

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

DERALD MORGAN, RICK AND CINDY)		
GRAVER, WILLIAM AND GLORIA PHIPPS)		
and DAVID LOTT,)		
)		
Complainants,)		
)		
v.)	File No. WC-2017-0037	
)		
CARL RICHARD MILLS,)		
CARRIAGE OAKS ESTATES,)		
DISTINCTIVE DESIGNS, and)		
CARING AMERICANS TRUST)		
FOUNDATION, INC. (f/k/a Caring)		
Americans Foundation, Inc.))		
)		
Respondents.)		

MOTION TO STRIKE MOTION FOR MEDIATION

Respondents move the Public Service Commission to strike the Staff of the Missouri Public Service Commission (“Staff”) Motion for Mediation for the following reasons:

1. On October 28, 2016, Staff filed its pleading in response to the Respondents’ Motion to Dismiss alleging generally that Staff believed the Carriage Oaks Subdivision (with less than ten residents) was subject to PSC jurisdiction even though it had been lawfully operated more than ten years subject to Missouri Department of Natural Resources jurisdiction and only allegedly came under PSC jurisdiction by virtue of Mr. Mills’ estate planning transfer.

2. Although Respondents believe Staff and Complainants’ legal analysis is flawed and not supported, due to the extreme cost of litigation, Respondents elected to form a not-for-profit water and sewer company to transfer the water and sewer assets of the Carriage Oaks Subdivision (as recommended by Staff in its original pleading).

3. Respondents notified Complainants and Staff of their intention to form the water and sewer company on December 19, 2016 pursuant to a letter marked “Confidential, for Settlement Purposes Only.” *See* attached letter, marked Exhibit “A.”

4. Following notification, Respondents forwarded draft Articles of Incorporation and Bylaws to Complainants and Staff for review and invited comment. These documents were provided pursuant to a letter marked “Confidential, for Settlement Purposes Only.” *See* attached letter marked as Exhibit “B.”

5. Rather than contact Respondents or engage in discussion regarding the draft settlement documents, the Staff filed a public pleading (“Motion for Mediation”) claiming that the “documents circulated by the Respondents... failed to effectuate lawful non-profit status... Staff identifies the following facial defects.”

6. Staff goes on to identify five defects in the confidential settlement documents, without permission of Respondents or agreement.

7. To add insult to injury, the alleged facial defects are not defects but rather superficial non-issues:

- a. RSMo. Chapter 393 requires five or more persons to organize a non-profit water or sewer corporation. The settlement documents identify four people. If Staff had called, they would have learned the fifth person is identified and Respondents are waiting to confirm that the fifth person will serve.
- b. The Missouri Department of Natural Resources advised our office that they have not and never have reviewed or approved non-profit corporation Bylaws or Articles of Incorporation.

- c. Staff claims there are no Articles of Conversion that were included in the documents. This is because a new corporate entity is being formed as the Articles indicate. As Staff stated, if a new corporate entity is formed “then such a conversion would not be required.”
- d. Staff claims that the Complainants are not identified as Members. However, the definition of Member includes all persons who are receiving services from the new utility. By definition, that would include Complainants and every other person within the Carriage Oaks Subdivision. Further, the documents are consistent with other non-profit sewer company documents which we have been able to review related to non-profit water and sewer companies within the State.
- e. The Articles identify five directors as required. Although Staff alleges that they may not qualify, if Staff had bothered to check with Respondents, they would have learned that they do.

ARGUMENT

Although counsel for Respondents has limited experience in litigation before the Public Service Commission, it has extensive experience in litigation before state and federal courts in the State of Missouri. In all forums in which it regularly appears, confidential settlement communications are inadmissible as evidence and further, are not presented to the court or tribunal out of concern that the information might affect the factfinder’s impartiality.

4 C.S.R. 240-2.090 concerns discovery and pre-hearings before the Public Service Commission. Consistent with state and federal courts, 2.090(7) states:

Facts disclosed in the course of a pre-hearing conference **and settlement offers are privileged and, except by agreement, shall not be used against participating parties unless fully substantiated by other evidence.**

As the exhibits clearly illustrate, the information shared with Staff was in the context of settlement and is privileged. There was no agreement by the parties to use the information or comment about it in a publicly filed pleading. There is no other evidence to substantiate the information that was disclosed in the publicly filed pleading.

On January 17, 2017, counsel for Respondents and Staff had a telephone conversation in which the undersigned requested that the Motion for Mediation be immediately withdrawn. Staff refused.

WHEREFORE, based on the above, Respondents request that the Public Service Commission immediately strike the Motion for Mediation, that any information related to or concerning the settlement discussions between the parties be removed and stricken from the record and for such other and further relief as the Public Service Commission deems just.

HUSCH BLACKWELL LLP

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Attorneys for Respondent

Certificate of Service

The below signed counsel hereby certifies that a true and accurate copy of the foregoing was sent to interested counsel on this 18th day of January, 2017.

Karl Finkenbinder (karl@sfalawfirm.com)

Staff Counsel (staffcounsel@psc.mo.gov); Hampton Williams (Hampton.williams@psc.mo.gov);

Office of Public Counsel (opcservice@ded.mo.gov)

/s/ Bryan Wade

Bryan Wade, Counsel for Respondents

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December 19, 2016

Via E-mail Transmission & U.S. Mail

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Re: Carriage Oaks PSC case #WC-2017-0037
Confidential Settlement Discussions

Gentlemen:

As I discussed with Hampton, our client has evaluated the staff counsel's pleadings and recommendation to the PSC. Although he disagrees with the staff counsel's legal position regarding the PSC's jurisdiction, he agrees it would be more productive to work towards resolution of pending issues.

To that end, Mr. Mills is forming the Carriage Oaks not-for-profit water and sewer company pursuant to RSMo. Chapter 393. Each Carriage Oaks property owner will be a member of the non-for-profit sewer company and the sewer company's geographic boundaries will be the boundaries of the Carriage Oaks subdivision.

We are currently working through the issues related to transfer of water and sewer assets to the not-for-profit company, but we trust that this action will conclude the PSC's involvement in this matter and that there will not be a need for scheduling mediation in the near future.

Please give me a call to discuss at your convenience.

Sincerely,



Bryan O. Wade

BOW/caz
cc: Client
SPH-2158283-1

Husch Blackwell LLP

EXHIBIT A

HUSCH BLACKWELL

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January 10, 2017

Via E-mail Transmission

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Re: Carriage Oaks PSC case #WC-2017-0037
Confidential Settlement Discussions

Gentlemen:

As indicated in my letter dated December 19, 2016 we are moving forward with formation of a not-for-profit water and sewer corporation pursuant to RSMo. §393. I attach here the draft Articles of Incorporation and Bylaws for your review and comment.

If you have any questions, please advise.

Sincerely,



Bryan O. Wade

BOW/caz
Attachment
cc: Client