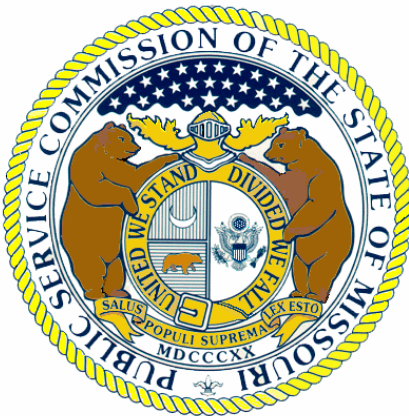


BEFORE THE PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI



Cathy J. Orler,

Complainant,

v.

Folsom Ridge, LLC,

and

Big Island Homeowners Water and Sewer
Association, Inc., f/k/a Big Island
Homeowners Association,

Respondents.

Case No. WC-2006-0082, et al.

In the Matter of the Application of Folsom Ridge,
L.L.C., and Big Island Homeowners Water and Sewer
Association, Inc., for an Order Authorizing the
Transfer and Assignment of Certain Water and
Sewer Assets to Big Island Water Company and
Big Island Sewer Company, and in Connection
Therewith Certain Other Related Transactions.

Case No. WO-2007-0277

REPORT AND ORDER

Issue Date: June 14, 2007

Effective Date: June 24, 2007

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

Cathy J. Orler,)	
)	
Complainant,)	
)	
v.)	<u>Case No. WC-2006-0082, et al.</u>
)	
Folsom Ridge, LLC,)	
)	
and)	
)	
Big Island Homeowners Water and Sewer)	
Association, Inc., f/k/a Big Island)	
Homeowners Association)	
)	
Respondents.)	

In the Matter of the Application of Folsom Ridge,)	
L.L.C., and Big Island Homeowners Water and Sewer)	
Association, Inc., for an Order Authorizing the)	
Transfer and Assignment of Certain Water and)	<u>Case No. WO-2007-0277</u>
Sewer Assets to Big Island Water Company and)	
Big Island Sewer Company, and in Connection)	
Therewith Certain Other Related Transactions.)	

APPEARANCES

Cathy J. Orler, appearing *pro se*, 3252 Big Island Drive, Roach, Missouri 65787.

Benjamin D. Pugh, appearing *pro se*, 1780 Big Island Drive, Roach, Missouri 65787.

Cindy Fortney, appearing *pro se*, 3298 Big Island Drive, Roach, Missouri 65787.

Stan Temares, appearing *pro se*, 371 Andrews Trail Court, St. Peters, Missouri 63376.

Mark. W. Comley, Newman, Comley & Ruth P.C., 600 Monroe Street, Suite 301, Post Office Box 537, Jefferson City, Missouri 65102. Attorney for Folsom Ridge, L.L.C. and Big Island Homeowners Water and Sewer Association, Inc.,

Charles E. McElyea, Phillips, McElyea, Carpenter & Welch, P.C., 85 Court Circle, Post Office Box 559, Camdenton, Missouri 65020. Attorney for Folsom Ridge, L.L.C. and Big Island Homeowners Water and Sewer Association, Inc.

Pamela Holstead, 3458 Big Island Drive, Roach, Missouri 65787. Attorney for Big Island Water Company and Big island Sewer Company.

Lewis R. Mills, Jr., Public Counsel, Office of the Public Counsel, Governor Office Building, Post Office Box 2230, Jefferson City, Missouri 65102. Attorney for Office of the Public Counsel and the Public.

Kevin Thompson, General Counsel, Missouri Public Service Commission, Post Office Box 360, Jefferson City, Missouri 65102. Attorney for the Staff of the Commission.

Jennifer Heintz, Assistant General Counsel, Missouri Public Service Commission, Post Office Box 360, Jefferson City, Missouri 65102. Attorney for the Staff of the Commission.

REGULATORY LAW JUDGE: **Harold Stearley**

REPORT AND ORDER

Procedural History

The complaint portion of these proceedings began in August and September, 2005, when nine individual complainants filed complaints against Folsom Ridge, L.L.C, ("Folsom Ridge").¹ The complaints alleged that Folsom Ridge, a property development company developing real estate at Big Island, Lake of the Ozarks, Missouri, ("Big Island") was illegally operating a water and sewer system by providing service to the general public without a certificate of convenience and necessity from this Commission. The complaints also alleged that Big Island Homeowners Water and Sewer Association, Inc., f/k/a Big Island Homeowners Association, Inc., ("Association"), the homeowners association managing and operating the water and sewer systems, was merely a captive entity doing the bidding of Folsom Ridge.

On November 4, 2005, the Commission consolidated these actions pursuant to 4 CSR 240-2.110(3) finding that they involved related questions of law or fact. Case No. WC-2006-0082 was designated as the lead case.² As the case progressed, the Association was added as a separate respondent.

On June 16, 2006, Big Island Water & Sewer Company, Inc., a new company that is affiliated with Folsom Ridge, filed an application for a certificate of convenience and

¹ The nine original complaints were filed by the following parties: Cathy Orlor, 3252 Big Island Drive, Roach, MO 65787 (Case No. WC-2006-0082); Benjamin D. Pugh, 1780 Big Island Drive, Roach, MO 65787 (Case No. WC-2006-0090); Ben F. Weir, 3515 SW Meyer Blvd., Blue Springs, MO 64015 (Case No. WC-2006-0107); Stan Temares, 371 Andrews Trail Court, St. Peters, MO 63376 (Case No. WC-2006-0120); Judy Kenter, 1794 Big Island Drive, Roach, MO 65787 (Case No. WC-2006-0121); Joseph J. Schrader, 1105 Yorktown Pl., DeLand, FL 32720 (Case No. WC-2006-0122); Duane Stoyer, 702 Ridgeview Drive, Washington, MO 63090 (Case No. WC-2006-0129); Cindy Fortney, 3298 Big Island Drive, Roach, MO 65787 (Case No. WC-2006-0138); Dean Leon Fortney, P.O. Box 1017, Louisburg, KS 66053 (Case No. WC-2006-0139).

² On June 13, 2006, Duane Stoyer's case was severed from the consolidated case because of his unfortunate death. Because no lawful representative was substituted as a party to his action pursuant to Supreme Court Rule 52.13(a), his case was dismissed by order effective August 13, 2006.

necessity to operate the water and sewer system currently being operated by Folsom Ridge and the Association. That application was assigned Case No. WA-2006-0480, and was set for hearing beginning on February 5, 2007.³ On June 27, 2006, in response to the filing of the application for certificate, the Commission suspended the proceedings in the complaint cases, WC-2006-0082, et al., until the certificate case could be resolved.

On January 23, 2007, Folsom Ridge and the Association filed a joint application asking the Commission to approve the transfer of water and sewer system assets to the Big Island Water Company and the Big Island Sewer Company, recently formed non-profit corporations organized under the provisions of Sections 393.825 to 393.861 and 393.900 to 393.954, RSMo 2000 ("Chapter 393 Companies").⁴ That application was assigned Case No. WO-2007-0277.⁵ The water and sewer system assets that were to be transferred to the non-profit corporations are the same assets that were to be transferred to Big Island Water & Sewer Company, Inc., the applicant in Case No. WA-2006-0480. The day after

³ The following individuals were granted intervention in Case No. WA-2006-0480: Cathy Orlor, 3252 Big Island Drive, Roach, MO 65787; Cindy Fortney, 3298 Big Island Drive, Roach, MO 65787; Benjamin D. Pugh, 1780 Big Island Drive, Roach, MO 65787; Joseph J. Schrader, 1105 Yorktown Pl., DeLand, FL 32720; Stan Temares, 1836 Big Island Drive, Roach, MO 65787; Ben F. Weir, 3515 SW Meyer Blvd., Blue Springs, MO 64015; Elaine H. and William T. Foley, II, 15360 Kansas Ave, Bonner Springs, KS 66012; Mark and Deborah Hesley, 2308 Big Island Drive, Roach, MO 65787; Don Deckard, 2218 Big Island Drive, Roach, MO 65787; Bernard J. Beaven, 13900 E 217, Peculiar, MO 64078; Jerry Steinhour, Lot 57, P.O. Box 737, Seneca, IL 61360; Joseph Geary Mahr, 5712 Dearborn Street, Mission, KS 66202; Arthur W. Nelson, 6504 Melody Lane, Parkville, MO 64152; Eugene Prather, 1604 Big Island Drive, Roach, MO 65787; Donald J. and Frances K. Weast, 5291 Kerth Road, Mehlville, MO 63128; Stephen D. Kleppe, 8210 E. Tether Trail, Scottsdale, AZ 85255.

⁴ All statutory citations refer to RSMo 2000 unless otherwise noted.

⁵ The following individuals were granted intervention in Case No. WO-2007-0277: Big Island Water Company, 3352 Big Island Drive, Roach, MO 65787; Big Island Sewer Company, 3352 Big Island Drive, Roach, MO 65787; William T. Foley, II, 15360 Kansas Ave., Bonner Springs, KS 66012; Benjamin D. Pugh, 1780 Big Island Drive, Roach, MO 65787; Cathy Jo Orlor, 3252 Big Island Drive, Roach, MO 65787; Cindy Fortney, 3298 Big Island Drive, Roach, MO 65787; Arthur W. Nelson, 2288 Big Island Drive, Roach, MO 65787; Sherrie Fields, 3286 Big Island Drive, Roach, MO 65787; Tom and Sally Thorpe, 3238 Big Island Drive, Roach, MO 65787; Bernadette Sears, Portage Park 3, Lot 10, Big Island, Roach, MO 65787; Geary and Mary Mahr, 1886 Big Island Drive, Roach, MO 65787; Donald J. Weast, 3176 Big Island Drive, Roach, MO 65787; Fran Weast, 3176 Big Island Drive, Roach, MO 65787.

the new application was filed, January 24, 2007, Big Island Water & Sewer Company, Inc. filed a motion in Case No. WA-2006-0480 indicating that it no longer wanted to acquire the water and sewer assets in question and asked for leave to withdraw its application and to voluntarily dismiss that case. That leave was granted on January 26, 2007, and Case No. WA-2006-0480 was dismissed.

In Case No. WO-2007-0277, Folsom Ridge and the Association asked the Commission to act on their application to transfer assets expeditiously to allow the transaction to occur by March 31, 2007.⁶ The Commission observed that the complaints pending in Case No. WC-2006-0082, et al., related to the same issues that would be before the Commission in Case No. WO-2007-0277 and those issues needed to be resolved before the Commission could act on the application to transfer assets. Consequently, the Commission established a joint procedural schedule to resolve both cases. The cases were not formally consolidated, but the evidentiary hearing was set to hear both cases at the same time.

The Commission issued its adopted list of issues list identifying the relevant primary issues in these matters as follows:

Primary Issues in WC-2006-0082:

- 1.) Are Folsom Ridge or the Association, or both of them, a public utility pursuant to § 386.020(42), RSMo Supp. 2006, and thus subject to the jurisdiction, control and regulation of the Missouri Public Service Commission pursuant to § 386.250, RSMo Supp. 2006?
- 2.) Have Folsom Ridge or the Association, or both of them, violated § 393.170, RSMo 2000, by constructing and operating a water system or a sewer system, or both, without having first obtained authority from the

⁶ During the hearing the Respondents acknowledged that they would suspend the finalization of their proposed transfer of assets until such time as the Commission could fully adjudicate and rule on these matters.

Commission in the form of a Certificate of Public Convenience and Necessity?

Primary Issue in WC-2007-0277:

Would Applicants' proposed transfer of the water and sewer assets to Big Island Water Company and Big Island Sewer Company be detrimental to the public interest?

The evidentiary hearing was conducted on February 28 through March 2, 2007. During the hearing, the Commission subpoenaed Mr. John MacEachen, an Environmental Specialist with the Missouri Department of Natural Resources ("DNR"), who is presently attached to its enforcement division. Mr. MacEachen testified on the last day of the hearing and he fielded questions from the Commission and the parties pertaining to photographs offered by Mr. Benjamin D. Pugh, particularly regarding the specifications and characteristics of flexible piping used for service lines on Big Island, and the manner in which service lines for water and sewer lines shared the same "metering" or access pit.

At the close of the hearing on March 2, 2007, Folsom Ridge and the Association sought leave to supply additional testimony on the nature of the service line installations, because this testimony deviated from the adopted list of issues, and that leave was granted. The Commission established an ancillary procedural schedule for submission of that testimony and testimony was received from Mr. James T. Crowder for Folsom Ridge and the Association. Rebuttal and Surrebuttal testimony was also allowed. In addition to receiving the additional prefiled testimony from the parties concerning the service lines, the Commission granted Complainants' request for an ancillary hearing to take additional testimony concerning this subject matter. The ancillary hearing was held on March 30, 2007.

Findings of Fact

The Missouri Public Service Commission, having considered all of the competent and substantial evidence upon the whole record, makes the following findings of fact. When making findings of fact based upon witness testimony, the Commission will assign the appropriate weight to the testimony of each witness based upon their qualifications, expertise and credibility with regard to the attested to subject matter.

The Parties Entering Their Appearance At Hearing⁷

1. Cathy J. Orler, a *pro se* complainant in WC-2006-0082 and intervener in WO-2007-0277, is a homeowner on Big Island at the Lake of Ozarks; her residential address being located at 3252 Big Island Drive, Roach, MO 65787.⁸

2. Benjamin D. Pugh, a *pro se* complainant in WC-2006-0082 and intervener in WO-2007-0277, is a homeowner on Big Island at the Lake of Ozarks; his residential address being located at 1780 Big Island Drive, Roach, MO 65787.⁹

3. Cindy Fortney, a *pro se* complainant in WC-2006-0082 and intervener in WO-2007-0277, is a homeowner on Big Island at the Lake of Ozarks; her residential address being located at 3298 Big Island Drive, Roach, MO 65787.¹⁰

4. Stan Temares, a *pro se* complainant in WC-2006-0082, is a homeowner on Big Island at the Lake of Ozarks; his primary residential address being located at 371

⁷ The parties that failed to appear are: Ben F. Weir, Joseph J. Schrader, Judy Kenter, Dean Leon Fortney, Fran Weast, Donald J. Weast, Joseph Geary Mahr, Mary Mahr, Tom Thorpe, Sally Thorpe, Bernadette Sears, Sherrie Fields, Arthur W. Nelson, and William T. Foley, II.

⁸ Cathy J. Orler's Complaint (WC-2006-0082), p. 1; Hearing Exhibit 1, Prefiled Direct Testimony of Cathy J. Orler, p. 1, lines 1-2.

⁹ Benjamin D. Pugh's Complaint (WC-2006-0090), p. 1; Hearing Exhibit 4, Prefiled Direct Testimony of Benjamin D. Pugh, p. 1, lines 1-2.

¹⁰ Cindy Fortney's Complaint (WC-2006-0138), p. 1; Hearing Exhibit 7, Prefiled Direct Testimony of Cindy Fortney, p. 1, lines 1-2.

Andrews Trail Court, St. Peters, MO 63376; his lake address being located at 1836 Big Island Drive, Roach, MO 65787.¹¹

5. Folsom Ridge is a limited liability company organized under the laws of the state of Colorado and authorized to engage in business in the state of Missouri.¹²

6. Folsom Ridge was formed in 1997 to engage in the business of owning and developing real property in the State of Missouri.¹³

7. Pursuing that development, Folsom Ridge purchased all, or nearly all of the undeveloped land on Big Island.¹⁴

8. Folsom Ridge owns certain assets used or useful in the provision of water and sewer service on Big Island.¹⁵

9. Big Island Homeowners Water and Sewer Association, Inc. (Association) is a nonprofit homeowners association organized under the laws of the State of Missouri.¹⁶

10. The Association is the operator and business administrator of the water and sewer systems owned by Folsom Ridge on Big Island.¹⁷

¹¹ Stan Temares's Complaint (WC-2006-0120), p. 1 and 4; Application to Intervene in Case No. WA-2006-0480 filed July 7, 2006, p. 1.

¹² Joint Application for Approval of Transfer of Assets to Non-Profit Companies Organized Under Chapter 393, RSMo, ("Joint Application"), paragraph 1, filed January 23, 2007; Exhibit 1 to the Joint Application.

¹³ Joint Application, paragraph 1; Hearing Exhibit 12, Prefiled Direct Testimony of Barbara Brunk, p. 2, lines 7-18.

¹⁴ Hearing Exhibit 12, Prefiled Direct Testimony of Barbara Brunk, p. 2, lines 7-18.

¹⁵ Joint Application, paragraph 2; Exhibit 1 to the Joint Application; Hearing Exhibit 9, Prefiled Direct Testimony of Rick Rusaw, p.3, lines 8-14.

