BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

The Staff of the Missouri Public Service Commission,	)	
Complainant,	)	
v.	)	
Aspen Woods Apartment Associates, LLC, and National Water & Power, Inc.	)	Case No. WC-2010-0227
Respondents.	)	

RESPONDENT ASPEN WOODS APARTMENT ASSOCIATES, L.L.C.'S MOTION FOR ATTORNEYS' FEES AND EXPENSES

Respondent Aspen Woods Apartment Associates, L.L.C. ("Aspen Woods"), pursuant to Section 536.021.7, RSMo Supp. 2010, respectfully moves this Commission for its Order granting Aspen Woods its attorneys' fees and expenses in this matter. As grounds, Aspen Woods states:

1. Section 536.021.9, RSMo 2010 Supp., provides in pertinent part:

> 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.

2. Thus, Section 536.021.7 imposes seven requirements for a fee award: (a) a finding in a contested case, (b) by an administrative or judicial fact-finder, (c) that a state agency, (d) took action based on a statement of general applicability which should have been adopted as a rule, (e) but was not so adopted, (f) notice to the agency prior to the hearing on the matter, and (g) the nonstate party is a prevailing party. When these elements are met the agency "shall" award fees not to exceed the amount in controversy. As will be shown below, all seven elements are met in this case, and therefore this Commission must award fees. Finally, the amount in controversy exceeds the amount of fees sought, so the Commission must award the full amount sought.

A. <u>This is a Contested Case</u>

3. A "contested case" is "a proceeding before an agency in which legal rights, duties or privileges of specific parties are required by law to be determined after hearing." *§ 536.010(4), RSMo 2010 Supp.*

4. This matter is a contested case as that term is used in Sections 536.010(4) and 536.021.7, RSMo 2010 Supp., because there is a statutory requirement of a hearing. *§ 386.390.5, RSMo 2000* (providing for hearing upon filing of a complaint with the Commission).

B. <u>The Commission is an Administrative Fact-Finder and State Agency</u>

5. This Commission is an "administrative fact-finder," as that term is used in Section 536.021.7, RSMo 2010 Supp. It is a "fact-finder" because it has the authority to hear and resolve the issues in this case. *See §§ 386.390 to .500, RSMo 2000.* The

Commission is an administrative agency of the State of Missouri. *See § 386.040, RSMo 2000.*

C. <u>This Case is an Action Based on a Statement of General Applicability That is a Rule But Was Not Promulgated as a Rule Under the Notice-and-Comment Rulemaking Procedures in Chapter 536</u>

6. A rule is an "agency statement of general applicability that implements, interprets, or prescribes law or policy." *§ 536.010(6), RSMo 2010 Supp.*

7. "No rule shall hereafter be proposed, adopted, amended or rescinded by any state agency unless such agency shall first file with the secretary of state a notice of proposed rulemaking and a subsequent final order of rulemaking." *§ 536.021.1, RSMo Supp. 2010.* The policy decisions at issue in this case have never been promulgated as rules. No rules or statute authorizes the Staff to assert that an apartment landlord is a water or sewer corporation.

8. Throughout this case, Aspen Woods has made the point that the Staff's decision to prosecute this case reflects an agency statement of general applicability that implements, interprets, or prescribes law or policy that would justify a fee award under Section 536.021.7. Aspen Woods' Answer pleaded as relief requested "all attorneys fees and costs associated with defending this matter." *Answer, Filed March 4, 2010, at p. 7.* Aspen Woods raised the issue of fees again in the following documents: *Aspen Woods Apartment Associates, L.L.C.'s Opposition to Motion for Leave to File Amended Complaint* (October 12, 2010) at pp. 4-5; *Memorandum in Support of Joint Motion for Summary Determination* (October 26, 2010) at pp. 4-5; *Notice of Intent to Seek Attorneys' Fees and Expenses* (October 29, 2010); and *Respondent Aspen Woods*

Apartment Associates, L.L.C.'s Opposition to Staff's Motion for Reconsideration (December 16, 2010), at p. 4.

9. The question of law or policy at issue in this case can be stated as follows: Does an apartment complex which does not individually meter each individual unit become a regulated water or sewer corporation by billing its tenants under a formula administered by a third-party?

