

**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. )  
 )  
Carl Richard Mills, Carriage Oaks Estates Homes )  
Association, Distinctive Designs and Caring )  
Americans Trust Foundation, Inc. (f/k/a Caring )  
Americans Foundation, Inc.), )  
 )  
Respondents. )

**File No. WC-2017-0037**

**STAFF RESPONSE TO RESPONDENTS' AMENDED MOTION TO DISMISS**

**COMES NOW** the Staff of the Missouri Public Service Commission (“Staff”), by and through counsel, and for its *Response to Amended Motion to Dismiss* in these matters hereby state:

1. On February 14, 2017, Respondents’ filed *Respondents’ Amended Motion to Dismiss* (“*Amended Motion to Dismiss*”), which argued the Missouri Public Service Commission (“Commission”) no longer had jurisdiction of the above captioned matter because Respondents had created a §§ 393.825 and 393.900 RSMo nonprofit sewer and nonprofit water company.

2. On February 15, 2017, the Commission issued its *Order Setting Times for Responses to the Amended Motion to Dismiss* with a deadline of February 22, 2017.

## Applicable Statutes

3. Commission jurisdiction is very broad. The Commission has jurisdiction, pursuant to § 386.020(43) RSMo, over “every water corporation. . . and sewer corporation, as these terms are defined in [§ 386.020], and each thereof is hereby declared to be a public utility and to be subject to the jurisdiction, control and regulation of the commission and the provisions of this chapter[.]” Section 386.020(43) RSMo.

4. Sections 386.020(49) and 386.020(59) RSMo, defines regulated sewer and water utility corporations, respectively, as every corporation owning, operating, controlling or managing any plant or property engaged in distributing or selling or supplying for gain any water, or for the collection, carriage, treatment, or disposal of sewage for gain.

5. Aside from for-profit entities, the Missouri appellate courts have held Commission jurisdiction extends to nonprofit entities that meet the definitions of a water corporation or sewer corporation, as those terms are defined in § 386.020 RSMo.<sup>1</sup>

6. When specific factual circumstances are present, the Commission may choose to not exert jurisdiction over nonprofit water and nonprofit sewer corporations.<sup>2</sup>

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<sup>1</sup> See, *Osage Water Co. v. Miller County Water Authority, Inc.*, 950 S.W.2d 569, 574 (Mo. Ct. App. 1997)(“A ‘not-for-profit’ corporation means a corporation where no part of the income or property is distributable to its members, directors, or officers. We do not interpret the legislature’s definition of ‘water corporation’ to exclude not-for-profit corporations” (internal citation omitted)). See also, *Hurricane Deck Holding Co. v. Public Service Comm’n*, 289 S.W.3d 260 (Mo. Ct. App. 2009).

<sup>2</sup> The three circumstances, which mirror the §§ 393.825 *et seq.* and 393.900 *et seq.* requirements, are:  
(1) All of the utility customers are members of the non-profit entity, and the utility is operated only for the benefit of those customers.  
(2) Any voting rights regarding utility matters are arranged as one vote per customer served by the system.  
(3) The non-profit entity must have complete operational control over the utility.

See, *In re: Application of Rocky Ridge Ranch Property Owners Association for an order of the Public Service Commission authorizing cessation of PSC jurisdiction and regulation over its operations*; Order Denying Request for Public Hearing and Cancelling Certificate of Convenience and Necessity, (Case No. WD-93-307, July 7, 1993). See also, *Orler v. Folsom Ridge, LLC*, 2007 WL 2066385 (2007); (Report and Order, Case No. WO-2007-0277, June 14, 2007).

7. Nonprofit sewer and nonprofit water corporations created pursuant to Chapter 393.825 RSMo and Chapter 393.900 RSMo, respectively, are not within the Commission's jurisdiction regarding their "construction, maintenance or operation . . . of facilities, service, rates, financing, accounting or management."<sup>3</sup>

8. However, § 393.933.3 RSMo provides that "The public service commission shall not have jurisdiction. . . ; *except that*, the public service commission shall have authority to approve the reorganization of any existing company regulated by the public service commission."<sup>4</sup> (Emphasis added).