¹⁶ Joint Application, paragraph 2; Exhibit 2 to the Joint Application. The Association was originally named Big Island Homeowners Association, Inc. Hearing Exhibit 12, Prefiled Direct Testimony of Barbara Brunk, p. 13, lines 15-19.

¹⁷ Joint Application, paragraph 2; Hearing Exhibit 9, Prefiled Direct Testimony of Rick Rusaw, p. 9, lines 8-15.

11. Big Island Water Company is a Missouri not-for-profit water company formed under the provisions of Chapter 393 for the purposes of providing water service to residents on Big Island.¹⁸

12. Big Island Sewer Company is a Missouri not-for-profit sewer company formed under the provisions of Chapter 393 for purposes of providing sewer service to residents on Big Island.¹⁹

13. The General Counsel of the Missouri Public Service Commission “represent[s] and appear[s] for the commission in all actions and proceedings involving any question under this or any other law, or under or in reference to any act, order, decision or proceeding of the commission . . .”²⁰

14. The Office of the Public Counsel “may represent and protect the interests of the public in any proceeding before or appeal from the public service commission.”²¹ Public

¹⁸ Application to Intervene, paragraph 1, filed January 30, 2007; Exhibit A to the Application to Intervene; Hearing Exhibit 98, Prefiled Direct Testimony of Gail Snyder, p. 1, lines 3-12.

¹⁹ Application to Intervene, paragraph 2, filed January 30, 2007; Exhibit B to the Application to Intervene; Hearing Exhibit 98, Prefiled Direct Testimony of Gail Snyder, p. 1, lines 3-12.

²⁰ Section 386.071, RSMo 2000; Commission Rules 4 CSR 240-2.010(8) and 4 CSR 240-2.040(1). Additionally, the General Counsel “if directed to do so by the commission, to intervene, if possible, in any action or proceeding in which any such question is involved; to commence and prosecute in the name of the state all actions and proceedings, authorized by law and directed or authorized by the commission, and to expedite in every way possible, to final determination all such actions and proceedings; to advise the commission and each commissioner, when so requested, in regard to all matters in connection with the powers and duties of the commission and the members thereof, and generally to perform all duties and services as attorney and counsel to the commission which the commission may reasonably require of him.” *Id.*

²¹ Section 386.710(2), RSMo 2000; Commission Rules 4 CSR 240-2.010(16) and 4 CSR 240-2.040(2).

Counsel “shall have discretion to represent or refrain from representing the public in any proceeding.”²²

The Parties Failing to Appear At Hearing

15. Concerning the parties that failed to appear at the evidentiary hearing:
 - a. Ben F. Weir, complainant in Case No. WC-2006-0082, asserts that he: (1) is not a member of the Association; (2) has not paid any fees for a tap-on to the water or sewer system or for reserving rights to tap-on; (3) does not receive water or sewer service from the Association; and, (4) has his own private well for drinking water and his own sanitary septic system. Mr. Weir alleges that Folsom Ridge and the Association have engaged in misrepresentation, fraud, creating health hazards and lowering property values.²³

No evidence was offered or adduced at hearing to support factual findings regarding Mr. Weir’s allegations. Mr. Weir failed to establish that he has a protectible interest in this matter and therefore lacks standing to

²² Section 386.710(3), RSMo 2000; Commission Rules 4 CSR 240-2.010(16) and 4 CSR 240-2.040(2). Public Counsel “shall consider in exercising his discretion the importance and the extent of the public interest involved and whether that interest would be adequately represented without the action of his office. If the public counsel determines that there are conflicting public interests involved in a particular matter, he may choose to represent one such interest based upon the considerations of this section, to represent no interest in that matter, or to represent one interest and certify to the director of the department of economic development that there is a significant public interest which he cannot represent without creating a conflict of interest and which will not be protected by any party to the proceeding.” *Id.*

²³ Ben F. Weir’s Complaint (WC-2006-0107), p. 1-4.

proceed with his complaint.²⁴ Mr. Weir also failed to prosecute his complaint in any manner other than filing the original complaint form and, pursuant to 4 CSR 240-2.116(2), is subject to dismissal for failure to prosecute. Additionally, his complaint is subject to dismissal pursuant to Commission Rule 4 CSR 240-2.116(3) for failure to appear at the evidentiary hearing.

b. Joseph J. Schrader, complainant in Case No. WC-2006-0082, made no averments as to his status as an Association member or how he obtains or provides for his own water and sewer services. Mr. Schrader alleges Folsom Ridge and the Association have engaged in misrepresentation and fraud concerning the provision of water and sewer services. Mr. Schrader's complaint states that he has moved to Florida and that a realtor found a buyer for his home on Big Island in 2003. There is no evidence in the record to support a factual finding that Mr. Schrader is a current homeowner on Big Island.²⁵

²⁴ Assertions or allegations in pleadings do not constitute evidence. The complaint was not verified by affidavit and did not contain any authenticated and verified supporting documentation to support any claim or allegation. It is well established legal doctrine that unsworn statements of attorneys or parties, statements in briefs, pleadings, motions, arguments, allegations, or charging documents, as well as articles or exhibits not formally or constructively introduced are not evidence of the facts asserted unless conceded to by the opposing party. *State ex rel. TWA, Inc. v. David*, 158 S.W.3d 232, 236 (Mo. Banc 2005) (Judge White Dissenting), *citing to*, *State ex rel. Dixon v. Darnold*, 939 S.W.2d 66, 69 (Mo. App. 1997); *State v. Smith*, 154 S.W.3d 461, 469 (Mo. App. 2005); *Lester v. Sayles*, 850 S.W.2d 858, 864 (Mo. Banc 1993); *State v. Rutter*, 93 S.W.3d 714, 727 (Mo. Banc 2002); *State v. Robinson*, 825 S.W.2d 877, 880 (Mo. App. 1992); *State ex rel. Horn v. Randall*, 275 S.W.2d 758, 763-764 (Mo. App. 1955). To have legal standing to prosecute a legal action a party seeking relief must have a legally cognizable interest in the subject matter and he or she must be facing a threatened injury or have suffered actual injury. *Eastern Missouri Laborers Dist. Council v. St. Louis County*, 781 S.W.2d 43, 46 (Mo. banc 1989). "A legally protectible interest contemplates a pecuniary or personal interest directly in issue or jeopardy which is subject to some consequential relief, immediate or prospective." *Absher v. Cooper*, 495 S.W.2d 696, 698 (Mo. App. 1973). The Commission recognized that the conclusion concerning standing is a legal conclusion, but found it convenient to place that conclusion within the findings of fact section. The Commission will further address these issues in its Decision Section of the Report and Order.

²⁵ Joseph J. Schader Complaint (WC-2006-0122), p. 1-4.

No evidence was offered or adduced at hearing to support factual findings regarding Mr. Schrader's allegations. Mr. Schrader failed to establish that he has a protectible interest in this matter and therefore lacks standing to proceed with his complaint.²⁶ Mr. Schrader also failed to prosecute his complaint in any manner other than filing the original complaint form and, pursuant to 4 CSR 240-2.116(2), is subject to dismissal for failure to prosecute. Additionally, his complaint is subject to dismissal pursuant to Commission Rule 4 CSR 240-2.116(3) for failure to appear at the evidentiary hearing.

c. Judy Kenter, complainant in Case No. WC-2006-0082, asserts that she has: (1) owned her home since 1961; (2) paid a tap-on fee of \$4800 for sewer service to Folsom Ridge prior to January 1999; (3) paid a reservation fee to ensure her right to hook onto the system starting in December 2000; and (4) hooked onto the sewer system and pays the Association for services. Ms. Kenter also states that she is not a member of the Association and alleges that Folsom Ridge and the Association have engaged in misrepresentation and fraud concerning the provision of water and sewer services.²⁷

No evidence was offered or adduced at hearing to support factual findings regarding Ms. Kenter's allegations. Ms. Kenter failed to establish that she has a protectible interest in this matter and therefore lacks standing

²⁶ See FN 24, *supra*.

²⁷ Judy Kenter Complaint (WC-2006-0121), p. 1-2.

to proceed with her complaint.²⁸ Ms. Kenter also failed to prosecute her complaint in any manner other than filing the original complaint form and, pursuant to 4 CSR 240-2.116(2), is subject to dismissal for failure to prosecute. Additionally, her complaint is subject to dismissal pursuant to Commission Rule 4 CSR 240-2.116(3) for failure to appear at the evidentiary hearing.

d. Dean Leon Fortney, complainant in Case No. WC-2006-0082, asserts: (1) he purchased a tap-on for the sewer system from Folsom Ridge for \$4800; (2) he is not a member of the Association; and (3) he sold his house on Big Island on July 21, 2005. Mr. Fortney further alleges that Folsom Ridge attempted to interfere with the sale of his home by misrepresenting to his realtor that he owes back fees for reserving his tap-on and that the new owners would be required to pay reservations fees and join the Association when closing on the purchase.²⁹ Mr. Fortney is also a co-owner of property owned by his daughter Cindy Fortney, another complainant in this matter.³⁰ Mr. Fortney's joint ownership of Big Island property would constitute a protectible interest and give Mr. Fortney standing to proceed with his complaint.³¹

However, no evidence was offered or adduced at hearing to support factual findings regarding Mr. Fortney's allegations. Mr. Fortney also failed to prosecute his complaint in any manner other than filing the original complaint

²⁸ See FN 24, *supra*.

²⁹ Dean Leon Fortney Complaint (WC-2006-0139), p. 1-4.

³⁰ Transcript p. 500, lines 2-5.

³¹ See FN 24, *supra*.

form and, pursuant to 4 CSR 240-2.116(2), is subject to dismissal for failure to prosecute. Additionally, his complaint is subject to dismissal pursuant to Commission Rule 4 CSR 240-2.116(3) for failure to appear at the evidentiary hearing.

e. Intervener Fran Weast filed a single page application to intervene in Case No. WO-2007-0277, indicating she opposed transfer of the water and sewer assets. No evidence was offered or adduced at hearing to support any factual findings regarding Ms. Weast's position on the transfer. Ms. Weast failed to establish that she has a protectible interest in this matter and therefore lacks standing to proceed in this matter.³² Additionally, she is subject to dismissal pursuant to Commission Rule 4 CSR 240-2.116(3) for failure to appear at the evidentiary hearing.

f. Intervener Donald J. Weast filed a single page application to intervene in Case No. WO-2007-0277, indicating he opposed transfer of the water and sewer assets. No evidence was offered or adduced at hearing to support any factual findings regarding Mr. Weast's position on the transfer. Mr. Weast failed to establish that he has a protectible interest in this matter and therefore lacks standing to proceed in this matter.³³ Additionally, he is

³² See FN 24, *supra*. Commission Rule 4 CSR 240-2.075 establishes a low threshold to gain entrance into a case before the Commission. All a person or entity must do is identify an interest that is different from that of the general public, which might be adversely affected by a final order of the Commission. Alternatively, a person or entity may intervene if it is established that their presence would serve the public interest. A grant of intervention, however, does not excuse a party from active participation in a proceeding and failure to proffer any evidence in a matter once granted intervention results in a failure to establish standing to remain in the action.

³³ See FN 32, *supra*.

subject to dismissal pursuant to Commission Rule 4 CSR 240-2.116(3) for failure to appear at the evidentiary hearing.

g. Intervener Joseph Geary Mahr filed a single page application to intervene in Case No. WO-2007-0277, indicating he opposed transfer of the water and sewer assets. No evidence was offered or adduced at hearing to support any factual findings regarding Mr. Mahr's position on the transfer. Mr. Mahr failed to establish that he has a protectible interest in this matter and therefore lacks standing to proceed in this matter.³⁴ Additionally, he is subject to dismissal pursuant to Commission Rule 4 CSR 240-2.116(3) for failure to appear at the evidentiary hearing.

h. Intervener Mary Mahr joined Joseph Geary Mahr in filing a single page application to intervene in Case No. WO-2007-0277, indicating she opposed the transfer of water and sewer assets. No evidence was offered or adduced at hearing to support any factual findings regarding Ms. Mahr's position on the transfer. Ms. Mahr failed to establish that she has a protectible interest in this matter and therefore lacks standing to proceed in this matter.³⁵ Additionally, she is subject to dismissal pursuant to Commission Rule 4 CSR 240-2.116(3) for failure to appear at the evidentiary hearing.

i. Intervener Tom Thorpe filed a single page application to intervene in Case No. WO-2007-0277, indicating he opposed the transfer of water and sewer assets. No evidence was offered or adduced at hearing to support any factual findings regarding Mr. Thorpe's position on the transfer.

³⁴ See FN 32, *supra*.

³⁵ See FN 32, *supra*.

Mr. Thorpe failed to establish that he has a protectible interest in this matter and therefore lacks standing to proceed in this matter.³⁶ Additionally, he is subject to dismissal pursuant to Commission Rule 4 CSR 240-2.116(3) for failure to appear at the evidentiary hearing.

j. Intervener Sally Thorpe joined Tom Thorpe in filing a single page application to intervene in Case No. WO-2007-0277, indicating she opposed the transfer of water and sewer assets. No evidence was offered or adduced at hearing to support any factual findings regarding Ms. Thorpe's position on the transfer. Ms. Thorpe failed to establish that she has a protectible interest in this matter and therefore lacks standing to proceed in this matter.³⁷ Additionally, she is subject to dismissal pursuant to Commission Rule 4 CSR 240-2.116(3) for failure to appear at the evidentiary hearing.

k. Intervener Bernadette Sears filed a single page application to intervene in Case No. WO-2007-0277, indicating she opposed the transfer of water and sewer assets. No evidence was offered or adduced at hearing to support any factual findings regarding Ms. Sears's position on the transfer. Ms. Sears failed to establish that she has a protectible interest in this matter and therefore lacks standing to proceed in this matter.³⁸ Additionally, she is subject to dismissal pursuant to Commission Rule 4 CSR 240-2.116(3) for failure to appear at the evidentiary hearing.

³⁶ See FN 32, *supra*.

³⁷ See FN 32, *supra*.

³⁸ See FN 32, *supra*.

l. Intervener Sherrie Fields filed a single page application to intervene in Case No. WO-2007-0277, without indicating any position regarding the proposed transfer of water and sewer assets. No evidence was offered or adduced at hearing to support any factual findings regarding Ms. Fields's unidentified position on the transfer. Ms. Fields failed to establish that she has a protectible interest in this matter and therefore lacks standing to proceed in this matter.³⁹ Additionally, she is subject to dismissal pursuant to Commission Rule 4 CSR 240-2.116(3) for failure to appear at the evidentiary hearing.

m. Intervener Arthur W. Nelson filed a single page application to intervene in Case No. WO-2007-0277, indicating he opposed the transfer of water and sewer assets. No evidence was offered or adduced at hearing to support any factual findings regarding Mr. Nelson's position on the transfer. Mr. Nelson failed to establish that he has a protectible interest in this matter and therefore lacks standing to proceed in this matter.⁴⁰ Additionally, he is subject to dismissal pursuant to Commission Rule 4 CSR 240-2.116(3) for failure to appear at the evidentiary hearing.

n. Intervener William T. Foley, II filed a single page application to intervene in Case No. WO-2007-0277, indicating he opposed the transfer of water and sewer assets. No evidence was offered or adduced at hearing to support any factual findings regarding Mr. Foley's position on the transfer. Mr. Foley failed to establish that he has a protectible interest in this matter

³⁹ See FN 32, *supra*.

⁴⁰ See FN 32, *supra*.

and therefore lacks standing to proceed in this matter.⁴¹ Additionally, he is subject to dismissal pursuant to Commission Rule 4 CSR 240-2.116(3) for failure to appear at the evidentiary hearing.

Facts Related to the Exercise of the Commission's Jurisdiction

16. The area known as Big Island is located north of Roach, Missouri in Camden County, Missouri.⁴²

17. Big Island is approximately 160 acres in size, with most of the present development along the lake shore.⁴³

18. There have been individual property owners in the area for several decades, but, beginning in 1997, Folsom Ridge purchased nearly all of the undeveloped land on Big Island, as well as 190 acres adjacent to Big Island to engage in structured land development.⁴⁴

19. There are approximately 105 property owners on Big Island.⁴⁵

⁴¹ See FN 32, *supra*.

⁴² Hearing Exhibit 104, Prefiled Rebuttal Testimony of James A. Merciel, Jr., Attached Staff Report of Investigation for Case No. WC-2006-0082 et al., February 9, 2006, p. 1.

⁴³ *Id.*

⁴⁴ Hearing Exhibit 104, Prefiled Rebuttal Testimony of James A. Merciel, Jr., Attached Staff Report of Investigation for Case No. WC-2006-0082 et al. February 9, 2006, p. 1; Hearing Exhibit 12, Prefiled Direct Testimony of Barbara Brunk, p. 2, lines 7-18.

