

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

Respondents.

Case No. WC-2010-0227

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

COMES NOW the Staff of the Missouri Public Service Commission (Staff), by and through the undersigned counsel, and respectfully provides the following response to the Commission. On January 29, 2010, the Staff filed a *Motion For Leave To Amend Complaint* to allege that Aspen Woods Apartment Associates, LLC (Aspen Associates), or an authorized agent, contracted with Respondent National Water & Power, Inc. (NWP), to provide utility billing services not only to residents of Madison at Aspen Woods, but also Madison at Seven Trails and Madison at Walnut Creek, known collectively hereafter as the Aspen Associates’ Apartment Properties. On October 12, 2010, Respondent Aspen Associates filed its *Opposition To Motion For Leave To File Amended Complaint (Opposition To Motion)*. The Commission’s October 12, 2010 *Order Directing Filing* advised the Staff to respond to Aspen Associates’ *Opposition To Motion* by October 22, 2010.

Standard for Amending a Complaint

The issue for the Commission to decide is whether the Staff may amend its *Complaint* to conform to the evidence provided to the Staff through discovery. 4 CSR 240-2.080 (20) states that a party may amend a complaint after the filing of responsive pleadings by leave of the Commission. Rule 55.33 of the Missouri Rules of Civil Procedure provides that leave to amend a petition “shall be freely given when justice requires.” “The decision whether to allow a party to amend a pleading is a matter within the discretion of the trial court which we [the appellate court] do not disturb unless there is an obvious and palpable abuse of discretion.” *Manzer v. Sanchez*, 985 S.W.2d 936, 939 (Mo. App. E.D. 1999). In reviewing a decision of the trial court, the appellate court concerns itself “with whether justice is furthered or subverted by the trial court’s decision.” *Id.* In making its decision, the Commission should consider any:

- Hardship to the moving party if leave to amend is not granted;
- The reasons for failure to include any new matter in earlier pleadings;
- Timeliness of the application;
- Whether the amendment could cure the inadequacy of the moving party’s pleading; and
- The injustice resulting to the party opposing the motion should it be granted.

Doran v. Chand, 284 S.W.3d 659, 666 (Mo. App. W.D., 2009).

Hardship to the Staff if Denied Leave To Amend and Amendment Could Cure the Inadequacy of the Pleading

A Commission decision that denies the Staff leave to amend will result in a fragmented case. And such a decision would force the Staff to file separate complaints on these additional locations, and then move to join the separate cases pursuant to the Commission’s rule 4 CSR 240-2.070 (12). That rule states “[a]ll matters upon which a complaint may be founded

may be joined in one (1) hearing and no motion for dismissal shall be entertained against a complainant for misjoinder of causes of action or grievances....”

Through discovery, the Staff based the *Amended Complaint* on a set of matters that arise out of the same transaction or occurrence, and involve the same questions of law and/or fact. The Staff’s *Amended Complaint* does not add new causes of action, only facts. Also, the additional locations cited in the *Amended Complaint* relate to the same billing contract, have the same owner and are managed identically, or very similarly, to Madison at Aspen Woods. If the Commission denies leave to the Staff, it is in effect denying there is a necessity for discovery in the administrative process. Such decision also rewards Respondent Aspen Associates for uncooperative behavior, while the Staff attempted to work towards a resolution with the Respondents prior to filing the *Complaint*.

Reasons the Staff Did Not Include New Locations in Earlier Pleadings

Respondent Aspen Associates is using uncooperative behavior as a sword and shield. The undersigned attempted several times to discuss with Respondent Aspen Associates amicable solutions to the Staff’s *Complaint* prior to its filing in January 2010. The Staff attempted by telephone several times, along with a letter sent by postal mail, both using the Company’s contact information filed with the Missouri Secretary of State’s Office. But, Aspen Associates failed to respond to the Staff. The Staff relied on formal discovery after the filing of the *Complaint* to determine the extent of NWP’s and Aspen Associates’ operations in Missouri. In fact, it was the Respondent NWP, not Aspen Associates, who provided the interrogatory and document responses to the Staff that identified the additional Aspen Associates’ Apartment Properties.

Timeliness of the Application

Respondent Aspen Associates provided initial interrogatory and document request responses to the Staff on July 14, 2010. From that initial production, the Staff performed additional discovery to support the *Amended Complaint* during July and August 2010, with entities protected by Section 386.480 RSMo. And the parties participated in settlement discussions from mid-August 2010 through early September 2010. The Staff discussed the potential of an amended complaint with the Respondent Aspen Associates during these settlement discussions.

The Staff worked with the parties to develop a procedural schedule that took into account the Staff's intention to file an amended complaint around September 30, 2010. The joint procedural schedule proposed hearing dates seven (7) to eight (8) months forward from the anticipated date of the Staff's *Motion For Leave To Amend*. A review of the individual paragraphs within the proposed procedural schedule supports these contentions. Aspen Associates jointly filed the proposed schedule with the Staff. So, any argument that the Staff's motion lacks timeliness is without merit.

