

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

In The Matter of The Joint Application of)	
South Jefferson County Utility Company and)	
the Summer Set Property Owners Association for)	Case No. WD-2006-0157
Cancellation of a Certificate of Convenience and)	
Necessity and Associated Tariff Sheets.)	

**RESPONSE OF JOINT APPLICANTS
TO ORDER DIRECTING FILING**

COMES NOW South Jefferson County Utility Company ("Company" or "SJCUC" hereafter) and the Summer Set Property Owners Association¹ ("Association") and, for their Response to the Commission's "Order Directing Filing" with an issue/effective date of November 23, 2005, set forth the following:

1. On October 11, 2005, Joint Applicants SJCUC and the Association filed their Joint Application to cancel the Certificate of Convenience and Necessity ("Application") originally issued to SJCUC for operation of a water and sewer service utility for residents of the Summer Set property development, and simultaneously requested this Commission to approve the transfer of SJCUC's assets to the Association in order to allow the Association to assume full authority to operate the water and sewer service henceforth without being subject to the Commission's jurisdiction. Joint Applicants assert that the Association will not, under the circumstances set forth, be acting as a

¹The Commission's previous orders in this matter have erroneously identified the Association as "Summer Sea Property Owners Association".

“water corporation” or “sewer corporation” under the relevant definitions in section 386.020, RSMo., and thus will not be subject to the Commission’s jurisdiction.

2. On November 1, 2005, the Commission Staff filed its recommendation in support of the Application. In so doing, Staff noted several factors weighing in favor of granting the relief requested in the Application. Among these factors, Staff noted that the Association owns all shares of the stock issued in SJCU’s name; that all customers of the utility are members of the Association and that the Association will operate the utility only for the benefit of Association members; that the Association has in the past and currently controls the day-to-day operations of the utility, including the issuance of monthly billings, and that there will thus be no changes regarding the operation and management of the utility; and, that upon approval of the Application, SJCU’s assets will be transferred to the Association and SJCU will be dissolved.

3. Upon review of the Application and Staff’s Recommendation, the Commission issued its “Order Directing Filing” with an issue and effective date of November 23, 2005, to which the instant pleading responds. In its Order, the Commission questions a key legal issue concerning the Association’s status as a regulated utility, that being whether the Association operates the disputed water and sewer utility “for gain.” Joint Applicants assert that because the Association is organized as a not-for-profit corporation, and because it has and will continue to provide utility service only to customers who are members of the Association and to no other customers, it is not operating “for gain” and thus does not meet the relevant definition of either a “water corporation” or “sewer corporation” under section 386.020, RSMo.

4. The Commission further notes the enactment of statutes authorizing creation of the entities of “nonprofit water company” and “nonprofit sewer company”², and appears to suggest that the Association should convert itself to these entities, if it has not already done so. Accordingly, the Commission has directed Joint Applicants to “supplement the record . . . by filing a verified statement indicating whether or not Summer Sea [sic] Property Owners Association is a nonprofit water corporation or a nonprofit sewer corporation . . .”.

Response

In response to the Commission’s specific request for supplementation of the record in this matter, Joint Applicants hereby advise that the Summer Set Property Owners Association is neither organized as a nonprofit water company, nor as a nonprofit sewer company pursuant to the relevant provisions of Chapter 393, RSMo. However, for the reasons which follow, Joint Applicants do not believe that it is necessary under the present circumstances for the Association to be organized as either of these particular “nonprofit” entities in order to accomplish the stated objective of allowing the Association to operate the utility independent of Commission jurisdiction.

In a previous matter, this Commission has approved a substantially identical application involving the same facts, issues, and objectives as are presented by the present Application. The Commission, in *In the Matter of the Application of Rocky Ridge Ranch Property Owners Association*, Case Nos. WM-93-136 and WD-93-307, ultimately approved the transfer of all assets of the previous regulated utility company to the homeowners’ association and canceled the certificate of convenience and necessity under which the association had operated, once the association confirmed to the Commission that there were no customers of the association’s utility service who

²Sections 393.825, RSMo. Supp. 2005 *et. seq.* and sections 393.900, RSMo. Supp. 2005 *et. seq.*

were not also members of the association.³ Notably, the Commission also set forth three specific factors to use in determining whether an association is being operated “not for gain”, and thus whether the association is “legitimate” for purposes of allowing it to operate as a utility independent of Commission jurisdiction. These factors, adopted by the Commission based on the suggestions of Staff, are as follows:

- 1) [The association] must have as membership all of its utility customers, and operate the utility only for the benefit of its members;
- 2) [The association] must base the voting rights regarding utility matters on whether or not a person is a customer, as opposed to, allowing one (1) vote per lot which would not be an equitable situation if one (1) person owned a majority of lots irrespective of whether each of those lots subscribed to the utility service; and
- 3) [The association] must own or lease the utility system so that it has complete control over it.

