

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

The Staff of the Missouri Public Service Commission,,	)	
	)	
	)	
Complainant,	)	
	)	
v.	)	<b><u>Case No. WC-2010-0227</u></b>
	)	
Aspen Woods Apartments Associates, LLC,	)	
Barry Howard, Aspen Woods Apartments,	)	
Sapal Associates, Sachs Investing Co.,	)	
Michael Palin, Jerome Sachs, and	)	
National Water & Power, Inc.	)	
	)	
Respondent.	)	

**STAFF'S RESPONSE TO ASPEN WOODS'  
NOTICE OF INTENT**

**COMES NOW** the Staff of the Missouri Public Service Commission, by and through the Commission's Chief Staff Counsel, and for its Response to Aspen Woods' Notice of Intent to Seek Attorney's Fees and Expenses, states as follows:

1. On October 29, 2010, Respondent Aspen Woods Apartment Associates, LLC, filed its Notice of Intent to Seek Attorneys Fees and Expenses, advancing therein the novel theory that Staff's act of bringing this complaint against these several respondents constitutes the unlawful and unauthorized promulgation of a rule.

2. Aspen Woods relies on § 536.021 (9), RSMo (Supp. 2009), which provides, in part, that fees and expenses may be awarded where an

agency has taken an action “....based upon a statement of general applicability which should have been adopted as a rule . . . .”

3. Aspen Woods theory fails because the statement of general application upon which the Staff bases its action is statutory; Sections 386.020 (49) and (59), RSMo (Supp. 2009), and 393.170 (1), RSMo (2000), provide that those who engage in the conduct of distributing potable water and providing sewage collection for gain must first seek a certificate of convenience and necessity from this Commission and submit thereafter to regulation pursuant to the Public Service Commission Law.

4. Neither this Commission nor its Staff can either expand or contract the scope of the statutes enacted by the General Assembly. It is Staff’s opinion that in the absence of a certificate, the Respondents’ conduct is unlawful. The Staff discovered the Respondents’ activities as described in the Complaint after receiving calls from customers reporting the activity.

5. Staff has acted in accordance with Sections 386.020 (49) and (59), RSMo (Supp. 2009), and 393.170 (1), RSMo (2000). As Staff’s actions are governed by statute, no additional rules are necessary; otherwise, the need for adjudication under the statute would always be replaced by rulemaking. Aspen Woods’ purported “notice” is here without effect.

6. Staff notes that there is no amount in controversy in this matter and any request for fees and expenses under Section 536.021 (9), RSMo (Supp. 2009), fails because, under the statute, a circuit court can only award

“....reasonable attorney’s fees incurred prior to the award, not to exceed the amount in controversy in the original action.”

**WHEREFORE**, Staff prays that the Commission will find that Staff has not acted in violation of Section 536.021 (9), RSMo (Supp. 2009), and grant such other and further relief as it may deem just in the circumstances.

Respectfully submitted,

s/ Kevin A. Thompson  
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/s/ Jennifer Hernandez  
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Attorneys for the Staff of the Missouri  
Public Service Commission.

### **Certificate of Service**

I hereby certify that a true and correct copy of the foregoing was served, either electronically or by hand delivery or by First Class United States Mail, postage prepaid, on this 8<sup>th</sup> day of November 2010, on the parties of record as set out on the official Service List maintained by the Data Center of the Missouri Public Service Commission for this case.

s/ Jennifer Hernandez