

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

<b>ANCHOR’S POINT CONDOMINIUM OWNERS ASSOCIATION, INC.,</b>	)	
	)	
<b>Complainant,</b>	)	
	)	
<b>v.</b>	)	<b>File No. WC-2020-0048</b>
	)	
<b>TRR MANAGEMENT, LLC;</b>	)	
<b>FRANK J. STEED, JR., d/b/a</b>	)	
<b>STEED COMMUNITIES;</b>	)	
<b>JM LAND HOLDINGS, LLC; TRR</b>	)	
<b>TIME SHARE, LLC; CARROLL</b>	)	
<b>JAMES CHRISTIANSEN;</b>	)	
<b>KIMBERLING INN, INC.; and</b>	)	
<b>KIMBERLING PROPERTIES, INC.</b>	)	
	)	
<b>Respondents.</b>	)	

**COMPLAINANT’S RESPONSE TO STAFF REPORT**

COMES NOW Anchor’s Point Condominium Owners Association, Inc. (“APCOA”), and for its response to the Staff Report states as follows:

1. On January 16, 2020, the Commission’s Staff filed a report stating, “it is Staff’s position that the Respondents do not hold themselves out to serve the public, indiscriminately, and therefore, are not subject to the jurisdiction of this Commission.” However, the facts and settled Missouri law establish that Respondents are subject to the jurisdiction of the Missouri Public Service Commission (the “Commission”).

**BACKGROUND**

2. Anchor’s Point is a condominium common interest community in Stone County, Missouri. APCOA filed a Complaint with the Commission on behalf of all unit owners at Anchor’s Point (the “Unit Owners”).

3. APCOA represents sixty-seven individual Unit Owners who purchased condominiums located in Anchor's Point. Under § 448.3-102(4) of the Missouri Revised Statutes, APCOA may "institute, defend, or intervene in litigation or administrative proceedings in its own name on behalf of itself or two or more unit owners on matters affecting the condominium..."

4. In the 1980s, Carroll James Christiansen ("Christiansen") and his companies began developing a peninsula at the southern end of Kimberling City, Missouri. Christiansen's companies include Kimberling Properties, Inc. ("Kimberling Properties") and Kimberling Inn, Inc. ("Kimberling Inn" which, together with Christiansen and Kimberling Properties, is referred to as the "Christiansen Respondents"). The development included individual condominium units, time share units, and a hotel (the "Complex"). **See Exhibit A, attached hereto and incorporated herein.** As part of the development, the Christiansen Respondents drilled a well and added water lines (the "Water System") to all the buildings in the Complex, as well as to the Kimberling City Waste Treatment Plant (the "Sewer Plant") located on the same peninsula.<sup>1</sup> **See Exhibit B, attached hereto and incorporated herein.** The water lines were installed in a so-called loop system to serve the buildings and other improvements located in the Complex, and from the beginning have provided water to all buildings and other improvements through one interconnected water line. **See Exhibit A.** At some point during the development of the Water System, the Water System was also configured in a way that allows water from

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<sup>1</sup> This waste treatment plant is owned and operated by the City of Kimberling City, Missouri.

the Water System to be directed to a neighboring water system – Ozarks Clean Water Company (“OCWC”) – which allows the Water System to provide water to OCWC if needed or requested by OCWC.

5. In 1990, Christiansen, as developer, established Anchor’s Point Condominium at the extreme southern end of the peninsula and began selling condominium units to members of the public. As part of his marketing and sales of the units, Christiansen informed Unit Owners that water was included in their monthly assessments of \$125 per month. **See Exhibit C, attached hereto and incorporated herein.** The Unit Owners did not have a choice regarding where to obtain water service to their condominiums as the only option available was to buy water which Christiansen and/or the Christiansen Respondents provided. Of the sixty-seven units sold, all received water from the Water System built, operated, and maintained by the Christiansen Respondents. The Christiansen Respondents solicited new customers to the Water System each time they sold a condominium unit.

