BEFORE THE PUBLIC SERVICE COMMISION
OF THE STATE OF MISSOURI

The Staff of the Missouri Public Service Commission,	)	
Complainant,	)	
v.	)	Case No. WC-2010-0227
Aspen Woods Apartment Associates, LLC, *et. al.*	)	
Respondents.	)	

NATIONAL APARTMENT ASSOCIATION'S MEMORANDUM IN SUPPORT OF RESPONDENTS' JOINT MOTION FOR SUMMARY DETERMINATION

Intervenor, the National Apartment Association (NAA), files this Memorandum in Support of Respondents' Joint Motion for Summary Determination, pursuant to 4 CSR 240-2.117, and respectfully states as follows:

Introduction:

At a time when Missouri faces a number of economic challenges, including the availability of affordable housing, the Staff of the Public Service Commission (Staff) has concocted a regulatory theory of jurisdiction that will raise the cost of housing, discourage conservation of natural resources, and transform the commercial real estate industry into a public utility. This trifecta of consequences stems from the Staff's implausible theory that an apartment community is a water and sewer corporation subject to the jurisdiction of the Missouri Public Service Commission (Commission). In fact, the Staff seeks a declaration that where an owner or manager of real estate passes water costs to their tenants, it must file tariffs with the Commission,

obtain certificates of convenience, and pay penalties associated with any such past (unregulated) conduct.

The facts are undisputed. Certain apartment communities either submeter the water consumption of its tenants or apply a formula allocating portions of waters costs (in a single meter building) among the various rental units. In no instance does the owner manager profit from this arrangement. The residents pay only the estimated costs of their water usage and in some instances, a nominal fee to a billing agent. The arrangement of paying these costs is reflected in the residential lease agreement between the parties.

These undisputed facts alone are legally insufficient to support an unwarranted expansion of the Commission's jurisdiction to the entire commercial real estate sector. This will be an inevitable consequence of embracing a vision that passing through water costs to tenants (a prevalent commercial practice) transforms a building from a dwelling unit or place of work, to a public utility. The Commission was never given the authority to regulate commercial real estate by the legislature.

Standard for Granting Summary Determination:

The Commission should grant Summary Determination in favor of the moving party when no genuine issue of material fact exists. *Allied Mutual Ins. Co. v Brown*, 105 S.W.3d 543, 545 (Mo. App. E.D. 2003).

There is No Public Offering or Use of the Services Offered By Respondents, Thus the Staff's Overreach Fails:

An activity may be regulated by the Commission if the business offers utility services for public use. *State ex rel. M. O. Danciger & Co. v. Public Service Commission,* 205 S.W. 36 (Mo. 1918). However, *Danciger* held that a company

supplying utility service to specific businesses or individuals under a private contract does not fall under the jurisdiction of the Commission when no public offering or use occurs. *Id.* at 40.

Following the rule supplied in *Danciger*, Missouri courts consistently have refused to find jurisdictional authority on behalf of the Commission or confer public utility status upon a company when the business in question contracts privately with individuals or other entities and does not make the contracted services available for public use. *See*, *State ex rel. Lohman & Farmers Mutual Telephone Company v. Brown*,19 S.W.2d 1048 (Mo. 1929) [Telephone company's activities related to the operation of lines for its own use and not the public is not subject to PSC jurisdiction]*; Khulusi v. Southwestern Bell Yellow Pages,* 916 S.W.2d 227 (Mo. App. 1996) [Yellow page advertising is a private contractual agreement between publisher and advertiser, not a public service]; *State ex rel. Buchanan Power Transmission Company v. Baker,* 9 S.W.2d 589 (Mo. App. 1928) [Transmitting electrical power to a single customer does not make the private company a public utility].

