

GREGORY D. WILLIAMS
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Missouri Public Service Commission
P.O. Box 360
Jefferson City, MO 65102-0360

September 5, 2006

FILED⁴

SEP 08 2006

Missouri Public
Service Commission

Attn: Filing Desk

Re: Case No. WC-2006-0303

Dear Sirs:

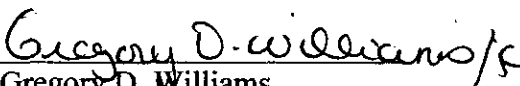
Please find enclosed for filing in the above referenced matter the original and 8 copies of the following:

1. Motion for Rehearing

An additional copy is enclosed to be stamped "filed" and returned to me in the enclosed envelop.

If you have any questions regarding this matter, please contact me at your earliest convenience.

Sincerely Yours,


Gregory D. Williams

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

The Staff of the Missouri Public Service
Commission,

Complainant,

v.

Hurricane Deck Holding Company,

Respondent.

Case No. WC-2006-0303

FILED⁴

SEP 08 2006

MOTION FOR REHEARING

Missouri Public
Service Commission

COME NOW Hurricane Deck Holding Company (HDHC), Respondent herein,
and pursuant to Section 386.500 RSMo., move the Commission for its Order granting a
Rehearing herein. In support thereof, said Respondent state to the Commission as
follows:

**THE COMMISSION HAS FAILED TO COMPLY WITH APPLICABLE LAW IN
FINDING THAT HDHC IS A WATER AND SEWER CORPORATION**

**1. The Commission Has Failed to Apply Missouri Case Law to Determine that
HDHC's Services Were Offered to the General Public.**

The Commission has failed to apply the appropriate law in determining it has
jurisdiction to regulate the water and sewer system owned by HDHC. The Public Service
Commission (PSC) only has power to regulate those utilities that are defined in Section
386.020 RSMo (2000) (Supp. 2005). Section 386.020(58) defines "water corporation" as:

"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[.]

Section 386.020(48) defines "sewer corporation" as:

"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[.]

In addition to these definitions, Missouri case law has added a further criterion before the Commission has jurisdiction. The utility service must be for the use of the public, rather than for a limited group of private individuals. See State ex rel. M.O. Danciger & Co. v. Public Service Commission of Missouri, et al., 205 S.W. 36 (Mo. 1918); Osage Water Company v. Miller County Water Authority, Inc., 950 S.W.2d 569, 574 (Mo. App. S.D. 1997).

The Commission's Order states that HDHC falls within the Commission's jurisdiction because it meets the statutory definition. However, the Commission has substantially ignored Missouri precedent that interpreted the statutory language to mean providing service to the general public. Indeed, "[t]o constitute a public utility and be subject to regulation by the Commission, a service must be *devoted to public use*" Khulusi v. Southwestern Bell Yellow Pages, Inc., 916 S.W.2d 227, 232 (Mo. App. 1995) (citing State ex rel. M.O. Danciger & Co. v. Public Service Commission of Missouri, et al., 205 S.W. 36, 40 (Mo. 1918)) (emphasis added). A service being offered to the general public is the defining characteristic of a 'public utility.' See Osage Water Co. v. Miller County Water Authority, Inc., 950 S.W.2, 569 (Mo. App. S.D. 1997).

The *Osage Water Co.* court determined that the mode of operation and the nature of the services are controlling. *Id.* As the *Osage Water Co.* court considered these factors, along with relevant examples from other jurisdictions, it held, "[d]efendant sells water to

the public for compensation, and its actions suggest that it has *undertaken the responsibility to provide water service to all members of the public* within its capabilities.” *Id.* at 575 (emphasis added). When applying the language of this holding to the facts in this case, it is clear that HDHC is not a water and sewer corporation as it did not offer services to all members of the public. No evidence was presented that would substantiate the assumption that HDHC’s capacities are limited to the thirty (30) members that it serves. Additionally, no facts or evidence was presented to that would substantiate the assumption that HDHC would supply services to any member of the public that would request said services.

The Commission concluded that because more than a “few friends” were involved, the services must have been offered to the “public.” The Commission further compared the services, and the limited members served in this case, to the *State ex rel. Cirese v. Public Service Commission*, 178 S.W.2d 788 (Mo. App. K.C. 1944), case where electric services were offered through advertisements and handbills to the general public. The findings of fact that the Commission relies upon do not suggest or support that HDHC advertised the services in any fashion. There are no facts or evidence presented that would support the assumption that HDHC advertised these services. These statements and conclusions of law by the Commission, are not supported by the facts and evidence in the present case.

2. The Commission Has Failed to Apply Missouri Case Law to Determine that HDHC’s Services were Offered for a Gain.

The Commission improperly applied the definition of a “water corporation” and “sewer corporation” to include a mere intent to provide the services for gain. The Commission states that there is no requirement that a “water corporation” actually receive

payment. Instead, the Commission states that "the definition depends upon an *intent* to supply water or sewer service for gain or compensation." The Commission's interpretation of the statutory definition is without any precedential support. In fact the Commission's conclusions of law are devoid of any case law to support its interpretation. However, the Commission made this conclusion of law without any factual or evidentiary support. The Commission relies upon the delivery of assessments for the benefit of a homeowners association as establishing intent on the part of HDHC to receive compensation. The Commission failed to understand that HDHC would never be compensated with the money collected for the assessments.

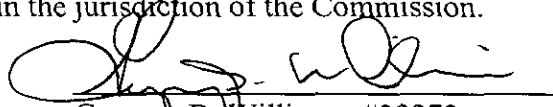
Further, the Commission equates the delivery of the assessment, for the operating costs of the services, to the operation "for gain." The Commission has failed to make any findings of fact that would support that HDHC has operated the services for any monetary gain. In fact, the Commission found that HDHC did not deposit any money into its own account.

CONCLUSION

By failing to apply the appropriate law in determining it has jurisdiction to regulate HDHC, the Commission has failed to establish that HDHC is a water or sewer corporation. By applying an erroneous standard to HDHC, the Commission has subjected HDHC to the possibility of fines being levied against it. The Commission cannot, without evidence, make findings of fact or conclusions of law. Beyond this fundamental due process error, the Commission has applied the wrong legal standard to its assumed facts, and has reached a decision which is not in accordance with applicable Missouri Law, and

deprives the Applicants of valuable property rights in violation of the requirements of the United States and Missouri Constitutions.

WHEREFORE, Respondent prays for an Order of the Commission setting aside the Order Granting in Part and Denying in Part Staff's Motion for Summary Disposition herein, and setting this matter for an evidentiary hearing as to whether the water and sewer system owned by HDHC is within the jurisdiction of the Commission.

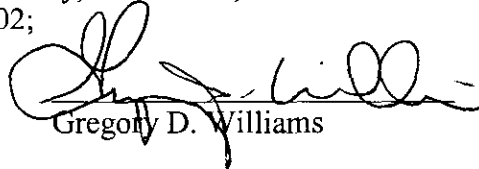


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CERTIFICATE OF SERVICE

I, Gregory D. Williams, do hereby certify that a true copy of the foregoing was on this 5 day of Sept., 2006, mailed, postage prepaid, to the following:

General Counsel, P.O. Box 360, Jefferson City, MO 65102; Office of Public Counsel,
P.O. Box 7800, Jefferson City, MO 65102;



Gregory D. Williams