Respondent Aspen Associates will not Face Injustice Should the Commission Grant the Staff's Motion

The Staff's *Motion For Leave To Amend Complaint* asserts that the additional locations relate to the same billing contract, have the same owner and are managed identically, or very similarly, to Madison at Aspen Woods. The Staff's *Amended Complaint* does not prejudice or harass the Respondent Aspen Associates because the additional allegations arise out of the same transaction or occurrence, and involve the same questions of law and/or fact that the Respondent Aspen Associates is currently defending. The Staff's *Amended Complaint* does not add new causes of action, only facts.

While new facts, the Staff's addition of Seven Trails and Walnut Creek will not increase the factual complexity of the case. In fact, due to the properties' physical location in the state, both Madison at Aspen Woods and Madison at Seven Trails receive water for the tenants from Missouri-American Water Company, and wastewater services from the Metropolitan Sewer District. So, should the Respondent Aspen Associates be compelled to fully comply with the Staff's initial document request, the Staff expects that little to no additional discovery will be necessary. The Staff asserts that Aspen Associates failed to respond to the interrogatory and document requests propounded by the Staff for information related to any Missouri properties, including, but not limited to, Madison at Aspen Woods. Only Respondent NWP provided interrogatory and document responses to the Staff that identified the additional Aspen Associates' Apartment Properties.

Jurisdictional Analysis Not Relevant for the Commission's Decision on Staff's Motion

A jurisdictional analysis is not part of the test for granting leave to amend. Regardless, Respondent Aspen Associates raised jurisdictional issues, so the Staff will quickly address them. The Staff will reserve its complete legal analysis of the Commission's jurisdiction over the Respondent Aspen Associates for its November 22, 2010 filing.

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. The Respondent 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 rules and regulations. 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. The framework of the operation also includes the relationship between Respondents Aspen Associates and NWP.

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. 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. A finding that Respondent Aspen Associates operates individually and/or jointly with NWP as a public utility will have a significant impact upon apartment tenants. Such a finding by the Commission ensures that the Respondents Aspen Associates charge just and reasonable rates for the utility services provided to their tenants.

Discovery Period Not Relevant for the Commission's Decision on Staff's Motion

A review of any discovery period is not part of the test for granting leave to amend. Regardless, Respondent Aspen Associates raised discovery issues, so the Staff will address them. The Staff filed its original *Complaint* on January 29, 2010. After the Commission convened a prehearing conference, the parties filed a joint proposed procedural schedule on March 30, 2010. The pleading stated that the parties agreed to recommend to the Commission that any discovery end by July 31, 2010. But, that filing stated that "[t]he Parties shall strive to complete discovery during this period, however any party may file a motion before the Commission for an extension

of the discovery period with the support based upon any delay in obtaining discovery due to disputes, or if discovery proves much more extensive than any party could have anticipated.” In response, the Commission’s April 1, 2010 *Order Directing Status Report and The Filing Of A Second Procedural Schedule* stated that “[t]he Commission trusts the parties can conduct their discovery and settlement discussions without mandating deadlines.”

While the Commission established no cutoff for discovery, the Staff moved for an extension of the discovery period, contrary to Respondent Aspen Associates’ argument. On July 30, 2010, the Staff filed a status report stating that “[w]hile the Staff realizes that the Commission’s order did not mandate an end to discovery on July 31, 2010, the Staff respectfully requests that the Commission treat this pleading as a motion to extend the discovery period...if the Commission deems such motion necessary.” As support, the Staff stated it “did not know, nor could it have known, the extent of the locations and/or parties allegedly involved when it filed its *Complaint*.” Respondent Aspen Associates did not file an objection to the Staff’s July 30, 2010 status report, or the request for an extension of discovery contained therein. And the Commission’s September 7, 2010 *Order Establishing A Procedural Schedule* leaves discovery open to all parties for the development of pre-filed testimony.

WHEREFORE, the Staff submits this response in compliance with the Commission’s October 12, 2010 *Order Directing Filing*, for its information and consideration, and prays for the Commission to grant the Staff’s *Motion For Leave To Amend Complaint*.

Respectfully submitted,

/s/Jennifer Hernandez

Jennifer Hernandez

Associate Staff Counsel

Missouri Bar No. 59814

Attorney for the Staff of the
Missouri Public Service Commission

P. O. Box 360

Jefferson City, MO 65102

(573) 751- 8706 (Telephone)

(573) 751-9285 (Fax)

jennifer.hernandez@psc.mo.gov

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above was served upon the attorneys 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 craigsjohnson@berrywilsonlaw.com; and the Office of the Public Counsel at opcservice@ded.mo.gov this 22nd day of October 2010.

/s/ Jennifer Hernandez