BEFORE THE PUBLIC SERVICE COMMISSION
STATE OF MISSOURI

The Staff of the Missouri Public Service Commission,,	)	
Complainant,	)	
v.	)	**Case No. WC-2010-0227**
Aspen Woods Apartments Associates, LLC, And National Water & Power, Inc.	)	
Respondents.	)	

STAFF'S RESPONSE IN OPPOSITION TO ASPEN WOODS APARTMENT ASSOCIATES, LLC'S MOTION FOR ATTORNEY'S FEES AND EXPENSES

COMES NOW the Staff of the Missouri Public Service Commission, by and through the undersigned counsel, and for its *Response In Opposition to Aspen Woods Apartment Associates, LLC's Motion For Attorney's Fees and Expenses* states as follows:

1. On October 29, 2010, Respondent Aspen Associates filed its *Notice of Intent to Seek Attorneys Fees and Expenses*, advancing therein the novel theory that the Staff's act of bringing its *Complaint*[1] against the several Respondents constitutes the unlawful and unauthorized promulgation of a rule.

2. On February 14, 2011, Aspen Associates filed its *Motion For Attorney's Fees and Expenses* (*Motion*). The *Motion* requests that the Commission issue an Order awarding Aspen Associates $53,145.06 in fees and expenses incurred through January 31, 2011, and the resulting fees and expenses incurred for this *Motion*.

[1] Staff filed a Motion for Leave to Amend the Complaint, which was granted on October 19, 2010 and use of the term "Complaint" includes the Amended Complaint filed in this case.

3. Aspen Associates relies on § 536.021 (9), RSMo (Supp. 2009), which provides, in part, that fees and expenses may be awarded where an agency has taken an action "….based upon a statement of general applicability which should have been adopted as a rule . . . ."

4. The Staff opposes the *Motion* on the following grounds: (A) the Staff's *Complaint* is not based on a statement of general applicability that is a rule; (B) the Staff's *Complaint* is substantially justified by the law and specific facts of Aspen Associates' conduct; (C) Aspen Associates' is not a "prevailing party"; and (D) there is no "amount in controversy" in the Staff's *Complaint*, only a request to seek penalties for the Respondents' behavior after an evidentiary hearing and Order from the Commission finding Aspen Associates engaged in the conduct of distributing potable water and providing sewage collection for gain.

A. The Staff's *Complaint* is Not Based On a "Statement of General Applicability That is a Rule"

5. "Rule" does not include "[a] determination, decision, or order in a contested case…." Section 536.010 (6)(d), RSMo (2000).

6. Section 536.021.9, RSMo (2000), "should not be taken as precluding the development of administrative common law in the shape of the 'rule of the case' as so often happens in the course of specific adjudications." 20 Mo. Prac., § 7:24 (4th ed.).

7. "If the legislature intends that rulemaking be mandatory in lieu of adjudication, it should be required to be explicit in doing so when departing so dramatically from customary administrative law principles." *Id.* "Importantly, the [Missouri Administrative Procedure Act] MAPA already recognizes that 'rules of the

case' are not considered of general application and are expressly excluded from the MAPA's definition of rule." *Id.*, and *see generally supra* § 5:21 and *infra* § 8:7.

8. Even if an agency does develop a new principle of law in adjudication, it will not be deemed rulemaking subject to the rulemaking procedures of the MAPA. In *Greenbriar Hills Country Club v. Director of Revenue*, also cited in Aspen Associates' *Motion*, the Court noted that the situation in the case was not one where "the agency was adjudicating a particular controversy into a precedent defining policy." 47 S.W.3d 346, 357 (Mo. banc 2001). This point "confirms the continuing vitality of the legitimacy of the process of the development of new agency policy in the course of adjudication." 20 Mo. Prac., § 5:21 (4th ed.). *See also Securities and Exch. Comm'n v. Chenery Corp.,* 332 U.S. 194 (1947).

9. In this case, the Staff is pursuing a complaint that may result in a new principle of law or policy based on the facts included in the *Complaint*, but it is not, as Aspen Associates argues in its *Motion*, asking the Commission to "make a statement of general applicability that implements, interprets, or prescribes law or policy…." *Motion* at 3.

10. "The 'rule' of the contested case must be based on the evidence of record in the case." 20 Mo. Prac., § 5:21 (4th ed.). The Commission can establish a new standard by making a decision that adjudicates "based on the facts of the case being considered." *State ex rel. Beaufort Transfer Co. v. Public Service Commission* 610 S.W.2d 96, 100 (Mo. App. 1980). In this case, Staff's *Complaint* is based upon specific facts involved and is not creating a formula of general application that would have the effect of a rule.

