

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

DERALD MORGAN, RICK AND CINDY)
GRAVER, WILLIAM AND GLORIA PHIPPS,)
and DAVID LOTT,)

Complainants,)

v.)

File No. WC-2017-0037

CARL RICHARD MILLS,)
CARRIAGE OAKS ESTATES,)
DISTINCTIVE DESIGNS, and)
CARING AMERICANS TRUST)
FOUNDATION, INC. (f/k/a Caring)
Americans Foundation, Inc.))

Respondents.)

**SUGGESTIONS IN OPPOSITION TO
RESPONDENTS' AMENDED MOTION TO DISMISS**

COME NOW, Complainants Derald Morgan, Rick and Cindy Graver, William and Gloria Phipps, and David Lott (“Complainants”) state the following in opposition to Respondents’ Amended Motion to Dismiss:

Introduction

On February 14, 2017, Respondents’ filed an Amended Motion to Dismiss Complainants’ Amended Petition. Respondents, in their Amended Motion to Dismiss, claim that because Respondents organized a non-profit sewer and water corporation, Carriage Oaks Not-for-Profit Water and Sewer Corporation (the “Non Profit”), under Section 393.825 and 393.900, RSMo. the Public Service Commission (PSC) no longer has jurisdiction over this matter. Respondents’ argument is misplaced for several reasons and dismissing Complainants’ Amended Petition would frustrate the purpose of the public service regulations—to protect public utility consumers from monopolistic coercion. The Non Profit is currently structured in a way that gives

Respondents control over the manner in which the water and sewer system is operated. Furthermore, Complainants are not members of the Non Profit because they have not “agree[d] to use services furnished by the [Non Profit]” as required by Sections 393.921 and 393.839, RSMo. Accordingly, Complainants have no control or ability to influence the manner in which the water and sewer services are provided. Even if the Complainants had agreed to use the services of the Non Profit and were members of the Non Profit, they would still have little to no ability to protect themselves from Respondents’ coercive and abusive practices in operating the Non Profit because Respondent, the developer, owns a majority of lots in the subdivision, and is therefore afforded more voting power according to the Bylaws of the Non Profit. Because the Non Profit does not comply with Chapter 393 and serves non-members, the PSC retains jurisdiction over this matter.

ARGUMENT

The PSC retains jurisdiction over the Non Profit because the Non Profit is a public utility in that it provides services indiscriminately to the lot owners in the Carriage Oaks Subdivision.

The PSC has jurisdiction to regulate public utilities, which includes both water and sewer corporations. § 386.250(3) and (4), RSMo. The Non Profit was created by the Respondents merely to circumvent the power of the PSC and maintain control over the manner in which the water and sewer systems are operated. Despite Respondents’ attempts to avoid the jurisdiction of the PSC, the PSC maintains jurisdiction because the Non Profit serves all lot owners indiscriminately regardless of whether they are a member of the Non Profit.

Public Interest Analysis Requires PSC to Retain Jurisdiction Because the Owners are Not Members of the Entity Controlling the Water and Sewer Systems.

In order for a company to be considered a public utility subject to the jurisdiction of the PSC, its services must be devoted to the public use. *State ex rel. M.O. Danciger & Company v.*

Public Serv. Comm'n, 205 S.W. 36 (Mo. banc 1918). “The right to regulate under the present law must be measured by the public interest.” *Id.* at 42. In other words, an entity is a public utility if it provides service to the general public indiscriminately. *Id.*

Additionally, a not-for-profit corporation must have all of its members as utility customers, and operate the utility *only* for the benefit of its members. See *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 Operations*, Case No. WD-93-307 (Mo. P.S.C.). Sections 393.921 and 393.839, RSMo. state that: “No person shall become a member of a nonprofit [sewer or water] company unless such person shall *agree* to use services furnished by the company when such shall be available through its facilities.” (emphasis added). The ability to agree to use services implies choice. The lot owners have no choice as to what water and sewer utility to use because there is no other option. They do not currently agree to be members of the Non Profit. Despite not being members, they do receive the services of the Non Profit. For that reason, the Non Profit currently does not operate only for the benefit of members; it serves non-members as well.