6. In 1989, Christiansen established what was originally called the Kimberling Inn Rental Condominium Owners Association, Inc., the name of which he later changed to Anchor’s Point Condominium Owners Association, Inc. (“APCOA”). From its inception through late 2011, Christiansen, as developer, exercised complete control over APCOA. He issued assessments to the individual Unit Owners and, because he also had complete control over the Water System, he charged the Unit Owners for water usage as part of their assessments.

7. In late 2011, Christiansen turned over day-to-day control of APCOA to the Unit Owners. At that point, although the Unit Owners' assessment payments for water and other services and costs ostensibly went to APCOA, the portions allocated to water and other costs continued to be paid to and benefitted the Christiansen Respondents. APCOA was simply the conduit through which those payments flowed, as it had been during the years when Christiansen had complete control over the APCOA. As always, the Unit Owners – not APCOA – were still the ones who received the water service and who were required to pay for that service.

8. On or about August 19, 2013, the Christiansen Respondents conveyed the entire Complex – excluding the Anchor's Point condominium units – to Frank J. Steed ("Steed") and/or Steed's companies including TRR Management, LLC; Steed Communities; JM Landholdings, LLC; and/or TRR Time Share, LLC (collectively with Steed, the "Steed Respondents"), and assigned the development rights to one or more of the Steed Respondents.

9. As Christiansen did before, the Steed Respondents currently control the Water System which serves the entire peninsula – not only the sixty-seven Anchor's Point Unit Owners and the Steed Respondents' properties, but also the Sewer Plant and, on occasion, the Ozarks Clean Water Company ("OCWC") system to the north.<sup>2</sup> As has always been the case, new purchasers of individual condominium units at Anchor's Point are required to use the

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<sup>2</sup> The Steed Water System and the OCWC system are interconnected and, on occasion for months at a time, when asked to do so Steed has used his Water System to supply water to OCWC's customers and received payment for doing so.

Water System owned and operated by the Steed Respondents. As with the Christiansen Respondents, the Steed Respondents solicit new customers to the Water System each time a condominium unit is sold.

10. With respect to Anchor's Point, the Steed Respondents have not issued monthly bills for water to individual Unit Owners, but water costs are paid from assessments upon the individual Unit Owners, which are collected by APCOA. The assessments pay for various expenses, including the Water System. APCOA then pays the Steed Respondents for the use of the Water System provided to the Unit Owners.

11. Soon after purchasing the Complex, the Steed Respondents tried to raise the rates for water provided to the Unit Owners. APCOA attempted to negotiate the water rates on behalf of the Unit Owners, but APCOA does not receive water on its own behalf or distribute water to the Unit Owners. As a practical matter, APCOA has no means of receiving water service or distributing the water on its own behalf. The water flows through lines originally installed by Christiansen and sold to Steed, through which the water is distributed to the individual condominium units.

12. When Steed began demanding higher payments for water and threatening to shut off service if the Anchor's Point owners refused to pay the higher rates, APCOA began trying to find alternative sources, but after extensive investigation, APCOA found no feasible alternatives. APCOA researched drilling a well on APCOA property and had site surveys and discussions with a consulting engineer. In later discussions with Department of

Natural Resources engineers, those engineers pointed out three very significant and likely insurmountable problems with drilling a well: 1) such a new well would probably be too close to Steed's existing well, which would make operation of the new well problematic; 2) a new well would have to be cased down to 700 feet, which would make it extremely expensive; and 3) the drill tailings from the drilling process would be unacceptable – i.e., the driller would not be able to keep contaminated water from the drilling process from flowing into Table Rock Lake, which would violate Corp of Engineers' regulations.