11. The court in *Beaufort* found that the Commission could not use a mileage formula of general application for its decision that "has the effect of a rule *and which does not adjudicate based on the facts of the case being considered*." 610 S.W.2d 96, 100 (Mo. App. 1980) (emphasis added), 20 Mo. Prac., § 5:21 (4th ed.). Aspen Associates theory that the Staff based its *Complaint* on a "statement of general application that is a rule" fails because the Staff's *Complaint* asks for adjudication based on the facts of Aspen Associates' utility behavior.

12. Also, Aspen Associates' theory fails because the "statement of general application" in this case is statutory; Section 393.170 (1), RSMo (2000), provides that those water and/or sewer corporations, as defined in Sections 386.020 (49) and (50) (Supp. 2009), who engage in the conduct of distributing potable water and providing sewage collection for gain must first seek a certificate of convenience and necessity from this Commission and submit thereafter to regulation pursuant to the Public Service Commission Law. No rule is required to act on this authority.

13. The Staff does not attempt to extend the Commission's jurisdiction within its *Complaint* and *Amended Complaint* beyond the authority granted to it by the legislature. Aspen Associates attempts to depict the Staff's analysis of a "public utility" as based on the type of entity, i.e., apartment complex. The Staff investigates complaints and provides recommendations to the Commission on its statutes and rules pursuant to Section 386.240, RSMo. However, the Staff's analysis focuses not on the fact that the Respondent Aspen Associates' owns, operates, controls, and/or manages apartment complexes, but on the framework of the operation.

14. Repeatedly, the Staff asserted as part of various filings the focus of not regulating landlords or apartment complexes, but the conduct of the said entities' operation when it becomes that of a public utility. *See Staff's Response To National Water & Power's Suggestions In Opposition To Amended Complaint* at page 5:

> The Respondent NWP frames the "threshold issue" in this case incorrectly. The issue is not whether the Commission should regulate landlords, nor "whether apartments, wherein the landlord passes on its utility expense to tenants, are subject to regulation by this Commission." A landlord's pass through of fees is allowed by the Commission; however, new account fees, late fees, expedited handling fees, nonsufficient fund fees, and other additional fees are not "utility expense", but are arbitrary fees never approved by the Commission as just and reasonable charges for utility services;

Staff's Response To Aspen Woods Apartment Associates, L.L.C.'s Opposition To Motion For Leave To File Amended Complaint at page 6:

> The Respondent Aspen Associates also frames the "threshold issue" in this case incorrectly. The issue is not whether the Commission should regulate landlords, nor whether the Commission allows a utility expense pass through. A landlord's pass through of utility fees is allowed by the Commission; however, new account fees, late fees, expedited handling fees, non-sufficient fund fees, and other additional fees are not "utility expense", but are arbitrary fees never approved by the Commission as just and reasonable charges for utility services;

Staff's Response To The Application To Intervene By The National Apartment Association And Motion For Expedited Consideration at page 5:

> 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;

and *Staff's Memorandum In Opposition To Respondents' Joint Motion For Summary Determination And Legal Memorandum And Intervenor's Legal Memorandum* at page 5:

> Applicable to the Respondents, the Commission's jurisdiction extends to those that conduct business as a public utility through the billing and collection of not only a commodity fee, but additional fees (such as new account fees, late fees, expedited payment fees and an insufficient funds fee), as well as offering service hotlines to answer customers billing questions and other questions including dispute resolution. In this case, the Respondents use of a billing vendor should be subject to the same review as other public utilities regulated by the Commission. The Respondents' allocation to tenants is not just a simple pass through.

15. The Staff discovered the Respondents' activities as described in the *Complaint* after receiving calls from customers reporting the activity. Thereafter, pursuant to Section 386.240, RSMo, the Staff engaged in an investigation into the particular conduct of Aspen Associates', and from which the Staff based its *Complaint.* The Staff investigates any framework of operation that appears to function as a public utility, regardless of the physical structure of the owner, albeit an apartment complex, mobile home park, subdivision, or home/property owner's association.

16. Should the *Complaint* continue to evidentiary hearing in this matter, the Commission will adjudicate the matter based on the specific facts of the case as applied to the governing statutes and case law. As such, the Staff's *Complaint* is not based on a "statement of general applicability that is a rule."

B. The Staff's Complaint is Substantially Justified by the Law and Specific Facts of Aspen Associates' Conduct

17. As stated above, the Staff conducted an investigation into Aspen Associates' specific conduct.

18. The Staff's *Complaint* was substantially justified by the case law on point, summarized here and as fully set forth in the *Staff's Memorandum In Opposition To Respondents' Joint Motion For Summary Determination and Legal Memorandum And Intervenor's Legal Memorandum.*

19. Aspen Associates argues that the 1918 case of *In State ex rel. M.O. Danciger & Co. v. P.S.C. of Mo*., 205 S.W. 36, and the 1944 case of *State ex rel. Cirese v. P.S.C of Mo*., 178 S.W.2d 788, have settled the question of Aspen Associates' conduct in the Staff's *Complaint.* While a difference of opinion exists between Aspen Associates' and the Staff, that does not negate the fact that the Staff's *Complaint* is substantially justified by the body of case-law, in particular, *Hurricane Deck Holding Co. v. Public Serv. Com'n*, 289 S.W.3d 260 (Mo. App. W.D. 2009).