See “Order Denying Request for Public Hearing and Cancelling Certificate of Convenience and Necessity”, Case No. WD-93-307 (effective July 20, 1993) at p. 2.

In the *Rocky Ridge* matter, it was necessary for the association to amend its bylaws in order to assure that the association would only be providing utility service to its members; after the necessary amendments were made (i.e. eliminating a dues requirement and making all property owners eligible for membership in the association, and allowing any association member/water customer to vote on matters involving the utility) the Commission found the above enumerated factors to have been met, and approved cancellation of the certificate of convenience and necessity. The Commission summarized its approval as follows:

“Pursuant to those changes, the Commission finds that the Property Owners Association does and will only provide water service to members of the Association.

³*See* “Order Denying Request for Public Hearing and Cancelling Certificate of Convenience and Necessity”, Case No. WD-93-307 (effective July 20, 1993).

As such, [the association] does not qualify as a "water corporation" as defined by 386.020(51) RSMo. 1992. For this reason, the Commission finds that it may no longer exercise jurisdiction over [the association] . . . the Commission further makes the finding that it would not be detrimental to the public interest for the Certificate of Public Convenience and Necessity herein to be cancelled."

See Order, id. at p. 4.

In the present matter, the first and third enumerated factors are clearly in place to be met by the Summer Set Property Owners Association at the present time. Specifically: the Association operates, and will continue to operate, the water and sewer utility only for the benefit of its members, and all utility customers served by the Association are in fact members of the Association; and, the Association currently owns all shares of SJCU and will, upon approval of the pending Application, purchase all utility assets of SJCU, thus giving complete ownership and complete control of the utility to the Association.

As to the second factor, the Association concedes that at present its bylaws provide for "one vote per lot owned" without distinguishing between different types of matters or issues before the Association. However, it would be a very simple matter for the Association to make the necessary amendments to its bylaws, as was done in the *Rocky Ridge* matter, and in any case Joint Applicants would suggest that this is a far more expedient and cost-effective means of attaining the desired objectives than by the creation of new corporate entities.

Thus, Joint Applicants assert that the Association in the present matter currently meets, or could, with a minor amendment to its bylaws, easily meet the three (3) factors which are relied on by the Commission in determining the relevant issues presented. In short, there is no material distinction between the facts and record of the present Application which would dictate any different treatment or outcome than was accorded in the *Rocky Ridge* matter. The Joint Applicants herein are

willing to provide the Commission with any additional data or information (including the referenced amendment to its bylaws) which may be necessary to assure the Commission that it may release the Association from its regulatory jurisdiction and cancel the disputed Certificate.

Further, Joint Applicants respectfully disagree with the Commission's reading of the *Miller County Water Authority* case⁴ in respect to what is meant by the phrase "for gain" in the statutory analysis surrounding whether a water or sewer utility is subject to the Commission's jurisdiction. On this point the Commission finds that case to hold that essentially any compensation to a not-for-profit entity providing utility service only to its members means that the entity is operating "for gain" and thus will always be subject to the Commission's jurisdiction. However, the facts and evidence which were at issue in the *Miller County Water Authority* case, as well as the cases relied on by the Southern District in reaching its conclusion, are distinguishable from and inapplicable to the facts and issues presented by the current Application.

First, in finding the defendant/respondent to be a "water corporation", and thus subject to the Commission's regulatory jurisdiction, the Southern District in *Miller County* relied heavily on testimony introduced in proceedings below which "suggested that Defendant has undertaken the responsibility to provide water service to everyone within its capability, not merely for particular persons." See 950 S.W.2d at 575 (emphasis added). Based on this testimony and other evidence, the appellate court concluded that Miller County Water Authority's actions "suggest that it has undertaken the responsibility to provide water service to all members of the public within its capabilities . . . [w]e believe therefore that Defendant's service has been devoted to public use." *Id.*;

⁴*Osage Water Co. v. Miller County Water Authority, Inc.*, 950 S.W.2d 569 (Mo. App. S.D. 1997).

citing *State ex rel. M. O. Danciger & Co. v. Public Service Comm'n.*, 205 Mo. 36, 40 (Mo. banc 1918).