10. Prior to the bringing of this case, it would have appeared this question was well-settled by case law, and that the answer was, "No." *In State ex rel. M. O. Danciger & Co. v. P.S.C. of Mo.*, 205 S.W. 36 (Mo. 1918),` the Supreme Court of Missouri held that a landlord did not devote itself to public use, and therefore was not a utility, when it provided utility service to a tenant:

> The state claims that by furnishing heat, light, and power to the tenants of their own building the plaintiffs become a public utility; that the furnishing of such commodities to any one else than to one's self is furnishing it to the public within the meaning of the statute. It is obvious that such a construction is too narrow, for it would constitute the owner of every building furnishing heat or light to tenants, as well as every householder who rents a heated or lighted room, a public utility. The Legislature never contemplated such a construction to be given the words "public utility." They must receive a construction that will effectuate the evident intent of the Legislature, and not one that will lead to a manifest absurdity. It was not the furnishing of heat, light, or power to tenants, or, incidentally, to a few neighbors, that the Legislature sought to regulate, but the furnishing of those commodities to the public – that is, to whoever might require the same.

Danciger, 205 S.W. at 41 quoting *Cawker v. Meyer*, 133 N.W. 157 (Wisc.)

11. Equally, in *State ex rel. Cirese v. P.S.C. of Mo.*, 178 S.W.2d 788 (Mo. App. 1944), the Court stated:

> There was ample and substantial evidence to support a finding by respondent that appellants are engaged as a public utility to the extent that they manufacture, distribute and sell electrical energy to members of the public. They are not, however, 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 in the manner shown in evidence. *State ex rel. Lohman & Farmers Mutual Telephone Company v. Brown, et al.*, 323 Mo. 818, 19 S.W.3d 1048, loc. cit. 1049; *State ex rel. M. O. Danciger & Company v. Public Service Commission*, 275 Mo. 483, 205 S.W. 36, 18 A.L.R. 754.

Cirese, 178 S.W.2d at 790.

12. On January 13, 2011, the Commission entered its Order Staying Complaint and Opening Workshop ("Order"). The Order stated:

> The issues involved in this matter involve a complex interplay between the statutes and regulations governing public utilities, consumer protection, and contract law. Any ultimate decisions regarding the interpretation and application of law and policy in this matter will have a major affect on Missouri citizens receiving utility service in landlord-tenant relationships. Consequently, the Commission will stay this action and open a workshop to allow all stakeholders the opportunity to accurately delineate the full reach of the Commission's jurisdiction and what appropriate regulations and mechanisms are required to ensure safe and adequate utility services are being provided to this segment of Missouri ratepayers at just and reasonable rates.

(emphasis added).

13. The Order thus recognizes that the issues in this case involve the interpretation and application of law and policy. Indeed, the language in the Order underlined above is very similar to the definition of a rule: "an agency statement . . . that implements, interprets, or prescribes law or policy." *§ 536.010(6), RSMo 2010 Supp.* Equally, a rule is a statement "of general applicability." By referencing the "major affect on Missouri citizens receiving utility service in landlord-tenant relationships," the

Commission's Order understands that the issue of regulation of landlord-tenant utility service has general applicability.

14. The Staff's decision to bring this case was the implementation of law or policy, as the case law establishes. For example "[a]ny agency announcement of policy or interpretation of law that has future effect and acts on unnamed and unspecified facts is a 'rule.'" *Div. Med. Svcs. v. Little Hills Healthcare*, 236 S.W.3d 637, 642 (Mo. banc 2007). An agency declaration that has "a potential, however slight, [chance] of impacting the substantive or procedural rights of some member of the public" is a rule. *Little Hills*, 236 S.W.3d at 642, quoting *Baugus v. Director of Revenue*, 878 S.W.2d 39, 42 (Mo. banc 1994). "[F]ailure to promulgate a rule as required voids the decision that should have been properly promulgated as a rule." *Little Hills*, 236 S.W.3d at 643; *NME Hospitals v. Dep't. of Social Svcs.,* 850 S.W.2d 71, 74-75 (Mo. banc 1993).

D. <u>Aspen Woods Prevailed</u>

15. Section 536.021 does not define "prevail" or "prevailing party." However, a different fee statute in Chapter 536 does. Section 536.085(3), RSMo defines "prevails" as "obtains a favorable order, decision, judgment, or dismissal in a civil action or agency proceeding[.]" "To prevail . . . is not limited to favorable judgment following a trial *on the merits*; it may also include . . . obtaining a favorable decision on a single issue if the issue is one of significance to the underlying case." *Greenbriar Hills Country Club v. Dir. of Revenue*, 47 S.W.3d 346, 353 (Mo. banc 2001) (emphasis added). Thus, it is clear that a party does not have to win the whole case to "prevail." The references in Section 536.035(3) to a favorable "order" or "decision" clearly means that victory on a

portion of a case can make a party a "prevailing party." *Greenbriar Hills* makes that even more explicit.

