

**STATE OF MISSOURI
PUBLIC SERVICE COMMISSION**

At a session of the Public Service Commission held at its office in Jefferson City on the 3rd day of August, 2017.

Derald Morgan, Rick and Cindy Graver,)
William and Gloria Phipps and David Lott,)
)
Complainants)
v.)
)
Carl Richard Mills, Carriage Oaks Estates,)
Distinctive Designs and Caring Americans Trust)
Foundation, Inc. (f/k/a Caring Americans)
Foundation, Inc.),)
)
Respondents.)

File No. WC-2017-0037

**ORDER DENYING MOTION TO DISMISS,
GRANTING MOTION TO STRIKE,
AND DIRECTING FILING OF PROCEDURAL SCHEDULE**

Issue Date: August 3, 2017

Effective Date: August 3, 2017

On August 4, 2016, Derald Morgan, Rick and Cindy Graver, William and Gloria Phipps, and David Lott (collectively referred to as “Complainants”) filed a *Complaint* with the Missouri Public Service Commission requesting that the Commission return operations of a water and sewer system over to its home owner’s association. The Commission ordered Carl Richard Mills, Carriage Oaks Estates Homes Association, Distinctive Designs Ltd., and Caring Americans Trust Foundation, Inc., f/k/a Caring Americans Foundation, Inc. (collectively referred to as “Respondents”) to respond to the allegations and directed Staff to investigate the complaint and file a report.¹ The

¹ *Notice of Contested Case and Order Directing Filing*, File No. WC-2017-0037 (issued August 4, 2016).

Complainants filed an *Amended Complaint*² on August 11, 2016, and the Commission ordered parties to address the contents of the *Amended Complaint*.³

The Respondents filed a response and motion to dismiss alleging that the Commission lacks jurisdiction over the Respondents because the water and sewer company is a not-for-profit organization.⁴ The Complainants filed *Suggestions in Opposition to Respondents' Motion to Dismiss*⁵ and the Staff filed its report, indicating that it believed the Commission had jurisdiction and requesting mediation.⁶ On January 13, 2017, Staff filed a *Motion for Mediation*. Respondents filed a request to strike Staff's motion indicating the report contained information that was part of confidential settlement discussions.⁷

Respondents filed an amended motion to dismiss on February 14, 2017.⁸ In its amended motion to dismiss, Respondents included Articles of Incorporation, a Certificate of Incorporation, and deeds that purported to show a transfer of the water and sewer operations to a not-for-profit water and sewer corporation.⁹

A Procedural Conference was held on February 15, 2017 and *Suggestions in Opposition to Respondents' Amended Motion to Dismiss* and the *Staff Response to Respondents' Amended Motion to Dismiss* were filed on February 22, 2017. A further

² *Amended Complaint*, File No. WC-2017-0037 (filed August 11, 2016) (Amended Complaint).

³ *Order Regarding Responses to Amended Complaint*, File No. WC-2017-0037 (issued August 15, 2016).

⁴ *Respondents' Motion to Dismiss Complainants' Amended Petition*, File No. WC-2017-0037 (filed September 6, 2016).

⁵ *Suggestions in Opposition to Respondents' Motion to Dismiss*, File No. WC-2017-0037 (filed September 16, 2016).

⁶ *Staff Report and Motion for Mediation*, File No. WC-2017-0037 (filed October 28, 2016) (Staff Report).

⁷ *Motion to Strike Motion for Mediation*, File No. WC-2017-0037 (filed January 18, 2017).

⁸ *Respondents' Amended Motion to Dismiss*, File No. WC-2017-0037 (filed February 14, 2017).

⁹ *Respondents' Amended Motion to Dismiss*, File No. WC-2017-0037 (filed February 14, 2017).

response was received from the Respondents,¹⁰ and a supplement to the amended motion to dismiss was filed on April 25, 2017.¹¹ The supplement contained a letter from the Missouri Department of Natural Resources (MDNR).¹²

The Respondents

This proceeding is complicated by the many different forms and organizations that the Respondents have operated under. The Complainants allege that in April 2016, Carl Richard Mills, caused the transfer of the ownership of the water and sewer systems to Caring Americans Trust Foundation, Inc., f/k/a Caring Americans Foundation, Inc. (Trust Foundation), a non-profit corporation.¹³ This transfer ultimately prompted the Complainants to file their Complaint alleging that the Respondents were operating a water and sewer corporation without having a certificate of convenience and necessity granted by the Commission.