20. The court in *Hurricane Deck* held that the Commission did not err in finding that Hurricane Deck was operating as a public utility subject to its regulation. The court reviewed the Commission's order in that case, which stated:

> The key fact in that by sending out bills to the residents, Hurricane Deck Holding Company offered service to all residents of the given subdivisions. It is *not purporting to merely offer services to a few friends*. By offering water and sewer utility services to the public, even if that public is confined to the residents of a few subdivisions, Hurricane Deck Holding Company has made itself subject to regulation as a public utility.

Hurricane Deck, S.W.3d at 262. (emphasis added). Additionally, the court explained that:

> Under *Osage Water* and *Cirese*, Hurricane Deck could constitute a "public utility," even though its services were limited to the two subdivisions in which its water and sewer systems were located, where it offered service indiscriminately to all persons located within that service area. And that is what the PSC found….

The Staff's *Complaint* alleged that Aspen Associates' have provided water and sewer services to all tenants within the apartment complex, not merely a few friends.

21. While the Respondents did not reference *Hurricane Deck*, they did cite several other cases as applicable including *Osage Water Co. v. Miller County Water*

Auth., Inc., 950 S.W.2d 569, 574 (Mo. App. S.D. 1997), in which Osage Water provided water service to residents of two subdivisions in Camden County, Missouri. The court in *Osage Water* followed *Danciger's* requirement that one must devote a facility to the public use before they are subjected to the Commission's regulation. The court in *Osage Water* found service to the two subdivisions satisfied the *Danciger* test and stated:

> The record is void of any testimony which suggested that Defendant has refused to provide water service to any of the residents in the two subdivisions at issue. Indeed, the testimony suggested that Defendant has undertaken the responsibility to provide water service to everyone within its capability, not merely for particular persons.

Id. at 575.

22. Respondents' also cite *State ex rel. Cirese v. Public Service Commission*, 178 S.W.2d 788 (Mo. App. 1944). The court stated that Cirese was not a public utility "insofar as their facilities and activities are confined to the manufacture, distribution and sale of electrical energy to themselves and to their own buildings and tenants thereof in the manner shown in evidence *Id*. at 790. The court in *Cirese* cites the language "in the manner shown in evidence" from the case of *State ex rel. Lohman & Farmers' Mut. Telephone Co. v. Brown,* 19 S.W.2d 1048, 1049 (Mo.1929).

23. The *Lohman* case is distinguishable from Aspen Associates' conduct. In *Lohman*, the issue was whether a mutual telephone company operating for its members was subject to regulation if a single line was publicly used. The *Lohman* court held only "the company as an owner and operator of the [public] telephone line…and to that extent only, 'is a public utility…within the whole purview and for all inquisitorial and regulatory purposes of the Public Service Commission Act.'" *Id., quoting Danciger*, 205 S.W. at 36.

24. The non-public part of the company was organized as a mutual telephone exchange with several rural lines. "The owners of each party line have an organization of their own, independent of the company, and as such select one of their number to represent them in their relations to and transactions with the company." *Lohman*, 19 S.W.2d at 1048.

25. In regard to cost the Court stated:

> The actual cost of operating and maintaining the exchange is levied against the phones served. There are 195 or 196 altogether, and the average monthly assessment against each is 25 cents. There is no other charge of any kind for the service. The owners of these phones constitute the company, and its property was acquired with a fund made up of membership fees and special assessments paid in by them.

Id. The non-public utility in *Lohman* was not operated as a monopoly, but governed by the users of the service. Not so in regard to Aspen Associates' conduct.

C. Aspen Associates is Not a Prevailing Party Because the Legal Relationship Between the Commission and the Respondents was Altered in the Manner Sought by the Staff and Opposed by the Respondents

26. Section 536.021.9, RSMo, allows non-state agency "prevailing" parties to recover reasonable attorney's fees, if the other statutory requirements are also met.

27. Section 536.021.9 does not define "prevail", but another fee section, Section 536.085, does. Section 536.085 (3) defines "prevails" as "….obtains a favorable order, decision, judgment, or dismissal in a civil action or agency proceeding."

