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September 29, 2005

The Honorable Colleen M. Dale  
Secretary/Chief Regulatory Law Judge  
Missouri Public Service Commission  
P.O. Box 360  
Jefferson City, MO 65102-0360

**FILED<sup>2</sup>**

SEP 29 2005

Missouri Public  
Service Commission

Re: Case No. WC-2006-0082

Dear Judge Dale:

Please find enclosed for filing in the referenced matter the original and five copies of a Motion to Dismiss Complaint and Motion to Extend Time to File Answer Pending Disposition of Motion to Dismiss.

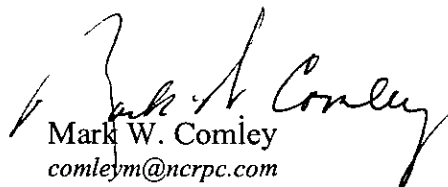
Would you please bring this filing to the attention of the appropriate Commission personnel.

Please contact me if you have any questions regarding this filing. Thank you.

Very truly yours,

NEWMAN, COMLEY & RUTH P.C.

By:

  
Mark W. Comley  
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MWC:ab

Enclosure

cc: Office of Public Counsel  
General Counsel's Office  
Cathy Orlor  
Reginald V. Golden

BEFORE THE PUBLIC SERVICE COMMISSION  
OF THE STATE OF MISSOURI

FILED<sup>2</sup>

SEP 29 2005

Missouri Public  
Service Commission.

Cathy J. Orler, )  
)  
Complainant, )  
v. ) Case No. WC-2006-0082  
)  
Folsom Ridge, LLC, )  
)  
Respondent. )

**MOTION TO DISMISS COMPLAINT AND**  
**MOTION TO EXTEND TIME TO FILE ANSWER PENDING DISPOSITION OF**  
**MOTION TO DISMISS**

***MOTION TO DISMISS***

COMES NOW Folsom Ridge, LLC (Folsom Ridge or Company) and moves to dismiss the complaint on grounds that it fails to state a claim upon which relief may be granted against the named respondent, Folsom Ridge, and furthermore, it requests relief from this Commission which it is powerless to enter.

***SUGGESTIONS IN SUPPORT***

Although technical rules of pleading are not applied to applications or pleadings filed with the Public Service Commission and pleadings are to be liberally construed; State ex rel. Crown Coach Co. v. Public Service Commission, 179 S.W.2d 123, 126 (K.C. Ct. App.1944); the pleading rules adopted by the Commission are in great measure the same as those promulgated by the Supreme Court of Missouri, and applying the maxims of pleading construction used by the courts of our state when motions to dismiss are filed would be appropriate here. Consequently, the sufficiency of the instant complaint should be evaluated under the following principles:

As noted in *Nazeri v. Missouri Valley College*, 860 S.W.2d 303, 306 (Mo. banc 1993), a motion to dismiss for failure to state a cause of action is solely a test of

the adequacy of the plaintiff's petition. It assumes that all of plaintiff's averments are true, and liberally grants to plaintiff all reasonable inferences therefrom. No attempt is made to weigh any facts alleged as to whether they are credible or persuasive. Instead, the petition is reviewed in an almost academic manner, to determine if the facts alleged meet the elements of a recognized cause of action, or of a cause that might be adopted in that case.

Reynolds v. Diamond Foods & Poultry, Inc., 79 S.W.3d 907, 909 (Mo. banc 2002).

Ms. Orler's complaint lacks paragraph numbers and does not attempt to separate the allegations into easily cited statements of fact. Moreover, many of the remarks in her complaint are not averments of fact but rather are conclusions, legal and otherwise. There are no page numbers on the complaint which compounds the difficulty in referring the Commission to particular allegations or averments with definiteness. As a consequence, when quoting from the complaint Folsom Ridge will be unable to supply specific citations by paragraph number or page.

