

**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, Barry Howard, Aspen Woods Apartments, Sapal Associates, Sachs Investing Co., Michael Palin, Jerome Sachs, and National Water & Power, Inc.  
  
Respondents.

**Case No. WC-2010-0227**

**STAFF’S RESPONSE TO THE APPLICATION TO INTERVENE BY THE NATIONAL APARTMENT ASSOCIATION AND MOTION FOR EXPEDITED CONSIDERATION**

COMES NOW the Staff of the Missouri Public Service Commission (Staff), by and through the undersigned counsel, and respectfully requests that the Commission deny the National Apartment Association’s (NAA) October 19, 2010 application to intervene. The Staff objects to the application on four grounds: timing of the application, lack of good cause, prejudice to the Staff and the NAA’s opportunity to raise any interest in the matter as an *amicus curiae*.

**Timing of the Application**

Pursuant to 4 CSR 240-2.075 (1), “[a]n application to intervene...shall be filed within (30) days after the Commission issues order giving notice of the case, unless otherwise ordered by the commission.” On February 2, 2010, the Commission issued its *Order Giving Notice Of Complaint and Directing Answer (Order)*. The Commission did not issue a differing intervention schedule in that *Order*, nor in any other subsequent Commission order in this case. Now, after observing the case and allowing more than 258 days to pass, the NAA wishes to

intervene in the matter; after the Staff has participated in initial discovery and settlement conferences with the Respondents Aspen Woods Apartment Associates (Aspen Associates) and National Water & Power, Inc. (NWP). The Commission should deny the NAA's application based on NAA's lack of timeliness.

#### Lack of Good Cause

“Intervention is the process whereby a stranger becomes a full participant in a legal action.” *In the Matter of Atmos Energy Corporation*, 2010 WL 1838782 (Mo. P.S.C., 2010), citing *Ballmer v. Ballmer*, 923 S.W.2d 365, 368 (Mo. App. 1996). “Due process requires that any person with a life, liberty or property interest that will be affected by the outcome of a legal matter be permitted to intervene upon timely application.” *Id.*, citing U.S. Constitution, Amendment XIV; Missouri Constitution, Article I, Section 10 (1945). Such persons have a right to intervene; however, even persons with a right to intervene must exercise that right in good time and in accordance with established procedures.” *Id.*, citing *Ballmer*, 923 S.W.2d at 368. The NAA has failed to meet the Commission's established procedures.

Rule 4 CSR 240-2.075 governs intervention before the Commission. The Commission may grant an untimely application to intervene should the applicant show good cause. *See* Rule 4 CSR 240-2.075(5). “Although the term ‘good cause’ is frequently used in the law, the rule does not define it.” *In the Matter of Atmos Energy Corporation*, 2010 WL 1838782, citing *State v. Davis*, 469 S.W.2d 1, 5 (Mo. 1971). “Therefore, it is appropriate to resort to the dictionary to determine its ordinary meaning.” *Id.*, citing *State ex rel. Hall v. Wolf*, 710 S.W.2d 302, 303 (Mo. App. E.D. 1986) (in absence of legislative definition, court used dictionary to ascertain the ordinary meaning of the term “good cause” as used in a Missouri statute). Black's Dictionary states that good cause “generally means a substantial reason amounting in law to a legal excuse

for failing to perform an act required by law.” *Id.*, quoting *Black's Law Dictionary* 692 (6th ed. 1990). “Similarly, ‘good cause’ has been judicially defined as a ‘substantial reason or cause which would cause or justify the ordinary person to neglect one of his [legal] duties.’” *Id.*, quoting *Graham v. State*, 134 N.W. 249, 250 (Neb. 1912). “Missouri appellate courts have also recognized and applied an objective ‘ordinary person’ standard.” *Id.*, quoting *Cent. Mo. Paving Co. v. Labor & Indus. Relations Comm'n*, 575 S.W.2d 889, 892 (Mo. App. W.D. 1978) (“[T]he standard by which good cause is measured is one of reasonableness as applied to the average man or woman.”).

“Of course, not just *any* cause or excuse will do. To constitute *good* cause, the reason or legal excuse given ‘must be real not imaginary, substantial not trifling, and reasonable not whimsical.’” *In the Matter of Atmos Energy Corporation*, 2010 WL 1838782 (Mo. P.S.C., 2010), quoting *Belle State Bank v. Indus. Comm'n*, 547 S.W.2d 841, 846 (Mo. App. S.D. 1977). “And some legitimate factual showing is required, not just the mere conclusion of a party or his attorney.” *Id.*, citing *Haynes v. Williams*, 522 S.W.2d 623, 627 (Mo. App. E.D. 1975). But, here, the NAA failed to provide any reason or legal excuse for failing to meet the rules of the Commission. So, the Commission must deny the NAA’s application to intervene. To find otherwise would in effect render the Commission’s “good cause” requirement meaningless.

#### NAA’s Interest in This Case

The Staff asserts that the Commission should deny the NAA’s application to intervene upon the association’s failure to show good cause. No further deliberation is necessary. But, even if the Commission was to deliberate further and consider the NAA’s alleged interests in this case, the NAA has failed to demonstrate an interest upon which the Commission may grant

relief. Pursuant to Commission Rule 4 CSR 240-2.075(4), the Commission may grant intervention to the NAA upon the showing: “....(A) The proposed intervenor has an interest which is different from that of the general public and which may be adversely affected by a final order arising from the case; or (B) Granting the proposed intervention would serve the public interest.”