With respect to providing utility service to the tenants in a residential building, the Missouri Court of Appeals already refuses to recognize the Commission's authority to regulate the real estate owners when there is no public offering of the service. *State ex rel. and to Use of Cirese v Public Service Commission*, 178 S.W.2d 788, 790 (Mo. App. 1944). In *Cirese*, the real estate owners leased property to the tenants and then provided electricity to the rental units with power generated from facilities that the landlords owned. The court held that to the extent the owners only provided the service to their own buildings and residing tenants, no public use was at hand. *Id.*

The Commission has routinely applied the public use test to decline jurisdiction in cases similar to the one at hand. It dismissed a complaint against a mobile home park operator that provided water and sewer services to those renting pads upon which to place a mobile home. The Commission concluded that the respondent in that case was only providing services to a limited number of tenants and, therefore, was not providing them to the general public. *Re: Norman Goad Construction Company*, 21 Mo.P.S.C. (N.S.) 614 (1977).

Thereafter, the Commission held that hotels which resell telephone service to tenants have not offered the service for public use and are therefore not to be regulated as telecommunications companies. *Matter of the Investigation into WATS Resale by Hotels,* et al., Case Nos. TO-84-222, et al. 29 Mo. P.S.C. (N.S.) 535 (1986). The Commission's logic centered on the fact that hotels selling the telephone service do so as an incidental offering to their core business, and do not offer such to the general public indiscriminately.

Most recently in *Orler v. Folsom Ridge*, LLC, WC-2006-0082, et al., Report and Order of June 14, 2007, the Commission held that a community association that does not offer utility services to non-association members is not indiscriminately dealing with the general public, and therefore not under the jurisdiction of the Commission.

Applying the "public use" standard to the undisputed material facts of this case demonstrates that the Respondents are not engaged in selling or otherwise offering utility services to the general public. Aspen Woods contracts with an individual tenant via a written lease which provides for the resident to reimburse the landlord for the resident's share of the community's water and sewage costs. (See Joint Motion for

Summary Determination, Material Facts for Which There is No Genuine Issue #10, p. 4). NWP contracts with Aspen Woods to provide billing services for allocating the individual tenants' share of water and sewage at the community. (See #11, p. 4). NWP charges residents a monthly fee for the billing process. Aspen Woods does not offer apartments to the general public indiscriminately – instead, applicants must qualify based on credit and criminal history, employment verification, and the payment of a security deposit and future rent. (See # 20, p. 5).

Aspen Woods does not offer or provide water or sewage service to any individuals or businesses not residing at its communities. NWP simply calculates and sends a bill to the residents of Aspen Woods, pursuant to its contract with the owner of the rental property. Therefore, the practice of passing through the utility costs of the community to the tenants, and only the tenants, does not constitute offering private property for the public use and this Commission cannot exercise authority over the respondents.

Moreover, the mere addition of a nominal processing fee to the bill does not subject NWP to the jurisdiction of the PSC. NWP does not offer private property for public use as required by *Danciger*. NWP provides no water or sewage systems to the residents of Aspen Woods. Nor does NWP engage in the offering of utility services indiscriminately to the general public. As such, the Staff's attempt to regulate NWP as a utility fails.

The Legislature Regulates the Landlord-Tenant Relationship and Never Delegated This Authority to the Commission:

The Staff fails to address the true threshold issue in this case: Whether Missouri landlord tenant law controls or otherwise preempts the Commission's jurisdiction?[1] There is a comprehensive and specific statutory scheme governing landlord tenant relationships and there is no evidence that the legislature intended that the Commission regulate landlords.[2]

The Issue of utility billing raised by the Staff implicates the very essence of the landlord-tenant relationship. The Missouri legislature has developed a comprehensive statutory scheme which governs landlord and tenant relationships and it consist of Chapter 441 R.S. Mo. titled "Landlord and Tenant", Chapter 534 RSMo., titled "Forcible Entry and Unlawful Detainer", Chapter 535 RSMo., titled "Landlord-Tenant Actions".

Missouri landlord tenant law is drafted to address landlord-tenant issues and therefore takes precedence over the statutory provisions governing public utilities covered under §386.020 RSMo., which might be only be stretched in order for the Commission to construe it is related to the landlord tenant relationship. *See*, *Turner v School District of Clayton*, et al., 318 S.W.3d 660 (Mo. 2010) [The Missouri Supreme Court finds "The doctrine of in pari materia recognizes that statutes relating to the same subject matter should be read together, but where one statute deals with the subject in general terms and the other deals in a specific way, to the extent they conflict, the

[1] It is worth noting that when The State Corporation Commission of neighboring Kansas considered this question. It ruled that it did not have the jurisdiction to regulate apartment properties as public utilities in finding landlord-tenant relationship issues are governed by the state landlord-tenant law. *See*, 2006 Kan. PUC LEXIS 964.

