BEFORE THE PUBLIC SERVICE COMMISSION
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, and National Water & Power, Inc.	)	
Respondents.	)	

NATIONAL APARTMENT ASSOCIATION'S REPLY TO STAFF AND OPC'S OPPOSITIONS TO JOINT MOTION FOR SUMMARY DETERMINATION

Intervenor, the National Apartment Association (NAA), files this Reply to the Staff of the Missouri Public Service Commission (the "Staff") and the Office of Public Counsel's ("OPC") Oppositions to Respondents' Joint Motion for Summary Determination, pursuant to 4 CSR 240-2.117, and respectfully states as follows:

Procedural History and Introduction:

On October 26, 2010 Respondents filed a *Joint Motion for Summary Determination*. NAA filed its *Memorandum in Support of Respondents' Joint Motion for Summary Determination* on November 1, 2010. Staff and OPC filed oppositions on November 22, 2010. Subsequent to filing its opposition brief, Staff filed a *Motion for Reconsideration* of an order issued by the Commission on December 1, 2010 entitled *Order Setting Oral Argument, Directing Filing And Amending File Caption.* [1]

[1] NAA acknowledges that Respondents will file their own Reply Brief and thus, for the sake of judicial economy, will limit this Reply to: 1) Staff's contention that the fees charged by billing providers subject apartment owners and billing agents to the jurisdiction of the Commission; and 2) Staff's erroneous and misleading statements of the Commission's purpose and jurisdiction as it relates to corporations with monopoly power.

In the *Motion for Reconsideration*, Staff acknowledges that the pass through of utility costs to apartment residents does not subject apartment owners or managers to the jurisdiction of the Commission. Rather, Staff now seeks to limit its misguided overreach to companies that charge "new account fees, late fees, expedited handling fees, non-sufficient fund fees, and other arbitrary fees, amongst other activities." However, as discussed below, the mere addition of a nominal fee to the resident's bill does not subject a billing agent or an apartment community to the jurisdiction of the Commission.

Billing agents and apartment communities are not public utilities as defined by Missouri law and the simple itemization of the costs associated with billing the resident shown by the fees now attacked by Staff does not subject Respondents or other companies to the Commission's jurisdiction. In short, the adoption of Staff's warped view will result in apartment communities and billing agents simply rolling utility fees into the rent amount contained in the lease. Residents will cease to have a transparent and itemized view of the costs associated with renting a specific apartment unit from a community. Such cost will be billed and characterized simply as "rent."

Staff also misapplies settled case law in attempt to shoehorn the Commission's purpose to regulate corporations with monopoly power into an all encompassing arbitrator of leasing transactions. Such a result would subject thousands of Missouri commercial or residential owners of rental property to regulation as public utility companies – driving up both the cost of affordable housing and doing business in Missouri.

Staff's Attempt to Regulate Itemized Costs Fails:

In a case very similar to this one, the Commission held that hotels which resell telephone service to tenants have not offered the service for public use and are therefore not under the

jurisdiction of the Commission. *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.[2] Despite the fact that the hotels were charging patrons more for phone service, the decision turns on the fact that hotels selling the telephone service did so as an incidental offering to their core business, and did not offer such to the general public indiscriminately.

Like the hotels in *WATS Resale,* Missouri apartment owners are passing on the costs of utility service to their patrons. However, apartment owners are acting even less like utility companies than the hotel operators in *WATS Resale* because the apartment owners are not reselling the utility service—they are simply passing the costs of the service through to the residents. Moreover, the fees charged and itemized by the billing agents for producing the bills for the tenants, timely collecting the payments from the residents and paying the utility companies do not subject the billing providers to the jurisdiction of the Commission for reasons outlined in NAA's *Memorandum in Support of Respondents' Joint Motion for Summary Determination.*

The billing providers do not offer private property for the public use as required by *Danciger & Co. v. MoPSC,* 205 SW 36, 40, Mo. 483 (Mo 1918). The billing agents provide no water or sewage systems to residents. Nor do billing agents engage in the offering of utility services indiscriminately to the general public as required in *Danciger* and its progeny. 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

[2] It is curious that Staff failed to address this decision in its Opposition suggestions, merely stating that it is "inapplicable" but providing no argument or analysis as to why it is not. The Commission should have the benefit of analysis of such an analogous case rather than be deprived of information that is adverse to Staff's position.

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).

Should the Commission adopt Staff's erroneous position – that the itemization of costs associated with RUBS and Sub-metering billing equates to the establishment of a public utility—thousands of real estate owners and servicers will be under the jurisdiction of the Commission. In order to evade the high costs associated with being regulated as public utilities, owners will simply include the fees associated with passing through utility costs in the rent, and residents will be deprived of transparent reporting and billing systems currently in place.

