

On October 26, 2010, Respondents filed a joint motion for summary determination arguing the Commission lacked jurisdiction because they did not indiscriminately dedicate their property for the provision of utility service to the general public. A series of responsive pleadings with various requests for extensions ensued. Ultimately, the Commission heard oral arguments on the motion on January 3, 2011, following which it stayed this action on January 13, 2011.

On January 19, 2011, independently from this action, the Commission opened workshops dockets in relation to examining the full reach of the Commission's jurisdiction with regard to any landlord-tenant relationships where utility services are being provided in a manner consistent with the statutory definitions of the entities that are subject to the Commission's regulatory authority. The purpose of those workshops was to determine what appropriate regulations and mechanisms might be required to ensure safe and adequate utility services are being provided to this segment of Missouri ratepayers at just and reasonable rates. Upon further examination, the Commission closed those dockets finding them to be unnecessary because the Commission's regulatory powers in this regard are already sufficiently defined.

Aspen Woods' Motion

On February 14, 2011, Aspen Woods filed a motion for attorney's fee pursuant to section 536.021.9, RSMo, 2000. Section 536.021.9 provides:

If it is found in a contested case by an administrative or judicial fact finder that a state agency's action was based upon a statement of general applicability which should have been adopted as a rule, as required by sections 536.010 to 536.050, and that agency was put on notice in writing of such deficiency prior to the administrative or judicial hearing on such matter, then the administrative or judicial fact finder shall award the prevailing nonstate agency party its reasonable attorney's fees incurred prior to the award, not to exceed the amount in controversy in the original action. This

award shall constitute a reviewable order. If a state agency in a contested case grants the relief sought by the nonstate party prior to a finding by an administrative or judicial fact finder that the agency's action was based on a statement of general applicability which should have been adopted as a rule, but was not, then the affected party may bring an action in the circuit court of Cole County for the nonstate party's reasonable attorney's fees incurred prior to the relief being granted, not to exceed the amount in controversy in the original action.

Aspen Woods argues that: (1) the Commission's Staff's decision to prosecute this case reflects an agency statement of general applicability implementing, interpreting or prescribing law or policy; (2) the Commission's opening of a workshop to explore the issues in this case confirms a rule should have been adopted; and (3) Aspen Woods became the prevailing party when the Commission stayed the complaint.

Staff's Response

Staff responded on February 24, 2011. Staff contends: (1) its Complaint is not based on a statement of general applicability; (2) its Complaint is substantially justified by the law and specific facts of Aspen Associates' conduct; (3) Aspen Associates' is not a "prevailing party"; and (4) there is no "amount in controversy" in the Staff's Complaint, only a request to seek penalties.

Findings¹

1. The Commission's Staff received a customer complaint describing various activities by the Respondents that portrayed Respondents as having set up a framework of operation consistent with the functions of a public utility.
2. After receiving the complaint, the Commission's Staff investigated pursuant to the statutory authority in Section 386.240, RSMo 2000.
3. After conducting its investigation, Staff filed its complaint alleging that Respondents'

¹ Because the Commission ultimately dismissed Staff's complaint and made no decision on the merits of the complaint, these findings are based upon Staff's pleadings. See EFIS Docket Entry No. 1, *Complaint*, filed January 29, 2010 and EFIS Docket Entry No. 67, *Motion for Leave to Amend Complaint* (amended complaint attached), filed October 5, 2010. EFIS is the Commission's Electronic Information and Filing System.

conduct, individually and/or jointly was encompassed within the statutory definitions of a water corporation, a sewer corporation and a public utility.

4. Respondents alleged activities included: obtaining water service and wastewater management for the Aspen apartment properties; contracting with tenants for payment for those utility services – charges were passed through to the tenants by use of a formula, not actual measured usage; and the charging of additional fees including new account fees, late payment fees, returned check fees, and a monthly service fee for billing.
5. A landlord's pass through of utility fees is allowed by the Commission; however, new account fees, late fees, expedited handling fees, nonsufficient fund fees, and other additional fees are not "utility expense", but are arbitrary fees that must be approved by the Commission as just and reasonable charges for utility services.
6. Additionally, Respondent NWP has a policy and procedure in place for handling billing disputes, typical of public utilities.
7. The Commission's jurisdiction extends to those entities 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.
8. Respondents do not have certificates of convenience and necessity from the Commission to own, operate, manage or control water and wastewater utility services.
9. The Commission's Staff made no allegations that the Commission should regulate landlords or billing companies generally.
10. The Commission's Staff sought authorization to seek penalties and did not plead a specific amount in controversy.
11. The Commission heard oral argument on the jurisdictional issue and stayed the action to examine that issue.