First, for part (A), the NAA’s application provides two general interests as support: (1) protection of the lease contract and addendum developed by the NAA and used by the Respondents in this case; and (2) the NAA’s members ability to contract with prospective residents of their properties.” The NAA correctly acknowledges that the Staff filed its *Complaint* against the Respondents on or about January 29, 2010. As part of the Staff’s January 2010 *Complaint*, the Staff attached as an exhibit a lease contract between a tenant of Madison at Aspen Woods and Aspen Associates. The Staff also attached the utility addendum associated with that lease contract. As part of the Staff’s *Amended Complaint*, the Staff again attached the contract and addendum from the Madison at Aspen Woods tenant, but also a contract and addendum from a tenant of Madison at Seven Trails.

The NAA has acknowledged in paragraph three (3) of its application that it closely monitors the activities in each state and consults with local counsel. What the NAA fails to explain is if the exhibits in Staff’s *Amended Complaint* caused such concern over intellectual property, why the same documents in the Staff’s January 2010 *Complaint* did not cause the same concern and request for intervention. The NAA’s actions, or lack thereof, do not support its now alleged “concern.”

Further, the NAA incorrectly states “at issue in this case are two of the leasing forms that NAA publishes in Missouri.” Neither the Staff’s *Complaint*, nor the *Amended Complaint*, asserts any claims of action against the NAA or its contract and addendum. The Staff used the documents to show the contractual relationship and assignment of responsibilities between the tenant, Aspen Associates, and National Water & Power, Inc. (NWP). What this case is about is the fact that the Respondents have either individually and/or jointly owned, operated, controlled, and/or managed a public utility by charging new account fees, late fees, expedited handling fees, non-sufficient fund fees and other arbitrary fees, among other activities. Such activity is not simply a landlord’s or billing company’s pass through of utility expense incurred from tenants’ utility usage. A Commission order granting the relief requested by the Staff in its *Complaint* or *Amended Complaint* would not prevent “professional management companies” or “owners” from employing the use of NAA’s contracts. And, such relief would not prevent an owner from employing a billing system, RUBS method and/or sub-metering system to pass through only the utility costs incurred by the property owner for the residents’ utility usage.

Second, as to part (B), the NAA asserts in paragraph eleven (11) of its application that its participation in this proceeding “will present a broader perspective of the rental housing industry not otherwise represented in the proceeding and, as such, will provide the Commission with the position of an important sector of Missouri’s economy.” Again, the NAA attempts to change the issue that is before the Commission. Perhaps it is true that the NAA’s members could present broader perspectives on the use of its contracts, or how owners and professional management companies use billing systems, a RUBS method, or sub-metering systems within their businesses. But, those issues are not before the Commission. The Staff’s *Complaint* and *Amended Complaint* are requesting that the Commission review the Respondents’ activities,

among them the billing of extra fees, and determine that through those actions the Respondents are acting as public utilities. No “broader perspective” is necessary for the Commission to consider this issue within its primary jurisdiction and expertise.

Prejudice to the Staff and NAA’s Alternative For Amicus Curiae

Allowing the NAA to intervene at this time would prejudice the Staff. While the Staff asserts that the discovery period is not closed, the Staff has participated in discovery since January 2010 for the development of its case. The current parties have also discussed their positions during the settlement conferences held in August 2010. Allowing a party to intervene at this late time could delay the procedural timeline ordered by the Commission. The Staff has no knowledge of the NAA, the listed members the association represents, nor the exact position(s) the NAA will take in this proceeding. Should the NAA become a party, the Staff will need to complete additional discovery, the extent of which is unknown at this time.

In addition to the various reasons stated above, the Commission should deny the NAA’s application because the association can apply for leave to file a brief as an amicus curiae. Through this forum, the NAA could provide its “broader perspective” to the Commission through a brief, without delaying resolution of this case. Rule 240-2.075 (6) provides that “[a]ny person not a party to a case may petition the commission for leave to file a brief as an *amicus curiae*.”

**WHEREFORE**, the Staff submits this response for the Commission’s information and consideration, and prays for the Commission to deny the *Application To Intervene By The National Apartment Association And Motion For Expedited Consideration*.

Respectfully submitted,

**/s/Jennifer Hernandez**

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### **CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the above was served upon the attorneys of record via electronic mail to Lowell D. Pearson, attorney for Aspen Woods Apartment Associates, LLC, at [lowell.pearson@huschblackwell.com](mailto:lowell.pearson@huschblackwell.com); Craig S. Johnson, attorney for National Water & Power, Inc., at [craigsjohnson@berrywilsonlaw.com](mailto:craigsjohnson@berrywilsonlaw.com); Paul A. Boudreau and John McDermott, attorneys for the National Apartment Association, at [paulb@brydonlaw.com](mailto:paulb@brydonlaw.com) and [jmcdermott@naahq.org](mailto:jmcdermott@naahq.org); and the Office of the Public Counsel at [opcservice@ded.mo.gov](mailto:opcservice@ded.mo.gov) this 25<sup>th</sup> day of October 2010.

**/s/ Jennifer Hernandez**