⁴⁵ Hearing Exhibit 9, Prefiled Direct Testimony of Rick Rusaw, p. 9, line 3; Transcript p. 199, lines 17-18, p. 585, lines 11-13, p. 586, lines 2-5, p. 644, lines 6-9.

20. Folsom Ridge began constructing a community water system and a wastewater treatment facility in 1998 for use by owners of newly developed lots and to provide the option of hooking on to the system to existing individual homeowners.⁴⁶

21. Folsom Ridge intended to transfer the operation, management and maintenance of the water and sewer facilities to some type of homeowners association and the Association was established on July 16, 1998 for that purpose.⁴⁷

22. On November 10, 1998, a letter from David Lees, member of Folsom Ridge, was mailed to the Big Island Homeowners stating that Folsom Ridge would fund 100% of the cost to provide the water and sewer systems initially, but that once the systems were complete they would turn the systems over to the Association in exchange for the escrow funds, comprised of the tap-on fees.⁴⁸

23. The November 10, 1998 letter also instructed the recipients that “. . . only those people who choose to hook onto the sewer or water system will be affected by the Association.” The letter further stated the Association would “maintain the system by assessing its members a monthly fee.”⁴⁹

24. On July 20, 2000, the members of Folsom Ridge mailed a letter to the members of the Association informing them, *inter alia*, that based upon the membership’s recommendation, a monthly assessment of \$5.00 to \$10.00 would be charged to those

⁴⁶ Hearing Exhibit 104, Prefiled Rebuttal Testimony of James A. Merciel, Jr., Attached Staff Report of Investigation for Case No. WC-2006-0082 et al. February 9, 2006, p. 1.

⁴⁷ Hearing Exhibit 104, Prefiled Rebuttal Testimony of James A. Merciel, Jr., Attached Staff Report of Investigation for Case No. WC-2006-0082 et al. February 9, 2006, p. 1; Hearing Exhibit 10, Prefiled Rebuttal Testimony of Rick Rusaw, p. 17, line 11; Hearing Exhibit 12, Prefiled Direct Testimony of Barbara Brunk, p. 13, lines 18-19.

⁴⁸ Hearing Exhibit 88, Letter from David Lees to Big Island Homeowners, dated November 10, 1998.

⁴⁹ Hearing Exhibit 88, Letter from David Lees to Big island Homeowners, dated November 10, 1998. Findings of Fact Numbers 24, 48, 49, 50, and 51 delineate the fees that the Association charges for service and maintenance. Fees for water and sewer service are billed as “member dues.” See Finding of Fact Number 69.

people who had purchased the right to tap onto the system, but who had not yet tapped on. This charge was levied to provide for maintenance of the system.⁵⁰

25. As of November 29, 2000, the water and sewer systems were available to the entire island for use by the new owners of the lots being sold and/or developed by Folsom Ridge and giving existing residents an option to connect to these systems should their existing water and/or sewer systems fail.⁵¹

26. The water system is comprised of the following components:

a. a single water supply well with a capacity that is adequate to serve 320 residential customers;

b. three twelve-foot non-pressure ground storage tanks with a storage capacity between 12,000 and 15,000 gallons combined that were designed to serve 80 residential customers, which are currently being replaced with a standpipe designed to serve 320 residential customers;

c. a booster pumping system that can deliver a flow of approximately 100 gallons per minute with plans to upgrade it to supply 140 gallons per minute; and,

d. a distribution system composed of approximately 2 miles of 4 inch schedule 40 PVC pipe forming a loop in the service area that is adequately sized to serve 320 residential customers.⁵²

27. The sewer system is comprised of the following components:

⁵⁰ Hearing Exhibit 96, Letter from Folsom Ridge members to Jim and Jeanette Schrader, dated July 20, 2000.

⁵¹ Hearing Exhibit 97, Letter from the Association (Reggie Golden) to Jeffery and Cathy Litty (Orler), dated November 29, 2000.

⁵² Hearing Exhibit 104, Prefiled Rebuttal Testimony of James A. Merciel, Jr., Attached Staff Report of Investigation for Case No. WC-2006-0082 et al. February 9, 2006, p. 2; Hearing Exhibit 17, Hearing Exhibit 17, Prefiled Direct Testimony of Michael T. McDuffey, p. 3, lines 1-9; Hearing Exhibit 14, Prefiled Direct Testimony of David Krehbiel, p. 3, lines 4-12.

- a. a septic tank effluent pumping (STEP) pressure collection system;
- b. approximately 2 miles of PVC pressurized collection lines, varying between two and four inches in diameter, looping the service area, and connecting to the septic tank installed for each residence;
- c. individual home septic tanks, owned and maintained by the property owner, that collect and treat solids, and pump the gray water from the septic tanks through the small diameter pipes to the recirculating sand filter; and,
- d. a recirculating sand filter treatment facility designed to treat 22,525 gallons per day, with a capacity to serve 80 residential customers, which is currently being upgraded to provide for treatment of an additional flow of 41,625 gallons per day to serve a total of 230 customers.⁵³

28. Folsom Ridge executed its Amended and Restated Declaration of Covenants and Conditions (“Declaration”) on January 10, 2001, establishing covenant and conditions regarding the property its water and sewer system would serve.⁵⁴ The Declaration was recorded at Book 508, Page 597 of the records of the Camden County Records Office.⁵⁵

29. The Declaration establishes the terms for Association membership, voting rights for the members, and the members’ and Association’s respective responsibilities with

⁵³ Hearing Exhibit 104, Prefiled Rebuttal Testimony of James A. Merciel, Jr., Attached Staff Report of Investigation for Case No. WC-2006-0082 et al. February 9, 2006, p. 2; Hearing Exhibit 17, Prefiled Direct Testimony of Michael T. McDuffey, p. 5, lines 1-22; Hearing Exhibit 14, Prefiled Direct Testimony of David Krehbiel, p. 3, lines 14-23.

⁵⁴ Hearing Exhibit 12, Prefiled Direct Testimony of Barbara Brunk, Attachment Schedule 6; Hearing Exhibit 9, Prefiled Direct Testimony of Rick Rusaw, p. 9, lines 8-15; See also Hearing Exhibit 46, Amended and Restated By-Laws of Big Island Homeowners Association, Inc.

⁵⁵ *Id.*

relation to the operation, maintenance and provision of water and sewer services to the property owners.⁵⁶

30. The Declaration replaced the prior Declaration of Covenant and Conditions that was recorded on April 14, 2000 at Book 494, Page 577 of the records of the Camden County Records Office and it added additional property listings that would be able to utilize the water and sewer systems, subject to the covenants and conditions.⁵⁷

31. Article III, Section 1 of the Declaration provides in pertinent part: “An Owner of a Lot Shall become a member in the Association upon conveyance to him of his interest in a Lot and shall remain a member for the period of his ownership.”⁵⁸

32. Article V, Section 1 of the Declaration states: “Every Owner of the Property and/or a Lot shall be a member of the Association. Membership shall be appurtenant to

⁵⁶ Hearing Exhibit 12, Prefiled Direct Testimony of Barbara Brunk, Attachment Schedule 6. See also Hearing Exhibit 46, Amended and Restated By-Laws of Big Island Homeowners Association, Inc.

⁵⁷ Hearing Exhibit 12, Prefiled Direct Testimony of Barbara Brunk, Attachment Schedule 6; Hearing Exhibit 9, Prefiled Direct Testimony of Rick Rusaw, p. 9, lines 8-15; See also Hearing Exhibit 46, Amended and Restated By-Laws of Big Island Homeowners Association, Inc.

⁵⁸ Hearing Exhibit 12, Prefiled Direct Testimony of Barbara Brunk, Attachment Schedule 6, p. 3, Article III, Section 1; Hearing Exhibit 46, Amended and Restated By-Laws of Big Island Homeowners Association, Inc., Article III, Section 1.

Article I, Section 13 defines “**Owner**” as “the record owner, whether one or more persons or entities, of a fee simple title to any Lot, including contract sellers, but excluding those having such interest merely as security for the performance of an obligation.” *Id.*

Article I, Section 9 defines “**Lot**” as referring to “any plot of land and improvements thereon designated as a Lot on any subdivision filings or for purposes of the purchaser constructing residential improvements, and for which a connection to the Water and/or Sewer System is intended and shall include any portion of the Property conveyed by the Declarant or other real property which is added, in the future, to the terms of this Declaration by ratification or other document whereby such other property is intended to be bound by the terms of this Declaration.” *Id.*

Article I, Section 14 defines “**Property**” as “that certain real property described on Exhibit “A” attached hereto and such additions thereto as may hereafter be brought within the jurisdiction of the Association.” *Id.*

and may not be separate from ownership of any Property and/or Lot, except by mutual written agreement of the Association and the Owner.”⁵⁹

33. Article V, Section 2 of the Declaration provides, in pertinent part: “The Association shall have one class of voting membership which shall be all Owners and shall be entitled to one vote for each Lot owned or connected to either the Water System or the Sewer System.”⁶⁰

34. Article V, Section 3 of the Declaration provides, in pertinent part: “Decision of the Association shall be by majority of votes cast at any meeting, except as otherwise provided hereinabove.”⁶¹

35. Article IV, Section 1 of the Declaration provides, in pertinent part: “ The Declarant, for each Lot owned within the Property and each Owner of a Lot ratifying this Declaration, hereby covenants, and each Owner of any Lot by acceptance of a deed therefore, whether or not it shall be so expressed in such deed, is deemed to covenant and agree to pay to the Association for each Lot connected to the Water and Sewer System: (i) annual assessments or charges, and (ii) special assessments for capital improvements, such assessments to be established and collected as hereinafter provided.”⁶²

⁵⁹ Hearing Exhibit 12, Prefiled Direct Testimony of Barbara Brunk, Attachment Schedule 6, p. 9, Article V, Section 1; Hearing Exhibit 46, Amended and Restated By-Laws of Big Island Homeowners Association, Inc., Article III, Section 1.

⁶⁰ Hearing Exhibit 12, Prefiled Direct Testimony of Barbara Brunk, Attachment Schedule 6, p. 9, Article V, Section 2; Hearing Exhibit 46, Amended and Restated By-Laws of Big Island Homeowners Association, Inc., Article III, Section 1. Transcript, p. 584, lines 19-25, p. 585, lines 1-10.

⁶¹ Hearing Exhibit 12, Prefiled Direct Testimony of Barbara Brunk, Attachment Schedule 6, p. 9, Article V, Section 3.

⁶² Hearing Exhibit 12, Prefiled Direct Testimony of Barbara Brunk, Attachment Schedule 6, p. 6, Article IV, Section 1.

36. Approximately 60 of Big Island's residents have signed a ratification agreement to become members of the Association and abide by the Declaration.⁶³

37. While Folsom Ridge currently holds the majority of votes by virtue of its ownership of the majority of lots, the Association has never exercised its right to fully vote its majority when decisions have been made by the Association.⁶⁴

38. The Association's decisions are made by the majority vote of non-Folsom Ridge members, and Folsom Ridge has never over-ridden the majority of the remaining membership by exercising its votes.⁶⁵

39. The Association offers water and sewer services to persons owning real property on Big Island that is not described in its Declaration, but only to those persons whose property is proximate to the water mains and wastewater collection lines installed for the systems and who have agreed to pay the required tap-on fees.⁶⁶

40. All persons who use the water and sewer system are expected to pay for the service, and membership in the Association is an expected part of receiving service.⁶⁷

41. The Association began operating the water distribution system and wastewater facilities when its first customers connected in late 1999 and early 2000.⁶⁸

⁶³ Transcript p. 585, lines 14-21, p. 586, lines 6-9.

⁶⁴ Transcript p. 587, lines 20-25, p. 588, lines 1-25, p. 589, lines 1-12, p. 645, lines 4-25.

⁶⁵ *Id.*

⁶⁶ Hearing Exhibit 9, Prefiled Direct Testimony of Rick Rusaw, p.10, lines 15-21. Transcript p. 590, lines 3-9.

⁶⁷ Hearing Exhibit 10, Prefiled Rebuttal Testimony of Rick Rusaw, p. 8. line 23, p. 9, lines 1-7. Transcript p. 634, lines 10-12 (Anyone connected to the system is considered to be a member and has full membership rights. See also Findings of Fact Numbers 70-75).

⁶⁸ Hearing Exhibit 12, Prefiled Direct Testimony of Barbara Brunk, p. 13, lines 21-23. Benjamin D. Pugh's Complaint (WC-2006-0090), p. 2; Hearing Exhibit 48, Letter to Benjamin and Karen Pugh from the Association, dated April 9, 2001; Hearing Exhibit 49, Invoice from the Association to Benjamin and Karen Pugh, dated April 9, 2001; Hearing Exhibit 50, Letter to R. V. Golden from Benjamin D. Pugh, dated April 14, 2001.

42. The Association began billing customers for water and sewer service in January 2001.⁶⁹

43. The Association's existing customers consist of both full-time and part-time residents.⁷⁰

44. There are approximately a total of 60 customers connected to, and served by, the wastewater system.⁷¹

45. There are approximately a total of 49 customers connected to, and served by, the water distribution system.⁷²

46. There are approximately 33 households who have paid connection or tap-on fees that have not connected to the system.⁷³

47. There are approximately a total of 92 customers that are billed by the Association.⁷⁴

48. The rates for sewer service are currently \$15.00 per month.⁷⁵

49. The rates for water service are currently \$10.00 per month.⁷⁶

⁶⁹ *Id.*

⁷⁰ Hearing Exhibit 104, Prefiled Rebuttal Testimony of James A. Merciel, Jr., Attached Staff Report of Investigation for Case No. WC-2006-0082 et al. February 9, 2006, p. 2.

⁷¹ Joint Application, paragraph 3; Hearing Exhibit 9, Prefiled Direct Testimony of Rick Rusaw, p. 8, line 22; Hearing Exhibit 12, Prefiled Direct Testimony of Barbara Brunk, p. 14, lines 15-18; Transcript p. 644, lines 6-9.

⁷² Joint Application, paragraph 3; Hearing Exhibit 9, Prefiled Direct Testimony of Rick Rusaw, p. 8, lines 22-23; Hearing Exhibit 12, Prefiled Direct Testimony of Barbara Brunk, p. 14, lines 15-18; Transcript p. 644, lines 6-9, p. 1088, lines 6-9

⁷³ Hearing Exhibit 12, Prefiled Direct Testimony of Barbara Brunk, p. 14, lines 20-23. Transcript p. 582, lines 5-7.

⁷⁴ Hearing Exhibit 9, Prefiled Direct Testimony of Rick Rusaw, p. 8, line 27; Transcript p. 580, lines 4-9.

⁷⁵ Hearing Exhibit 12, Prefiled Direct Testimony of Barbara Brunk, p. 15, lines 11-17.

⁷⁶ *Id.*

50. Members and non-members of the Association who are not connected to the systems are currently charged \$5.00 per month for water and \$5.00 per sewer, not for utility services but as reservation/maintenance fees to cover the costs of making the facilities available for connection and maintaining those facilities.⁷⁷

51. The reservation/maintenance fees are not charges for utility services.⁷⁸

52. Other Commission regulated companies charge similar reservation/maintenance fees, these are untariffed charges and these fees do not constitute a charge for utility service.⁷⁹

53. The Association is a not-for-profit or stock corporation and Folsom Ridge has no ownership interest in the Association.⁸⁰

⁷⁷ Hearing Exhibit 12, Prefiled Direct Testimony of Barbara Brunk, p. 15, lines 11-17. Transcript p. 581, lines 13-25, p. 582, lines 1-9. Transcript, p. 470, lines 8-25, pp. 471-473, p. 474, lines 1-12.

⁷⁸ Transcript, p. 1095, lines 3-25. p. 1096, lines 1-9.

⁷⁹ Transcript pp. 1093-1096. As defined in Section 386.020(47): "Service includes not only the use and accommodations afforded consumers or patrons, but also any product or commodity furnished by any corporation, person or public utility and the plant, equipment, apparatus, appliances, property and facilities employed by any corporation, person or public utility in performing any service or in furnishing any product or commodity and devoted to the public purposes of such corporation, person or public utility, and to the use and accommodation of consumers or patrons." The reservation of a tap-on is not the provision of water or sewer service. The reservation of a tap-on is also not an "accommodation." "Accommodation" means: "an arrangement or engagement made as a favor to another, not upon consideration received." Black's Law Dictionary, 6th Ed. West Publishing Co. 1990, p. 16. Clearly, paying a tap-on fee is not a favor without legal consideration.

