

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

DERALD MORGAN, RICK AND CINDY )  
GRAVER, WILLIAM AND GLORIA PHIPPS, )  
and DAVID LOTT, )  
 )  
Complainants, )

v. )

File No. WC-2017-0037

CARL RICHARD MILLS, )  
CARRIAGE OAKS ESTATES, )  
DISTINCTIVE DESIGNS, and )  
CARING AMERICANS TRUST )  
FOUNDATION, INC. (f/k/a Caring )  
Americans Foundation, Inc.) )  
 )  
Respondents. )

**SUGGESTIONS IN OPPOSITION TO**  
**RESPONDENTS' MOTION TO DISMISS COMPLAINANTS' SECOND AMENDED**  
**COMPLAINT**

On October 24, 2017, Respondents moved to dismiss Complainants' Second Amended Petition filed in the above-captioned matter on the basis that the Missouri Public Service Commission (hereinafter "PSC") lacks jurisdiction over the Respondents, that Complainants are precluded from obtaining an ownership interest in the water and sewer and that Respondents have complied with Complainants' demands. Respondents' Motion to Dismiss should be denied for the following reasons.

**I. The PSC Has Jurisdiction.**

The PSC has jurisdiction to regulate public utilities, which includes both water and sewer corporations. However, the PSC does not have jurisdiction over non-profit entities organized under Section 393.825 et seq. and 393.900 et. seq. for the sole purpose of providing wastewater and drinking water services, respectively. Carriage Oaks NFP was not properly formed under Section

393.825 and 393.900. Pursuant to Section 393.190, RSMo., entities that are subject to Commission jurisdiction must obtain Commission approval to transfer their assets. Prior to the transfer of assets, Carriage Oaks NFP did not seek Commission approval. Additionally, Section 393.933.3, RSMo., gives the Commission jurisdiction over the reorganization of any regulated water company into a Chapter 393 nonprofit entity. For those reasons, the PSC has jurisdiction of Carriage Oaks NFP.

Respondents also argue that the PSC has always lacked jurisdiction over Respondents. Section 386.020(59) RSMo., defines a water corporation as “every corporation...and person...owning, operating, controlling or managing any plant or property, dam or water supply, canal, or power station, distributing or selling for distribution, or selling or supplying for gain any water.” Further, Section 386.020(49) RSMo., defines a sewer corporation as “every corporation...or person...owning, operating, controlling or managing any sewer system, plant or property, for the collection, carriage, treatment, or disposal of sewage anywhere within the state for gain, except that the term shall not include water systems with fewer than twenty-five outlets.” Respondents are public utilities subject to PSC regulation because they operated the water and sewer systems at Carriage Oaks Estates subdivision for gain.

As Respondents’ legal authority for why it does not operate the water and sewer system for gain, they rely on *Hurricane Deck Holding Co. v. Public Service Com’n of State*, 298 S.W.3d 260 (Mo. Ct. App. W.D. 2009). In *Hurricane*, one of the issues before the court was whether a subdivision developer was operating a water and sewer system for gain. *Id.* The court noted that the phrase “for gain” was not specifically defined in the Public Service Commission Act; however, the court relied on the dictionary definition of gain in finding that “for gain” means “the operation of a water or sewer system for the purpose of receiving compensation.” *Id.* at 267; SEE ALSO *Osage Water Co. v. Miller County Water Auth., Inc.*, 950 S.W.2d 569, 574 (Mo. App. S.D. 1997). The

court ultimately held that the developer was operating for gain, or compensation, when it sent a letter to homeowners itemizing costs for the water and sewer systems, and requesting payment from the homeowners. *Id.* Whether the developer received compensation or not was of no consequence to the court, it was the mere act of requesting compensation. *Id.* The court concluded that the developer was a “public utility” subject to PSC regulation. *Id.*

Additionally, a not-for-profit corporation must have all of its members as utility customers, and operate the utility *only* for the benefit of its members. See *In the Matter of Rocky Ridge Ranch Property Owners Association for an Order of the Public Service Commission Authorizing Cessation of the PSC Jurisdiction and Regulation Over its Operations*, Case No. WD-93-307 (Mo. P.S.C.). Sections 393.921 and 393.839, RSMo. state that: “No person shall become a member of a nonprofit [sewer or water] company unless such person shall *agree* to use services furnished by the company when such shall be available through its facilities.” (emphasis added). The ability to agree to use services implies choice. The lot owners have no choice as to what water and sewer utility to use because there is no other option. They do not currently agree to be members of the Non Profit. Despite not being members, they do receive the services of the Non Profit. For that reason, the Non Profit currently does not operate only for the benefit of members; it serves non-members as well.