13. In addition, APCOA looked into the possibility of the Unit Owners obtaining water directly from OCWC.<sup>3</sup> However, the hard costs would be exorbitant<sup>4</sup> and, because Anchor's Point buildings are completely surrounded by Steed's land, numerous easements from Steed would be required, and

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<sup>3</sup> OCWC did send a letter to the Steed Respondents in 2018 stating that its system had the capacity to add the Unit Owners to its water system. The Steed Respondents attempt to use this letter as proof that the APCOA Unit Owners have other options for water, but that letter is taken out of context with the entire situation as merely having a well with the capacity to serve is not the same as having the ability and connectivity to serve. In 2019 and again in 2020 – well after the 2018 letter was sent – when APCOA contacted OCWC's president to determine the actual feasibility of adding the Anchor's Point Unit Owners to the OCWC system, it was determined that the expense and complexity of adding the Unit Owners would be extremely expensive and impractical. Not only would the upfront engineering costs be high, but the costs related to installing completely new lines (separate from the lines owned by the Steed Respondents) across and under and through parking lots, walkways, drives and other improvements owned by the Steed Respondents would drive up costs even more. In addition, operational costs would be higher than at present, because standpipes would likely be required to keep water moving and to keep the system sanitary.

<sup>4</sup> The Unit Owners would be required to disconnect from the current Water System, obtain easements from Steed, and dig and blast to install new water lines across Steed's property to hook up to a new system.

OCWC and APCOA Board were and are not optimistic that Steed would be cooperative. While Steed has indicated at times he would be willing to grant such easements, immediately following the issuance of the PSC Staff Report, he stated that he would not provide such easements without requiring APCOA or the Unit Owners to pay dearly for the right to cross his or his companies' land to install, use, and maintain the required separate water lines.

14. Ironically, hooking on to the OCWC system would likely also negatively impact the Steed Respondents. Because they and the Anchor's Point Unit Owners are part of the same loop system (which was designed to serve the entire peninsula, and which benefits from constantly moving water), that loop would be broken if Anchor's Point were disconnected.

15. Finally, APCOA does not have and has never had a contract with the Steed Respondents to provide water. No such written contract exists, and no implied, special, or quasi contract can be established. APCOA simply does not receive and never has received water from the Steed Respondents' Water System. Any interaction APCOA has had with the Steed Respondents regarding the Water System and water service has always been on behalf of the sixty-seven Unit Owners. The **Anchor's Point Unit Owners** are the ones who receive the water and they are required to receive water from the Steed Respondents because of the Water System design.

### **ANALYSIS**

16. "Under Missouri's Public Service Commission Law, public utilities, such as telephone, telegraph, electric, gas, water, and sewer companies, are

regulated by the Missouri Public Service Commission on a statewide basis.” *Hurricane Deck Holding Co. v. Pub. Serv. Comm’n*, 289 S.W.3d 260, 263 (Mo. App. 2009) (quoting *Ogg v. Mediacom, L.L.C.*, 142 S.W.3d 801, 813 (Mo. App. 2004). Missouri statutes state that a public utility “includes every...water corporation...as these terms are defined in this section, and each thereof is hereby declared to be a public utility and to be subject to the jurisdiction, control and regulation of the commission...” Section 386.020(43), RSMo. A water corporation is defined to include to the following:

[E]very 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.

Section 386.020(59).<sup>5</sup>

17. While the Missouri statutes hold no requirement for a public utility to be devoted to “public use,” the Missouri Supreme Court found that a utility “must, in short, be devoted to a public use before it is subject to public regulation.” *State ex rel. M.O. Danciger & Co. v. Pub. Serv. Comm’n*, 205 S.W. 36, 38 (Mo. 1918).

18. The Staff Report states that the three factors to consider when determining whether a utility is devoted to public use are as follows: (1) whether the utility solicited customers within its service area; (2) whether the

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<sup>5</sup> While under Missouri law a utility must be both for public use and for gain to come under the jurisdiction of the Commission, the Staff Report found that the Steed Respondents operated for gain and thus this Response only addresses the public use aspect. *See Staff Report* ¶ 27.



utility refused to provide service to customers within its service area; and (3) whether the utility provides services through a special contract. *Staff Report* ¶ 17 (citing *State ex. rel Cirese v. Pub. Serv. Comm'n*, 178 S.W.2d 788, 790 (Mo. App. 1944); *Hurricane Deck*, 289 S.W.3d at 266; *Osage Water Co. v. Miller County Water Authority, Inc.*, 950 S.W.2d 575 (Mo. App. 1977)). Each of these factors demonstrate that the Steed Respondents are a public utility, and are discussed in turn below.