16. The January 13 Order in this case meets the definition of "prevail" in Section 536.085 and in *Greenbriar Hills*. It stays the instant case and implicitly recognizes that Aspen Woods cannot be subjected to being the sole entity in the state subject to Commission jurisdiction: "Any ultimate decisions regarding the interpretation and application of law and policy in this matter will have a major affect on Missouri citizens receiving utility service in landlord-tenant relationships". *Order, at 2.*

17. The Commission's stay order is a "favorable order" under Section 536.085(3) and a "favorable decision on a single issue . . . of significance to the underlying case" under *Greenbriar Hills* because it achieves Aspen Woods' goal of ending the selective prosecution issue that it has complained about throughout this case. That this Order is favorable to Aspen Woods and significant to it and to the case is shown by this exchange between Commissioner Gunn and counsel for Aspen Woods at the oral argument:

> COMMISSIONER GUNN: Let me ask you a jurisdictional question because you brought up – you brought up the request that we dismiss the petition. If we were to undertake a rulemaking, do you think we would have the ability to hold a decision in abeyance until we went through at least a stakeholder process to determine how or if we should deal with this?
>
> Would that be acceptable where we say, Look, we're not going to rule on this right now because we don't know the answer to the question and rather than make a bad decision, either saying we don't have jurisdiction or asserting jurisdiction, we're going to hold off on making any determination until we go through a process that helps us get a better answer?

MR. PEARSON: My client would be happier with a different solution. I think you could do that. I mean staying the case and holding it in abeyance does have the benefit to my client of letting them stop paying me and they would be happy -- happy with that outcome. But the concern that they would have is what happens if the Commission at the end of that proceeding decides that it does have jurisdiction over some universe of apartment complexes? Because my client is now sitting there with the one active pending complaint case, it would be reasonable to expect the Staff at that point to push this case forward. And I'm going to assume in my answer that the outcome of that -- of that process that the Commission would engage in would not be that my client is the only entity in the state who is subject to jurisdiction.

So that's a long-winded answer to say that partly solves the problem. We would be happier with that than where we are now, to be sure, but we wouldn't be entirely happy with that.

COMMISSIONER GUNN: And it would give you more comfort if we said, Look, we're -- if any order we would say if we were to do a stay order or hold an abeyance order, that we made it clear that this was -- we were not going to proceed merely on a-one apartment complex basis? That would give you a little bit –

MR. PEARSON: That would –

COMMISSIONER GUNN: -- more comfort?

MR. PEARSON: Yes. I apologize for interrupting. That would give us more comfort, yes, sir.

E. <u>Aspen Woods Provided Statutory Notice</u>

On October 29, 2010, before the hearing in this matter, Aspen Woods provided the necessary notice in its Notice of Intent to Seek Attorneys' Fees and Expenses.

F. <u>The Amount in Controversy Exceeds the Fees Requested</u>

18. The Staff initiated this case by filing a Complaint on or about January 29, 2010, seeking an order that Aspen Woods is "subject to the Commission's authority to set rates." *Complaint, at 9.*

19. The original Complaint also sought an order from the Commission giving the General Counsel the authority to seek penalties in circuit court under Section 386.570. That section authorizes penalties of "not less than one hundred dollars nor more than two thousand dollars for each offense." *§ 386.570, RSMo 2000.* The Complaint also invoked the provision in Section 386.570 providing that:

> Every violation . . . by any corporation or person or a 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.

§ 386.570, RSMo 2000; Complaint, p. 10.

20. The Complaint went on to pray for the Commission's order "deem[ing] each day that such violation existed to be a separate offense and authorize its General Counsel to proceed in Circuit Court to seek such penalties as are authorized by law." *Complaint, ¶ 10.*

21. The Complaint does not specify when the Staff believed that Aspen Woods began the allegedly unlawful acts. If one began counting on January 29, 1010 (the date of the Complaint) through February 11, 2011 (the date of the filing of this Motion), there would be a continuing violation of 378 days. At the statutory minimum of $100 per day, the civil penalty sought by the Staff would be $37,800; at the statutory maximum of $2,000 per day, the civil penalty sought by the Staff would be $756,000.

22. These amounts exceed the amount of fees sought by Aspen Woods in this motion.

23. Filed with this Motion is the Affidavit of Amy Chen, which provides a foundation for admission of the time records of Husch Blackwell, LLP. It establishes that the fees and expenses sought through January 31, 2011, by Aspen Woods are $53,145.06.

WHEREFORE, Aspen Woods prays for the following relief: (1) an award of $53,145.06, for its fees and expenses incurred through January 31, 2011, and (2) an order that Aspen Woods shall be permitted to file a supplemental affidavit setting forth the fees and expenses incurred in filing this Motion, so that the Commission will have the proper evidentiary record to award the fees and expenses incurred starting on February 1, 2011.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was served by hand-delivery, facsimile transmission, certified mail, electronic mail and/or United States mail, postage prepaid, to the following parties of record this 14th day of February, 2011:

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