

**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI**

The Staff of the Missouri Public Service
Commission,

Complainant,

v.

Aspen Woods Apartment Associates, L.L.C.
and National Water & Power, Inc.,

Respondents.

)
)
)
)
)
)
)
)
)
)
)

Case No. WC-2010-0227

STAFF’S MOTION FOR RECONSIDERATION

COMES NOW the Staff of the Missouri Public Service Commission (Staff), by and through the undersigned counsel, pursuant to Commission rule 4 CSR 240-2.160 (2), and moves for the Commission to reconsider the December 1, 2010, *Order Setting Oral Argument, Directing Filing And Amending File Caption (Order)*. For its motion, the Staff respectfully states that the *Order* incorrectly states the facts and issues in dispute in this matter for the following reasons:

Background

1. On December 1, 2010, the Commission held an open agenda session, during which the regulatory law judge and the Commissioners discussed this case. The discussion resulted in the issuance of the *Order* in question.

2. Paragraph Three (3) of the *Order* reads:

No later than December 31, 2010, the parties shall file a report delineating the number of Missouri apartment complexes that are similarly situated to the complexes owned and/or managed by Aspen Woods Apartment Associates, L.L.C., *that pass-through costs of utility services to their tenants* and that may be affected by this litigation should the Commission determine it has jurisdiction in this instance.

(emphasis added). Paragraph Three misstates the issue before the Commission.

3. The Staff has consistently asserted that the Respondents are doing more than passing through the costs of utility service to the tenants; therefore, the number of Missouri apartment complexes that “pass-through costs of utility service to their tenants” is not relevant to this matter, even if it were possible for the Staff to gather the information. The Staff will prove that Respondents sell water to their tenants for more than the Respondents’ cost and therefore are not merely passing through utility costs.

Discussion

4. Paragraph Three of the *Order* categorizes the Respondents’ behavior in a manner inconsistent with the Staff’s pleadings and misrepresents the issue before the Commission in this case. Repeatedly, the Staff has asserted that the Respondents are doing more than passing through the costs of utility service to their tenants. *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.

5. It is crucial to present an accurate issue to the Commission for consideration and decision. Otherwise, all parties are left without the guidance they seek. As the Staff is the Complainant, the issue should be that of the Staff's *Amended Complaint*; whether the Respondents have either individually and/or jointly owned, operated, controlled, and/or managed a public utility subject to the Commission's jurisdiction by charging new account fees, late fees, expedited handling fees, non-sufficient fund fees and other arbitrary fees, amongst other activities. Therefore, the Staff asks that the Commission issue an order correctly citing the issues before the Commission for determination, as this matter is currently set for a summary determination hearing on January 3, 2011.

6. As to the number of similarly situated complexes, the Respondents' activities came to the Staff's attention through the receipt of consumer complaints. The Staff is not individually seeking out apartment owners to regulate. Having determined through an investigation of those consumer complaints that the Respondents' activities are within the ambit of the Public Service Commission

Law, the Staff had an obligation to bring the instant complaint before the Commission. 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. Therefore, the Staff asks that the Commission relieve it of this task.

7. Additionally, the Staff intends to file a separate pleading in support of its previously filed response to *Respondents' Joint Motion for Summary Determination* to assert that this matter is not ripe for summary determination as there are material facts in dispute.

Conclusion

WHEREFORE, the Staff requests that the Commission grant the Staff's motion for reconsideration of the December 1, 2010, *Order Setting Oral Argument, Directing Filing And Amending File Caption*, and amend the order to: (1) reflect the issue of the Respondents' behavior as alleged in the *Amended Complaint* and stated in Paragraph Five (5) above; (2) relieve the Staff of the task of enumerating any similarly-situated apartment buildings and complexes in the state of Missouri; and (3) any and all other relief the Commission deems necessary and proper.

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/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 craigsjohnson@berrywilsonlaw.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 13th day of December 2010.

/s/ Jennifer Hernandez