The purpose of the statute requiring that a not-for-profit operate only for the benefit of its members is that by having all the customers as members, the customer-members have the power to set their own rates and manage their own services. In the present case, none of the owners receiving utility service are members of the Non Profit and they do not have the ability to set their own rates or manage their own services. The owners at Carriage Oaks Estates subdivision have no control or say over the operations of the water and sewer system. Furthermore, Complainants



have no choice but to use the services provided by the Non Profit since the Carriage Oaks Estates Declaration restricts the owners from installing their own well and septic system. Accordingly, the Complainants are at the mercy of the Non Profit, which is controlled by Respondents. The public interest analysis requires the Commission to retain jurisdiction over this matter.

**The Non Profit does not comply with Chapter 393.**

Additionally, the Non Profit was not created in compliance with Sections 393.839.1, 393.921.1, 393.839.7, and 393.921.7. The Bylaws are currently drafted in such a manner that gives Respondents more voting power than allowed in Sections 393.839.7 and 393.921.7, RSMo. Sections 393.839.7 and 393.921.7, RSMo. require that each member be entitled to “one vote on each matter submitted to a vote at a meeting.” Article II, Section 2 of the Bylaws violate the “one member, one vote” requirement by allowing members to hold “more than one Membership Interest.” Because Respondents would hold more than one Membership Interest, they would be entitled to multiple votes on any particular matter. Likewise, the Bylaws violate Sections 393.839.1 and 393.921.1, RSMo. by allowing prospective utility consumers to be members. Sections 393.839.1 and 393.921.1, RSMo. limit membership to persons who “agree to use services furnished by the company when such shall be available through its facilities.” The water and sewer utility services have been operation for nearly twenty years. Accordingly, they are presently available and membership is therefore limited to those persons receiving utility services.

The Bylaws of the Nonprofit are currently drafted in a manner that allows Respondents to retain control over the management of the water and sewer system and violate Chapter 393, RSMo. Because the Nonprofit has not complied with the requirements of Chapter 393, Complainants

respectfully request that the Public Service Commission retain jurisdiction over this matter until the Nonprofit complies with Sections 393.838 and 393.921.

## **II. Ownership Interest in Systems**

While it is true that the lot owners do not currently have an ownership interest in the systems, they do have an interest in making sure the entity which provides water and sewer services complies with state regulations and law and operates the systems in a manner that is fair to the lot owners. For that reasons, the PSC does have jurisdiction over the entity at least during the reorganization process.

## **III. Respondents have Not Attempted to Comply with Complainants' Demands**

Complainants need a mechanism in place to protect them from Respondents' abusing their control of the utility services provided to Complainants. Complainants are at the mercy of Respondents since they have no choice but to accept the water and sewer services provided by the Non Profit. They have not agreed to accept the services of the Non Profit. They have been forced to accept such services since the utility services are offered by no other utility and the Declaration prohibits them from installing their own well and septic system. Despite being forced to accept the utilities provided by the Non Profit, Complainants have no ability to vote or influence the decisions related to the operation of the water and sewer system because they are not members of the Non Profit. Even if they were members with voting rights, Respondents would control the manner in which the Non Profit is operated because the Bylaws are written in such a way as to give Respondents votes for each lot they own. Since Respondent, the developer of the subdivision, owns the majority of the lots, Respondents control how the Non Profit is operated it. It is believed that Respondents will operate the water and sewer systems to the detriment of Complainants. In fact, Respondents have already threatened to disconnect the water

connection to Complainant Derald Morgan despite no authority to do so. The PSC has jurisdiction over this matter and should exercise such jurisdiction to protect Complainants from Respondents' abusive tactics.

Respectfully submitted,

SCHENEWERK & FINKENBINDER,  
ATTORNEYS AT LAW, LLC

By: /s/ Karl Finkenbinder  
Karl Finkenbinder, Mo. Bar No. 59425  
Jacqueline Bryant, Mo. Bar No. 64755  
100 Prairie Dune Dr., Ste. 200  
Branson, Missouri 65616  
[417] 334.7922;  
[417] 334.7923 FAX  
Email: [karl@sfalawfirm.com](mailto:karl@sfalawfirm.com)  
COUNSEL FOR COMPLAINANTS

### **CERTIFICATE OF SERVICE**

The below signed counsel hereby certifies that a true and accurate copy of the foregoing was sent to all counsel of record via email on November 3, 2017, to the following email addresses: Bryan Wade [bryan.wade@huschblackwell.com]; Ryan Smith [ryan.smith@ded.mo.gov]; Whitney Smith [whitney.smith@huschblackwell.com]; and Jacob Westen [Jacob.westen@psc.mo.gov]

/s/ Karl Finkenbinder  
Karl Finkenbinder