The tap-on is part of the "water system" or "sewer system" as defined by sections 386.020(49) and (59). Section 386.020(49) defines "sewer system" as including "all pipes, pumps, canals, lagoons, plants, structures and appliances, and all other real estate, fixtures and personal property, owned, operated, controlled or managed in connection with or to facilitate the collection, carriage, treatment and disposal of sewage for municipal, domestic or other beneficial or necessary purpose." Section 386.020(59) defines "water system" as including "all reservoirs, tunnels, shafts, dams, dikes, headgates, pipes, flumes, canals, structures and appliances, and all other real estate, fixtures and personal property, owned, operated, controlled or managed in connection with or to facilitate the diversion, development, storage, supply, distribution, sale, furnishing or carriage of water for municipal, domestic or other beneficial use."

⁸⁰ Hearing Exhibit 9, Prefiled Direct Testimony of Rick Rusaw, p. 9, lines 17-20. Transcript p. 587, lines 3-11.

54. Folsom Ridge is a member of the Association by virtue of its ownership of lots covered by the Declaration.⁸¹

55. The Association has never declared a dividend to Folsom Ridge or any of its members.⁸²

56. Folsom Ridge has never received a fee, commission, or any remuneration from the Association from the rates charged by the Association for water or sewer service.⁸³

57. The rates charged by the Association are designed to cover the actual costs of operating and maintaining the system, not profit, i.e. the contract operator's charges, the cost of billing and the cost of permits required by environmental and other agencies.⁸⁴

58. Any excess revenue collected by the Association above actual costs of operation and maintenance of the water and sewer systems is retained for future liquidity and working capital. This revenue is deposited into a reserve account to cover or defray unexpected or unanticipated costs associated with the operation and maintenance of the water and sewer systems. It is estimated that there is currently \$9,000 in this account.⁸⁵

⁸¹ Hearing Exhibit 9, Prefiled Direct Testimony of Rick Rusaw, p. 9, lines 17-20.

⁸² Hearing Exhibit 9, Prefiled Direct Testimony of Rick Rusaw, p. 9, line 22, p. 10, lines 1-4; Hearing Exhibit 13, Prefiled Direct Testimony of William A. Hughes, p. 2, lines 8-9.

⁸³ Hearing Exhibit 9, Prefiled Direct Testimony of Rick Rusaw, p.10, lines 6-13. The Association has reimbursed Folsom Ridge for costs and expenses it advanced as start-up funding for the Association and for reimbursement of construction costs related to the Caldwell crossing; however, these funds do not constitute profit or gain in any form being returned to Folsom Ridge. Hearing Exhibit 13, Prefiled Direct Testimony of William A. Hughes, p. 3, lines 17-23, p. 4, lines 1-4; Transcript p. 660, lines 6-25, p. 661, lines 1-9.

⁸⁴ Hearing Exhibit 9, Prefiled Direct Testimony of Rick Rusaw, p. 10, lines 6-13; Hearing Exhibit 13, Prefiled Direct Testimony of William A. Hughes, p. 2-5.

⁸⁵ Hearing Exhibit 9, Prefiled Direct Testimony of Rick Rusaw, p. 4, lines 17-22, p. 10, lines 6-13; Hearing Exhibit 10, Prefiled Rebuttal Testimony of Rick Rusaw, p.19, lines 10-14; Hearing Exhibit 13, Prefiled Direct Testimony of William A. Hughes, p. 3, lines 2-15, p. 4, lines 17-23, p. 5, lines 1-3; Hearing Exhibit 13, Prefiled Direct Testimony of William A. Hughes, Attached Balance Sheet and Statement of Revenue and Expenses. Transcript p. 567, line 25, p. 568, lines 1-6.

59. The Association is a non-profit entity, does not accrue profit from any of its operations, and its charges for service are not derived from a profit motive or for making a return.⁸⁶

Findings of Fact Regarding Complainants' and Other Homeowners' Relationships with the Association

60. Ms. Orler is the successor in interest to the prior owner of the home located at 3252 Big Island Drive, Roach, MO 65787, who paid tap-on fees to Folsom Ridge of \$4200 for sewer and \$2000 for water, reserving the right to tap into these systems.⁸⁷

61. On November 29, 2000, the Association mailed Ms. Orler a letter of invitation to join the Association. The letter refers to the invitation as being an additional invitation to previous invitations. The letter also extends an invitation to attend an informational meeting on December 29, 2000, and references the issues to be discussed and offers to provide copies of documents the Association will be reviewing. Those documents included revised bylaws of the Association and revised covenants and restrictions for the Association.⁸⁸

62. Ms. Orler declined the Association's invitation to join, has not signed the ratification document for the Amended and Restated Covenants and Conditions of the Association and is not a member of the Association.⁸⁹

⁸⁶ Hearing Exhibit 13, Prefiled Direct Testimony of William A. Hughes, p. 2, lines 7-8, p. 3, lines 2-15, p. 4, lines 6-12.

⁸⁷ Cathy J. Orler's Complaint (WC-2006-0082), p. 2; Hearing Exhibit 1, Prefiled Direct Testimony of Cathy J. Orler, p. 1, lines 10-20, p. 2, lines 1-12; Hearing Exhibit No.3, Prefiled Surrebuttal Testimony of Cathy J. Orler, p. 2, lines 10-15.

⁸⁸ Hearing Exhibit 97, Letter from the Association (Reggie Golden) to Jeffery and Cathy Litty (Orler), dated November 29, 2000.

⁸⁹ Hearing Exhibit 1, Prefiled Direct Testimony of Cathy J. Orler, p. 3, lines 14-16; Hearing Exhibit 10, Prefiled Rebuttal Testimony of Rick Rusaw, p.14, lines 1-2; Hearing Exhibit 39, Letter to the Commission from Pamela Holstead, dated May 17, 2006, p. 1; Transcript p. 319, lines 3-6, p. 320, line 25, p. 323, lines 9-10, p. 352, lines 2-3.

63. Ms. Orler does not receive water or sewer service from the Association, having her own private well for drinking water and her own sanitary septic system.⁹⁰

64. Ms. Orler currently pays monthly reservation/maintenance fees in the amount of \$5.00 per month to preserve her right to tap onto the water distribution system and \$5.00 per month to preserve her right to tap onto the sewer system.⁹¹

65. Mr. Pugh does not receive water service from the Association, but he does receive sewer service from the Association, having paid a tap-on fee of \$4800 to Folsom Ridge and having connected to the sewer system on November 9, 1999.⁹²

66. On November 29, 2000, the Association mailed Mr. Pugh a letter of invitation to join the Association. The letter refers to the invitation as being an additional invitation to previous invitations. The letter also extends an invitation to attend an informational meeting on December 29, 2000, and references the issues to be discussed and offers to provide copies of documents the Association will be reviewing. Those documents included revised bylaws of the Association and revised covenants and restrictions for the Association.⁹³

⁹⁰ Hearing Exhibit 1, Prefiled Direct Testimony of Cathy J. Orler, p. 8, lines 16-19. Transcript p. 115, lines 5-9; p. 166, lines 1-3; p. 182, lines 25, p. 183, lines 1-2, p. 196, lines 19-25, p. 339, lines 19-25, p. 340, lines 1-25.

⁹¹ Hearing Exhibit 43, Invoices from the Association to Cathy J. Orler for payment of water and sewer fee ("Not Connected"), dated January 2007, April, June, August, and October of 2002. See also hearing Exhibit 76, Invoices to Jeff and Cathy Litty from the Association, dated June, July and December of 2001, April June, and August of 2002, and January of 2003. Note: "Litty" was Ms. Orler's married name and these invoices reflect different charges associated with the time periods of the billing. Transcript p. 322, lines 16-25, pp. 323-324, p. 325, lines 1-2.

⁹² Benjamin D. Pugh's Complaint (WC-2006-0090), p. 2; Hearing Exhibit 4, Prefiled Direct Testimony of Benjamin D. Pugh, p. 8, lines 12-14; Hearing Exhibit 48, Letter to Benjamin and Karen Pugh from the Association, dated April 9, 2001; Hearing Exhibit 49, Invoice from the Association to Benjamin and Karen Pugh, dated April 9, 2001; Hearing Exhibit 50, Letter to R. V. Golden from Benjamin D. Pugh, dated April 14, 2001.

⁹³ Hearing Exhibit 61, Letter from the Association (Reggie Golden) to Benjamin and Karen Pugh, dated November 29, 2000; Transcript p. 464, lines 24-25, pp. 465-466, p. 467, lines 1-20, p. 469, lines 14-17.

67. Mr. Pugh did not accept the Association's offer to join, does not consider himself to be a member of the Association and has not signed the ratification document for the Amended and Restated Covenants and Conditions of the Association.⁹⁴

68. Mr. Pugh also declined the Association's offer to return the money he spent for the sewer tap, disconnect the sewer service and remove the tap.⁹⁵

69. In the invoice sent to Mr. Pugh on April 9, 2001, the Association identifies the sewer fees as being "Member Dues."⁹⁶

70. On November 16, 2001, the Missouri Department of Natural Resources advised Folsom Ridge that, in accordance with 10 CSR 20-6.010(3)(B)(5)(C)(IV), "everyone connected to the wastewater treatment system shall be bound by the rules of the homeowners association, and thus be a member [of the homeowner's association]."⁹⁷

71. On November 29, 2001, after receiving the DNR's November 16, 2001 letter, the Association notified Mr. Pugh that although he had not signed the acknowledgment of

⁹⁴ Benjamin D. Pugh's Complaint (WC-2006-0090), p. 2; Hearing Exhibit 4, Prefiled Direct Testimony of Benjamin D. Pugh, p. 2, lines 3-5, p. 9, lines 15-22; Hearing Exhibit 39, Letter to the Commission from Pamela Holstead, dated May 17, 2006, p. 2; Hearing Exhibit 52, Letter from Charles E. McElyea to Mr. and Mrs. Pugh, dated November 29, 2001; Transcript p. 464, lines 24-25, pp. 465-466, p. 467, lines 1-20, p. 469, lines 14-17.

⁹⁵ Hearing Exhibit 39, Letter to the Commission from Pamela Holstead, dated May 17, 2006, p. 2.

⁹⁶ Hearing Exhibit 49, Invoice from the Association to Benjamin and Karen Pugh, dated April 9, 2001. On April 25, 2001, the Association mailed a letter addressed solely to Benjamin and Kathy Pugh outlining different fees for members and non-members of the Association based upon whether they were connected to the water and sewer services. Hearing Exhibit 62, Letter from Reggie Golden, the Association, to Benjamin and Karen Pugh, dated April 25, 2001. There is no evidence in the record to clarify if this letter was sent to Mr. Pugh because of his disputed membership status with the Association, or if these stated rates were actually charged to any alleged non-members of the Association. *Id.* Mr. Pugh is not identified as being a "nonmember" of the Association, and in fact, his membership status is not address at all in this letter. *Id.* The billing statements sent to Mr. Pugh that are part of this record and identify his monthly charges as being "Member Dues." See Footnote 96, *supra*. As the remainder of the FOFs reveal, there is no evidence in the record establishing that any nonmember, or any other individual contesting membership status such as Mr. Pugh, has hooked up to the system, received service from Folsom Ridge or the Association, or was billed by Folsom Ridge or the Association.

⁹⁷ Hearing Exhibit 54, Letter from Kristine Ricketts, Regional Director of the DNR to Mr. Reggie Golden, dated November 16, 2001.

membership, i.e. the ratification document, he was bound by the rules and regulations of the Association since he was connected to the water and sewer system.⁹⁸

72. In the November 29, 2001 letter to Mr. Pugh, the Association, pursuant to 10 CSR 20-6.010(3)(B)(5)(C)(IV), stated that it considered Mr. Pugh to be a member by virtue of him having connected to the sewer system and being bound by the rules and regulations of the Association with regard to that connection.⁹⁹

73. The Association considers Mr. Pugh to be a member and he has full voting rights with the Association.¹⁰⁰

74. Mr. Pugh acknowledges that the Association treats him as being a member.¹⁰¹

75. Ms. Fortney is the successor in interest to the prior owners of her home, Richard and Carol Hirsch, who paid a tap-on fee to Folsom Ridge of \$4200 for sewer service, reserving the right to tap into this system.¹⁰²

76. Ms. Fortney paid a \$14.00 Association membership fee as part of the purchase agreement when she closed on the purchase of her home from the Hirschs; however, she does not consider herself to be a member of the Association.¹⁰³

⁹⁸ Hearing Exhibit 52, Letter from Charles E. McElyea to Mr. and Mrs. Pugh, dated November 29, 2001.

⁹⁹ Hearing Exhibit 52, Letter from Charles E. McElyea to Mr. and Mrs. Pugh, dated November 29, 2001; Transcript p. 633, lines 15-25, p. 634, lines 1-12.

¹⁰⁰ Hearing Exhibit 10, Prefiled Rebuttal Testimony of Rick Rusaw, p. 25, line 1; Transcript p. 633, lines 15-25, p. 634, lines 1-12.

¹⁰¹ Transcript p. 465, lines 11-22.

¹⁰² Cindy Fortney's Complaint (WC-2006-0138), p. 2; Transcript p. 500, lines 10-17, p. 501, lines 24-25, p. 502, lines 1-3.

¹⁰³ Cindy Fortney's Complaint (WC-2006-0138), p. 2; Hearing Exhibit 74, Closing Document for the Purchase of the Home at 3298 Big Island Drive, Roach, MO 65787, dated July 14, 2005; Transcript p. 502, lines 24-25, p. 503, lines 1-19.

77. Ms. Fortney was invited to join the Association but declined to accept that offer, feeling that attempts to get her to join amounted to intimidation and coercion.¹⁰⁴

78. Ms. Fortney does not receive water or sewer service from the Association, having her own private source of drinking water and her own sanitary septic system.¹⁰⁵

79. Mr. Temares appeared at hearing and cross examined several witnesses. However, Mr. Temares did not offer any testimony or documentary evidence and was not cross examined. Consequently, the Commission can make no factual findings regarding the allegations Mr. Temares's has made in his complaint -- either to support or refute them. He has not established that he has legally protectible interest that would be affected by a decision made by the Commission.¹⁰⁶

80. Phillip Hiley, a witness, but not a complainant in this matter, testified that he did not consider himself to be a member of the Association because he did not ratify the Association's bylaws, but that he pays monthly fees for "someone now hooked on" to the system.¹⁰⁷

81. Mr. Hiley testified that he did not believe that joining the Association made any difference one way or the other.¹⁰⁸

¹⁰⁴ Transcript p. 503, lines 1-11.

¹⁰⁵ Cindy Fortney's Complaint (WC-2006-0138), p. 2; Transcript p. 490, lines 19-20, p. 498, lines 16-17, p. 500, lines 6-9, p. 503, lines 22-25

¹⁰⁶ While it is not evidence, the commission can glean from Mr. Temares's complaint that he is connected to the Association's water and sewer systems and does receive water and sewer service from the Association. He implies that he is a member of the Association, but states he became aware of this fact after he purchased his home. See Complaint filed in Case No. WC-2006-0120, p. 2. None of Mr. Temares's allegations can be established due to his failure to introduce any evidence.

¹⁰⁷ Transcript p. 996, lines 20-25, p. 997, lines 1-22.

¹⁰⁸ Transcript p. 997, lines 9-13.

82. Mr. Hiley also testified that he attended the Association's meeting concerning the transfer of assets to the Chapter 393 Companies and that he "probably" voted at that meeting.¹⁰⁹

83. There is no evidence in the record to clarify if Mr. Hiley is "hooked on" to either the water or sewer service, or if he was referring to having paid "tap-on" fees and/or monthly reservation/maintenance fees.

Findings of Fact Related to the Safe and Adequate Provision of Services

84. Folsom Ridge hired Lake Professional Engineering Services Inc. ("LPES") to design the first phase of the water and sewer systems.¹¹⁰

85. On August 7, 1998, the DNR received the Association's Application for Construction or Operating Permit for Facilities which Receive Basically Domestic Waste.¹¹¹

86. LPES submitted detailed plans, specifications, an engineering report and an application for a construction permit for the water distribution system and wastewater disposal facility to DNR on September 30, 1998, and on November 4, 1998, DNR advised the Association and LPES that approval of the project was pending on the results of a review by a private consultant.¹¹² The plans called for a system designed to provide water and sewer service for 80 lots.¹¹³

¹⁰⁹ Transcript p. 997, line 15.

¹¹⁰ Transcript, p. 93, lines 12-20, p. 639, lines 18-25; p. 765, lines 3-4, p. 771, lines 11-19, p. 941, lines 9-12.

¹¹¹ Hearing Exhibit 83, construction permit application for wastewater treatment plant, signed by David Lees on June 11, 1998.

¹¹² Hearing Exhibit 78, Letter from DNR (Breck E. Summerford) to David Lees (Association) dated November 4, 1998.