As the basis for her complaint, Ms. Orler states that Big Island Home Owners Association (BIHOA) "is not operating as a Homeowners' Association as per the Department of Natural Resources (DNR) Regulation Requirements." She contends that Folsom Ridge "owns and controls" BIHOA but aside from that statement she does not contend anywhere in the complaint that Folsom Ridge is engaging in any activity offensive to rules or regulations of the Commission.<sup>1</sup>

From the other statements in her complaint, it becomes clear that in total it is directed exclusively toward BIHOA. In the "request for relief" summary of the complaint, Ms. Orler requests a temporary injunction (which will be addressed separately below) "halting the transfer of liability of the BIHOA water and sewer system to the actual members of the association . . .

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<sup>1</sup> The Commission has no regulatory authority over those who merely own or control corporations and would have no authority to direct their votes for members of the board of directors or changes in the bylaws.

until a determination and ruling can be made by the PSC, as to the BIHOA and it's [sic] legal operation as a public utility." It is the conduct and operations of BIHOA that concerns Ms. Orler and not the conduct of Folsom Ridge. Giving the allegations of her complaint the liberal construction they are afforded by law, it can be inferred that BIHOA is a separately created corporate entity with bylaws and a board of directors. There is no allegation in the complaint that Folsom Ridge and BIHOA are one and the same.

Ms. Orler has also asked the Commission to enter a temporary injunction which is a decree in equity. As stated in *State Tax Commission v. Administrative Hearing Commission*, 641 S.W.2d 69, 75 -76 (Mo.banc 1982):

"[T]he judicial power of the state is vested in the courts designated in Mo. Const. Art. V, § 1. The courts declare the law." See also *Lightfoot v. City of Springfield*, 361 Mo. 659, 669, 236 S.W.2d 348, 352 (1951) (Public Service Commission "has no power to declare ... any principle of law or equity"); *State ex rel. Kansas City Terminal Railway v. Public Service Commission*, 308 Mo. 359, 373, 272 S.W. 957, 960 (1925) (Public Service Commission has no power to declare the validity or invalidity of city ordinance); *State ex rel. Missouri Southern Railroad v. Public Service Commission*, 259 Mo. 704, 727, 168 S.W. 1156, 1164 (banc 1914) (Public Service Commission has no power to declare statutes unconstitutional); *State ex rel. Missouri & North Arkansas Railroad v. Johnston*, 234 Mo. 338, 350-51, 137 S.W. 595, 598 (banc 1911) (secretary of state has no power to declare a statute unconstitutional).

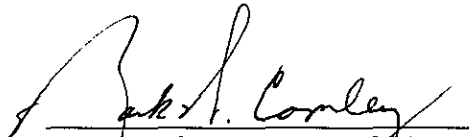
Since the averments of Ms. Orler's complaint are directed against the conduct and operations of BIHOA, and furthermore the complaint requests a form of injunction against BIHOA (or Folsom Ridge or both), the complaint fails to state any claim upon which relief may be granted by the Commission against Folsom Ridge and it should be dismissed.

**MOTION TO EXTEND TIME TO FILE ANSWER  
PENDING DISPOSITION OF MOTION TO DISMISS**

Under the provisions of 4 CSR 240-2.070(8) Folsom Ridge is to file an answer to the complaint within the time provided by the Commission. Technically, the Company's answer is

due to be filed today. Folsom Ridge submits that the complaint suffers from serious flaws that warrant its summary dismissal and if that is the case, then in the interest of avoiding undue cost and expense in formulating a paragraph by paragraph answer to Ms. Orlor's complaint at this time, Folsom Ridge requests that its time for filing an answer to the complaint be extended until further order of the Commission. If the Commission should deem that an answer is required by today's date, then Folsom Ridge shall for the time being generally deny any allegation in the complaint that it is operating a utility company, or is unlawfully operating a public utility company, or otherwise is violating any statute, rule or regulation enforceable by the Commission.

Respectfully submitted,



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Attorneys for Folsom Ridge, LLC

Certificate of Service

I hereby certify that a true and correct copy of the above and foregoing document was sent via e-mail on this 29th day of September, 2005, to General Counsel's Office at [gencounsel@psc.mo.gov](mailto:gencounsel@psc.mo.gov); and Office of Public Counsel at [opcservice@ded.mo.gov](mailto:opcservice@ded.mo.gov); and via U.S. Mail, postage prepaid, to Cathy Orlor, 3252 Big Island Drive, Roach, MO 65787.