The purpose of the statute requiring that a not-for-profit operate only for the benefit of its members is that by having all the customers as members, the customer-members have the power to set their own rates and manage their own services. In the present case, none of the owners receiving utility service are members of the Non Profit and they do not have the ability to set their own rates or manage their own services. The owners at Carriage Oaks Estates subdivision have no control or say over the operations of the water and sewer system. Furthermore, Complainants have no choice but to use the services provided by the Non Profit since the Carriage Oaks Estates Declaration restricts the owners from installing their own well and septic

system. Accordingly, the Complainants are at the mercy of the Non Profit, which is controlled by Respondents. The public interest analysis requires the Commission to retain jurisdiction over this matter.

The Non Profit does not comply with Chapter 393.

Additionally, the Non Profit was not created in compliance with Sections 393.839.1, 393.921.1, 393.839.7, and 393.921.7. The Bylaws are currently drafted in such a manner that gives Respondents more voting power than allowed in Sections 393.839.7 and 393.921.7, RSMo. Sections 393.839.7 and 393.921.7, RSMo. require that each member be entitled to “one vote on each matter submitted to a vote at a meeting.” Article II, Section 2 of the Bylaws violate the “one member, one vote” requirement by allowing members to hold “more than one Membership Interest.” Because Respondents would hold more than one Membership Interest, they would be entitled to multiple votes on any particular matter. Likewise, the Bylaws violate Sections 393.839.1 and 393.921.1, RSMo. by allowing prospective utility consumers to be members. Sections 393.839.1 and 393.921.1, RSMo. limit membership to persons who “agree to use services furnished by the company when such shall be available through its facilities.” The water and sewer utility services have been operation for nearly twenty years. Accordingly, they are presently available and membership is therefore limited to those persons receiving utility services.

The Bylaws of the Nonprofit are currently drafted in a manner that allows Respondents to retain control over the management of the water and sewer system and violate Chapter 393, RSMo. Because the Nonprofit has not complied with the requirements of Chapter 393, Complainants respectfully request that the Public Service Commission retain jurisdiction over this matter until the Nonprofit complies with Sections 393.838 and 393.921.

Conclusion

Complainants are at the mercy of Respondents since they have no choice but to accept the water and sewer services provided by the Non Profit. They have not agreed to accept the services of the Non Profit. They have been forced to accept such services since the utility services are offered by no other utility and the Declaration prohibits them from installing their own well and septic system. Despite being forced to accept the utilities provided by the Non Profit, Complainants have no ability to vote or influence the decisions related to the operation of the water and sewer system because they are not members of the Non Profit. Even if they were members with voting rights, Respondents would control the manner in which the Non Profit is operated because the Bylaws are written in such a way as to give Respondents votes for each lot they own. Since Respondent, the developer of the subdivision, owns the majority of the lots, Respondents control how the Non Profit is operated it. It is believed that Respondents will operate the water and sewer systems to the detriment of Complainants. In fact, Respondents have already threatened to disconnect the water connection to Complainant Derald Morgan despite no authority to do so. *See Exhibit A* attached hereto. The PSC has jurisdiction over this matter and should exercise such jurisdiction to protect Complainants from Respondents' abusive tactics.

The public interest analysis requires the Commission to retain jurisdiction, as none of the Complainants receiving water and sewer service are members of the not-for-profit corporation. Moreover, the Bylaws of the Non Profit do not comply with Chapter 393. Respondents' Amended Motion to Dismiss should be denied, and the Commission should retain jurisdiction over this matter.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The below signed counsel hereby certifies that a true and accurate copy of the foregoing was sent to all counsel of record via email on this 22nd day of February, 2017.

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