#### **A. Soliciting Customers**

19. In *Cirese*, the court noted that the utility solicited new customers through, *inter alia*, “the indiscriminate distribution of customers’ bills.” *Cirese*, 178 S.W.2d at 790. Similarly, in *Hurricane Deck*, the court found that sending bills to the residents was an offer of service to those residents, soliciting them to use its services. *Hurricane Deck*, 289 S.W.3d at 266. In this case, the Christiansen Respondents specifically told new purchasers of condominium units that water service would be provided as part of their \$150 per month assessment payments, thereby soliciting Water System customers. The Steed Respondents also offered water service to all new purchasers and continued providing service to the Unit Owners. The Steed Respondents send bills to and negotiate rates of service for the Unit Owners through APCOA, just as in *Hurricane Deck* and *Cirese*.

#### **B. Refusal to Provide Service**

20. The Missouri Court of Appeals previously pointed to a “universally accepted test” for determining whether a service is a public utility – whether

the utilities “hold themselves out as serving or ready to serve all members of the public, who may require it, to the extent of their capacity.” *Osage Water Co.*, 950 S.W.2d at 574 (quoting *City of Englewood v. City & County of Denver*, 123 Colo. 290, 229 P.2d 667, 672-73 (Colo. banc 1951)). The court in *Osage Water Co.* found that the utility was a public utility, stating that the record was “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.” *Osage Water Co.*, 950 S.W.2d at 575. Moreover, the Defendant had “undertaken the responsibility to provide water service to everyone within its capability, not merely for particular persons.” *Id.*

21. In *State ex rel. Buchanan County Power Transmission Co. v. Baker*, 9 S.W.2d 589 (Mo. banc 1928), the relator was an entity that purchased electricity from a public utility and sold it to St. Joseph Railway, Light, Heat & Power Company, which in turn used the electricity itself. *Id.* at 590. The parties stipulated that “relator has no other customer, and does not hold itself out as seeking or desiring other customers, for the sale of its electric energy, and does not otherwise sell or dispose of the same to any other corporation, partnership or person; that, on the contrary, relator has refused to furnish the public, or any other user of electricity, except the one customer above named, and has disclaimed any right or authority to service the public generally.” *Id.* The court found that because the relator only had one customer, it was not a public utility. *Id.* at 592. However, the court stated that if the St. Joseph Railway sold and distributed the electricity it purchased from the relator, the court may

have found the relator to be a public utility as “an important link” in the sale and distribution of electricity. *Id.*

22. The utility in *Cirese* attempted to argue that it only had private contracts to provide power to twenty-three members of the public and thus was not devoted to public use. *Cirese*, 178 S.W.2d at 789. The court found that the utility solicited business, distributed bills to its customers, and increased their capacity, all of which supported a finding that the utility was holding itself out to offer public service. *Id.* at 790. The court stated that “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...” *Id.* at 791. In the same way, the Steed Respondents solicit customers and hold themselves out to provide water service to all on the peninsula, without refusing anyone within the service area.

23. In *Danciger*, the respondent utility company provided electricity to some businesses within its service area but refused to do so for others. *Danciger*, 205 S.W.at 36. The court found that, because of the refusal, the utility was not devoted to public use, and thus the Public Service Commission did not have jurisdiction over it. *Id.* at 42. Here, in contrast to *Danciger* and just as in *Osage Water Co.*, there is no evidence to show that the Steed Respondents refused to provide service to anyone within the Water System service area. In fact, the Steed Respondents provide water to all sixty-seven Unit Owners, the Sewer Plant, and, as needed, to the OCWC.