28. In addition to the fact that the Staff's *Complaint* is being held in abeyance, the court in *White v. Missouri Veterinary Medical Board*., 906 S.W.2d 753, 755 (Mo. App. 1995), indicated that "[t]he touchstone of the prevailing party inquiry must be the material alteration of the legal relationship of the parties…"

29. In *White*, the suspension of a veterinary license by the Veterinary Medical Board was challenged by the subject veterinarian. *Id.* at 753. Although the veterinarian prevailed on some of the issues, the Board had prevailed on the ultimate question of disciplining the veterinarian. *Id.* at 756. The Court stated that in this instance, "[a]lthough the Board was not able to prove all the factual allegations claimed as cause for discipline, appellant [veterinarian] did not prevail on the significant issue of the underlying litigation," and "the legal relationship of the parties was altered in the manner sought by the Board and opposed by the appellant." *Id.*

30. Aspen Associates' *Legal Memorandum In Support Of Joint Motion For Summary Determination* states the motion "….is focused upon the lack of the devotion to public use [of the apartment complex] element necessary for jurisdiction of, and regulation by, the Missouri Public Service Commission." *Legal Memorandum* at 3.

31. The Staff's *Complaint* prayed in part:

> ….that the Commission will give notice to the Apartment Respondents [including Aspen Associates] and Respondent NWP as required by law and after hearing, find that some or all of the Apartment Respondents and Respondent NWP are individually and/or jointly a water corporation and a sewer corporation within the intendments of Section 386.020 (49) and (59) RSMo (Supp. 2008), and thus public utilities within the intendments of Section 386.020 (43) RSMo (Supp. 2008) subject to the jurisdiction, regulation and control of this Commission.

The Staff's *Complaint* also prayed:

> that the Commission will give notice to the Respondents as required by law, and after hearing, find that some or all of the Aspen Respondents and Respondent NWP, individually and/or jointly are subject to the Commission's authority to set rates, and determine the just and reasonable rates to charge for Respondents' water and sewer services.

32. On January 13, 2011, pursuant to the Commission's investigatory authority under Chapters 386 and 393, RSMo, issued its *Order Staying Complaint And Opening Workshop* that stated in part:

> ….the Commission will stay this action and open a workshop to allow all stakeholders the opportunity to accurately delineate the full reach of the Commission's jurisdiction and what appropriate regulations and mechanisms are required to ensure safe and adequate utility services are being provided to this segment of Missouri ratepayers at just and reasonable rates.

33. A rulemaking does not advance Aspen Associates' "focus upon the lack of the devotion to public use [of the apartment complex] element necessary for jurisdiction of, and regulation by, the Missouri Public Service Commission."

34. Aspen Associates statement that its "goal of ending the selective prosecution issue" is disingenuous at best, as its *Legal Memorandum* set forth a different goal or focus, and it has not provided any notice suggestions, or a statement of the lack of knowledge thereof, for the identification of parties potentially interested in the workshop proceeding.

35. The Staff's *Complaint* sought for the Commission to find that Aspen Associates' conduct made it a public utility and subject to the jurisdiction of, and regulation by, the Commission. The rulemaking workshops ordered are to establish the Commission's jurisdiction over Aspen Associates' utility conduct, and are intended to determine what appropriate regulation and mechanisms are required to ensure these utility services are provided safe and adequately and at just and reasonable rates.

D. Staff's Complaint Does Not Contain an Amount in Controversy From Which to Base Attorney's Fees

36. There is no amount in controversy within the Staff's *Complaint.* Count Three (III) of the Staff's *Complaint* requests authority to seek penalties in the Circuit Court of Cole County as set forth in Section 386.570, RSMo (2000), and pursuant to Section 386.600, RSMo.

37. Section 386.600 provides, in part that"[a]n action to recover a penalty…or to enforce the powers of the commission…may be brought in any circuit court in this state….and shall be commenced and prosecuted to final judgment by the general counsel…."

38. The *Complaint* is currently in abeyance. As such, the Commission has not made any finding on this count of the Staff's *Complaint*.

39. Any request for fees and expenses under Section 536.021.9, RSMo (Supp. 2009), fails because, under the Commission's statutes, only a circuit court can award "….reasonable attorney's fees incurred prior to the award, not to exceed the amount in controversy in the original action."

WHEREFORE, the Staff submits this Response for the Commission's information and consideration, and requests that the Commission issue an order denying the *Respondent Aspen Woods Apartment Associates, LLC's Motion For Attorney's Fees and Expenses* incurred through January 31, 2011, and any other fees and expenses incurred thereafter, for the WC-2010-0227 case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above was served upon the attorneys/parties of record via electronic mail to Lowell D. Pearson, attorney for Aspen Woods Apartment Associates, LLC, at lowell.pearson@huschblackwell.com; Craig S. Johnson, attorney for National Water & Power, Inc., at cjaslaw.com; Paul A. Boudreau and John J. McDermott, attorneys for the National Apartment Association at paulb@brydonlaw.com and jmcdermott@naahq.org; and the Office of the Public Counsel at opcservice@ded.mo.gov this 24th day of February 2011.

/s/ Jennifer Hernandez