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, and National Water & Power, Inc.	)	Case No. WC-2010-0227
Respondents.	)	

RESPONDENT ASPEN WOODS APARTMENT ASSOCIATES, L.L.C.'S OPPOSITION TO STAFF'S MOTION FOR RECONSIDERATION

Respondent Aspen Woods Apartment Associates, L.L.C.'s ("Aspen Woods") respectfully files this Opposition to Staff's Motion for Reconsideration.

This case represents an effort by the Staff to convince the Commission that it has regulatory jurisdiction over what is likely to be hundreds of apartment complexes in Missouri. Quite understandably, paragraph three of the Commission's December 1, 2010, Order sought information about the scope, magnitude and consequences of the Staff's position. The Motion admits that Staff is both unable and unwilling to provide the information.

Throughout this case, the Respondents have stressed that the effort to regulate apartment landlords is unprecedented, and that it is grossly unfair to undertake that regulation through piecemeal litigation that exposes one apartment complex to the legal

fees of defending itself, as well as the possibility that it will be the only landlord in the state subject to PSC jurisdiction. In its Motion for Reconsideration, the Staff makes two admissions that underscore these points:

1. "The Staff is not individually seeking out apartment owners to regulate." *Motion, ¶ 6.*

2. "The Staff is at a loss as to how it could possibly identify the number of apartment buildings and complexes in Missouri that are selling water and/or sewer services to tenants or utilizing sub-metering or both." *Id.*

These admissions make clear that there has been and will be no effort to apply the Commission's regulatory jurisdiction fairly and evenly. The admission that Staff "is not individually seeking out apartment owners to regulate" proves that. The concession that Staff "is at a loss as to how it could possibly" identify the number of complexes affected by its new jurisdictional theory proves that no consideration has been given to the statewide consequences of the jurisdictional theory.

The Motion for Reconsideration makes much of its assertion that it is not seeking to assert jurisdiction over all complexes that pass through fees. It is unclear exactly what the jurisdictional theory is. The Motion for Reconsideration, at paragraph 4, articulates three different formulations of its jurisdictional test. The first is:

> 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

Thus, this articulation appears to focus solely on the enumerated list of fees that are not "pass through" fees.

Then, the Motion articulates the test this way:

> 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;

This formulation adds two new elements not in the earlier formulation: "other arbitrary fees" and "other activities." Aspen Woods has no idea what "other arbitrary fees" and "other activities" would create Commission jurisdiction.

At a third point, the Motion states the test this way:

> 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.

This formulation adds two more new elements to the first test: "offering service hotlines to answer customers' billing questions and other questions including dispute resolution" and "use of a billing vendor."

These statements raise far more questions than they answer. Most fundamentally, what precisely does the Staff believes triggers Commission jurisdiction? Does the imposition of any fee that results in any revenue beyond the direct costs of the complex warrant jurisdiction? Why does a fee like an insufficient funds fee that reimburses the complex for its increased collection costs convert it into a utility? What are the "other

arbitrary fees, among other activities" that trigger jurisdiction? Does any entity that offers a service hotline to promote customer service become a utility? Does answering customer questions without a "hotline" trigger jurisdiction? Given the statement that "Respondents use of a billing vendor should be subject to the same review as other public utilities regulated by the Commission," does that mean that use of a billing vendor, *per se,* creates Commission jurisdiction?

Aspen Woods is thus a victim of regulatory roulette. The Staff has articulated no coherent statement of what it believes the jurisdiction of the Commission to be. The Motion to Reconsider contains three different formulations in the very same paragraph. One or a small number of complaints has triggered thousands of dollars in legal fees for one apartment complex. As Aspen Woods has stressed throughout, if the Staff came to believe that practices it describes – which are common in the apartment rental business – trigger Commission jurisdiction, the Staff should have pursued rulemaking or a statutory change. The Commission's December 1 Order makes this point. The Commission's request for information about the number of affected complexes is exactly the type of information that the Commission would have to obtain before promulgating a rule. *See § 536.205, RSMo 2000* (state agency proposing a rule must file with the Secretary of State a fiscal note containing "An estimate of the number of persons, firms, corporations, associations, partnerships, proprietorships or business entities of any kind or character by class which would likely be affected by the adoption of the proposed rule"); *see also §§ 536.300 and .303, RSMo 2009 Supp*. (requiring small business impact statement).

Throughout the litigation, Respondents have struggled to understand the Staff's theory. Though the Motion contends that something more than pass-through billing is required, it fails to articulate exactly what that "something more" is. The Commission properly asked for information about complexes "that pass-through costs of utility services to their tenants and that may be affected by this litigation." Aspen Woods would gladly provide the requested information if it had it. Aspen Woods operates one apartment complex in the State of Missouri, and it does not have specific data about its competitors. Aspen Woods understands that Intervenor National Apartment Association is compiling responsive information and by December 30 will provide the information compiled. Aspen Woods, on information and belief, believes that RUBS billing is an efficient and environmentally sound practice that is widely used in the multifamily industry.

WHEREFORE, Aspen Woods respectfully asks that the Commission deny the Staff's Motion for Reconsideration.

Respectfully submitted,

HUSCH BLACKWELL 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 electronic mail and United States mail, postage prepaid, to the following parties of record this 16th day of December, 2010:

Jennifer Hernandez
Rachel Lewis
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
Johnson & Sporleder, LLP
304 E. High Street, Suite 200
P.O. Box 1670
Jefferson City, MO 65102

Paul Boudreau
Brydon Swearengen & England, P.C.
312 East Capitol Avenue
Jefferson City, MO 65101

/s/ Lowell D. Pearson