, 2005. Because there are no issues of material fact with respect to Respondents' lack of a certificate of authority, Staff is entitled to relief as a matter of law on Count II of its Complaint.

Summary disposition of this issue is in the public interest because as a public utility, Respondents have a responsibility to "provide such service instrumentalities and facilities as shall be safe and adequate and in all respects just and reasonable." Section 393.130 RSMo (Supp. 2005). It is in the public interest for Respondent to be subject to all applicable permit and certificate requirements so that the public is assured of safe and adequate water and sewer service.

D. Because no Respondent currently holds a permit issued by the Missouri Department of Natural Resources, their provision of sewer services to the public is in violation of the Code of State Regulations and Staff is entitled to relief as a matter of law on Count III of its Complaint.

Rule 10 C.S.R. 20-6.010(5)(A) provides:

(5) Operating Permits.

(A) Persons who build, erect, alter, replace, operate, use or maintain any water contaminant source, point source or wastewater treatment facility which discharges to waters of the state shall obtain an operating permit from the department before any discharge occurs. The operating permit shall be issued to the owner/operator. Nondischarging facilities for the treatment or disposal of wastes, wastewater or residuals shall obtain permits as provided in 10 CSR 20-6.015. Persons who intend to discharge in accordance with section (14) of this rule are permitted by rule and may discharge without additional written approval from the department.

Commission Rule 4 C.S.R. 60.010(J) provides:

(J) Sewer utility--Includes every corporation, company, association, joint stock company or association, partnership or person, their lessees, trustees or receivers appointed by any court, owning, operating, controlling or managing any sewer system, plant or property, for the collection, carriage, treatment or disposal of sewage anywhere within the state for gain; provided, that the provisions of this order shall not apply to sewer systems with fewer than twenty-five (25) outlets[.]

Respondents have admitted that none of them has a permit from the Missouri Department of Natural Resources to operate a sewer utility. Respondents claim to have owned and operated the sewer facility serving the Chelsea Rose Service Area through Respondent HDHC from September 22, 2005. By billing customers in the Chelsea Rose Service Area for sewer services provided between September 22, 2005 and December 30, 2005, Respondents were operating as a sewer utility for gain within the meaning of 4 C.S.R. 60.010(J). Because Respondents do not hold a permit from the Missouri Department of Natural Resources, they are in violation of 10 C.S.R. 20-6.010(5)(A). Because the material facts supporting these violations are not in dispute, Staff is entitled to relief as a matter of law on Count III of its Complaint.

Summary disposition of this issue is in the public interest because as a public utility, Respondents have a responsibility to “provide such service instrumentalities and facilities as shall be safe and adequate and in all respects just and reasonable.” Section 393.130 RSMo (Supp. 2005). It is in the public interest for Respondent to be subject to all applicable permit and certificate requirements so that the public is assured of safe and adequate water and sewer service.

E. Because the Commission has not authorized the sale or transfer of Respondent HDHC’s ownership of the water and sewer facilities serving the Chelsea Rose Service Area to Respondent CRLOA, Respondents are in violation of Section 393.190.1 RSMo and Staff is entitled to relief as a matter of law on Count IV of its Complaint.

Section 393.190.1 RSMo provides:

1. No. . .water corporation or sewer corporation shall hereafter sell, assign, lease, transfer, mortgage or otherwise dispose of or encumber the whole or any part of its franchise, works or system, necessary or useful in the performance of its duties to the public, nor by any means, direct or indirect, merge or consolidate such works or system, or franchises, or any part thereof, with any other corporation, person or public utility, without having first secured from the commission an order authorizing it so to do. Every such sale, assignment, lease, transfer, mortgage, disposition, encumbrance,

