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October 25, 2005

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**FILED<sup>2</sup>**

OCT 25 2005

**Missouri Public  
Service Commission**

The Honorable Colleen M. Dale  
Secretary/Chief Regulatory Law Judge  
Missouri Public Service Commission  
P.O. Box 360  
Jefferson City, MO 65102-0360

Re: Case No. WC-2006-0107

Dear Judge Dale:

Please find enclosed for filing in the referenced matter the original and five copies of a Motion to Dismiss Complaint.

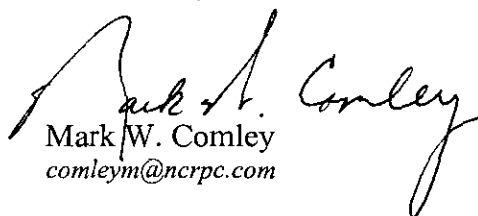
Would you please bring this filing to the attention of the appropriate Commission personnel.

Please contact me if you have any questions regarding this filing. Thank you.

Very truly yours,

NEWMAN, COMLEY & RUTH P.C.

By:

  
Mark W. Comley  
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MWC:ab

Enclosure

cc: Office of Public Counsel  
General Counsel's Office  
Ben F. Weir  
Reginald V. Golden

BEFORE THE PUBLIC SERVICE COMMISSION  
OF THE STATE OF MISSOURI

FILED<sup>2</sup>

OCT 25 2005

Missouri Public  
Service Commission

Ben F. Weir,	)	
	)	
Complainant,	)	
v.	)	Case No. WC-2006-0107
	)	
Folsom Ridge, LLC	)	
	)	
Respondent.	)	

**MOTION TO DISMISS COMPLAINT**

COMES NOW Folsom Ridge, LLC (Folsom Ridge or Company) and pursuant to the Commission's Order Directing Response of October 19, 2005 submits this motion to dismiss in response to the Complaint. The Complaint fails to state a claim upon which relief may be granted against the named respondent, Folsom Ridge and should be dismissed.

***SUGGESTIONS IN SUPPORT***

Although technical rules of pleading are not applied to applications or pleadings filed with the Public Service Commission and pleadings are to be liberally construed; *State ex rel. Crown Coach Co. v. Public Service Commission*, 179 S.W.2d 123, 126 (K.C. Ct. App.1944); the pleading rules adopted by the Commission are in great measure the same as those promulgated by the Supreme Court of Missouri, and applying the maxims of pleading construction used by the courts of our state when motions to dismiss are filed would be appropriate here. Consequently, the sufficiency of the instant complaint should be evaluated under the following principles:

As noted in *Nazeri v. Missouri Valley College*, 860 S.W.2d 303, 306 (Mo. banc 1993), a motion to dismiss for failure to state a cause of action is solely a test of the adequacy of the plaintiff's petition. It assumes that all of plaintiff's averments are true, and liberally grants to plaintiff all reasonable inferences therefrom. No attempt is made to weigh any facts alleged as to whether they are credible or

persuasive. Instead, the petition is reviewed in an almost academic manner, to determine if the facts alleged meet the elements of a recognized cause of action, or of a cause that might be adopted in that case.

*Reynolds v. Diamond Foods & Poultry, Inc.*, 79 S.W.3d 907, 909 (Mo. banc 2002).

Mr. Weir's complaint has many of the characteristics of others before the Commission regarding the same respondent. There are few paragraph numbers and no page numbers and there is difficulty in citing or referring to portions of the complaint. Furthermore, Mr. Weir and the other complainants have assumed that the Commission has jurisdiction over a wide variety of legal subjects. The instant complaint is not focused on the conduct of the named respondent, and in particular lacks clarity on what act Folsom Ridge has done over which the Commission has jurisdiction to correct or punish.

In his complaint, Mr. Weir contends that corporate abuse, misrepresentation, lack of responsibility and disregard of the public's health and safety have occurred but he does not further explain the contentions. He contends that he has been personally threatened but does not identify by whom; that his property values may be negatively affected; that the Missouri Department of Natural Resources has failed to enforce its regulations; that BIHOA (which Folsom Ridge presumes is the Big Island Home Owners Association) is being mismanaged because of two recent violations of MoDNR regulations. He complains about a recent extension of the water distribution system. He claims that the operations of the water and sewer system are kept secret by the respondent but in the request for relief section of the complaint he asks the Commission to enter a temporary injunction against BIHOA until the operations of BIHOA can be investigated.

Most notably for this motion is that Mr. Weir admits he is not a member of BIHOA. He admits that he has paid no tap on fees for water and sewer service, and no where in the complaint

does he claim that he receives utility service of any kind from Folsom Ridge or BIHOA. He makes no claim that he intends to connect to any services supplied by Folsom Ridge or BIHOA or is charged for any utility services by either.

