

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

Benjamin D. Pugh,)	
)	
Complainant,)	
v.)	Case No. WC-2006-0090
)	
Folsom Ridge, LLC)	
)	
Respondent.)	

MOTION TO DISMISS COMPLAINT

COMES NOW Folsom Ridge, LLC (Folsom Ridge or Company) and pursuant to the Commission's Order Directing Response of October 13, 2005 submits this motion to dismiss in response to the Complaint. The Complaint fails to state a claim upon which relief may be granted against the named respondent, Folsom Ridge and should be dismissed.

SUGGESTIONS IN SUPPORT

Although technical rules of pleading are not applied to applications or pleadings filed with the Public Service Commission and pleadings are to be liberally construed; State ex rel. Crown Coach Co. v. Public Service Commission, 179 S.W.2d 123, 126 (K.C. Ct. App.1944); the pleading rules adopted by the Commission are in great measure the same as those promulgated by the Supreme Court of Missouri, and applying the maxims of pleading construction used by the courts of our state when motions to dismiss are filed would be appropriate here. Consequently, the sufficiency of the instant complaint should be evaluated under the following principles:

As noted in *Nazeri v. Missouri Valley College*, 860 S.W.2d 303, 306 (Mo. banc 1993), a motion to dismiss for failure to state a cause of action is solely a test of the adequacy of the plaintiff's petition. It assumes that all of plaintiff's averments are true, and liberally grants to plaintiff all reasonable inferences therefrom. No attempt is made to weigh any facts alleged as to whether they are credible or

persuasive. Instead, the petition is reviewed in an almost academic manner, to determine if the facts alleged meet the elements of a recognized cause of action, or of a cause that might be adopted in that case.

Reynolds v. Diamond Foods & Poultry, Inc., 79 S.W.3d 907, 909 (Mo. banc 2002).

Mr. Pugh's complaint lacks paragraph numbers and does not attempt to separate the allegations into easily cited statements of fact. There are no page numbers on the complaint which compounds the difficulty in referring the Commission to particular allegations or averments with definiteness. As a consequence, when quoting from the complaint Folsom Ridge will be unable to supply specific citations by paragraph number or page.

As the basis for his complaint, Mr. Pugh states that "Folsom Ridge/Big Island HOA [are] "providing water/sewer service to non-members therefore operating as a public utility, that should be regulated by the PSC." There are two parties named in this sentence.

Respecting Folsom Ridge, he contends that he paid it \$4,800 to connect, and did later connect, to a wastewater system on Big Island in the Lake of the Ozarks which was built purportedly by Folsom Ridge. He states that an HOA, which counsel will presume means "homeowners association," had not been established at the time he connected to the system but was organized sometime after his connection to the system. He was asked to sign and ratify certain HOA documents which he refused to do. He contends that Folsom Ridge violated regulations of "DNR," which counsel will presume refers to the Missouri Department of Natural Resources, in the installation of the wastewater system and water distribution system. None of these contentions trigger the jurisdiction of the Commission.

Regarding Big Island HOA, Mr. Pugh supplies attachments to his complaint showing that Mr. Pugh and his wife are billed for sewer service by Big Island Homeowners Association (BIHOA) and he pays BIHOA for his service. He seems to contend that Folsom Ridge should

not have accepted his connection fee while the HOA was not yet established, but his principle complaint lies against BIHOA. He contends that the “BIHOA” is operating as a public utility by offering service to property owners who are not member [sic] and therefore should be regulated by the PSC.” He further contends that the “HOA is not being run properly as a legal HOA, but as a unlicensed public utility.” [emphasis his own] From the other statements in his complaint, it becomes clear that in total it is directed exclusively toward BIHOA. In the “relief requested by PSC” summary of the complaint, Mr. Pugh requests a “Determination/Ruling that BIHOA is operating as a public utility by providing service to non-members and therefore should be regulated by PSC.” With respect to the jurisdiction of this Commission, it is the conduct and operations of BIHOA that concerns Mr. Pugh and not the conduct of Folsom Ridge.

Giving the allegations of his complaint the liberal construction they are afforded by law, it can be inferred that BIHOA is a separately created corporate entity with bylaws and a board of directors. There is no allegation in the complaint that Folsom Ridge and BIHOA are one and the same, and that allegation cannot be made. Both entities are separate and distinct as a matter of law. Rather Mr. Pugh asserts that that Folsom Ridge “had complete control of the HOA” which is not a violation of the rules or regulations of this Commission. Since the averments of Mr. Pugh’s complaint are truly directed against the conduct and operations of BIHOA, the complaint fails to state any claim upon which relief may be granted by the Commission against Folsom Ridge and it should be dismissed.

Respectfully submitted,

/s/ Mark W. Comley

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Certificate of Service

I hereby certify that a true and correct copy of the above and foregoing document was sent via e-mail on this 20th day of October, 2005, to General Counsel's Office at gencounsel@psc.mo.gov; and Office of Public Counsel at opcservice@ded.mo.gov; and via U.S. Mail, postage prepaid, to Benjamin D. Pugh, 1780 Big Island Drive, Roach, MO 65787.

/s/ Mark W. Comley