9. Moreover, §§ 393.825.3(1) and 393.900.3(1) RSMo state that:

Prior to obtaining a permit to provide service, a nonprofit sewer company shall provide a copy of the articles of incorporation and company bylaws to the department of natural resources to ensure compliance with all statutory requirements. The department shall review the documents and provide the nonprofit sewer company authorization to provide service if all statutory requirements are met. If all statutory requirements have not been met, the department shall inform the nonprofit sewer company of all deficiencies and assist such company in curing the deficiencies.<sup>5</sup>

10. Finally, any entity subject to Commission jurisdiction must obtain approval from the Commission prior to transferring any assets of that entity, to another entity.

Section 393.190 RSMo.

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<sup>3</sup> See, §§ 393.847 and 393.933 RSMo.

<sup>4</sup> Staff notes that the exception language does not appear in the nonprofit sewer company statutory corollary, § 393.847, which simply reads:

The public service commission shall not have jurisdiction over the construction, maintenance or operation of the wastewater facilities, service, rates, financing, accounting or management of any nonprofit sewer company.

Nevertheless, Staff argues it is an absurd result to interpret the statute as declining jurisdiction where a company providing both drinking water and sewer service avoids § 393.933's regulatory review by creating a single entity with "sewer" in the title.

<sup>5</sup> The language in § 393.900.3(1) regarding nonprofit water companies is essentially identical, except for the substitution of "water" for "sewer."

## Argument

11. Complainants have alleged that Respondents charge for water and sewer service to the residents of the Carriage Oaks Estates subdivision. Respondents have admitted they have sought payment for services. EFIS Item 10, *Respondents' Motion to Dismiss Complainants' Amended Petition*, p. 1-2. (The homeowner's association "is charged a small fee every year to cover expenses associated with the operation of the water and sewer systems.") As a result, prior to organizing as a Chapter 393 nonprofit entity, Respondents were subject to Commission jurisdiction.<sup>6</sup>

12. Respondents' *Amended Motion to Dismiss* shows Respondents' created a Chapter 393 nonprofit on January 18, 2017. See, *Amended Motion to Dismiss*, p. 5, ¶ 5, and *Amended Motion to Dismiss* Exhibit A.<sup>7</sup>

13. Respondents also transferred the regulated assets into the Chapter 393 nonprofit. See, *Amended Motion to Dismiss* Exhibit B.

14. Based on Respondents' *Amended Motion to Dismiss*, it is unclear whether Respondents have provided the Articles of Incorporation and Bylaws to the Department of Natural Resources for review and approval.

15. Regardless of whether Respondents' have obtained Department of Natural Resources approval of their Articles of Incorporation or Bylaws, entities that are subject to Commission jurisdiction must seek Commission approval to transfer their assets, pursuant to § 393.190 RSMo. Moreover, § 393.933.3 RSMo grants the

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<sup>6</sup> See, WC-2017-0037, EFIS Item 15, *Staff Report and Motion for Mediation*, for a thorough analysis of Commission jurisdiction of the then applicable facts, prior to Respondents' creation and asset transfer to the 393 nonprofit entities.

<sup>7</sup> It is important to note that Respondents' did not "convert" the existing entities into a Chapter 393 nonprofit, as provided for by §§ 393.827 & 393.903 RSMo.

Commission jurisdiction over the reorganization of any regulated water company into a 393 nonprofit entity.

16. Therefore, the Commission retains jurisdiction over the matter, at a minimum, until Respondents make a showing to the Commission, either by seeking approval for the transfer with the Commission, or filing the required approval issued by the Department of Natural Resources, that show the converted or new nonprofit water and sewer company is in “compliance with all statutory requirements.”

**WHEREFORE**, Staff respectfully submits its *Response to Respondents’ Amended Motion to Dismiss*, and respectfully suggests the Commission still retains jurisdiction over the above captioned matter.

Respectfully submitted,

**/s/ Jacob T. Westen**

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### **CERTIFICATE OF SERVICE**

I hereby certify that copies of the foregoing have been mailed or hand-delivered, transmitted by facsimile or electronically mailed to all counsel of record on this 22<sup>nd</sup> day of February, 2017.

**/s/ Jacob T. Westen**