

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

THE OFFICE OF THE PUBLIC COUNSEL’S RESPONSE
TO JURISDICTIONAL ISSUES

COMES NOW the Office of the Public Counsel (Public Counsel) and for its Response to Jurisdictional Issues states the following:

1. On January 9, 2010, the Staff of the Missouri Public Service Commission (Staff) initiated the above stated Complaint alleging unlawful provision of water and sewer services to the public for gain, without certification or other authority from the Missouri Public Service Commission (Commission).
2. On October 12, 2010, the Commission issued an Order stating that Aspen Woods Apartment Associates, L.L.C. (Aspen Woods) may file a motion challenging the Commission's jurisdiction no later than November 1, 2010. The Commission ordered any other party wishing to address the jurisdictional issues identified by Respondents to respond by November 22, 2010.
3. On October 26, 2010¹, Respondent Aspen Woods, and Respondent National Water & Power, Inc. (NWP), filed a Joint Motion for Summary Determination and an attached Legal

Memorandum in Support of Joint Motion for Summary Determination (Joint Motion) seeking an order of Summary Determination to the effect that the Commission has no jurisdiction over them, or that the Commission will not assert jurisdiction, assuming *arguendo* that the Commission possesses such jurisdiction.

4. The jurisdiction of the Commission is set out in RSMo §386.250. Where a statute is reasonably open to construction, the Public Service Commission has the power to determine administratively its own jurisdiction. In the Joint Motion, Aspen Woods and NWP recognized that there could be disputes of fact as to whether Aspen Woods and NWP, its tenant utility billing and collection vendor, meet the statutory definitions of a water corporation¹, a sewer corporation², or a public utility³. Aspen Woods and NWP also recognized that there could be disputes of fact as to whether Aspen Woods own facilities that meet the statutory definitions of a water system⁴ or sewer system⁵.

5. In *State ex rel. M.O. Danciger & Company v. Public Serv. Comm'n*, the Missouri Supreme Court held that for a company to be considered a public utility its services must be devoted to the public use.⁶ Aspen Woods and NWP question whether a private apartment complex can be considered devoted to a public use as required for Commission jurisdiction.

6. In the Joint Motion, Aspen Woods and NWP incorrectly state that it does not appear that the Commission has, during its existence, attempted to regulate the manner in which apartment owners charge tenants for water and sewer usage. The Commission has in fact endeavored to regulate the manner in which owners charge tenants for utility usage. In a recent case, the

¹ 386.020 (59) RSMo

² 386.020 (49) RSMo

³ 386.020 (43) RSMo

⁴ 386.020 (60) RSMo

⁵ 386.020 (50) RSMo

⁶ *State ex rel. M.O. Danciger & Company v. Public Serv. Comm'n*, 205 S.W. 36, 40 (Mo. banc 1918).

Commission considered similar allegations against mobile home park owners who charged tenants for water usage in a similar manner as alleged in this case.⁷ While the Commission case was ultimately voluntarily dismissed, the Commission actively exerted jurisdiction over the matter while it was pending.

7. In *Danciger*, the Court stated that the test for determining if a company was devoting its services to the public use was whether the fundamental characteristic of a public calling is an **indiscriminate** dealing with the general public.⁸ In the Joint Motion, Aspen Woods and NWP try to argue that the actions of a private apartment complex are not indiscriminate and therefore are not devoted to a public use:

Looking at the affidavit of James Mathes, it is clear that, with respect to the apartment complex in question, Aspen Woods has not devoted its privately owned apartment complex to public use by indiscriminately offering occupancy and use of water and sewer services therein to the entire general public. The Mathes affidavit establishes that the apartment complex is private property located on 33 acres, has several separate structures with each including many individual apartments. Aspen Woods requires that tenants meet Aspen Woods eligibility criteria, and must sign a written lease wherein they agree to the water and sewer allocation, along with billing and collection services by NWP, for which the tenants agree to pay NWP.⁹

8. Aspen Woods and NWP seem to argue that the mere existence of eligibility criteria and a lease somehow makes the offer of apartments be to a private, non-general public arrangement not subject to the jurisdiction of the Commission. However, the use of these criteria is common and general in nature. Many public utilities use service agreements and financial eligibility inquiry before providing service. Nothing about these criteria indicates a private, non-general public arrangement between a landlord and a tenant which is outside the jurisdiction of the Commission.

⁷ See PSC Case No. WC-2008-0126, *The Staff of the Missouri Public Service Commission v. Delmic, Inc., Delbert C. Jacobs, and Michelle Fanning-Jacobs*.

⁸ *Danciger*, 205 S.W. at 42.

⁹ Legal Memorandum in Support of Joint Motion for Summary Determination, WC-2010-0227, p. 10.

9. The Joint Motion also asks that the Commission not assert jurisdiction, assuming *arguendo* that the Commission possesses such jurisdiction. Customers depend on the Public Service Commission to ensure that just and reasonable utility service is provided by entities which are under the Commission's jurisdiction. This complaint alleges that the service being provided is not just and reasonable. Therefore, the Commission must assert jurisdiction over Respondents in order to provide the necessary due process for the Staff's complaint.

WHEREFORE, Public Counsel respectfully submits its Response.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been mailed, emailed or hand-delivered to the following this 22nd day of November 2010:

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