

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

**ASPEN WOODS APARTMENT ASSOCIATES, L.L.C.'S
OPPOSITION TO MOTION FOR LEAVE
TO FILE AMENDED COMPLAINT**

Respondent Aspen Woods Apartment Associates, L.L.C. ("Aspen Associates"), opposes the Motion for Leave to Amend Complaint ("Motion") filed by the Complainant, the Staff of the Missouri Public Service Commission ("Staff"). As grounds, Aspen Associates states as follows:

1. The authority cited in the Staff's Motion as support for the amended complaint is 4 CSR 240-2.080(20), which permits amendment by leave of the Commission. That rule does not require leave to be granted, and it provides no standard for the Commission to apply in considering a motion for leave to amend a pleading.
2. One proffered justification for the amended complaint is that "From discovery documents produced by NWP," Staff now wants to "allege in good faith" that Aspen Associates "owns, operates, controls, and/or manages" apartment complexes the

Staff calls “Madison at Seven Trails” and “Madison at Walnut Creek.” *Motion*, ¶ 3. The Motion fails to specify what discovery response by NWP would warrant that allegation.¹

3. In truth, NWP’s discovery responses do not, in any manner, support the Staff’s claim that it can “allege in good faith that Aspen Associates . . . owns, operates, controls and/or manages” Madison at Seven Trails and Madison at Walnut Creek. NWP’s interrogatory answers identify “Madison at Seven Trails” and “Walnut Creek” as “persons and/or organizations . . . from whom NWP derives revenue in Missouri for water and/or sewer service billing.” *See NWP’s Answers to Complainant’s First Set of Interrogatories to Respondent National Water & Power, Inc., 6/30/2010 Interrogatory 1, page 2, copy attached hereto as Exhibit A.* No other interrogatory answer by NWP establishes Aspen Associates’ ownership, operation, control or management of Madison at Seven Trails, Walnut Creek, or Madison at Walnut Creek, either.

4. Just as with the interrogatory answers, no document produced by NWP supports the claim that Aspen Associates owns, operates, controls and/or manages “Madison at Seven Trails,” “Madison at Walnut Creek,” or “Walnut Creek.” NWP produced a “Master Services Agreement” between NWP and an entity called “Madison Apartment Group” (*copy attached hereto as Exhibit B; relevant references marked*). That document mentions an apartment complex called “Walnut Creek” and one called “Madison at Seven Trails.” The document does not mention Aspen Associates, and it

¹ It is unclear to the undersigned why Staff refers to “Madison at Walnut Creek.” As set forth below, NWP’s discovery refers to a location called “Walnut Creek,” not “Madison at Walnut Creek.”

certainly does not establish any “good faith” basis to allege that Aspen Associates “owns, operates, controls, and/or manages entities called “Madison at Seven Trails” or “Madison at Walnut Creek.”

5. The Staff’s Motion for Leave to Amend further alleges that its motion should be granted to permit it to “allege Aspen Associates and/or an authorized agent contracted with Respondent NWP to provide utility billing services to” entities including “Madison at Seven Trails” and “Madison at Walnut Creek.” *Motion*, ¶ 4. The Motion provides no factual basis for this allegation. There is no suggestion in any discovery in this case that Aspen Associates contracted with NWP for any services relating to “Madison at Seven Trails” or “Madison at Walnut Creek.” Attached to this Motion as Exhibit C is an Affidavit from James Mathes. Exhibit C shows that Aspen Associates never contracted with NWP, either in its own capacity or through an agent.

6. Exhibit C also establishes that Staff’s conjecture about what it might want to allege is not founded in fact. Simply put, Aspen Associates does not “own, operate, control, or manage” Madison at Seven Trails, Madison at Walnut Creek, or Walnut Creek, as the affidavit shows. Staff could have learned this fact in discovery if it had issued an interrogatory to Aspen Associates asking it whether it “owns, operates, manages, and/or controls” Madison at Seven Trails, Madison at Walnut Creek, or Walnut Creek. For whatever reason, no such interrogatory was issued by Staff, and discovery has closed.

7. Though 4 CSR 240-2.080(20) does not define when an amended pleading is warranted, case law under Rule 55.33 of the Missouri Civil Rules does. The right to

amend a pleading is not absolute. *Woods v. Friendly Ford, Inc.*, 248 S.W.3d 665, 677 (Mo. App. 2008). Amendment is not to be employed as a stratagem in litigation. *Dueker v. Gill*, 175 S.W.3d 662, 671 (Mo. App. 2005); *Woods*, 248 S.W.3d at 677. The well-established factors to be considered are (1) hardship to the moving party if leave is not granted; (2) reasons for failure to include the matter in earlier pleadings; (3) timeliness of the application; (4) whether an amendment could cure the inadequacy of the moving party's pleading; and (5) injustice to the party opposing the motion. *See, e.g., Dueker*, 175 S.W.3d at 671.