[2] Interestingly, Staff recently conceded that if the Commission has jurisdiction over real estate companies that pass through utility costs to residents, the Commission should not exercise that jurisdiction to regulate landlords who only pass through the utility costs incurred without adding administrative fees. The Staff supplied no justification for this curious position. See: Staff's Response to the Application to Intervene by the National Apartment Association and Motion For Expedited Consideration p.5-6.

specific statute prevails over the general statute."] *See also*, *Chelsea Plaza Homes, Inc v Moore*, 601 P.2d 1100 (KS 1979) [The Kansas Supreme Court finds "It is a cardinal rule of law that statutes complete in themselves, relating to a specific thing, take precedence over other statutes which deal only incidentally with the same question, or which might be construed to relate to it…"] For the Commission to exercise its jurisdiction over landlords pursuant to §386 RSMo., it would require the Commission concurrently to regulate the landlord tenant relationship and invade the province of private party relationships governed by a rental lease. Under §441.005 (1) RSMo., a "lease" is defined as "a written or oral agreement for the use or possession of a premises." and as such would include all agreements and valid rules and regulations adopted by the landlord and agreed to by the tenant.

The legislature drafted Missouri landlord-tenant law with landlord to utility service provider issues in mind. §441.650 RSMo., specifically addresses multitenant dwelling landlord heat utility service responsibilities. This section separately defines the "owner" (see §441.650 (6)) of a multitenant premises from the utility service corporations which provide utility services (specifically electric and gas corporations as defined in 386.020(2) and (3) RSMo., respectively) to the premises. Neither this statute which specifically addresses landlord - utility service corporation provider issues, including defining specific utility corporations in this context, nor any other statute in the Revised Statutes of Missouri, states that a multitenant dwelling can also be defined as a utility corporation in and of itself. One may only conclude this is because the legislature never contemplated dual treatment of a landlord under both Missouri landlord tenant law and

the Public Service Commission Law. Missouri landlord-tenant law should be read to control all transactions concerning multitenant property owners and their residents.

The Business of Multifamily Property Owners/Managers is Defined by Missouri Landlord-Tenant Law, Not Section 386.020 RSMo:

The Staff has suggested that a landlord billing separately for utilities and collecting reasonable fees in connection with providing that service may meet the definition of the term “public utility” as defined in §386.020 (43) RSMo. While a literal reading of this definition could lead to that interpretation the legislature is presumed to intend that a statute be given a reasonable construction so as to avoid unreasonable or absurd results. *See*, *Jacobson v Massachusetts*, 197 U.S. 11 (1905) [The U.S. Supreme Court states that "all laws should receive a reasonable construction, and general terms should be so limited in their application as not to lead to injustice, oppression or absurd consequence. It will, therefore, be presumed that the Legislature intended exceptions to its language which would avoid results of that character. The reason of the law in such cases should prevail over its letter."] Staff’s proposed construction of §386.020 RSMo is both unreasonable and leads to absurd results.

A simple examination of the character of a multitenant premises business’ operations shows that the Staff’s construction of §386.020 RSMo is unreasonable. Missouri’s comprehensive landlord-tenant statutory scheme completely defines the character of the landlord's business operation. For example *See*, §441.005 (1), (2), (3), (4) RSMo (defining Lease, Lessee, Premises, and Rent respectively.) Landlords are in the business of renting dwelling units within a premises to tenants who are entitled to occupy the dwelling units to the exclusion of others pursuant to a rental lease under which rent is paid. "Rent" means a stated payment for the temporary possession or use

of a house, land, or other real property, made at fixed intervals by a tenant to a landlord. §441.005 (4) RSMo. A “lease” is defined as “a written or oral agreement for the use or possession of a premises.” §441.005 (1) RSMo. It would follow then, that even if a landlord is billing separately for utilities and the administrative fees that support that billing, and such arrangement is governed by the rental agreement, as it must be according to §441.005 RSMo, the nature of the landlord's business cannot be transformed from that of renting units to tenants to that of "public utility." The Staff’s contrary construction of Missouri landlord tenant law and §386.020 RSMo. is unreasonable.

