

**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 MOTION FOR LEAVE TO AMEND COMPLAINT**

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, Staff filed a motion for leave to amend its complaint. Staff wishes to expand its complaint to include two additional apartment complexes allegedly owned by Respondent Aspen Woods Apartment Associates, L.L.C. ("Aspen"). Staff also wishes to include a new allegation that Aspen, or an authorized agent, contracted with Respondent

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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.

National Water and Power, Inc. (“NWP”) to provide utility billing services to the residents of Aspen’s apartment properties. Staff claims that amending its complaint will not prejudice any party to this matter.

### **NWP’s Response**

On October 11, NWP responded to Staff’s motion claiming that to allow Staff to amend its complaint at this time and in this manner would be prejudicial and would increase the length and expense of this litigation. NWP observes that discovery was completed by the parties’ agreement on July 31, and the procedural schedule was set on September 7. NWP believes that Staff’s proposed amendments are too late after completion of discovery. NWP claims that since the amendments add apartment complexes that are factually distinct from the complex originally involved (i.e. different apartments with different water and wastewater suppliers and different distribution facilities) that delay and additional costs will ensue.

NWP finds Staff’s motion particularly objectionable because it claims administrative economy would better be served by addressing the threshold issue of jurisdiction within the confines of the original complaint. NWP believes addressing that issue first will be dispositive to any allegations with regard to the two additional apartment complexes.

Specifically, NWP asserts that Staff’s complaint is based upon the false premise that the Commission has jurisdiction over landlords passing on utility expenses to their tenants, and that the landlords have devoted their facilities to the public use. NWP does not believe that Respondents fall under the definition of a regulated public utility and that it is fundamentally unfair and creates a disparate competitive impact upon the Respondents to

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

bear the expense of defending this action. NWP believes that the ramifications of asserting jurisdiction in this fashion upon potentially thousands of apartment owners must be accomplished through the legislative process or rulemaking process, not this single adjudicatory action.

### **Aspen's Response**

On October 12, Aspen filed a response to Staff's motion. In addition to repeating the arguments raised by NWP, Aspen contends that Staff has not alleged "in good faith" that it owns the two newly named apartment complexes because no discovery responses establish such facts. Aspen further claims that there is no suggestion in any discovery that it contracted with NWP for any services in relation to the two named apartment complexes. Aspen cites to Civil Rule 55.33 for the proposition that it is not an error to deny a motion to amend a pleading where it seeks to add a claim without merit.

### **Staff's Reply**

On October 22, Staff replied to the Respondent's objections. Staff claims: (1) that NWP's interrogatory responses do establish the basis for adding its allegations concerning the additional two apartment complexes; (2) the standard for leave to amend in the Rules of Civil Procedure support its motion; (3) failure to allow amendment will result in a fragmented case because it will exclude issues arising from the same occurrence involving the same questions of law and fact; and (4) the jurisdictional issues raised by the Respondents are irrelevant to its motion to amend its petition.

### **Analysis and Decision**

Commission Rule 4 CSR 240-2.080(20) provides that any pleading may be amended within ten days of filing unless a responsive pleading has already been filed, or at

any time by leave of the Commission. While the parties have cited to Civil Rule 55.33, and while this rule may aid the analysis by analogy, the Missouri Rules of Civil Procedure (Rules 41 through 101) do not apply to administrative tribunals unless they are specifically authorized by statute or adopted by the agency.<sup>3</sup> While Civil Rule 55.33 does not apply to the Commission, the rule provides that leave to amend shall be freely given when justice so requires. And Missouri courts attempt to balance the interest of the parties when granting leave to amend based upon consideration of the reasons to amend, the timeliness of the application, if the amendment cures a deficiency in the prior pleading, and the relative hardships of the parties.<sup>4</sup>

On September 7, the Commission established a procedural schedule that culminates with an evidentiary hearing beginning on May 2, 2011. On October 12, the Commission set a briefing schedule to timely address the jurisdictional issues raised by NWP and Aspen. That schedule concludes on November 22. There is no operation of law date for this complaint.

It serves the interests of administrative economy to have all related issues and allegations heard in one case. There is more than adequate time built into the current procedural schedule to allow Respondents an opportunity to answer the new allegations and for any defense to be prepared prior to the evidentiary hearing. Should additional time be required the schedule can be modified. Moreover, the Commission has already established an expedited timetable to address the jurisdictional arguments so as to eliminate any possible delay or unnecessary increase in the cost of litigation in relation to this threshold issue. Consequently, the Commission finds there would be no undue

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<sup>3</sup> *State ex rel. Rosenberg v. Jarrett*, 233 S.W.3d 757, 762 (Mo. App. 2007).

hardship placed upon the Respondents to grant Staff leave to amend its Complaint. Respondents will be granted sufficient time to answer the new allegations.

**THE COMMISSION ORDERS THAT:**

1. The Staff of the Missouri Public Service Commission's motion for leave to amend its complaint is granted.
2. Respondents shall respond to the amended complaint no later than November 22, 2010.
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, concur.

Stearley, Senior Regulatory Law Judge

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<sup>4</sup> *Doran v. Chand*, 284 S.W.3d 659, 666 (Mo. App. 2009).