merger or consolidation made other than in accordance with the order of the commission authorizing same shall be void. The permission and approval of the commission to the exercise of a franchise or permit under this chapter, or the sale, assignment, lease, transfer, mortgage or other disposition or encumbrance of a franchise or permit under this section shall not be construed to revive or validate any lapsed or invalid franchise or permit, or to enlarge or add to the powers or privileges contained in the grant of any franchise or permit, or to waive any forfeiture. Any person seeking any order under this subsection authorizing the sale, assignment, lease, transfer, merger, consolidation or other disposition, direct or indirect, of any . . . water corporation, or sewer corporation, shall, at the time of application for any such order, file with the commission a statement, in such form, manner and detail as the commission shall require, as to what, if any, impact such sale, assignment, lease, transfer, merger, consolidation, or other disposition will have on the tax revenues of the political subdivisions in which any structures, facilities or equipment of the corporations involved in such disposition are located. The commission shall send a copy of all information obtained by it as to what, if any, impact such sale, assignment, lease, transfer, merger, consolidation or other disposition will have on the tax revenues of various political subdivisions to the county clerk of each county in which any portion of a political subdivision which will be affected by such disposition is located. Nothing in this subsection contained shall be construed to prevent the sale, assignment, lease or other disposition by any corporation, person or public utility of a class designated in this subsection of property which is not necessary or useful in the performance of its duties to the public, and any sale of its property by such corporation, person or public utility shall be conclusively presumed to have been of property which is not useful or necessary in the performance of its duties to the public, as to any purchaser of such property in good faith for value.

In its letter of December 30, 2005, Respondent HDHC stated its intention to transfer its interest in the water and sewer facilities serving the Chelsea Rose Service Area to Respondent CRLOA. The letter informed residents that Articles of Incorporation had already been filed with the Secretary of State. The Articles of Incorporation were filed on December 12, 2005. In a letter dated January 20, 2006, Respondent Gregory D. Williams stated “[t]he water and sewer system serving the Chelsea Rose development is owned by Hurricane Deck Holding Company.” Because Respondent HDHC is a “water corporation” within the meaning of Section 386.020(58) RSMo and a “sewer corporation” within the meaning of Section 386.020(48), any sale or transfer must be authorized by the Commission. The Commission has not authorized the sale or transfer of Respondent HDHC’s interest in the water and sewer facility serving the Chelsea Rose Service

Area to CRLOA. Any such sale or transfer of HDHC's interest in the water and sewer facilities to Respondent CRLOA would be in violation of Section 393.190.1. Because the material facts supporting a violation of Section 393.190.1 if Respondent HDHC sold or transferred its interest in the water and sewer facility serving the residents of the Chelsea Rose Service Area to CRLOA are not in dispute, Staff is entitled to relief as a matter of law on Count IV of its Complaint.

Summary disposition of this issue is in the public interest because the Commission has an interest in ensuring that transfers of utilities will not be to the detriment of the persons served by the utility. *See*, Section 393.190.1 RSMo.

F. Because Respondents have committed numerous statutory and regulatory violations, the Commission is entitled to find that penalties should be assessed against Respondents pursuant to Section 386.570 RSMo and to direct the General Counsel to proceed against Respondents in Circuit Court to collect penalties pursuant to Section 386.600 RSMo.

Section 386.570 RSMo provides:

1. Any corporation, person or public utility which violates or fails to comply with any provision of the constitution of this state or of this or any other law, or which fails, omits or neglects to obey, observe or comply with any order, decision, decree, rule, direction, demand or requirement, or any part or provision thereof, of the commission in a case in which a penalty has not herein been provided for such corporation, person or public utility, is subject to a penalty of not less than one hundred dollars nor more than two thousand dollars for each offense.
2. Every violation of the provisions of this or any other law or of any order, decision, decree, rule, direction, demand or requirement of the commission, or any part or portion thereof, by any corporation or person or public utility is a separate and distinct offense, and in case of a continuing violation each day's continuance thereof shall be and be deemed to be a separate and distinct offense.
3. In construing and enforcing the provisions of this chapter relating to penalties, the act, omission or failure of any officer, agent or employee of any corporation, person or public utility, acting within the scope of his official duties of employment, shall in every case be and be deemed to be the act, omission or failure of such corporation, person or public utility.