24. Similarly, the court found that the utility in *Hurricane Deck* was a public utility. 289 S.W.3d at 266. The utility required all homeowners within two subdivisions to get water only from it; only provided water to two subdivisions and not any of the surrounding subdivisions; and sent bills to homeowners through monthly assessments from the Homeowners Association, rather than directly to the homeowners. *Id.* at 262-63. The court stated that a utility could be considered devoted to public use “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.” *Id.* at 266. Because the court found that the utility had in fact provided water to all homeowners within the area, the court determined that it was a public utility. *Id.*

25. If a utility provides services to all users within its service area, then the utility is by definition not refusing to provide services to those within that area, even if it does not provide service to users outside of that area. See, e.g., *Hurricane Deck*, 289 S.W.3d at 266 (finding that Hurricane Deck was a public utility, even though it only provided service to two subdivisions and no others); *Osage Water Co.*, 950 S.W.2d at 575 (finding that the Osage Water Company was a public utility because it provided to all homeowners in two subdivisions and none outside those subdivisions). Here, the Christiansen Respondents required the Unit Owners to use the Water System, and the Steed Respondents have continued that practice. Notwithstanding the fact that Steed has threatened to cut off water as a means to force the Anchor’s Point Unit Owners

to pay higher rates, neither the Christiansen Respondents nor the Steed Respondents have refused to provide service to any of the Unit Owners or other occupants on the peninsula, and thus have held themselves out to serve (and have served) all within the service area of the Water System.

### **C. Special Contracts**

26. The Staff Report concludes “that Respondents are not providing indiscriminate service for public use, and therefore, are not subject to the jurisdiction of the Commission.” *Staff Report* ¶ 28. The Staff Report states that the Steed Respondents only “provides two entities with water service: APCOA and the Kimberling Inn Resort and Vacation Club,” relying upon a statement from the Steed Respondents who, in their own interest, fail to differentiate between the individual Unit Owners and APCOA, and fail to identify the Sewer Plant, and occasionally OCWC, as customers as well. *Id.* Thus, the Staff Report declares that the Steed Respondents only have one customer – APCOA – and that the two entities have an “unwritten special contract.” *Id.* at n.24.

27. In its conclusion, the Staff Report does not recognize that the Steed Respondents provide water to **sixty-seven individual Unit Owners**, not APCOA, or that the Steed Respondents’ Water System supplies water to all on the peninsula – the Steed properties, the sixty-seven individual Unit Owners at Anchor’s Point, and the Sewer Plant. In addition, on occasion, Steed has used his Water System for months at a time to supply water to customers of OCWC (whose system is interconnected) and received payment for doing so. Finally, the Steed Respondents have no contract with APCOA – implied or otherwise –

to provide water. Receiving water from the only available source, first from Christiansen and now from the Steed Respondents, has always been part and parcel of what each Anchor's Point Unit Owner received when they purchased their condominium unit. Thus, the Staff Report's reliance on *Danciger* for the idea that there is a special contract with only one customer in this case fails.

28. In *Danciger*, the respondent put in a private electric plant for its own use at its brewery. *Danciger*, 205 S.W at 36. The respondent determined that it had enough power to provide electricity to other entities surrounding the brewery, and so entered into private verbal contracts with certain surrounding entities but refused to provide electricity to others in the area. *Id.* Moreover, respondent required the entities to run their own power lines to the brewery to get electricity. *Id.* The court found that the respondent was not a public utility, stating that 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 for you and me only, that is a matter of special contract." *Id.* at 42 (quoting 1 Wyman on Pub. Service Corps. 227). Similarly, in *Palmer v. City of Liberal*, 64 S.W.2d 265 (Mo. 1933), the court found that the utility company was not a public utility because it only supplied electricity to the City of Liberal, which then distributed the electricity through its distribution plant. In contrast, here the Steed Respondents provide water directly to sixty-seven individual Unit Owners – not to APCOA – as well as to the Sewer Plant and, on occasion, to OCWC's customers.