Such a transformation would also lead to absurd results in that it would trigger all the statutes authorizing the Commission to supervise and control corporate or business action in the utility field. Prior to implementing a utility billing program at an apartment property, tenants do not receive “free” water. Rather they were and have always been charged for water and the administrative costs for providing that water as part of the monthly rental charge. If not using a utility billing program, lease documents between the landlord and tenant typically declare that the utility is “included in rent.” Inclusion does not equate to free, but rather a cost lumped together and hidden within many other expenses charged to tenants. The only difference between a billing program and its necessitated administrative fees and “included in rent” is that the tenant either has a clear understanding of the costs or they do not. Applying this fact to the staff’s interpretation of §386.020 RSMo would necessitate the conclusion that every single rental property, included commercial real estate[3], in the state of Missouri is a public utility, which would require all of these properties to register with the Commission and

[3] Many commercial leases in office buildings permit pass through of utility costs to commercial tenants.

the Commission in turn the duty to oversee their operations. This conclusion would apply in the same manner from office buildings to duplex and single-family home rentals. It is impossible to believe that this absurd result coincides with the legislature's intent when they enacted §386.020 RSMo. Accordingly, §386.020 RSMo is inapplicable to arrangements within the scope of Missouri landlord tenant law.

Granting Staff's Overreach Would Be Harmful Public Policy:

The expansion of the Commission's jurisdiction to include the regulation of the landlord-tenant relationship will have a direct negative impact upon two well established Missouri public policies; encouraging an adequate supply of quality affordable housing and the conservation of scarce natural resources. A finding that Respondents are subject to the jurisdiction of the Commission would require that all private billing providers, residential rental properties, and other commercial real estate buildings be treated as public utilities, a bizarre if not absurd outcome that would drive the costs of doing business in Missouri higher as well as increase rents.

A ruling by the Commission against the Respondents would prompt most Missouri residential rental property owners using submetering or RUBs utility billing programs to stop the practice and revert to including water costs in residents' rent. In order to properly budget for all contingencies and to ensure that the proper amount capital is on hand to cover landlord utility costs rents would necessarily have to be increased for all rental tenants in the state of Missouri. This would apply irrespective of the volume of water usage undertaken by a tenant at their individual dwelling unit. Such a result is not only inequitable but will have the direct result of reducing housing affordability for *all* Missourians at a time when Missouri faces a number of economic

challenges due the Great Recession. Owners who continue to bill residents individually and charge administrative fees for this service would be forced to pay tariffs imposed on regulated utilities. Under both scenarios, rental tenants would most likely see their housing costs increase and in some cases this increase would be sudden and sizeable.

In addition, the regulation of rental property as a utility would likely result in an increase in water usage as mentioned above because it would discourage rental property owners and managers from utilizing individual utility billing. When a tenant receives an individual bill for their water usage they are motivated to use that resource in a responsible manner. If this economic reminder to conserve is removed it only stands to reason that water consumption across the state will increase. For example, this effect was recently confirmed in a survey conducted by Ipsos Public Affairs. The results of this survey state that more adults cite saving money than any other reason why they would take measures to reduce waste, save energy, and save water in their home[4].

Conclusion:

The attempt of Staff to regulate a private apartment complex and billing agent as Missouri utility companies fails because the Respondents do not offer utility services to the general public indiscriminately (or at all), the Missouri legislature has created a statutory regime to regulate the landlord-tenant relationship and has not delegated such authority to the Commission, and the granting of jurisdiction would result in harmful public policy. The Staff provides no authority for jurisdiction over private real estate companies or their agents, and granting such authority would drive Missouri rents for businesses and individuals higher in a time of economic uncertainty.

[4] The full report can be found at http://www.ipsos-na.com/download/pr.aspx?id=9397

For the reasons stated herein, the Commission should grant the Respondents' Joint Motion Summary Determination and award such other relief as appropriate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing document was delivered by first class mail, electronic mail or hand delivery, on the 1st day of November, 2010, to the following:

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