As the record in this case has already established, the Summer Set Property Owners Association does not hold itself out to offer any water or sewer utility service to the general public or indeed to any persons other than those particular persons who are residents of the Summer Set subdivision and who are members of the Association. The utility service provided by the Association extends only to residents of the Summer Set development, who are, by definition⁵, members of the Association. There can therefore be no assumption that the Association exists to serve any customers except those customers who are its members. The Association has no desire to extend its utility service beyond these customers, and certainly has never represented itself to be capable of serving the “general public”.

For these same reasons the appellate cases and other authorities relied on by the Court in *Miller County* are inapposite, as they all rely on the principle of an entity professing or furnishing utility service to the “general public”⁶ or “all members of the public”⁷ in reaching a determination that the entity under examination was susceptible to public regulation. In short, nothing contained in the *Miller County* holding should prohibit the Commission from granting the relief sought by the Joint Applicants in their pending Application.

⁵Article II of the Association’s bylaws states that “[a]ll lot owners of Summer Set Subdivision, Sections 1,2,3,4,5,6,7,8 & 9 are members of the [Association].”

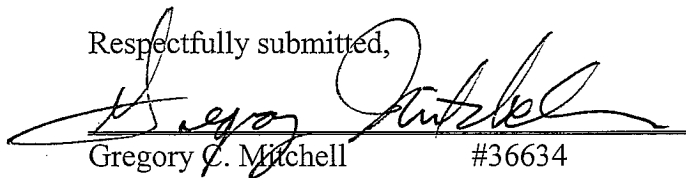
⁶*State ex rel. M. O. Danciger & Co. v. Public Service Comm’n.*, 205 Mo. 36, 40 (Mo. banc 1918).

⁷*City of Englewood v. City & County of Denver*, 229 P.2d 667, 672-73 (Colo. banc 1951).

As a final note, none of the officers, directors, or staff of the Association derive any income or other "compensation" whatsoever from the operations of the water and sewer utility. Inasmuch as possible, this utility is operated with the goal only of covering its costs for operation, maintenance, and, as needed, construction of new lines or facilities to maintain the quality of service being provided. Therefore, there is no "compensation" of the Association or its principals for its operation of the utility, given any accepted definition of that term. The Association makes no "gain" from operating the utility, other than the convenience its members derive from the provision of ongoing reliable water and sewer service.

WHEREFORE, for all of the above-stated reasons, Applicants jointly request that the Commission cancel the Certificate of Convenience and Necessity issued in its Case No. 17,787 and associated tariffs; and, that it approve the Association's operation of the referenced water and sewer service solely for private purposes independent of the Commission's regulatory jurisdiction; and, for such other orders and relief as may be deemed necessary and appropriate in the circumstances.

Respectfully submitted,



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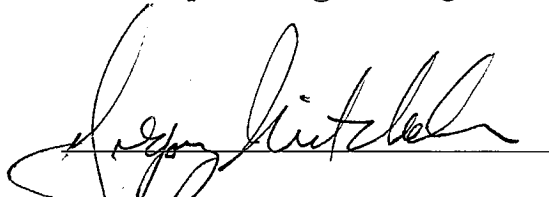
Attorneys for Joint Applicants South Jefferson County Utility
Company and the Summer Set Property Owners Association

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing document was delivered by electronic mail, first class mail or by hand delivery, on this ____ day of December, 2005 to the following:

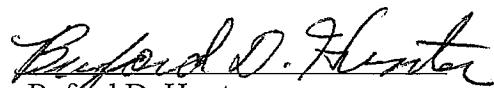
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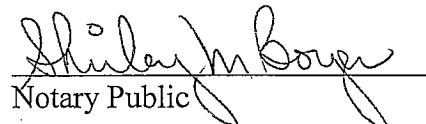

VERIFICATION

STATE OF MISSOURI)
) ss
COUNTY OF)
 Jefferson

I, Buford Dale Hunter, having been duly sworn upon my oath, state that I am President of South Jefferson County Utility Company; that I am duly authorized to make this Affidavit on behalf of South Jefferson County Utility Company; and that the matters and things stated in the foregoing Application are true and correct to the best of my information, knowledge and belief.


Buford D. Hunter

Subscribed and sworn to before me this 15th day of December, 2005.


Notary Public

My Commission expires:

Feb 08, 2007
STATE OF MISSOURI)

COUNTY OF

Jefferson

) ss

)

I, Robert F. Avery, having been duly sworn upon my oath, state that I am President of the Summer Set Property Owners Association; that I am duly authorized to make this Affidavit on behalf of the Summer Set Property Owners Association; and that the matters and things stated in the foregoing Application are true and correct to the best of my information, knowledge and belief.

Robert F. Avery
Robert F. Avery

Subscribed and sworn to before me this 15th day of December, 2005.

Shirley M. Boyer
Notary Public

My Commission expires:

Feb 08, 2007