Rental Properties are Neither Public Utilities nor Natural Monopolies:

In its brief, Staff attempts to establish Commission jurisdiction over rental properties by citing *State ex rel. Crown Coach Co. v. Pub. Serv. Com'n*, 179 S.W.2d 123 (1944) and *State ex rel. Laclede Gas Co. v. Public Service Commission***,** 600 S.W.2d 222, (Mo. App. W.D. 1980). Specifically Staff states:

> "The Commission's principal interest is to serve and protect ratepayers. State ex rel. Crown Coach Co. v. Pub. Serv. Com'n, 179 S.W.2d 123, 126 (1944). The history of regulation over utility monopolies "….has been one of a continued balance between preserving the existence and integrity of the utility so it might continue service to the users, and protection to the users and ultimate ratepayers against unwarranted costs for utility services." State ex rel. Laclede Gas Co. v. Public Service Commission**,** 600 S.W.2d 222, 228 (Mo. App. W.D. 1980)." (Staff's Memorandum in Opposition to Respondents' Joint Motion for Summary Determination and Legal Memorandum and Intervenor's Legal Memorandum p.2)

Staff neglected to include the entire quotation from *Laclede* perhaps because it refutes Staff's argument. That paragraph in its entirety reads:

> "While it is correct that utilities operate within our free enterprise system, the courts remain mindful that these same utilities are, in fact, by their nature monopolies. The history of regulation of such monopolies has been one of a continued balance between preserving the existence and integrity of the utility so it might continue service to the users, and protection to the users and ultimate ratepayers against unwarranted costs for utility services."

*State ex rel. Laclede Gas Co. v. Public Service Commission***,** 600 S.W.2d 222, 226 (Mo. App. W.D. 1980).

The Public Service Commission's mission is to protect citizens from true public utilities that operate as state sanctioned natural monopolies together with the potential negative pricing power those monopolies could exercise if they remained unchecked. See also *Laclede:* "The P.S.C. derives its authority exclusively from the legislature. The first P.S.C. law was enacted in 1913 under SB 1, Mo. Laws Sec. 1-140 (1913) and from its inception, the courts have recognized the purpose of such enactment to be the protection for the consuming public against the public utilities as ***natural monopolies***." *Laclede* at 226 (Emphasis added). Rental properties are neither public utilities, as determined by the *Danciger* line of case law discussed above, or natural monopolies.

A natural monopoly is a market where, for technical or social reasons, there cannot be more than one efficient provider of a good.[3] Another definition of natural monopoly is "a type of monopoly that exists as a result of the high fixed or start-up costs of operating a business in a particular industry."[4] As such, true public utilities like electric and water and sewer corporations -- as the general public would accept as the meaning of such organizations -- are always cited as prime examples of natural monopolies.

[3] http://economics.about.com/cs/economicsglossary/g/naturalmonopoly.htm

[4] http://www.investopedia.com/terms/n/natural_monopoly.asp

Rental properties on the other hand do not fall within the definition of natural monopolies. The establishment of a rental property operation does not have a prohibitive startup cost nor does the establishment of multiple rental properties within a particular market cause inherent market inefficiencies or create destructive competition which might result in injury to the public-- as would be the case for true public utilities. The proof that rental properties do not operate as monopolies can easily be established by the sheer number of such properties that operate throughout the state. From single-family home rentals to commercial office properties to multiunit apartment buildings, hundreds of thousands of such properties operate throughout Missouri. Obviously many of these rental properties operate within the same markets. The same cannot be said for the number of organizations operating as true public utilities.

Because there are so many rental properties operating in any given area of the state at one time it is impossible for any of these rental operators to establish monopoly market power and/or pricing. If a potential renter seeks to rent from a particular property and upon being notified that per the lease they will be responsible for paying the expenses for the utilities that they use and for paying a fee which supports the billing for such utility use, the potential renter who does not wish to agree to that arrangement can easily find similar rental accommodations with different utility payment arrangements within a close distance of the originally shopped property. By any measure such a situation is an open and competitive consumer driven free market, not one in which the legislature would have considered the need to regulate the business operations of an organization due to monopoly market power. For these reasons, rental properties are not natural monopolies and as such were not intended by the legislature to fall within the rate review jurisdiction of the Public Service Commission.

The Missouri courts have clearly stated that the purpose of establishing the Commission and granting it jurisdiction and rate review powers over public utilities is to protect the consuming public against the negative market control and pricing powers of natural monopolies. It has been demonstrated above due to extreme market competition and the wide range of rental property type and company options from which consumers can choose in all markets singular rental properties are by no definition natural monopolies. As the legislature established the Commission to protect the public against natural monopolies and rental properties are not natural monopolies Staff's argument for Commission jurisdiction over rental properties must fail.

Conclusion:

For the reasons stated herein, the Commission should grant the Respondents' Joint Motion for 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 15th day of December, 2010, to the following:

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