

At a session of the Public Service Commission held at its office in Jefferson City on the 7th day of March, 2005.

Respondents.

On February 24, a Motion to Dismiss, submitted by the Respondents, was filed in the Commission's electronic filing system. Staff responded on March 3 by filing two pleadings.

The first pleading is a Motion for Default Order; the second is a Motion to Strike Pleading or in the Alternative, Response to Motion to Dismiss. The Commission will address all three motions in this order.

### **Staff's Motion for Default Order and Motion to Strike Pleading**

Staff's Motion for Default alleges that the Respondents are in default because they failed to file an answer by February 22, as directed by the Commission. The motion also alleges that the Motion to Dismiss that the Respondents filed two days late on February 24 is not an answer. On that basis, Staff asks the Commission to strike the Motion to Dismiss and grant a default order pursuant to Commission Rule 4 CSR 240-2.070(9). Staff's separate Motion to Strike Pleading alleges the same facts and seeks the same relief.

Staff's motions contain two aspects. First, Staff alleges that the Respondents failed to file a response to Staff's complaint by February 22. While the motion was not filed in the Commission's electronic filing system until February 24, it was faxed to the Commission's data center by the Respondents on February 22. The Commission's rules require that a person wishing to file a pleading file either one paper original and eight paper copies, or an electronic copy of the pleading directly into the Commission's electronic filing system.<sup>1</sup>

The Commission's data center properly waited until it received the paper copies required by the rule before stamping the pleading as filed and entering it into the electronic filing system. Thus, the official filing date of the Respondents' Motion to Dismiss is February 24.<sup>2</sup> However, the two-day delay in formally filing the Motion to Dismiss is not a sound basis for declaring the Respondents in default and denying them an opportunity to defend themselves against the allegations Staff raises in its complaint.

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<sup>1</sup> 4 CSR 240-2.080(8). The procedure for electronic filing is set out at 4 CSR 240-2.045.

<sup>2</sup> 4 CSR 240-2.080(11).

The second aspect of Staff's motions is an argument that the Respondents' Motion to Dismiss, whenever filed, is not an answer, and that therefore the Respondents are still in default. Obviously, a motion to dismiss is not an answer. However, the question is a bit more complicated than that. The Commission does not have a specific rule regarding pleadings that can substitute for an answer. However, Rule 55.27 of the Missouri Supreme Court's Rules of Civil Procedure allows certain defenses to be raised by motion within the time allowed for responding to the opposing party's pleadings. The Respondents have properly raised such defenses in their Motion to Dismiss and the filing of that motion delays the need to file an answer to Staff's complaint.

Since both aspects of Staff's Motion for Default Order and Motion to Strike Pleading fail, both motions will be denied. The Commission will now consider the Respondents' Motion to Dismiss.

### **Motion to Dismiss**

The Respondents' Motion to Dismiss contains six paragraphs. The first argues that the Staff's complaint fails to state a claim upon which relief can be granted. The Respondents fail to assert any facts or arguments to support that bald assertion. A review of Staff's complaint reveals that it does in fact assert a cause of action against the Respondents in that it alleges that the Respondents are purporting to operate a water and sewer system to serve the public without authority from the Commission to do so in violation of Missouri statutes and Commission regulations.

The second paragraph argues that the Commission lacks jurisdiction over the Chelsea Rose Land Owners Association, Inc., because it is a not-for-profit corporation authorized to provide water and sewer service to its members. As such, the Respondents

claim that it is not a public utility and is not subject to the jurisdiction of the Commission. Staff replies that the Association is merely a sham corporation established by Hurricane Deck Holding Company in an attempt to cover its illegal operation of an uncertificated public utility. Furthermore, Staff contends that it is Hurricane Deck, not the Association, that is actually offering services to the public.

If the facts alleged by Staff are taken as true, as they must be for purposes of considering a motion to dismiss, then the Commission has jurisdiction over the Respondents.

The third paragraph argues that Hurricane Deck Holding Company has the legal authority to create the Chelsea Rose Land Owners Association and denies that Hurricane Deck Holding Company has ever offered water or sewer service to the public. These are factual allegations that the Commission may ultimately resolve, but they are not a basis for dismissing Staff's complaint.

The fourth paragraph argues that the complaint does not allege that the individually named Respondents are offering water or sewer services to the public. Presumably, the Respondents are contending that the named individuals should, for that reason, be dismissed from the complaint. A review of Staff's complaint reveals that Staff is indeed alleging that the three named individuals are involved in offering water and sewer services to the public. Of course, alleging that fact and proving it are different matters. But Staff's allegations are sufficient to defeat the Respondents' motion to dismiss.

The fifth and sixth paragraphs of the Motion to Dismiss allege that the Commission has commenced a parallel action in the Circuit Court of Camden County that involves the same issues and parties as this complaint. The Respondents argue that this action before

the Commission should properly be joined in the circuit court action under the “first filed” rule. The Respondents contend that the Commission cannot proceed with this administrative complaint while concurrently seeking relief from the Circuit Court for the same transactions and occurrences.

The Respondents do not cite any authority for their contention that an administrative action would be blocked by the filing of a related action in circuit court. The “first filed” rule cited by the Respondents concerns competing actions involving the same parties brought in courts of concurrent jurisdiction. The cited rule would require the court in which the action was later filed to defer to the jurisdiction of the court in which the action was first filed. Obviously, this Commission is not a court and it does not have concurrent jurisdiction with the Circuit Court of Camden County. As a result, the “first filed” rule does not apply to this situation. In any event, the complaint that Staff has filed with this Commission is not the same as the action it has pursued in circuit court.

Although it involves some of the same parties and events, the action that Staff and Osage Water Company has filed against Hurricane Deck Holding Company, Gregory Williams and Debra Williams in the Circuit Court of Camden County is clearly quite different than Staff’s complaint before this Commission. The Circuit Court action seeks specific performance of a contract to sell or convey land, or in the alternative to quiet title to real estate. Staff does not seek such relief in its complaint before this Commission. The Circuit Court action also includes a motion for preliminary injunction relating to Staff’s allegation that Hurricane Deck Holding Company is attempting to operate an uncertificated utility. However, Staff’s action in Circuit Court does not ask for any damages or penalties regarding such activities. In contrast, Staff’s complaint before this Commission asks for

authorization to pursue such penalties against the Respondents as are allowed by statute. Since they are different actions seeking different relief, the existence of the action in circuit court can in no way bar Staff's pursuit of its complaint before this Commission.

For the foregoing reasons, the Commission finds that the Respondents' Motion to Dismiss is without merit and it will be denied. The Respondents will be ordered to promptly file their answer to Staff's complaint.

**IT IS ORDERED THAT:**

1. Staff's Motion for Default Order and Motion to Strike Pleading are denied.
2. Respondents' Motion to Dismiss is denied.
3. Respondents shall file their answer to Staff's complaint no later than March 17, 2006.
4. This order shall become effective on March 7, 2006.

**BY THE COMMISSION**



Colleen M. Dale  
Secretary

( S E A L )

Davis, Chm., Murray, Gaw, Clayton and Appling, CC., concur  
Woodruff, Senior Regulatory Law Judge