

**STATE OF MISSOURI  
PUBLIC SERVICE COMMISSION**

At a session of the Public Service  
Commission held at its office in  
Jefferson City on the 27<sup>th</sup> day  
of October, 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. <sup>1</sup>	)	
Respondents.	)	

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

**ORDER REGARDING APPLICATION TO INTERVENE**

Issue Date: October 27, 2010

Effective Date: October 27, 2010

**Background**

On January 29,<sup>2</sup> the Commission's Staff filed this Complaint alleging that the Respondents owned, operated, controlled and/or managed water and sewer corporations and public utilities, subject to the Commission's jurisdiction without proper Commission approval. On October 5, the Commission's Staff filed a motion for leave to amend its complaint. Respondents Aspen Woods Apartment Associates, L.L.C. ("Aspen") and National Water and Power, Inc. ("NWP") raised objections to Staff's motion, one of which was a challenge to the Commission's jurisdiction.

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<sup>1</sup> On March 22, 2010, Staff voluntarily dismissed Barry Howard, Aspen Woods Apartments, Sapal Associates, Sachs Investing Co., Michael Palin, and Jerome Sachs, leaving only Aspen Woods Apartment Associates, L.L.C. and National Water & Power, Inc. as Respondents.

On October 19, the National Apartment Association (“NAA”) filed an application to intervene. The NAA describes itself as follows:

NAA is the leading national advocate for quality rental housing. NAA is a federation of 170 state and local affiliated associations, representing more than 50,000 members responsible for more than 5.9 million apartment units nationwide. NAA is the largest broad-based organization dedicated solely to rental housing. NAA has several affiliate organizations located in Missouri: Missouri Apartment Association, Columbia Apartment Association, Greater Springfield Apartment and Housing Association, Mid Missouri Rental Properties Association, Mid-Missouri Apartment Association, Saint Louis Apartment Association, Southwest Missouri Rental Housing Association.

NAA provides a lease service to its members whereby it supplies its members with templated forms, including two forms that are at issue in this case: (1) the NAA Missouri Apartment Lease Contract; and, (2) the NAA Utility Addendum for Water, Sewer, Gas and Electric Service. NAA asserts that it has an interest in this matter because it needs to protect the integrity of the content of its intellectual property. Additionally, an adverse Commission ruling involving NAA’s contracts will affect the ability of its members to contract with prospective residents of their properties.

NAA seeks expedited approval of its intervention because it wishes to participate in the ordered briefing concerning whether the Commission has jurisdiction over landlords utilizing “ratio utility billing” (“RUBS”) and sub-metering systems, commonly employed methods for owners and managers of multifamily properties to recoup the expenses associated with the residents’ utility usage. Aspen and NWP support the NAA’s intervention.

Pursuant to CSR 240-2.075(3) NAA attaches a list of its Missouri members. NAA states that it has many members nationwide and providing a list of every member would be

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<sup>2</sup> All dates throughout this order refer to the year 2010 unless otherwise noted.

unduly burdensome. Accordingly, NAA requests a variance from subsection (3) of Commission rule 4 CSR 240-2.075 to permit it instead to provide a list of its Missouri members. However, NAA will provide a complete membership list to the Commission in the event such a list is necessary to satisfy the procedural rule.

### **Staff's Response**

On October 25, Staff responded to NAA's application. Staff claims that pursuant to Commission Rule 4 CSR 240-2.075, the intervention deadline ran on March 4 (thirty days after the Commission issued notice), and that NAA has failed to state good cause for late-filing its application.

### **Analysis and Decision**

Commission Rule 4 CSR 240-2.075 states that intervention may be granted if the proposed intervenor has an interest that is different than the general public that may be adversely affected by a final order arising from the case, or if it would serve the public interest. Late intervention requires a showing of a good cause. Good cause "generally means a substantial reason amounting in law to a legal excuse for failing to perform an act required by law."<sup>3</sup> Similarly, "good cause" has also been judicially defined as a "substantial reason or cause which would cause or justify the ordinary person to neglect one of his [legal] duties."<sup>4</sup> Of course, not just *any* cause or excuse will do. To constitute *good* cause, the reason or legal excuse given "must be real not imaginary, substantial not trifling, and

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<sup>3</sup> *Black's Law Dictionary* 692 (6th ed. 1990).

<sup>4</sup> *Graham v. State*, 134 N.W. 249, 250 (Neb. 1912). Missouri appellate courts have also recognized and applied an objective "ordinary person" standard. See, e.g., *Cent. Mo. Paving Co. v. Labor & Indus. Relations Comm'n*, 575 S.W.2d 889, 892 (Mo. App. W.D. 1978) ("[T]he standard by which good cause is measured is one of reasonableness as applied to the average man or woman.")

reasonable not whimsical.”<sup>5</sup> And some legitimate factual showing is required, not just the mere conclusion of a party or his attorney.<sup>6</sup>

The Commission’s Staff filed this complaint on January 29, and the parties agreed to a lengthy discovery schedule. As a result of discovery, Staff sought to amend its complaint, expanding the reach of the complaint, which triggered Aspen and NWP to raise the jurisdictional issue. The full scope of the implications of this case becoming apparent on October 5 has resulted NAA’s application to intervene.

The Commission finds NAA has an interest different from that of the general public that could be adversely affected by the Commission’s decision in this matter. Additionally, the Commission finds that the NAA has stated good cause for its late intervention request and it would be in the public interest to grant NAA intervention. Having NAA participate in the briefing on the jurisdictional issue, the deadline for which is November 1, is good cause for an expedited ruling on its motion. The Commission further finds that NAA’s request for a variance from subsection (3) of Commission Rule 4 CSR 240-2.075 to permit it to provide a list of its Missouri members, as opposed to its national members, is reasonable.

NAA’s intervention, taking the procedural schedule as it is currently set, will not prejudice any party and should not delay this action. Direct testimony is not scheduled to be filed until March 7, 2011, allowing adequate time for any discovery Staff wishes to conduct with regard to NAA.

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<sup>5</sup> *Belle State Bank v. Indus. Comm’n*, 547 S.W.2d 841, 846 (Mo. App. S.D. 1977). See also *Barclay White Co. v. Unemployment Compensation Bd.*, 50 A.2d 336, 339 (Pa. 1947) (to show good cause, reason given must be real, substantial, and reasonable).

<sup>6</sup> See generally *Haynes v. Williams*, 522 S.W.2d 623, 627 (Mo. App. E.D. 1975); *Havrisko v. U.S.*, 68 F.Supp. 771, 772 (E.D.N.Y. 1946); *The Kegums*, 73 F.Supp. 831, 832 (S.D.N.Y. 1947).

**THE COMMISSION ORDERS THAT:**

1. The National Apartment Association's application to intervene is granted.
2. The National Apartment Association's request for a variance from Commission Rule 4 CSR 240-2.075(3) is granted.
3. This order shall become effective immediately upon issuance.

**BY THE COMMISSION**



**Steven C. Reed**  
**Secretary**

( S E A L )

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

Stearley, Senior Regulatory Law Judge