According to the Respondents, in an effort to avoid litigation, the Trust Foundation further transferred the water and sewer assets to Carriage Oaks Not-For-Profit Water and Sewer Corporation (hereafter referred to as “Carriage Oaks NFP”).¹⁴

MOTION TO DISMISS

The standard for determining whether a complaint should be dismissed has been established as:

¹⁰ *Respondents Response to Staff Response to Amended Motion to Dismiss*, File No. WC-2017-0037 (filed March 6, 2017).

¹¹ *Respondents’ Supplement to Amended Motion to Dismiss*, File No. WC-2017-0037 (Filed April 25, 2017).

¹² Exhibit B-1, *Respondents’ Supplement to Amended Motion to Dismiss*, File No. WC-2017-0037 (Filed April 25, 2017).

¹³ Paragraph 7.a., *Amended Complaint*, File No. WC-2017-0037 (filed August 11, 2016).

¹⁴ *Motion to Strike Motion for Mediation*, File No. WC-2017-0037 (filed January 18, 2017), p. 1.

solely a test of the adequacy of the petition. It assumes that all of the petition's averments are true and liberally grants to the petitioner the benefit of all reasonable inferences. 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.^{15]}

Additionally, the Missouri Supreme Court has said that “[p]leadings filed with the PSC are not to be tested by the technical rules of pleading; if a pleading fairly presents for determination some matter which falls within the jurisdiction of the Commission, it is sufficient.”¹⁶

The Respondents’ motion to dismiss is based upon arguments regarding Commission jurisdiction. The Commission has jurisdiction over “every water corporation . . . and sewer corporation, as these terms are defined in” Section 386.020, RSMo, as follows:

(49) "**Sewer corporation**" includes every corporation, company, association, joint stock company or association, partnership or person, their lessees, trustees or receivers appointed by any court, 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 sewer systems with fewer than twenty-five outlets;

* * *

(59) "**Water corporation**" includes every corporation, company, association, joint stock company or association, partnership and person, their lessees, trustees, or receivers appointed by any court whatsoever, 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[.]

¹⁵ *Nazeri v. Mo. Valley College*, 860 S.W.2d 303, 306 (Mo. banc 1993). See also, *Zeller v. Scafe*, 498 S.W.3d 846, 849 (Mo.App., W.D. 2016).

¹⁶ *St. ex rel. Kansas City Terminal Railway Co. v. Public Service Commission*, 308 Mo. 359, 372, 272 S.W. 957, 960 (banc 1925).

Further, Subsection 386.390.1, RSMo 2016, provides that the Commission may hear complaints “setting forth any act or thing done or omitted to be done by any corporation, person or public utility, including any rule, regulation or charge heretofore established or fixed by or for any corporation, person or public utility, in violation, or claimed to be in violation, of any provision of law, or of any rule or order or decision of the commission”

Missouri case law also indicates that public utilities are subject to the Commission’s jurisdiction if they are operated “for the public use”¹⁷ and a water or sewer corporation must be operated “for gain.”¹⁸ In order for the Commission to determine if these systems were operated “for gain” it will need to receive additional evidence. However, taking the allegations of the Amended Complaint at face value, this determination lies within the purview of the Commission. The Complainants have alleged that the Respondents have been providing water and sewer service to the public (the residents of Carriage Oaks Estates) and have been collecting assessments for such service.¹⁹ The Amended Complaint further alleges that the Respondents have operated and made transfers of water and sewer utilities without the proper authorization from the Commission. These allegations fall within the jurisdiction of the Commission.

In addition to the above requirements, the definition of “sewer corporation” includes an exception to the Commission’s jurisdiction for “sewer systems with fewer

¹⁷ *State ex rel. M.O. Danciger v. Pub. Serv. Comm’n*, 205 S.W. 36, 38 (Mo. 1918).

¹⁸ *Osage Water Co. v. Miller Cty. Water Auth., Inc.*, 950 S.W.2d 569, 574–75 (Mo. Ct. App. 1997).

¹⁹ Amended Complaint, paras. 1.g. and h.

than twenty-five outlets.”²⁰ Commission Rule 4 CSR 240-60.010(3)(K) defines an outlet as a “service sewer connection to the collecting sewer.” Respondents argue that it does not have 25 outlets and, therefore, cannot be a sewer corporation under the Commission’s jurisdiction.²¹ However, the Amended Complaint generally alleges that the Respondents are operating as a “public utility” and Staff argues that as many as 33 “outlets” exist.²² The record has not yet been sufficiently developed to determine the number of “outlets” under the statutory definition. However, that determination falls within the Commission’s jurisdiction.