¹¹³ *Id.* Letter from James O. Jackson, LPES, to Steve Jones, DNR, dated September 30, 1998; Construction Permit Application, dated September 24, 1998. See also Hearing Exhibit 87, Draft copy of DNR's Missouri State Operating Permit.

87. Folsom Ridge/LPES began construction of the water and sewer lines without the required permit in 1998, and the DNR sent a letter to the Association on November 19, 1998 instructing the Association to stop construction until a construction permit was issued. No Notice of Violation was issued in conjunction with the stop construction letter ¹¹⁴

88. According to the DNR, it is common practice for contractors to begin construction of water and sewer systems prior to having received their construction permits, and it is common for the DNR to issue stop orders to allow the permitting process to be completed prior to allowing resumption of construction. ¹¹⁵

89. On November 22, 1998, LPES sent a letter to the DNR advising the agency that it had immediately halted construction, and apologized explaining that it had begun construction early to take advantage of good weather. LPES waited for the permit process to become finalized before resuming construction. ¹¹⁶

90. The November 22, 1998 letter also advised the DNR that due to various geographical features and dictates from the Camden County Road Department, LPES was revising its construction plans to place the water and sewer mains in the same trench. The letter requested approval of the revised plans. ¹¹⁷

91. On December 18, 1998, The DNR issued approval of the Association's submission of the engineering report, plans and specifications for a new community public

¹¹⁴ Hearing Exhibit 60, p. 2, Letter from Breck E. Summerford of the Permit Section of DNR to James O. Jackson of Lake Professional Engineering Service, Inc. ("LPES"), working for the Association, dated November 19, 1998; Transcript, p. 767, lines 20-25, p. 768, lines 1-19.

¹¹⁵ Transcript, p. 851, lines 7-25, p. 852, lines 1-9.

¹¹⁶ Hearing Exhibit 60, p. 3 Letter from James O. Jackson of LPES to Breck E. Summerford of the DNR, dated November 22, 1998; Hearing Exhibit 78, Letter from James O. Jackson of LPES to Breck E. Summerford of the DNR, dated November 22, 1998.

¹¹⁷ *Id.*

water supply storage facility and distribution system, pursuant to Public Drinking Water Program Review Number 31182-98.¹¹⁸

92. Also on December 18, 1998, the Missouri Public Drinking Water Program requested the Association to provide detailed drawings of the trench to match the revised specifications showing the earthen shelf upon which the water line was replaced, and those drawings were provided.¹¹⁹

93. On January 5, 1999, DNR issued the Association a construction permit for its wastewater system, Permit # 26-3081, to serve eighty homes in Big Island.¹²⁰

94. Design guidelines for trench excavation for the placement of water and sewer mains, *inter alia*, provided that: "Whenever possible, the water mains shall be laid ten feet (10') horizontally from any existing or proposed drain or sewer line. Should conditions prevent a lateral separation for ten feet (10'), water mains may be laid closer than ten feet (10') to a storm or sanitary sewer, provided the water main is laid in a separate trench, or on an undisturbed earth shelf located on one side of the sewer at such an elevation that the bottom of the water main is at least eighteen (18") inches above the top of the sewer. When it is impossible to obtain the proper horizontal or vertical clearance as stipulated above, both the water and sewer line shall be constructed of a full twenty foot (20') length of pipe crossing in the middle and shall be pressure tested to assure watertightness before backfilling."¹²¹

¹¹⁸ Hearing Exhibit 91, DNR cover letter dated April 23, 2004 and attached Settlement Agreement, p. 2.

¹¹⁹ *Id.*

¹²⁰ Hearing Exhibit 86, Letter from Robert H. Hentges, DNR, to the Association and accompanying permit, date January 5, 1999; Hearing Exhibit 89, Letter from Robert H. Hentges, DNR, to the Association and accompanying permit, date January 5, 1999.

¹²¹ Hearing Exhibit 89, Article B, Trench Excavation, paragraph B.1-3, Horizontal Separation of Water and Sewer Mains.

95. Design guidelines utilized by the DNR for water and sewer systems are not codified in state statutes or the Code of State Regulations.¹²²

96. The design guidelines are based on the “Ten-State Standards” document, which was created by ten states, including Missouri, setting out guidance criteria for the construction of potable water and wastewater systems.¹²³

97. DNR enforcement of design guidelines is limited to cooperative efforts with persons constructing the systems, approval of construction and operating permits, and issuing notices of violation should an actual violation of water quality standards occur as a result of not following the design guidelines.¹²⁴

98. Folsom Ridge received a notice of violation from the DNR, dated May 24, 1999, (Notice of Violation Number 1315JC) for having begun construction of water and sewer mains without a permit pursuant to 10 CSR 20-6.010(1)(A) and 4(A), and 10 CSR 60-3.010(1)(A). The cover letter to the notice of violation states that the violation is in relation to the lines not being constructed in accordance with approved plans. Specifically, one inch service lines are required for each home and Folsom Ridge was using one line to serve up to three homes.¹²⁵

99. On October 9, 1999, LPES submitted to the DNR’s Division of Environmental Quality its Certification of Work Completed, representing that based upon periodic inspections the wastewater facilities were completed in accordance with the plans and

¹²² Transcript, p. 760, lines 17-25, p. 761, lines 1-2, p. 765, lines 23-25, p. 766, lines 1-25, p. 767, lines 1-3.

¹²³ Transcript, p. 766, lines 1-16.

¹²⁴ Transcript, p. 766, lines 17-25, p. 767, lines 1-19.

¹²⁵ Hearing Exhibit 59, Certified Letter from Stephen P. Jones Environmental Engineer for the DNR to Mr. David Lee; and DNR Notice of Violation Number 1315, dated May 24, 1999.

specifications submitted to DNR with the deviation of having placed the water and sewer lines in the same trench because of narrow roads and solid rock in the construction site.¹²⁶

100. On February 23, 2000, the DNR issued its Report of Final Inspection and Approval of Public Water Supply for Big Island Subdivision. The report stated that complete water facilities, so far as could be determined, had been constructed essentially in accordance with the approved plans. This report indicates that any issues concerning the May 24, 2000 violation, Violation Number 1315JC, had been resolved. The report also notes that DNR reserved the right to require alterations should the system later be found to be in noncompliance.¹²⁷

101. On February 25, 2000, DNR issued the Association its State Operating permit, Missouri Permit # MO-123013, to discharge from Big Island, i.e. its wastewater treatment facility operating permit, replacing all previous permits.¹²⁸

102. Effluent limitation and monitoring requirements were outlined in the February 25, 2000 permit, allowing for a daily maximum Fecal Coliform discharge of

¹²⁶ Hearing Exhibit 90, DNR Missouri State Operating Permit and attached Certification of Work Completed report, dated October 9, 1999.

¹²⁷ Hearing Exhibit 90, DNR Missouri State Operating Permit and attached Report of Final Inspection and Approval of Public Water Supply; Hearing Exhibit 91, DNR cover letter dated April 23, 2004 and attached Settlement Agreement, p. 2.

¹²⁸ Hearing Exhibit 84, Letter from Philip A. Schroeder, DNR to the Association, dated February 25, 2000, plus attached permit # MO-123013. It should be noted that on January 24, 2000, just prior to receiving its final approval on the original construction phase of the water and sewer system, LPES filed an application for a construction permit for a water line extension with the DNR, including plans, calculations, layout map, an engineers report, plans and specifications to extend the water system to serve the remainder of their lots. Approval of the permit request was granted on March 6, 2000. On March 7, 2000, the DNR issued its Report on engineering Report, Plans and Specifications for Waterline Extension, approving the plans submitted on January 24, 2000, by LPES. On June 23, 2000, the DNR issued the Association a construction permit authorizing the construction of septic tanks to serve 39 lots in Big Island West Subdivision. This water line extension proceeded without alteration of plans and without any DNR violations. See *Hearing Exhibit 79, Letter from James O. Jackson, LPES, to Keith Forck, DNR, plus attachment, dated January 24, 2000; Hearing Exhibit 80, Letter from Breck E. Summerford, DNR, to David Lees, Association, dated March 7, 2000, DNR Report and grant of construction permit, dated March 6, 2000, Application form for construction permit, dated January 24, 2000, Letter from Breck E. Summerford, DNR, to David Lees, Association, dated February 18, 2000; Hearing Exhibit 85, Construction Permit and accompanying letter from Robert H. Hentges, DNR.*

1000/100mL daily and 400/100mL monthly average; applicable only during the recreational season from April 1 through October 31.¹²⁹

103. In early 2001, there was an incident involving the wastewater treatment plant that came to be called the “Stoyer’s Spring” incident.¹³⁰

- a. It was discovered that at the same time when the discharge line from the wastewater treatment line was installed, the contractor installed an electric control panel to operate the plant;
- b. during the installation of the control panel a stake was driven down through the discharge line;
- c. a rubber coupling was cut in half, placed around the pipe, and attached with stainless steel clamps in attempt to repair the damage to the discharge line;
- d. the coupling was three inches in diameter, while the pipe was four inches in diameter;
- e. the faulty repair left a leak on the bottom side of the pipe, and the sewer effluent leaking from this pipe joined with a natural spring resulting in the combination of ground water and sewer leakage that traveled down hill to an area near Mr. Duane Stoyer’s home;
- f. due to the difficulty with locating the leak, that was hidden on the bottom of the pipe, it took approximately 76 days to locate and stop the leak from the wastewater discharge line.¹³¹

¹²⁹ Hearing Exhibit 84, Effluent Limitations and Monitoring Requirements, attached to operating permit # MO-123013.

¹³⁰ Transcript p. 712, lines 23-24.

¹³¹ Transcript, p. 675, lines 24-25, pp. 676-678, p. 698, lines 15-25, p. 699, lines 1-21, p. 711, lines 18-25, pp. 712-713, p. 714, lines 1-19, p. 828, lines 23-25, p. 829, lines 1-6.

104. There is no evidence in the record that the Stoyer Springs leak resulted in any instances of violation of water quality standards, or any contamination of the drinking water provided by the water distribution system.

105. There is no evidence in the record that the DNR, or any local or county agency issued any type of notice of violation, or documented any health violation of any type in association with the Stoyer Springs leak.¹³²

106. The water quality from the discharge pipe, the source of the leak for the Stoyer Springs incident, complies with DNR standards for effluent that is discharged into the Lake of the Ozarks.¹³³

107. On August 8, 2003, the DNR issued a Notice of Violation citing Folsom Ridge for a violation of the terms of Permit MO-123013. This violation was related to the placement of the water and wastewater collection and distribution lines.¹³⁴

108. On January 12, 2004, in follow-up to the August 8, 2003 Notice of Violation, DNR inspected the water and wastewater collection and distribution lines on Big Island and found these lines were placed in the same trench without proper separation of the lines. Specifically, the water distribution lines were not placed on an undisturbed earthen shelf as

¹³² Michael McDuffey, of Lake Ozark Water and Sewer L.L.C. ("LOWS") is under contract for the operation and maintenance of the water distribution and waste water treatment facilities. (Hearing Exhibit 12, Prefiled Direct Testimony of Barbara Brunk, p. 15, lines 1-9; Hearing Exhibit 17, Prefiled Direct Testimony of Michael T. McDuffey, p. 2, lines 8-13.) On April 23, 2001, a report from the McDuffey Lab indicated that there was one test of the Stoyer/Pewe facility revealing a Fecal Coliform Analysis demonstrating 10,909 fecal colonies per 100 ml of sample water. (Hearing Exhibit 64, McDuffey Lab Report dated April 23, 2001.) This sample was brought in for testing by Mr. Stoyer and was represented to be from his property. (Transcript, p. 676, line 10-12.) Mr. McDuffey testified that this level of fecal colonies was indicative of normal groundwater, not active wastewater that would register in the millions or have numbers too numerous to count. (Transcript p. 675, lines 24-25, p. 676, lines 1-25, p. 677, lines 1-10.) Mr. McDuffey further testified that treated wastewater from the facility is restricted to 400 fecal colonies per 100 ml sample of water. (*Id.*)

¹³³ Transcript, p. 733, lines 7-25, p. 734, lines 1-3.

¹³⁴ Hearing Exhibit 12, Prefiled Direct Testimony of Barbara Brunk, p. 10, lines 4-5.

stated in the “as-built” drawing and were not constructed in accordance with approved plans.¹³⁵

109. Failure to construct the water and wastewater collection and distribution lines in accordance with approved plans resulted in violations of Missouri’s Clean Water Law, Section 644.076.1 and 10 CSR 20-8.120(11)(C)(1), and Missouri’s Safe Drinking Water law, Section 640.115.2 and 10 CSR 3.010(1), and the record reflects that the DNR promptly entered into a settlement agreement with Folsom Ridge to resolve these violations.¹³⁶

110. On April 26, 2004, a Settlement Agreement was fully executed between Folsom Ridge, the Missouri Attorney General’s Office (AGO”) and DNR to resolve the violations discovered during the January 12, 2004 inspection.¹³⁷

111. The Settlement Agreement required, *inter alia*, that Folsom Ridge:

- a. pay a civil penalty of \$8000.00;
- b. submit an engineering report, plans and specifications identifying the corrections to be made to the water distribution system;

¹³⁵ Hearing Exhibit 91, DNR cover letter dated April 23, 2004 and attached Settlement Agreement, p. 3; Transcript, p. 762, lines 6-16.

¹³⁶ Hearing Exhibit 91, DNR cover letter dated April 23, 2004 and attached Settlement Agreement, p. 3. Folsom Ridge maintains that its prior member, Mr. David Lees, was the managing partner and the “on-ground” site managing partner. Mr. Lees left in April of 2001 related to problems with him managing the development, including overseeing and managing the original installation of the water and sewer mains, which turned out to be in violation of DNR regulations. Folsom Ridge has brought suit against Mr. Lees in Federal Court seeking indemnification for the costs associated with correcting the improperly installed water and sewer lines. Transcript p. 562, lines 19-25; p. 563, lines 1-25, p. 629, lines 18-19. Hearing Exhibit 10, Prefiled Rebuttal testimony of Rick Rusaw, p. 7, lines 4-19, p. 17, lines 1-6, p. 27, lines 8-11; Hearing Exhibit 12, Prefiled Direct Testimony of Barbara Brunk, p. 12, lines 13-23, p. 13, lines 1-12.

¹³⁷ Hearing Exhibit 91, DNR cover letter dated April 23, 2004 and attached Settlement Agreement.

- c. complete modification of the water distribution system to bring it into compliance with the approved plans and specifications approved by DNR;
- d. arrange periodic inspections with DNR during the reconstruction of the water distribution system;
- e. resolve any conflicts with placement and/or the alignment between water and wastewater piping with the DNR and refrain from covering such resolutions with fill material until inspected by DNR;
- f. and, obtain a final construction inspection and approval from DNR to completely satisfy the terms of the Settlement Agreement.¹³⁸

112. Krehbiel Engineering was involved with the relocation of the water main and the design of extensions and improvements to the system.¹³⁹

113. On September 22, 2004, DNR closed the file in relation to Big Island's violation and the Settlement Agreement.¹⁴⁰

114. On October 21, 2004, DNR issued its Report on Plans, Specifications and an Engineering Report for Waterline Replacement and Extension to Folsom Ridge approving

¹³⁸ *Id.*

¹³⁹ Hearing Exhibit 14, Prefiled Direct Testimony of David Krehbiel, p. 4, lines 1-25, p. 5, lines 1-18; Transcript p. 93, lines 16-19,

¹⁴⁰ Hearing Exhibit 92, Memorandum from Joseph P. Bindbeutel, AGO to Elena Seon, DNR.

the engineering plans and specifications for the waterline replacement and extension and issuing a construction permit.¹⁴¹

115. By the end of 2004, all corrections had been made with the waterline replacement.¹⁴²

116. On September 6, 2005, Krehbiel Engineering, Inc. submitted an Application for Water Main Extension Final Construction Approval to DNR.¹⁴³

117. On September 22, 2005, DNR sent a letter and report approving the engineering report regarding the application for a waterline extension to serve 12 potential users for the Big Island Subdivision.¹⁴⁴

118. On September 29, 2005, the DNR mailed its report of final inspection to Folsom Ridge granting its final and unconditional approval of the Big Island Subdivision waterline replacement and extension. DNR's final approval includes all variances that were

¹⁴¹ Transcript p. 951, lines 7-13; Hearing Exhibit 116, Letter from Breck E. Summerford, DNR, to Reggie Golden, Folsom Ridge, dated October 21, 2004, plus attached report. The October 21, 2004 report states that it is anticipated that the service lines connecting the mains to a number of homes will share a common 1-inch PVC line under the roadway and that technically such lines are part of the water distribution system and subject to the separation of water and sewer line construction policy. *Id.* Despite the notation in the October 21, 2004 report referencing service lines, John MacEachen, the Enforcement Unit Chief for the public drinking water branch of the DNR testified that the service lines and service connection lines do not fall under the jurisdiction of the DNR, but rather are regulated by local ordinance. See Transcript, p. 775, lines 6-25, p. 776, lines 1-25, p. 777, lines 1-13. The Commission notes that the issue concerning DNR's jurisdiction, or lack of jurisdiction over the service lines and service connection lines is irrelevant to the issues requiring determination by the Commission.

