

**STATE OF MISSOURI  
PUBLIC SERVICE COMMISSION**

At a session of the Public Service  
Commission held at its office in  
Jefferson City on the 14<sup>th</sup> day  
of April, 2010.

The Staff of the Missouri Public Service Commission,	)	
	)	
	)	
Complainant,	)	
	)	
v.	)	
	)	
Aspen Woods Apartment Associates, L.L.C.,	)	
Barry Howard, Aspen Woods Apartments,	)	
Sapal Associates, Sachs Investing Co.,	)	
Michael Palin, Jerome Sachs, and National	)	
Water & Power, Inc.	)	
Respondents.	)	

**File No. WC-2010-0227**

**ORDER DENYING MOTIONS TO DISMISS**

Issue Date: April 14, 2010

Effective Date: April 14, 2010

On January 29, 2010, the Staff of the Missouri Public Service Commission filed this complaint. On March 22, 2010, Staff voluntarily dismissed Barry Howard, Aspen Woods Apartments, Sapal Associates, Sachs Investing Co., Michael Palin, and Jerome Sachs. Aspen Woods Apartment Associates, L.L.C. ("Apartment Associates") and National Water & Power, Inc. ("NWP"), the remaining Respondents, answered the complaint making general denials and moved for dismissal for failure to state a claim.

The standard for review for consideration of a motion to dismiss has been clearly established by Missouri's courts as follows:

A motion to dismiss for failure to state a cause of action is solely a test of the adequacy of the plaintiff's petition. It assumes that all of plaintiff's averments are true, and liberally grants to plaintiff all reasonable inferences therefrom.

No attempt is made to weigh any facts alleged as to whether they are credible or persuasive. Instead, the petition is reviewed in an almost academic manner to determine if the facts alleged meet the elements of a recognized cause of action, or of a cause that might be adopted in that case.<sup>1</sup>

Section 386.390, RSMo 2000, provides the specific requirements for pleading complaints before the Commission. Section 386.390.1 provides:

Complaint may be made by the commission of its own motion, or by the public counsel or any corporation or person, chamber of commerce, board of trade, or any civic, commercial, mercantile, traffic, agricultural or manufacturing association or organization, or any body politic or municipal corporation, by petition or complaint in writing, setting forth any act or thing done or omitted to be done by any corporation, person or public utility, including any rule, regulation or charge heretofore established or fixed by or for any corporation, person or public utility, in violation, or claimed to be in violation, of any provision of law, or of any rule or order or decision of the commission; provided, that no complaint shall be entertained by the commission, except upon its own motion, as to the reasonableness of any rates or charges of any gas, electrical, water, sewer, or telephone corporation, unless the same be signed by the public counsel or the mayor or the president or chairman of the board of aldermen or a majority of the council, commission or other legislative body of any city, town, village or county, within which the alleged violation occurred, or not less than twenty-five consumers or purchasers, or prospective consumers or purchasers, of such gas, electricity, water, sewer or telephone service.

Staff is only required to set forth “any act or thing done or omitted to be done by any corporation, person or public utility, including any rule, regulation or charge heretofore established or fixed by or for any corporation, person or public utility, in violation, or claimed to be in violation, of any provision of law, or of any rule or order or decision of the commission.” Staff plead that Apartment Associates and NWP, either individually or jointly is a public utility subject to this Commission’s jurisdiction that is providing water and sewer service without a certificate of convenience and necessity.

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<sup>1</sup> *Bosch v. St. Louis Healthcare Network*, 41 S.W.3d 462, 463-464 (Mo. Banc 2001).

Assuming that the facts alleged in Staff's complaint are all true, and granting Staff all of the reasonable inferences therefrom, the facts alleged meet the elements of a recognized cause of action, satisfying both the requirements of Section 386.090 and the standard for denying a bald motion to dismiss.

The parties have agreed to a schedule for conducting discovery and the Commission has ordered the parties to file a status report no later than August 30, 2010. Apartment Associates and NWP may still be able to properly rebut Staff's allegations, and utilize other procedural devices in their defense, or renew their motions with suggestions and supporting affidavits or other evidence, but the currently pending motions to dismiss are meritless.

**THE COMMISSION ORDERS THAT:**

1. Aspen Woods Apartment Associates, L.L.C.'s and National Water & Power, Inc.'s Motions to Dismiss are denied.
2. This order shall become effective immediately upon issuance.

( S E A L )

**BY THE COMMISSION**



Steven C. Reed  
Secretary

Clayton, Chm., Davis, Jarrett, Gunn,  
and Kenney, CC., concur.

Stearley, Senior Regulatory Law Judge