The Respondents also argue that the water and sewer company is being operated by a not-for-profit corporation and as such, is exempt from the Commission’s jurisdiction.²³ Pursuant to statute and case law, the Commission has jurisdiction over non-profit entities that provide water and sewer service, except for those entities organized under Sections 393.825, et seq., and 393.900, et seq., RSMo, for the sole purpose of providing wastewater and drinking water services, respectively. The transfer of assets of a water or sewer corporation under the Commission’s jurisdiction without the proper authorization is void.²⁴ Thus, whether the water and sewer assets could have been transferred to the Trust Foundation and whether the Trust Foundation could have transferred its assets to Carriage Oaks NFP without Commission approval is within the Commission’s jurisdiction to decide. The Amended Complaint puts into question the status of the transfers and whether the corporations were formed in

²⁰ Subsection 386.020(59), RSMo.

²¹ *Respondents’ Motion to Dismiss Complainants’ Amended Petition*, File No. WC-2017-0037 (filed Sept. 6, 2016).

²² Staff Report, Appendix E.

²³ *Respondents’ Amended Motion to Dismiss*, File No. WC-2017-0037 (filed February 14, 2017).

²⁴ Subsection 393.190.1, RSMo 2016.

accordance with the requirements of Sections 393.825 to 393.861, 393.900 to 393.951, and 393.175, RSMo. Therefore, the allegations, on their face, present questions within the Commission's jurisdiction.

MOTION TO STRIKE

In addition to the motion to dismiss, the Respondents have also filed a motion to strike.²⁵ The Respondents argue that in its *Motion for Mediation*, Staff presented information that was part of settlement discussions and that information should be stricken.²⁶ Commission rules encourage settlement negotiations, stating that “[f]acts disclosed in the course of a prehearing conference and settlement offers are privileged and, except by agreement, shall not be used against participating parties unless fully substantiated by other evidence.”²⁷ Though not specifically forbidding the use of the information Staff presented, the spirit of the rule is to promote open communication without fear of retribution with the Commission and Staff. Thus, the Commission will grant the motion to strike. The *Motion for Mediation* is stricken, and the Commission will not consider it unless that information is provided from a non-settlement negotiations source.

CONCLUSION

The Complainants have alleged that the Respondents are operating a water and sewer corporation without the proper Commission authority to do so. Based on the face of the pleadings, this is an issue completely within the jurisdiction of the Commission. There are significant questions of fact to be determined, prior to the Commission

²⁵ *Motion to Strike Motion for Mediation*, File No. WC-2017-0037 (filed January 18, 2017).

²⁶ *Motion to Strike Motion for Mediation*, File No. WC-2017-0037 (filed January 18, 2017).

²⁷ 4 CSR 240-2.090(7).

making a determination about the status of the water and sewer facility as regulated entities. Therefore, the Commission denies Respondent's motion to dismiss and will direct the parties to submit jointly or separately a proposed procedural schedule including an evidentiary hearing. The Commission will direct its Staff to aide in the coordination of the proposed procedural schedule.

THE COMMISSION ORDERS THAT:

1. *Respondent's Amended Motion to Dismiss* is denied.
2. *The Motion to Strike Motion for Mediation* is granted.
3. The Commission will not consider the information and arguments presented in the *Motion for Mediation* unless provided from a non-settlement negotiations source in this proceeding.
4. The parties shall jointly or separately file a proposed procedural schedule including proposed dates for a hearing no later than August 15, 2017.
5. This order shall be effective when issued.



BY THE COMMISSION

A handwritten signature in black ink that reads "Morris L. Woodruff".

Morris L. Woodruff
Secretary

Hall, Chm., Stoll, Kenney,
Rupp, and Coleman, CC., concur.

Dippell, Senior Regulatory Law Judge

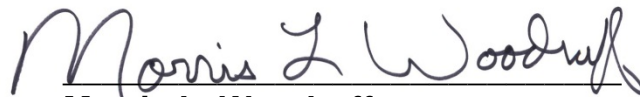
STATE OF MISSOURI

OFFICE OF THE PUBLIC SERVICE COMMISSION

I have compared the preceding copy with the original on file in this office and I do hereby certify the same to be a true copy therefrom and the whole thereof.

WITNESS my hand and seal of the Public Service Commission, at Jefferson City, Missouri, this 3rd day of August 2017.




Morris L. Woodruff
Secretary

MISSOURI PUBLIC SERVICE COMMISSION

August 3, 2017

File/Case No. WC-2017-0037

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Enclosed find a certified copy of an Order or Notice issued in the above-referenced matter(s).

Sincerely,

A handwritten signature in black ink that reads "Morris L. Woodruff". The signature is written in a cursive, flowing style.

**Morris L. Woodruff
Secretary**

Recipients listed above with a valid e-mail address will receive electronic service. Recipients without a valid e-mail address will receive paper service.