¹⁴² Transcript, p. 762, lines 6-16.

¹⁴³ Hearing Exhibit 81, Letter and attached application from David Krehbiel of Krehbiel Engineering, Inc. to Cynthia Davies, DNR, dated September 6, 2005.

¹⁴⁴ Hearing Exhibit 82, Letter from Breck E. Summerford, DNR, to Reggie Golden, Folsom Ridge, dated September 22, 2005, plus attached documents.

made in the plans for installation that occurred during the waterline replacement and extension.¹⁴⁵

119. On February 15, 2006, the DNR mailed its report of final inspection to Folsom Ridge granting its final and unconditional approval of a waterline extension serving 12 additional lots; Public Water Supply Number 30-31265.¹⁴⁶

120. As required by the terms of the settlement agreement between DNR and Folsom Ridge, all fines have been paid by Folsom Ridge in connection with any DNR Notice of Violation and any kind of unsatisfactory feature in relation to the water and sewer facilities.¹⁴⁷

121. Folsom Ridge fully cooperated with the DNR in rectifying the problems requiring reinstallation of its water main on Big Island.¹⁴⁸

¹⁴⁵ Hearing Exhibit 93, Letter and Report from DNR signed by Clinton J. Finn, address to Reggie Golden, dated September 29, 2005. Prior to final approval, DNR had provided Folsom Ridge with reports of its construction inspections identifying areas requiring further correction for the water line replacement and extension and for appropriate water testing. (Hearing Exhibit 68, Letter from DNR, Cynthia S. Davies, to Reggie Golden, dated March 18, 2005; Hearing Exhibit 70, Letter from DNR, Cynthia S. Davies, to Reggie Golden, dated June 28, 2005.) Additionally, on June 28, 2005, DNR issued a Notice of Violation (Notice of Violation Number 11210SW) for violations of Section 640.115.2 and 10 CSR 60-3.010(1)(A), for having begun construction of the extension of the waterline without written authorization. (Hearing Exhibit 69, Letter from DNR, including Schedule of Compliance, Cynthia S. Davies, to Reggie Golden, dated June 28, 2005.) The DNR's final approval, however, was unconditional and consequently, the previously identified deficiencies and violation were considered to be resolved. (Hearing Exhibit 77, Letter and Report from DNR signed by Clinton J. Finn, address to Reggie Golden, dated September 29, 2005); Hearing Exhibit 15, Prefiled Rebuttal Testimony of David Krehbiel, p. 2, lines 4-20; Transcripts pp. 946-953, p. 1218, lines 22-25, p. 1219, lines 1-5.

¹⁴⁶ Hearing Exhibit 94, Letter from Cynthia S. Davies, DNR, to Reggie Golden, and accompanying Report of Final Inspection of Public Water Supply Improvements, dated February 15, 2006

¹⁴⁷ Transcript, p. 862, lines 17-25, p. 863, line 1, p. 866, lines 4-25, p. 867, lines 1-9.

¹⁴⁸ Transcript, p. 851, lines 7-25, p. 852, lines 1-14, p. 866, lines 24-25, p. 867, lines 1-9.

122. There are no other DNR Notices of Violation pending regarding Folsom Ridge or the Association's ownership or operation and maintenance of the water and sewer systems on Big Island.¹⁴⁹

123. There are no outstanding DNR enforcement actions regarding the Folsom Ridge or the Association's ownership or operation and maintenance of the water and sewer systems on Big Island.¹⁵⁰

124. Folsom Ridge and the Association are in complete compliance with monitoring reports, contaminant requirements and maximum contaminant levels with regard to their water and sewer systems on Big Island.¹⁵¹

125. There is no evidence in the record that the original installation of the water and sewer mains, lacking the appropriate horizontal and/or vertical separation, resulted in any instances of violation of water quality standards, or any contamination of the drinking water provided by the system.

126. The drinking water system has passed all DNR standards.¹⁵²

127. The wastewater treatment plant has not received a bad discharge report.¹⁵³

128. The DNR has held the issuance of the operating permit, or a permit to dispense, for the water and sewer system on Big Island pending the determination of ownership of the facilities, i.e. pending the results of this litigation. The DNR does not consider the lack of an operating permit, or a permit to dispense, under these

¹⁴⁹ Transcript, p. 863, lines 2-5.

¹⁵⁰ *Id.*

¹⁵¹ Transcript, p. 865, lines 8-25, p. 866, lines 1-3.

¹⁵² Transcript p. 730, lines 1-6.

¹⁵³ *Id.*

circumstances to be a violation of any state statutes or regulations that would require an enforcement action.¹⁵⁴

Findings of Fact Related to the Transfer of Assets

129. Big Island Sewer Company was organized pursuant to the provisions of Sections 393.825 through 393.861.¹⁵⁵

130. Big Island Water Company was organized pursuant to the provisions of Sections 393.900 through 393.951.¹⁵⁶

131. Both companies were organized in October 2006 for the purpose of eventually receiving the water and sewer assets on Big Island that are currently owned by Folsom Ridge, and managed and operated by the Association.¹⁵⁷

132. As currently organized, both of these companies comply with the provisions of Chapter 393, and as such, are considered to be nonprofit companies as defined and regulated pursuant to Chapter 393.¹⁵⁸

133. Chapter 393 non-profit companies are expressly excluded from the jurisdiction of the Missouri Public Service Commission.¹⁵⁹

¹⁵⁴ Transcript, p. 898, lines 15-25, pp. 899-901, p. 902, lines 1-7.

¹⁵⁵ Hearing Exhibit 20, Joint Application for Approval of Transfer of Assets to Nonprofit Companies Organized Under Chapter 393, RSMo, p. 4, paragraph 9; Hearing Exhibit 98, Prefiled Direct Testimony of Gail Snyder, p. 1, lines 4-5; Hearing Exhibit 99, Prefiled Additional Direct Testimony of Gail Snyder, p. 1, lines 4-5.

¹⁵⁶ *Id.*

¹⁵⁷ Hearing Exhibit 98, Prefiled Direct Testimony of Gail Snyder, p. 1, lines 10-12; Hearing Exhibit 99, Prefiled Additional Direct Testimony of Gail Snyder, p. 1, lines 10-18.

¹⁵⁸ Hearing Exhibit 20 Joint Application for Approval of Transfer of Assets to Nonprofit Companies Organized Under Chapter 393, RSMo; Hearing Exhibit 101, Bylaws of the Chapter 393 Companies; Chapter 393, RSMo 2000 and 2006 Cum. Supp.

¹⁵⁹ Sections 393.847.2 and 393.933.2; Transcript p. 1050, lines 10-11.

134. Folsom Ridge and the Association are listed as being the “Sellers” and the Big Island Sewer Company and the Big Island Water Company (collectively “Chapter 393 Companies”) are listed as the “Buyers” in an agreement to transfer the water and sewer systems on Big Island.¹⁶⁰

135. Folsom Ridge and the Association will have no affiliation with the Chapter 393 Companies.¹⁶¹

136. Under the transfer agreement, Folsom Ridge and the Association will join in transferring their interests to all of the assets used or useful in the provision of water distribution services and wastewater collection and treatment, including the real estate and easements in or on which the facilities are located. The assets will include facilities now under construction for expansion of the system. All accounts, accounts receivable and reserve accounts, if any, related to the provision of water and sewer service will be transferred as well.¹⁶²

137. Folsom Ridge and the Association will transfer the assets without charge to the 393 Companies. However, a portion of tap permit fees collected by the 393 Companies from certain homeowners or their successors in title over the next 10 years will be paid to Folsom Ridge.¹⁶³

138. The Association has a reserve account for purposes of defraying or covering costs of unexpected equipment or material needs or other unanticipated expenses in the

¹⁶⁰ Hearing Exhibit 20, Joint Application for Approval of Transfer of Assets to Nonprofit Companies Organized Under Chapter 393, RSMo, Appendix 1, p. 1; Hearing Exhibit 9, Prefiled Direct Testimony of Rick Rusaw, p. 2, lines 1-8, p. 3, lines 8-14.

¹⁶¹ Hearing Exhibit 9, Prefiled Direct Testimony of Rick Rusaw, p. 2, lines 15-20.

¹⁶² *Id.* at p. 3, lines 16-23, p. 4, lines 1-15.

¹⁶³ *Id.* at p.5, lines 1-11.

operation and maintenance of the system. At the time of hearing, the balance in that account was approximately \$7,000.00. It will be transferred to the 393 Companies.¹⁶⁴

139. Bylaws for the Chapter 393 Companies have been drafted, but, at the time of hearing, were not in final form and were subject to approval by the Board of Directors.¹⁶⁵

140. The Bylaws for the Chapter 393 Companies, as they are currently drafted, follow a one-vote-per-customer rule.¹⁶⁶

141. Residents who have paid the tap fees for connection to the water and sewer systems but who have not yet connected are still guaranteed the right to connect. That obligation is expressed in the bylaws of each company.¹⁶⁷

142. The asset transfer will not close unless the 393 Companies have acquired the necessary permits or other approvals from the Missouri Department of Natural Resources.¹⁶⁸

143. After the transfer to the Chapter 393 Companies, operation and maintenance of the system will be the responsibility of Mr. Michael T. McDuffey's firm, Lake Ozark Water and Sewer LLC (LOWs). This company operates and maintains the systems already. Mr. McDuffey's organization will also do the billing for the 393 Companies.¹⁶⁹

¹⁶⁴ *Id.* at p. 4, lines 17-22.

¹⁶⁵ Hearing Exhibit 99, Additional Prefiled Direct Testimony of Gail Snyder, p. 2, lines 6-9; Hearing Exhibit 101, Bylaws of the Chapter 393 Companies; Transcript p. 1050, lines 19-24.

¹⁶⁶ Hearing Exhibit 9, Prefiled Direct Testimony of Rick Rusaw, p. 2, lines 15-20; Hearing Exhibit 101, Bylaws of the Chapter 393 Companies, Sewer Bylaws, p. 30, paragraph 10.2, Water Bylaws, Article XII – Voting Rights, p. 1-2.

¹⁶⁷ Hearing Exhibit 9, Prefiled Direct Testimony of Rick Rusaw, p. 5, lines 13-19; Hearing Exhibit 99, Additional Prefiled Direct Testimony of Gail Snyder, p. 2, lines 2-4; Hearing Exhibit 101, Bylaws of the Chapter 393 Companies, Sewer Bylaws, p. 10, paragraph 4.6 and Exhibit B, Water Bylaws, p. 11, Article XII and p. 19, Exhibit B.

¹⁶⁸ Hearing Exhibit 9, Prefiled Direct Testimony of Rick Rusaw, p. 7, lines 1-5.

¹⁶⁹ Hearing Exhibit 9, Prefiled Direct Testimony of Rick Rusaw, p. 7, lines 7-14; Hearing Exhibit 99, Additional Prefiled Direct Testimony of Gail Snyder, p. 3, lines 3-16.

144. Pursuant to written notice, the membership of the Association adopted a resolution to transfer the assets as proposed in the Application. The vote taken by the Association can be broken down as follows: There are 60 customers connected to the wastewater system and 49 customers connected to the water distribution system. Of the customers connected to the systems, 50 voted in favor of the resolution (83%) and 5 voted against it. There are 92 total customers that are billed by the Association; of those customers, 70 voted in favor of the resolution (76%) and 13 voted against it. Of the 105 total property owners on Big Island, 73 voted in favor of the resolution (69%) and 16 owners voted against it.¹⁷⁰

145. The Staff of the Missouri Public Service Commission has recommended that should the Commission determine that it has jurisdiction over these matters, it grant approval of the transfer of assets without condition. Staff has outlined a number of technical considerations that it believes the Chapter 393 Companies should address, but most of these conditions have already been addressed in Respondents' testimony and in the bylaws of the Chapter 393 Companies.¹⁷¹

¹⁷⁰ Hearing Exhibit 9, Prefiled Direct Testimony of Rick Rusaw, p. 7, lines 21-23, p. 8, lines 1-29, p. 9, lines 1-5; Hearing Exhibit 99, Additional Prefiled Direct Testimony of Gail Snyder, p. 4, lines 5-16.

¹⁷¹ Hearing Exhibit 104, Prefiled Rebuttal Testimony of James A. Merciel, Jr., pp. 3-6; Hearing Exhibit 104, Prefiled Rebuttal Testimony of James A. Merciel, Jr., Attachment Rebuttal Testimony of Martin L. Hummel in Case No. WA-2006-0480 (dismissed). Transcript pp. 1070- 1093; Hearing Exhibit 101, By-Laws of Big Island Water Company and Big Island Sewer Company. Most of these conditions have already been addressed. *Id.* These considerations include:

- Define water service line, service connection, water main and point-of-delivery. The "main" definition must include any pipe that has flow for more than one customer, regardless of size, including service connections that serve two customers. The service connection pipe under the road going to a lot should be part of the service connection, operated and maintained by the utility. Also, define the collecting sewers, and service sewers, including any service sewers serving more than one customer. As this is a pressure sewer system requiring pump units and septic tanks at each residence, specifications of required pump units and septic tanks along with maintenance responsibility needs to be prescribed. Much of this definition work can be modeled after the W/S Department's example tariff rules.

146. The Chapter 393 Companies have recommended, that should the Commission determine that it has jurisdiction over these matters, it grant approval of the transfer of assets subject to one condition. The Chapter 393 Companies believe that transfer should be conditioned upon requiring Folsom Ridge to transfer reserve funding

- Produce "as-built" drawings showing the location, size, and appurtenances of both the water system and the sewer system. This should include locations of "service connections," "service sewers" and small diameter pipe that serve more than one home. Some of this may need to be addressed as part of daily operation, such as, adding the location of a section of pipe to "as-built drawings" when exposed during a maintenance excavation. (Already addressed)

- There will be leaks on both systems, water and sewer, both of which are under pressure. How will the operator know when they occur, and what is to be the response? The leaks will vary from small leaks near shutoff valves possibly on the customer's side, to a large sewer or water leak or break, saturating the soil around the pipeline and perhaps flowing directly to the lake. Flow measurement capability on the wastewater system must be provided. Pressure monitoring/recording on the wastewater system should be considered. (Respondents stipulated to the installation of appropriate shut-off valves, Transcript p. 1083, lines 19-25, p. 1084, lines 1-7).

- Water meters should be installed for all new customers, and a meter installation program should be undertaken for existing customers. This system is big enough with the potential of too many excess water use problems to operate efficiently and equitably without meters and on a flat monthly rate indefinitely. Examples of problems are: excess use for lawn watering, leaving water run to prevent freezing of an exposed waterline to a boat dock or in a house that is vacant in winter, filling swimming pools or simply leaving a plumbing fixture leaking. To the extent that any excess drinking water goes to the sewer it also results in additional wastewater treatment costs.

- Establish a water main repair procedure and evaluate the main for the installation of isolation valves, air release valves and flush valves. The valving should be established that enables an efficient repair while limiting the time and number of customers out of service. (Already addressed)

- All sewer customers must have a septic tank and an effluent pump. The responsible party for installation, construction inspection, operation, repair, electric power, operational inspections and solids hauling must be designated. It is recommended that the utility be responsible for tank/pump standards, inspections, repair/replacement of pump, and solids hauling. Solids hauling should be based on annual tank inspections, not on a set time period. (Already addressed)

- Establish a written tapping procedure to be provided to plumbers making connections. Instructions should clearly state that both water and sewer are the same type and size, and address locating the correct main. If there are any portions of the main that were laid curved and therefore under stress, an appropriate cautionary statement should be included.

- Additional storage capacity is needed on the water system. It is the Staff's understanding that a new standpipe has been planned and the construction permit issued with construction expected in the spring of 2007. (Already approved – construction expected to start in the spring of 2007).