8. By way of context, this case is an effort by Staff to – for the first time ever as best the undersigned counsel can tell – establish Commission jurisdiction over apartment complexes that do not individually meter water and sewer usage. The consequences of this position are enormous. If Staff succeeds, an untold number of apartment complexes (from the largest with hundreds of units to duplexes with two) will, for the first time in history, be regulated by the Commission. Aspen Associates will, in due course, be filing a dispositive motion to demonstrate the weakness of the legal position on the jurisdictional issue. Case law establishes that Commission jurisdiction exists only where there is a devotion to public use: “that is, of holding himself or the Company out as ready and willing to serve the public.” *State ex rel. Danciger & Co. v. Public Service Commission*, 205 S.W. 36, 40 (Mo. 1918). “The fundamental characteristic of a public calling is *indiscriminate* dealing with the general public.” *Orler v. Folsom Ridge, LLC*, Mo. P.S.C. Case No. WC-2006-0082, et al. (June 14, 2007) (quoting *Danciger*, 205 S.W.2d at 42 and adding emphasis). There is no evidence in this

case suggesting that an apartment complex that does not use individual meters at every apartment is engaging in a public use.

9. With this understanding of what this case is all about, it is clear that the Motion should be denied. First, there is no hardship to the Staff if the Motion is denied. The case presents a jurisdictional issue of first impression. If the Staff persuades the Commission that it now has the authority to regulate apartment complexes, the Staff will presumably apply that authority to regulate every non-metered apartment complex in the state, not just “Madison at Seven Trails” or “Madison at Walnut Creek.” Indeed, if Staff failed to apply that regulatory power evenly and fairly, it would violate the due process and equal protection clauses of the Missouri and United States Constitutions. Where the Staff attempts to formulate the public policy of the state and find heretofore unknown jurisdiction for the Commission by piecemeal litigation, it makes no difference at all if the initial respondent is one apartment complex or three.

10. Second, the Staff has given no full explanation for the reason why the material was not initially pleaded. Taking as true the assertion that it discovered the matter through NWP’s discovery responses, the Staff’s lack of timeliness in bringing this issue forward is problematic. NWP’s discovery responses were made on June 30, 2010; the Motion was filed October 5. No reason is given by Staff for the delay. Moreover, discovery in this case closed July 31, 2010, by agreement of the parties. The Staff did not and has not moved to extend discovery. Nor has the Staff sought to compel additional discovery responses. If the Motion is granted, discovery will necessarily be reopened, over sixty days after all parties believed it was over. If Staff truly believed NWP’s

discovery responses warranted further discovery or an amended complaint, it should have taken action before July 31.

11. Moreover, there is substantial injustice to Aspen Associates from the Motion. It is already bearing the legal expense of being subjected to policy-making by piecemeal litigation. Now, ten months after the initial complaint, three months after the Staff learned the facts that it now contends warrant an amended complaint, and two months after the time for discovery has closed, the Staff now essentially seeks to start over. There will necessarily be increased costs to Respondents from the more complex litigation that will result if the Motion is granted. Staff has given no reason that would warrant this injustice.

12. Finally, under Rule 55.33, it is not an error to deny a motion to amend a pleading where it seeks to add a claim that has no merit. *Stewart Title Guaranty Co. v. WKC Restaurants Venture Co.*, 961 S.W.2d 874, 888 (Mo. App. 1998); *Curnutt v. Scott Melvin Transport, Inc.*, 903 S.W.2d 184, 194 (Mo. App. 1995). The Staff's new claims are that Aspen Associates "owns, operates, controls, and/or manages" the complexes Staff refers to as "Madison at Seven Trails" and "Madison at Walnut Creek" and that Aspen Associates contracted with NWP regarding those apartment complexes. Exhibit C is admissible evidence proving that the Staff's allegations are untrue. Accordingly, the amendments to the Complaint have no merit.

WHEREFORE, Respondent Aspen Associates respectfully asks that the Complainant's Motion for Leave to Amend Complaint be DENIED.

Respectfully submitted,

HUSCH BLACKWELL SANDERS LLP

By: /s/ Lowell D. Pearson
LOWELL D. PEARSON #46217
235 East High Street, Suite 200
P.O. Box 1251
Jefferson City, MO 65102
Telephone: 573-635-9118
Facsimile: 573-634-7854
Email: lowell.pearson@huschblackwell.com

COUNSEL FOR ASPEN WOODS APARTMENT
ASSOCIATES, LLC

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was served by hand-delivery, facsimile transmission, certified mail, electronic mail and/or United States mail, postage prepaid, to the following parties of record this 12th day of October, 2010:

Jennifer Hernandez
General Counsel Office
Missouri Public Service Commission
P.O. Box 360
Jefferson City, MO 65102

Lewis R. Mills, Jr.
Public Counsel
Missouri Office of the Public Counsel
P.O. Box 2230
Jefferson City, MO 65102-2230

Craig S. Johnson
Berry Wilson, LLC
304 E. High Street, Suite 100
P.O. Box 1606
Jefferson City, MO 65102

/s/ Lowell D. Pearson