Giving the allegations of his complaint the liberal construction they are afforded by law, it must be concluded that Mr. Weir is complaining about the conduct of BIHOA, and as the Commission record in other cases will establish, BIHOA is a separate legal entity. Moreover, BIHOA is not a party to this complaint. Mr. Weir has asserted that Folsom Ridge exerts control on BIHOA, but controlling a company that may or may not be engaging in unlawful conduct under the rules of this Commission is not a violation of the rules of the Commission. In truth, Mr. Weir is complaining about the actions of a non party. The actions that seemingly are attributable to Folsom Ridge in the complaint are matters beyond the jurisdiction of the Commission. The complaint fails to state any claim upon which relief may be granted by the Commission against Folsom Ridge and it should be dismissed.

Additionally, Mr. Weir lacks standing.

Considering the Public Service Commission Act as a whole, it seems apparent that parties to cases before the Commission, whether as complainants or intervenors are not required to have a pecuniary interest, or property or other rights, which will be directly or immediately affected by the order sought or even its enforcement. The reasonable construction seems to be that the interest necessary to authorize intervention should be the same as that required to become a complainant upon whose complaint a case is commenced. **Any local partisan interest in the situation involved, such as a customer, representative of the public in the locality or territory affected** (State ex rel. City of St. Louis v. Public Service Comm., 317 Mo. 815, 296 S.W. 790; or as a competitor for the same territory or privilege is surely sufficient to show an interest similar to that of complainants described in Section 5686 (State ex rel. Kansas City Power & Light Co. v. Public Service Comm., 335 Mo. 1248, 76 S.W.2d 343); and, therefore, is likewise a sufficient basis for intervention. [emphasis added]

*State ex rel. Consumers Public Service Co. v. Public Service Com'n* 352 Mo. 905, 920-921, 180 S.W.2d 40,46 (Mo. banc1944).

To have standing as a complainant, Mr. Weir must either be a customer of the respondent, a representative of the public in the area affected or a competitor. Mr. Weir makes no claim that he is a customer of any service from Folsom Ridge or BIHOA. He does not assert that he is a representative of the public such as an elected official or officer in an association, unincorporated or otherwise. He lacks the requisite standing to bring the complaint and it should be dismissed.

In his request for relief, Mr. Weir asks the Commission to investigate violations of the "Missouri Safe Drinking Water Regulations" and determine if additional punishment such as fines and restrictions on development should be assessed. He has also expressly asked that the Commission issue a temporary injunction. Aside from the fact that the requests for relief in the complaint pit the Commission head to head with the jurisdiction of the Missouri Department of Natural Resources, and asks for second or third punishment for the same purported offense,<sup>1</sup> it asks the Commission to enter injunctive decrees which are creatures of equity.

As stated in *State Tax Commission v. Administrative Hearing Commission*, 641 S.W.2d 69, 75 -76 (Mo.banc 1982):

"[T]he judicial power of the state is vested in the courts designated in Mo. Const. Art. V, § 1. The courts declare the law." *See also Lightfoot v. City of Springfield*, 361 Mo. 659, 669, 236 S.W.2d 348, 352 (1951) (Public Service Commission "has no power to declare ... any principle of law or equity"); *State ex rel. Kansas City Terminal Railway v. Public Service Commission*, 308 Mo. 359, 373, 272 S.W. 957, 960 (1925) (Public Service Commission has no power to declare the validity or invalidity of city ordinance); *State ex rel. Missouri Southern Railroad v. Public Service Commission*, 259 Mo. 704, 727, 168 S.W. 1156, 1164 (banc 1914) (Public Service Commission has no power to declare statutes unconstitutional); *State ex*


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<sup>1</sup> The complaint is vague and ambiguous, a trait it shares with the other complaints now on file at the Commission involving Folsom Ridge. What is actually at the root of the complaint and when the purportedly offensive conduct occurred cannot be discerned from the complaint. Mr. Weir seems to complain about matters that occurred seven years ago and if so, consideration of those acts is barred by the statute of limitations. Definite times for the purported violations are not alleged. Folsom Ridge cannot properly prepare a response or otherwise meaningfully prepare a defense for hearing with the complaint in its present condition. Folsom Ridge's offer of mediation was made in part to informally rectify that problem. If this motion is denied, Folsom Ridge reserves its right to file a motion for more definite statement of the complaint.

*rel. Missouri & North Arkansas Railroad v. Johnston*, 234 Mo. 338, 350-51, 137 S.W. 595, 598 (banc 1911) (secretary of state has no power to declare a statute unconstitutional).

Since 1) the averments of Mr. Weir's complaint are in truth directed against the conduct and operations of BIHOA; 2) Mr. Weir lacks standing to bring a complaint of this kind, and furthermore 3) the complaint requests a form of injunction against BIHOA (or Folsom Ridge or both), the complaint fails to state any claim upon which relief may be granted by the Commission against Folsom Ridge and it should be dismissed.

Respectfully submitted,



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Attorneys for Folsom Ridge, LLC

Certificate of Service

I hereby certify that a true and correct copy of the above and foregoing document was sent via e-mail on this 25th day of October, 2005, to General Counsel's Office at [gencounsel@psc.mo.gov](mailto:gencounsel@psc.mo.gov); and Office of Public Counsel at [opcservice@ded.mo.gov](mailto:opcservice@ded.mo.gov); and via U.S. Mail, postage prepaid, to Ben F. Weir, 3515 SW Meyer Blvd, Blue Springs, MO 64015.