- Evaluate the location and installation of the water service connections, water service lines, and service sewers, with a determination made on a case by case basis whether a specific improvement, e.g. separation, should be implemented. (Already addressed).

amounts in harmony with the DNR's standards outlines in its financial capacity assessment guidelines.¹⁷²

147. The transfer of assets to the Chapter 393 Companies is in the public interest because:

- a. all assets are being transferred, including all accounts, accounts receivable and reserve accounts;
- b. the assets are being transferred without charge;
- c. the interests of people paying for the future right to tap-on to the system are protected;
- d. future development and extensions of the system will be done at the developer's cost pursuant to extension agreements;
- e. the current management company for the utilities, LOWS, will remain in place and has the experience, qualifications and track record with managing the systems that have kept the systems free from bad water quality reports or bad wastewater discharge reports;
- f. the 393 Companies will have the technical, financial and managerial resources and ability to develop, operate and maintain the water and sewer systems;
- g. The water distribution facilities and wastewater treatment facility were professionally engineered, designed and constructed, and have sufficient capacity to meet the demands of the service area for many years;

¹⁷² Chapter 393 Companies' Post-hearing Brief, pages 15-16.

- h. the system, as transferred, is free of any unsatisfactory features, not subject to DNR violations or enforcement actions;
- i. all water quality and wastewater standards have been met and there has never been an adverse report with regard to meeting these standards;
- j. a supermajority of the systems' current customers (83%) are in favor of the transfer;
- k. the Chapter 393 Companies will be regulated by the DNR;
- l. the benefits of having central water and wastewater systems in place for future development ensure the public safety and the provision of safe and adequate service at reasonable rates.¹⁷³

Conclusions of Law

The Missouri Public Service Commission has reached the following conclusions of law.

Jurisdiction and Authority

The threshold question the Commission must answer in relation to both cases is if the Commission has jurisdiction over the Association by virtue of the Association being a public utility. Should the Commission determine that it lacks jurisdiction, then it would be obligated to dismiss the pending complaint actions, and Commission approval would not be required for Folsom Ridge to transfer its water and sewer assets to the Chapter 393 Companies.

¹⁷³ See Findings of Facts Nos. 129-146; Transcript pp. 338-339, 454-456, 853-863; Hearing Exhibit 12, Prefiled Direct Testimony of Barbara Brunk, p. 16, lines 14-23, p. 17, lines 1-2; Hearing Exhibits 9, 10, 11, 12, 13, 14, 15, 16 17, 18, 19, 106, and 107; Testimony of Barbara Brunk, Rick Rusaw, William Hughes, David Kriehbel, Michael McDuffey, James Crowder.

“[T]he Public Service Commission is a body of limited jurisdiction and has only such powers as are expressly conferred upon it by the statutes and powers reasonably incidental thereto.”¹⁷⁴ As the Commission is an administrative agency with limited jurisdiction, “the lawfulness of its actions depends directly on whether it has statutory power and authority to act.”¹⁷⁵ Accordingly, the Commission “has no power to adopt a rule, or follow a practice, which results in nullifying the expressed will of the Legislature.”¹⁷⁶ In particular, the Commission “cannot, under the theory of ‘construction’ of a statute, proceed in a manner contrary to the plain terms of the statute[.]” *Id.* “When determining the statutory authorization for, or lawfulness of, a Commission order the courts do not defer to the commission, which has no authority to declare or enforce principles of law or equity.”¹⁷⁷

In short, the Public Service Commission is a creature of statute and its jurisdiction is controlled by statute.¹⁷⁸ The commission is not a court. It is a creature of the Legislature. Its jurisdiction, powers, and duties are fixed by statute.¹⁷⁹ A basic tenet of administrative law provides that “an administrative agency has only such jurisdiction or authority as may be granted by the legislature.”¹⁸⁰ If the Commission lacks statutory power, it is without

¹⁷⁴ *State ex rel. Kansas City Power & Light Co. v. Buzard*, 168 S.W.2d 1044, 1046 (Mo. 1943); *State ex rel. City of West Plains v. Pub. Serv. Comm’n*, 310 S.W.2d 925, 928 (Mo. banc 1958).

¹⁷⁵ *State ex rel. Gulf Transp. Co. v. Pub. Serv. Comm’n*, 658 S.W.2d 448, 452 (Mo. App. 1983).

¹⁷⁶ *State ex rel. Springfield Warehouse & Transfer Co. v. Pub. Serv. Comm’n*, 225 S.W.2d 792, 794 (Mo. App. 1949).

¹⁷⁷ *State ex rel. Util. Consumers Council, Inc. v. Pub. Serv. Comm’n*, 585 S.W.2d 41, 47 (Mo. banc 1979).

¹⁷⁸ *State ex rel. Smithco Transport Co. v. Public Service Commission*, 307 S.W.2d 361, 374 (Mo. App. 1957) (overruled on other grounds, 316 S.W.2d 6 (Mo. banc 1958)).

¹⁷⁹ *State ex rel. Doniphan Tel. Co. v. Public Service Commission*, 369 S.W.2d 572, 575 (Mo. 1963).

¹⁸⁰ *Carr v. North Kansas City Beverage Co.* 49 S.W.3d 205, *207 (Mo. App. 2001); *Livingston Manor, Inc. v. Dep’t of Soc. Servs., Div. of Family Servs.*, 809 S.W.2d 153, 156 (Mo. App. 1991).

subject matter jurisdiction, and subject matter jurisdiction cannot be enlarged or conferred by consent or agreement of the parties.¹⁸¹

Whether the Commission has jurisdiction over Folsom Ridge or the Association hinges on the statutory definition, and the state appellate courts' interpretations of that statutory definition, as to what constitutes a public utility subject to the control and regulation of the Commission.

Section 386.020(42) defines "public utility" as including:

. . . **every** pipeline corporation, gas corporation, electrical corporation, telecommunications company, **water corporation**, heat or refrigerating corporation, and **sewer corporation**, **as these terms are defined in this section, 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 to the provisions of this chapter.**

Section 386.020(58) defines "water corporation" as including:

. . . **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 including:

. . . **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.**

¹⁸¹ *Carr v. North Kansas City Beverage Co.* 49 S.W.3d 205, *207 (Mo. App. 2001); *Livingston Manor, Inc. v. Dep't of Soc. Servs., Div. of Family Servs.*, 809 S.W.2d 153, 156 (Mo. App. 1991).

The statutes contemplate that these types of companies would have to offer their services for “gain” in order to fall under the jurisdiction of the Commission. In *Osage Water Co. v. Miller County Water Authority, Inc.*, 950 S.W.2d 569 (Mo. App. 1997), the Court of Appeals determined that not-for-profit corporations, where no part of the income or property is distributable to its members, directors, or officers, were not excluded from legislature's definition of a “water corporation.”¹⁸² The *Osage* Court, although without providing legal analysis, equated the terms “gain” and “compensation.”¹⁸³

This Commission is bound by the decisions of the appellate courts and the findings of fact in this case demonstrate the Association is incorporated as a not-for-profit entity with no income or property being distributable to Folsom Ridge, the owners of the water and sewer assets. The Court of Appeals’ use of the word “compensation” when applied to the statutes defining water and sewer corporations and the facts of this case results in the conclusion that: Folsom Ridge owns the assets of the Association, which in turn is a stock corporation operating and managing plant or property for distribution or supplying of water for compensation and for the collection, carriage, treatment, or disposal of sewage for compensation. Folsom Ridge and the Association fit the statutory definitions of being water

¹⁸² *Osage Water Co.*, 950 S.W.2d at 574. The Commission has indicated that this reasoning equally applies to the definition of a “sewer corporation.” See *In the Matter of the Joint Application of South Jefferson County Utility Company and the Summer Sea Property Owners Association for Cancellation of a Certificate of Convenience and Necessity and Associated Tariff Sheets* Case No. WD-2006-0157, 2005 WL 3330327 (Mo. P.S.C.). Order Directing Filing issued November 23, 2005.

¹⁸³ *Osage Water Co.*, 950 S.W.2d at 574. See also *The Staff of the Missouri Public Service Commission v. Hurricane Deck Holding Company, et al.* Case No. WC-2006-0303, Order Granting in Part and Denying in Part Staff’s Motion for Summary Determination issued on August 31, 2006. It should be noted that, given that the Court of Appeals’ decision in the *Osage Water* case failed to undertake any analysis of the definitions of these words, further appellate review of this interpretation could yield a reversal of this position given that gain is traditionally defined as being profit. See Black’s Law Dictionary, Sixth Edition, West Publishing Co. 1990, p. 678; The American Heritage College Dictionary, 3rd Edition, Houghton Mifflin Co. 1997, p. 556; Webster’s Third New International Dictionary, Unabridged, Merriam-Webster, Inc. 1986, p. 928. Profit signifies gain, and gain is an excess of income over and above expenses. *Sindey Smith, Inc. v. Steinberg*, 316 S.W.2d 243, 255 (Mo. App. 1958). “Gain is an increase or addition to what one has of that which is profit, advantage or benefit; resources or advantage acquired; profit; opposed to loss.” *In re Breuer’s Income Tax*, 190 S.W.2d 248, 249 (Mo. 1945).

and sewer corporations as interpreted by the Court of Appeals, and would potentially fall under the definition of a “public utility” subject the control and regulation of the Commission pursuant to Section 386.020(42).

However, in addition to the plain reading of these statutes, Missouri’s courts have further distinguished and defined what constitutes being a public utility. In *State ex rel. M.O. Danciger & Company v. Public Serv. Comm’n*, the Missouri Supreme Court held that for a company to be considered a public utility its services must be devoted to the public use.¹⁸⁴ The Court held that: “The regulation and control of business of a private nature is sustained by reference to the police power, and even then it is sustained only when the courts have been able to say that a business is in character and extent of operation such that it touches the whole people and affects their general welfare.”¹⁸⁵ Consequently, the Court articulated the test for determining if a company was devoting its services to the public use when it summarized and stated: “The fundamental characteristic of a public calling is **indiscriminate** dealing with the general public.”¹⁸⁶ In a later case, the Court would further cement its interpretation holding that regardless if the statutes defining

¹⁸⁴ *State ex rel. M.O. Danciger & Company v. Public Serv. Comm’n*, 205 S.W. 36, 40 (Mo. banc 1918).

¹⁸⁵ *Id.* at 41.

¹⁸⁶ *Danciger*, 205 S.W. at 42. Following this same line of reasoning, the Missouri Supreme Court later held that an electric company selling electric energy to only one customer (a corporate entity) that had not devoted its property to any public use in any manner, was not a public utility and not subject to the jurisdiction of the Commission. *State ex rel. Buchanan County Power Transmission Co. v. Baker et al.*, 9 S.W.2d 589, 591, 592 (Mo. banc 1928). Continuing in this same vein, the Court has held that a small rural exchange phone company serving approximately 41 customers provided service for its own members, not the general public, and was not a public utility subject to the jurisdiction of the Commission. *State ex rel. Lohman & Farmers’ Mut. Telephone Co. v. Brown*, 19 S.W.2d 1048, 1049 (Mo. 1929). This same company had one commercial line to Jefferson City, and to that extent only, it was found to be a public utility and the Commission had regulatory authority in relation to that single line. *Id.*

corporations falling under the jurisdiction of the Commission have expressly written the idea of the public use into them, it is nonetheless a requirement.¹⁸⁷

In *Osage Water*, while the Court of Appeals determined that not-for-profit corporations providing water service, where no part of the income or property is distributable to its members, directors, or officers, were not excluded from legislature's definition of a "water corporation,"¹⁸⁸ citing to *Danciger*, it also noted that: "To constitute a public utility and be subject to regulation by the Commission, a service must be devoted to public use."¹⁸⁹ The *Osage* Court attempted to distinguish what constituted a service being devoted to the public use and concluded that if a not-for-profit water corporation "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," the company's service has in fact been devoted to the public use and not merely for particular persons.¹⁹⁰ Consequently, the question as to whether Folsom Ridge or the Association are "public utilities" turns on whether these entities offer service to the general public indiscriminately.

The water and sewer systems owned by Folsom Ridge, and operated and managed by the Association, have the capacity (or are in the process of having capacity expanded)

¹⁸⁷ *Baker*, 9 S.W.2d at 591.

¹⁸⁸ *Osage Water Co.*, 950 S.W.2d at 574. The Commission has indicated that this reasoning equally applies to the definition of a "sewer corporation." See *In the Matter of the Joint Application of South Jefferson County Utility Company and the Summer Sea Property Owners Association for Cancellation of a Certificate of Convenience and Necessity and Associated Tariff Sheets* Case No. WD-2006-0157, 2005 WL 3330327 (Mo. P.S.C.). Order Directing Filing issued November 23, 2005.

¹⁸⁹ *Osage Water Co.*, 950 S.W.2d at 574; *Khulusi v. Southwestern Bell Yellow Pages, Inc.*, 916 S.W.2d 227, 232 (Mo. App. 1995) (citing, *Danciger*, 205 S.W. at 40).

¹⁹⁰ *Osage Water Co.*, 950 S.W.2d at 575. It should be noted that the Court of Appeals' substitution of the word compensation for the word gain was done in a conclusory manner, without legal analysis or citation to any authority.

to serve 320 and 230 customers respectively. Big Island currently has 105 residents. As of November 29, 2000, the water and sewer systems were available to the entire island for use by the new owners of the lots being sold and/or developed by Folsom Ridge, and existing residents were given an option to connect to these systems should their existing water and/or sewer systems fail.

Out of the 105 residents on Big Island, there are approximately 60 customers connected to, and served by, the wastewater system. There are approximately a total of 49 customers connected to, and served by, the water distribution system. There are approximately 33 households who have paid connection or tap-on fees that have not connected to the system. There are approximately 92 customers that are billed by the Association. People who are not connected pay a monthly reservation/maintenance fee to preserve their right to connect, but they are not billed for, and do not receive, water or sewer services.

As defined in Section 386.020(47): "Service includes not only the use and accommodations¹⁹¹ afforded consumers or patrons, but also any product or commodity furnished by any corporation, person or public utility and the plant, equipment, apparatus, appliances, property and facilities employed by any corporation, person or public utility in performing any service or in furnishing any product or commodity and devoted to the public purposes of such corporation, person or public utility, and to the use and accommodation of

¹⁹¹ "Accommodation" means to do a service for, or provide for and supply with. American Heritage College Dictionary, 3rd Ed., Houghton Mifflin Co. 1997, p. 8. "Accommodation" means: "an arrangement or engagement made as a favor to another, not upon consideration received." Black's Law Dictionary, 6th Ed. West Publishing Co. 1990, p. 16. Clearly, paying a tap-on fee is not a favor without legal consideration.

consumers or patrons.” The reservation of a tap-on¹⁹² is not the provision of water or sewer service and does not involve a use, accommodation, product or commodity. Indeed, Mr. Merciel, from the Commission’s Staff, testified at hearing that other Commission regulated companies charge similar reservation/maintenance fees, that these are untariffed charges and that these fees do not constitute a charge for utility service.¹⁹³

Complainants have established that there is potentially **one** non-member to the Association that receives sewer service, Benjamin Pugh, and his status as a member is debatable. Mr. Pugh was allowed to connect during the time period that the Association first offered service. It should be noted that at the time Mr. Pugh was allowed to connect, the sewer system was serving less than 25 outlets and was clearly outside the jurisdiction of the PSC. The system did not provide service to 25 outlets until 2001, after the Association had recorded covenants and restrictions requiring membership in the Association in order to tap-on to the system.

When the Association asked Mr. Pugh to join the Association, he refused. When asked to disconnect and receive a full refund for his tap-on fees, Mr. Pugh refused. On November 16, 2001, the Missouri Department of Natural Resources advised Folsom Ridge that, in accordance with 10 CSR 20-6.010(3)(B)(5)(C)(IV), “everyone connected to the wastewater treatment system shall be bound by the rules of the homeowners association,

¹⁹² The physical tap-on is part of the “water system” or “sewer system” as defined by sections 386.020(49) and (59). Section 386.020(49) defines “sewer system” as including “all pipes, pumps, canals, lagoons, plants, structures and appliances, and all other real estate, fixtures and personal property, owned, operated, controlled or managed in connection with or to facilitate the collection, carriage, treatment and disposal of sewage for municipal, domestic or other beneficial or necessary purpose.” Section 386.020(59) defines “water system” as including “all reservoirs, tunnels, shafts, dams, dikes, headgates, pipes, flumes, canals, structures and appliances, and all other real estate, fixtures and personal property, owned, operated, controlled or managed in connection with or to facilitate the diversion, development, storage, supply, distribution, sale, furnishing or carriage of water for municipal, domestic or other beneficial use.”

¹⁹³ Transcript pp. 1093-1096.

and thus be a member.”¹⁹⁴ On November 29, 2001, after receiving the DNR’s November 16, 2001 letter, the Association notified Benjamin Pugh that although he had not acknowledged membership in the Association he was bound by the rules and regulations of the Association since he was connected to the water and sewer system and he was considered to be a member of the Association pursuant to the DNR’s regulations and DNR’s interpretation of those regulations.¹⁹⁵ The Association has treated Mr. Pugh as a member with full membership status and voting rights.