Section 386.600, RSMo provides:

An action to recover a penalty or a forfeiture under this chapter or to enforce the powers of the commission under this or any other law may be brought in any circuit court in this state in the name of the state of Missouri and shall be commenced and prosecuted to final judgment by the general counsel to the commission. No filing or docket fee shall be required of the general counsel. In any such action all penalties and forfeitures incurred up to the time of commencing the same may be sued for and recovered therein, and the commencement of an action to recover a penalty or forfeiture shall not be, or be held to be, a waiver of the right to recover any other penalty or forfeiture; if the defendant in such action shall prove that during any portion of the time for which it is sought to recover penalties or forfeitures for a violation of an order or decision of the commission the defendant was actually and in good faith prosecuting a suit to review such order or decision in the manner as provided in this chapter, the court shall remit the penalties or forfeitures incurred during the pendency of such proceeding. All moneys recovered as a penalty or forfeiture shall be paid to the public school fund of the state. Any such action may be compromised or discontinued on application of the commission upon such terms as the court shall approve and order.

Respondent HDHC meets the definition of “water corporation” in Section 386.020(58) RSMo (Supp. 2005) and the definition of a “sewer corporation” in Section 386.020(48) RSMo (Supp. 2005). Respondent HDHC is therefore a public utility subject to regulation within the meaning of Section 386.020(42) RSMo (Supp. 2005). The violations committed by Respondents include operating a water and sewer facility without a certificate of convenience and necessity issued by the Missouri Public Service Commission in violation of Section 393.170 RSMo and operating a sewer facility without a permit from the Missouri Department of Natural Resources in violation of 10 C.S.R. 20-6.010(5)(A). Each day of operation by Respondents constitutes a separate offense. Respondents have admitted that they do not have the permits necessary to operate water and sewer facilities. The facts that are material to the issue of penalties are not in dispute and the Commission may find as a matter of law that Respondents are subject to penalties pursuant to Section 386.570 and may authorize the Office of General Counsel to institute penalty proceedings in the appropriate Circuit Court.

Summary disposition of this issue is in the public interest because the public has an interest in ensuring that the Commission has the power to enforce its regulations through the appropriate use of penalties for non-compliant public utilities.

CONCLUSION

Respondent HDHC meets the definition of “water corporation” in Section 386.020 (58) RSMo (Supp. 2005) and the definition of “sewer corporation” in Section 386.020(48) RSMo (Supp. 2005). Because Respondent HDHC meets these definitions, Respondent HDHC is subject to the jurisdiction, regulation and control of the Commission pursuant to Section 386.020(42) (Supp. 2005) and Staff is entitled to relief as a matter of law on Count I of its Complaint. Respondents admit that they do not have a Certificate of Convenience and Necessity issued by the Commission authorizing them to provide water and sewer services to the residents of the Chelsea Rose Service Area. The lack of a certificate is a violation of Section 393.170 RSMo and Staff is entitled to relief as a matter of law on Count II of its Complaint. Respondents admit that they do not hold a permit from the Missouri Department of Natural Resources authorizing the operation of a sewer system in the Chelsea Rose Service Area. This lack of a permit is a violation of 10 C.S.R. 20-6010(5)(A), and Staff is entitled to relief as a matter of law on Count III of its Complaint. Respondents have indicated an intention to transfer the interest of Respondent HDHC in the water and sewer system serving the Chelsea Rose Service Area to Respondent CRLOA. Such a transfer has not been approved by the Commission, and if such a transfer has occurred or if such transfer occurs without the Commission’s authorization it would be a violation of Section 393.190.1 RSMo. Staff is entitled to relief as a matter of law on Count IV of its Complaint. Because Respondents have committed statutory and regulatory violations, the Commission may find that Staff is entitled to relief as a matter of law on Count V of its

complaint and that Respondents are subject to penalties pursuant to Section 586.570 and that the Office of the General Counsel may take appropriate action in Circuit Court to collect such penalties pursuant to Section 586.600 RSMo. Summary disposition of all issues is in the public interest for the reasons stated above.

WHEREFORE, for the foregoing reasons, Staff respectfully requests that the Commission grant this Motion for Summary Disposition and take notice of the Memorandum in Support of Staff's Motion for Summary Disposition and grant all of the relief sought by Staff in Staff's Complaint.

Respectfully submitted,

/s/ Peggy A. Whipple

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Certificate of Service

I hereby certify that copies of the foregoing have been mailed, hand-delivered, transmitted by facsimile or electronically mailed to all counsel of record this 11th day of July 2006.

/s/ Peggy A. Whipple

Peggy A. Whipple