29. The Staff argue in their Report that the Steed Respondents and APCOA have an “implicit special contract” because the Steed Respondents provide service to APCOA. *Staff Report*, ¶ 28. However, APCOA is simply a body that represents the Unit Owners receiving the water. In *Osage Water Co.*, the homeowners’ association negotiated with the water company for better terms on behalf of the homeowners in the subdivision. *Osage Water Co.*, 950 S.W.2d at 572. In the same way, APCOA has been negotiating with the Steed Respondents on behalf of the Unit Owners for years regarding the terms of water service. There is no “special implicit contract” to provide water to APCOA, as APCOA is not the user or recipient of the water.

#### **D. Other Options for Service**

30. The Staff Report indicates that the Unit Owners have the ability to obtain water through other sources. *Staff Report* ¶ 25. However, as shown above in this response, APCOA has researched alternative ways for the Unit Owners to obtain water but has not found any affordable, feasible solutions. According to David Casaletto, president of OCWC, it makes little sense for the Unit Owners to hook onto the OCWC system because it would be extraordinarily expensive and fraught with numerous practical challenges.

31. Furthermore, the solution proposed in the Staff Report would require the cooperation of the Steed Respondents (which APCOA, despite multiple attempts, has been unsuccessful in obtaining for more than six years); it is undisputed that this extremely expensive and cumbersome “solution” would force the Unit Owners through APCOA to obtain easements across and

blast and drill through Steed's land. While there is no written prohibition on seeking service elsewhere, the practical realities make it virtually impossible to do so. Notably, the Anchor's Point Unit Owners did not contemplate spending hundreds of thousands of dollars to build a new water system when they purchased their homes (within a development with a Water System specifically designed to serve their units), simply because APCOA and the Steed Respondents cannot agree on the appropriate rate for use of the Water System designed to serve their properties. In sum, the Unit Owners currently have no feasible options for other service, and the only possibility for other service would entail massively large expenditures and the potentially unenforceable and expensive cooperation of the Steed Respondents.

32. Furthermore, the ability to obtain utility service through another source is not a factor identified by courts in Missouri to determine whether a utility is devoted to public service. For example, in *Danciger*, the court did not discuss whether the businesses had the ability to get electricity from other providers; it was concerned with whether the company refused to provide service to those seeking service from it and whether it entered into special contracts with certain businesses within its service area. *Danciger*, 205 S.W. at 42. The Unit Owners have no other current options – or feasible future options – for water service. However, even if they did, this is not a factor that is determinative in concluding whether a utility provider is a public utility under Missouri law.



## CONCLUSION

33. Missouri courts have repeatedly found an entity to be a public utility when providing service to fewer than the sixty-eight customers which the Steed Respondents currently serve (the 67 Anchor's Point Unit Owners plus the City of Kimberling City). See *Cirese*, 178 S.W.2d at 789 (serving twenty-three members of the public); *Osage Water Co.*, 950 S.W.2d at 572 (providing service to the residents of two subdivisions); *Hurricane Deck*, 289 S.W.3d at 266 (providing service to only two subdivisions).<sup>6</sup> The common factor among these cases is that the utility provided service to all who asked within its service area (even if the service area was limited to two blocks or two subdivisions) without refusing to provide to certain individuals within that service area. Here, the Steed Respondents (like Christiansen before) have provided water to all property owners within the Water System service area, including its own properties, all sixty-seven Unit Owners, OCWC (on occasion), and the only other entity in the Water System area, the Sewer Plant. Because they provide to all within the service area without refusal, the Steed Respondents are devoted to public use and operate as a public utility. Further, the Steed Respondents solicit new customers to the extent they provide water to new purchasers of condominium units in Anchor's Point. Accordingly, the Steed Respondents devote the Water System to public use. Because they also operate for gain, the Steed Respondents' Water System is subject to the Commission's jurisdiction.

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<sup>6</sup> See also Public Service Commission case number WC-2017-0037, wherein the Commission found that a utility serving only five homes in two subdivisions was a public utility.

**HUSCH BLACKWELL LLP**

/s/ J. Michael Bridges

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**CERTIFICATE OF SERVICE**

This is to certify that on February 13, 2020, a true and correct copy of the above and foregoing was filed and served electronically by email to all counsel of record.

/s/ J. Michael Bridges