Conclusions

The Missouri Supreme Court has "recognized that executive agencies may exercise 'quasi judicial powers' that are 'incidental and necessary to the proper discharge of their administrative functions, even though by doing so they at times determine questions of a

‘purely legal nature.’”² When the Commission determines facts from disparate evidence and applies the law to come to a decision in a particular controversy, it acts as an adjudicator, and so exercises its quasi-judicial power.³ Quasi-judicial power is in stark contrast to the agency’s quasi-legislative power where the Commission promulgates, for prospective effect, a standard addressed to the public or regulated industry generally.⁴ A “rule” does not include “[a] determination, decision, or order in a contested case....”⁵ An adjudication by the Commission binds only the parties to the proceeding, determines only the particular facts contested, and as in adjudications by a court, operates retrospectively.⁶

Staff’s complaint is based upon Section 393.170 (1), RSMo (2000), which provides that those water and/or sewer corporations, as defined in Sections 386.020 (49) and (50) (Supp. 2010), 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. No new rule must be promulgated to act on this authority.

Aspen Woods predicates its claims for attorney’s fees On Section 536.021.9 which requires the fact finder to determine not only that the agency’s action was based upon a statement of general applicability which should have been adopted as a rule, but it also

² *State Tax Comm’n. v. Administrative hearing Comm’n.*, 641 S.W.2d 69, 75 (Mo. banc 1982).

³ *Id.*; *National Labor Relations Board v. Wyman-Gordon Company*, 394 U.S. 759, 770, 89 S.Ct. 1426, 1432, 22 L.Ed.2d 709 (1969). See also *State ex rel. Gulf Transport Co. v. Public Service Comm’n*, 658 S.W.2d 448, 465 -467 (Mo. App. 1983) (Shagnler Dissent).

⁴ *Missouri Southern R. Co. v. Public Service Comm’n*, 484, 214 S.W. 379, 380[1] (1919).

⁵ A *rule* means “each agency statement of general applicability that implements, interprets, or prescribes law or policy” § 536.010(6)(d), RSMo Supp. 2010.

⁶ *N.L.R.B. v. Wyman-Gordon Co.*, 394 U.S. 759, 765, 89 S.Ct. 1426, 1429, 22 L.Ed.2d 709 (1969); *State ex rel. Summers v. Public Service Commission*, 366 S.W.2d 738, 741[1–4] (Mo.App.1963); *State ex rel. Consumers Public Service Co. v. Public Service Comm’n*, 352 Mo. 905, 180 S.W.2d 40, 46[6–8] (banc 1944). See also §§ 386.490 and 386.510.

requires the party seeking attorney's fees to have "prevailed" in that agency action. Section 536.021.9 does not define "prevail", but another fee section, Section 536.085, does. Section 536.085 (3) defines "prevails" as "...obtains a favorable order, decision, judgment, or dismissal in a civil action or agency proceeding." The courts have further elucidated and stated: "To 'prevail,' however, is not limited to favorable judgment following a trial on the merits; it may also include obtaining a settlement, obtaining a voluntary dismissal of a groundless complaint, or obtaining a favorable decision on a single issue if the issue is one of significance to the underlying case."⁷

Regardless if Aspen Woods "prevailed" in the sense that the Commission ultimately dismissed this action, Aspen Woods fails to meet the first statutory requirement that the Commission's action was based upon an unpromulgated rule. Even under Section 536.087 Aspen Woods' claim for attorney's fees would fail because Staff's complaint was substantially justified. Missouri courts have interpreted the term "substantially justified" to mean there must be "reasonable basis both in law and fact" for the government's action.⁸ Staff's complaint was properly pled pursuant to Section 386.390 and was supported with sufficient documentation from its investigation to establish a reasonable basis in law and fact to proceed. The Commission's ultimate decision has no bearing on Staff being substantially justified with bringing its complaint.

Decision

The Commission delayed a ruling on this motion initially because legislation was pending that could have had a direct impact on this matter. The legislation did not pass

⁷ *Greenbriar Hills Country Club v. Director of Revenue*, 47 S.W.3d 346, 353 (Mo. banc 2001).

⁸ *Id.* at 354.

and was not implemented. The Commission has had the opportunity to fully examine the parties' arguments and will deny the motion for attorney's fees.

THE COMMISSION ORDERS THAT:

1. Aspen Woods Apartment Associates, L.L.C. February 14, 2011 motion for attorney's fees and expenses is denied.
2. This order shall be effective October 10, 2011.

(S E A L)

BY THE COMMISSION



Steven C. Reed
Secretary

Gunn, Chm., Jarrett and Kenney, CC., concur
Davis, C., dissents.

Stearley, Senior Regulatory Law Judge