During the hearing, Phillip Hiley, also a Big Island resident, but not a complainant in this matter, testified that he did not consider himself to be a member of the Association because he did not ratify the Association’s bylaws, but that he pays monthly fees for “someone now hooked on” to the system. Mr. Hiley also testified that he attended the Association’s meeting concerning the transfer of assets to the Chapter 393 Companies and that he “probably” voted at that meeting. There is no evidence in the record to clarify if Mr. Hiley is actually “hooked on” to either the water or sewer service, or both, or if he was referring to having paid “tap-on” fees and/or monthly reservation/maintenance fees. Consequently, there is no competent and substantial evidence to allow for a conclusion that Mr. Hiley has the same relationship with the Association as does Mr. Pugh.

There is no additional evidence in the record to establish that anyone else could be considered a non-member of the Association that is receiving water or sewer service. All evidence indicates that no one currently is allowed to connect without first becoming a

¹⁹⁴ Hearing Exhibit 54, Letter from Kristine Ricketts, Regional Director of the DNR to Mr. Reggie Golden, dated November 16, 2001.

¹⁹⁵ Hearing Exhibit 52, Letter from Charles E. McElyea to Mr. and Mrs. Pugh, dated November 29, 2001; Transcript p. 633, lines 15-25, p. 634, lines 1-12.

member of the Association.¹⁹⁶ Consequently, with the exception of 1 or 2 possible aberrancies (Mr. Pugh and potentially Mr. Hiley) the Association does not offer water and sewer service to all members of the general public within its service capabilities, but rather offers services to a discrete group of people who become members of the Association. Even the aberrancies, which occurred during the Association's infancy, are treated as being members of the Association by virtue of DNR's instructions.

Substantial and competent evidence in the record establishes that service is only offered to individuals that have paid tap-on fees for access and who have become members of the Association. Thus, while the water and sewer systems are available to all current Island residents, and to potential future Island residents, they are only being offered on an optional basis to a discrete group of people (members of the Association), not the general public.

Rocky Ridge Ranch Public Interest Analysis

There have been past cases before the Commission where an entity providing water and/or sewer service has changed its corporate structure and the Commission has recognized that it no longer holds jurisdiction over those entities. In the case, *In the Matter of Rocky Ridge Ranch Property Owners Association for an Order of the Public Service Commission Authorizing Cessation of the PSC Jurisdiction and Regulation Over its*

¹⁹⁶ There is no record evidence concerning when the first individual connected to the water system. Nor is there any evidence in the record to establish the composition of any customers receiving water service from Folsom Ridge and the Association. i.e. whether they are members of the Association, nonmembers, or have changed membership status over time. Given there is no factual evidence on these matters, it is impossible for the Commission to make any conclusions of law with regard to who is currently connected to the water system, except to note that covenants and restrictions requiring membership in the Association have been in place since 2001 and the Association requires membership prior to commencing service – these are facts established by the evidence.

Operations, Case No. WD-93-307, the Commission began its jurisdictional analysis by concluding a Property Owners Association (POA) operating a water distribution system on a nonprofit basis “**is a not-for-profit corporation and as such does not distribute or sell water ‘for gain.’**” This conclusion, that a not-for-profit association would not fall under the definition of a water corporation in Section 386.020(58),¹⁹⁷ was made prior to *Osage Water* and that criteria can no longer be applied. However, that conclusion was not the deciding factor in *Rocky Ridge Ranch*.

In *Rocky Ridge Ranch*, the Commission’s Staff recommended three criteria for classifying what it termed as being a “legitimate” property owner’s association that would not fall under the Commission’s jurisdiction. Those criteria were:

- 1) It must have as membership all of its utility customers, and operate the utility only for the benefit of its members;
- 2) It must base the voting rights regarding utility matters on whether or not a person is a customer, as opposed to, allowing one (1) vote per lot which would not be an equitable situation if one (1) person owned a majority of the lots irrespective of whether each of those lots subscribed to the utility service; and
- 3) It must own or lease the utility system so that it has complete control over it.

It is important to note that at the time of this decision none of these criteria was statutorily based, but rather were more appropriately part of a public interest analysis.¹⁹⁸

As noted earlier, if the Commission lacks statutory power, it is without subject matter

¹⁹⁷ At the time of the Rocky Ridge Ranch decision, the statutory definition of a water corporation was found in Section 386.020(51).

¹⁹⁸ Currently, nonprofit water and sewer companies may incorporate under the provisions of Chapter 393. these provisions, *inter alia*, essentially codify the public interest factors from the *Rocky Ridge Ranch* case, and if a corporation complies with Chapter 393’s statutory scheme, jurisdiction over that corporation expressly lies with the DNR.

jurisdiction, and subject matter jurisdiction cannot be enlarged or conferred by consent or agreement of the parties.¹⁹⁹

Recognizing the appropriate statutory standards, in *Rocky Ridge Ranch*, the Commission determined that **only one** of these criteria was important to its decision on jurisdiction. That criterion, the membership requirement, was an appropriate application of the Missouri Supreme Court's test in *Danciger*, recognizing that an entity was not a public utility if it did not provide service to the general public indiscriminately. As it explained in the Commission's final paragraph of discussion in the order:

The Commission, having considered all of the competent and substantial evidence upon the whole record, finds that the POA has met its burden by qualifying as an association which does not require regulation under the rules and statutes of the state of Missouri. In Case No. WM-93-136, the Commission found it necessary to continue to retain jurisdiction over the Property Owners Association based upon the finding that the Association would continue to serve customers who were not members of the Association. The Commission now finds changed circumstances due to the changes in the bylaws of the Property Owners Association. **Pursuant to those changes, the Commission finds that the Property Owners Association does and will only provide water service to members of the Association. As such POA does not qualify as a "water corporation" as defined by 386.020(51).** (In the current revision of the Missouri Revised Statutes, the definition is found in Section 386.020 (58)).

As the Commission has already discussed, the Association operating and maintaining the water and sewer system on Big Island complies with the membership requirement. Benjamin Pugh qualifies as a *de facto* member, and the provision of service is restricted to a discrete group, and is not provided to the general public.

¹⁹⁹ *Carr v. North Kansas City Beverage Co.* 49 S.W.3d 205, 207 (Mo. App. 2001); *Livingston Manor, Inc. v. Dep't of Soc. Servs., Div. of Family Servs.*, 809 S.W.2d 153, 156 (Mo. App. 1991).

As for the remaining two *Rocky Ridge Ranch* factors, while Folsom Ridge currently holds the majority of votes by virtue of its ownership of the majority of lots, the Association's decisions are made by the majority vote of non-Folsom Ridge members and Folsom Ridge has never over-ridden the majority of the remaining membership by exercising its votes. The Association has never declared a dividend to Folsom Ridge or any of its members. Folsom Ridge has never received a fee, commission, or any remuneration from the Association from the rates charged by the Association for water or sewer service. The rates charged by the Association are designed to cover the actual costs of operating and maintaining the system, i.e. the contract operator's charges, the cost of billing and the cost of permits required by environmental and other agencies. Folsom Ridge's interest in the facilities is essentially in name only.

Under the specific facts of this case, not only have the *Rocky Ridge Ranch* criteria been sufficiently satisfied, but Folsom Ridge and the Association are currently in the process of transferring all of the assets of the water and sewer system to newly formed Chapter 393 Companies. The provisions of Chapter 393 essentially secure all of the criteria of the public interest analysis of the *Rocky Ridge Ranch*, and expressly remove any such water and/or sewer company from the jurisdiction of the Commission and place jurisdiction over such operations with the DNR. Although the Commission lacks jurisdiction in this matter to approve the transfer of assets, it has determined that if had that authority it would find the transfer to be in the public interest.

Precedential Effect

An administrative body, that performs duties judicial in nature, is not and cannot be a court in the constitutional sense.²⁰⁰ The legislature cannot create a tribunal and invest it with judicial power or convert an administrative agency into a court by the grant of a power the constitution reserves to the judiciary.²⁰¹

An administrative agency is not bound by stare decisis, nor are agency decisions binding precedent on the Missouri courts.²⁰² “Courts are not concerned with alleged inconsistency between current and prior decisions of an administrative agency so long as the action taken is not otherwise arbitrary or unreasonable.”²⁰³ The mere fact that an administrative agency departs from a policy expressed in prior cases which it has decided is no ground alone for a reviewing court to reverse the decision.²⁰⁴ “In all events, the adjudication of an administrative body as a quasi-court binds only the parties to the

²⁰⁰ *In re City of Kinloch*, 362 Mo. 434, 242 S.W.2d 59, 63[4-7] (Mo.1951); *Lederer v. State, Dept. of Social Services, Div. of Aging*, 825 S.W.2d 858, 863 (Mo. App. 1992).

²⁰¹ *State Tax Comm'n v. Administrative Hearing Comm'n*, 641 S.W.2d 69, 75 (Mo. banc 1982); *Lederer*, 825 S.W.2d at 863.

²⁰² *State ex rel. AG Processing, Inc. v. Public Serv. Comm'n*, 120 S.W.3d 732, 736 (Mo. banc 2003); *Fall Creek Const. Co., Inc. v. Director of Revenue*, 109 S.W.3d 165, 172 -173 (Mo. banc 2003); *Shelter Mut. Ins. Co. v. Dir. of Revenue*, 107 S.W.3d 919, 920 (Mo. banc 2003); *Southwestern Bell Yellow Pages, Inc. v. Dir. of Revenue*, 94 S.W.3d 388, 390 (Mo. banc 2002); *Ovid Bell Press, Inc. v. Dir. of Revenue*, 45 S.W.3d 880, 886 (Mo. banc 2001); *McKnight Place Extended Care, L.L.C. v. Missouri Health Facilities Review Committee*, 142 S.W.3d 228, 235 (Mo. App. 2004); *Cent Hardware Co., Inc. v. Dir. of Revenue*, 887 S.W.2d 593, 596 (Mo. banc 1994); *State ex rel. GTE N. Inc. v. Mo. Pub. Serv. Comm'n*, 835 S.W.2d 356, 371 (Mo. App. 1992). On the other hand, the rulings, interpretations, and decisions of a neutral, independent administrative agency, “while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.” *Lacey v. State Bd. of Registration For The Healing Arts*, 131 S.W.3d 831, 843 (Mo. App. 2004). “The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.” *Skidmore v. Swift & Co.*, 323 U.S. 134, 140, 65 S.Ct. 161, 164, 89 L.Ed. 124 (1944).

²⁰³ *Columbia v. Mo. State Bd. of Mediation*, 605 S.W.2d 192, 195 (Mo. App. 1980); *McKnight Place Extended Care, L.L.C. v. Missouri Health Facilities Review Committee*, 142 S.W.3d 228, 235 (Mo. App. 2004).

²⁰⁴ *Id.*

proceeding, determines only the particular facts contested, and as in adjudications by a court, operates retrospectively.”²⁰⁵

The Commission has repeatedly emphasized that its decision in this matter is specific to the facts of this case. Determining jurisdiction is done on a case-by-case basis and is a fact intensive inquiry. Consequently, the Commission makes it abundantly clear that, consistent with its statutory authority, this decision does not serve as precedent for any future determinations of the Commission’s jurisdiction.

Burden of Proof

Section 386.390, RSMo 2000, authorizes the individual complainants in Case No. WC-2006-0082 to bring a complaint before the Commission regarding a public utility. “In cases where a complainant alleges that a regulated utility is violating a law, its own tariff, or is otherwise engaged in unjust or unreasonable actions, the complainant has the burden of proof.”²⁰⁶ The complaining parties in consolidated Case No. WC-2006-0082 bear the burden of proving the allegations in their complaints. The Complainants have failed to establish, by competent and substantial evidence, that the Commission has jurisdiction over these matters. Consequently, the Commission must dismiss these actions as it has no authority to make a determination with regard to the complaints or the transfer of assets.

²⁰⁵ *State ex rel. Gulf Transport Co. v. Public Service Com’n of State*, 658 S.W.2d 448, 466 (Mo. App. 1983); *N.L.R.B. v. Wyman-Gordon Co.*, 394 U.S. 759, 765, 89 S.Ct. 1426, 1429, 22 L.Ed.2d 709 (1969); *State ex rel. Summers v. Public Service Commission*, 366 S.W.2d 738, 741[1-4] (Mo. App. 1963); *State ex rel. Consumers Public Service Co. v. Public Service Commission*, 352 Mo. 905, 180 S.W.2d 40, 46[6-8] (banc 1944); §§ 386.490 and 386.510. 1 Cooper, *State Administrative Law*, pp. 177 et seq. (1965); Mayton, *The Legislative Resolution of the Rulemaking Versus Adjudication Problem in Agency Lawmaking*, *Duke Law Journal*, Vol. 1980: 103, 118.

²⁰⁶ *David A. Turner and Michele R. Turner, Complainants, v. Warren County Water and Sewer Company, Respondent*, 9 Mo. P.S.C. 3d 548 (Mo. PSC 2001), *citing to*, *Margolis v. Union Electric Company*, 30 Mo. P.S.C. (N.S.) 517, 523 (1991); *Michaelson v. Wolf*, 261 S.W.2d 918, 924 (Mo. 1953); *Farnham v. Boone*, 431 S.W.2d 154 (Mo. 1968).

As noted in finding of fact numbers 15 and 80, numerous parties to these actions were subject to dismissal.²⁰⁷ Had the Commission determined that it had jurisdiction over these matters, it would have ruled on whether those parties should be dismissed. Because the Commission has determined that it lacks jurisdiction in these matters, and because the Commission is dismissing these actions in their entirety, there is no need to rule on the posture of those parties to these actions.

Decision

The Commission in making this decision has considered the positions and arguments of all of the parties. Failure to specifically address a piece of evidence, position or argument of any party does not indicate that the Commission has failed to consider relevant evidence, but indicates rather that the omitted material was not dispositive of this decision. After applying the facts, as it has found them, to its conclusions of law, the Commission has reached the following decision. Case numbers WC-2006-0082, WC-

²⁰⁷ On May 1, 2007, Respondents renewed their motion to dismiss these parties. On May 7, 2007, Complaints filed, on behalf of several of these parties, statements representing them to be evidence in support of these parties' positions. As previously noted: Assertions or allegations in pleadings do not constitute evidence. It is well established legal doctrine that unsworn statements of attorneys or parties, statements in briefs, pleadings, motions, arguments, allegations, or charging documents, as well as articles or exhibits not formally or constructively introduced are not evidence of the facts asserted unless conceded to by the opposing party. *State ex rel. TWA, Inc. v. David*, 158 S.W.3d 232, 236 (Mo. Banc 2005) (Judge White Dissenting), *citing to*, *State ex rel. Dixon v. Darnold*, 939 S.W.2d 66, 69 (Mo. App. 1997); *State v. Smith*, 154 S.W.3d 461, 469 (Mo. App. 2005); *Lester v. Sayles*, 850 S.W.2d 858, 864 (Mo. Banc 1993); *State v. Rutter*, 93 S.W.3d 714, 727 (Mo. Banc 2002); *State v. Robinson*, 825 S.W.2d 877, 880 (Mo. App. 1992); *State ex rel. Horn v. Randall*, 275 S.W.2d 758, 763-764 (Mo. App. 1955). To have legal standing to prosecute a legal action a party seeking relief must have a legally cognizable interest in the subject matter and he or she must be facing a threatened injury or have suffered actual injury. *Eastern Missouri Laborers Dist. Council v. St. Louis County*, 781 S.W.2d 43, 46 (Mo. banc 1989). "A legally protectible interest contemplates a pecuniary or personal interest directly in issue or jeopardy which is subject to some consequential relief, immediate or prospective." *Absher v. Cooper*, 495 S.W.2d 696, 698 (Mo. App. 1973).

2006-0090, WC-2006-0107, WC-2006-0120, WC-2006-0121, WC-2006-0122, WC-2006-0138, WC-2006-0139 and WA-2007-0270 shall be dismissed for lack of jurisdiction.

IT IS ORDERED THAT:

1. Case numbers WC-2006-0082, WC-2006-0090, WC-2006-0107, WC-2006-0120, WC-2006-0121, WC-2006-0122, WC-2006-0138, WC-2006-0139 and WA-2007-0270 are dismissed for lack of jurisdiction.
2. All objections not ruled on are overruled and all motions not granted are denied.
3. This order shall become effective on June 24, 2007.
4. This case may be closed on June 25, 2007.

BY THE COMMISSION



Colleen M. Dale
Secretary

(S E A L)

Davis, Chm., Murray and Appling, CC., concur;
Gaw, C., dissents;
Clayton, C. dissents with dissenting opinion to follow;
and certify compliance with the provisions of
Section 536.080, RSMo.

Dated at Jefferson City, Missouri,
on this 14th day of June, 2007.