

At a session of the Public Service Commission held at its office in Jefferson City on the 31st day of August, 2006.

Respondents.

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On July 11, Staff filed a Motion for Summary Disposition, alleging that there are no disputed material facts and that Staff is entitled to a judgment as a matter of law. The Respondents filed a response in opposition to Staff's Motion for Summary Disposition on

August 16. As part of that response, the Respondents included an affidavit of Gregory D. Williams asserting facts supporting the Respondents' position. Staff filed a reply to that response on August 18.

FINDINGS OF FACT

In its motion for summary determination, Staff asserted that certain material facts are undisputedly true. The Respondents did not contest many of the assertions and those facts will be accepted as true without further discussion. The asserted facts that are not admitted will be discussed in more detail. The Commission finds that the following facts are true:

1. Respondent Hurricane Deck Holding Company is a Missouri general business corporation in good standing, incorporated on June 6, 1988. Its principal place of business is located at P.O. Box 431, Sunrise Beach, MO 65079.
2. Respondent Chelsea Rose Land Owners Association is a Missouri non-profit corporation in good standing, incorporated on December 12, 2005. Its principal place of business is P.O. Box 431 Sunrise Beach, MO 65079.
3. Respondent Gregory D. Williams is the president, director, and registered agent of Respondent Hurricane Deck Holding Company.
4. Respondent Gregory D. Williams is the incorporator of Respondent Chelsea Rose Land Owners Association.
5. Respondent Gregory D. Williams is listed as a member of the Board of Managers in Respondent Chelsea Rose Land Owners Association's Articles of Incorporation.

6. Respondent Gregory D. Williams is the registered agent of Respondent Chelsea Rose Land Owners Association.

7. Respondent Debra J. Williams is the secretary of Respondent Hurricane Deck Holding Company.

8. Respondent Debra J. Williams is listed as a member of the Board of Managers of Respondent Chelsea Rose Land Owners Association in the Association's Articles of Incorporation.

9. Respondent Debra J. Williams' address is listed on Chelsea Rose Land Owners Association's Articles of Incorporation as P.O. Box 431, Sunrise Beach, MO 65079.

10. Respondent Charles H. Williams is listed as one of the original members of the Board of Managers of Respondent Chelsea Rose Land Owners Association in the Association's Articles of Incorporation.

11. Respondent Charles H. Williams' address is listed in Respondent Chelsea Rose Land Owners Association's Articles of Incorporation as P.O. Box 431, Sunrise Beach, MO 65079.

12. Osage Water Company is a general Missouri business corporation in good standing. Its registered agent is William P. Mitchell and its registered office is located at 328 Frontage Road, Osage Beach, MO 65065.

13. Osage Water Company has certificates of convenience and necessity issued by the Missouri Public Service Commission to provide water and sewer services in Camden County, Missouri.

14. Osage Water Company's Water and Sewer Tariffs include the Chelsea Rose Service area.

15. On October 21, 2005, the Circuit Court of Camden County, Missouri, at the request of the Commission, appointed Gary V. Cover of Clinton, Missouri, as receiver for Osage Water Company, pursuant to Section 393.145.

16. Osage Water Company and its officers, agents, representatives, and past contractual agent and representative, Environmental Utilities, were directed to cooperate with Mr. Cover and to transfer control of Osage Water Company to him and to deliver all records and assets to him.

17. On or about December 30, 2005, Respondent Hurricane Deck Holding Company sent a letter headed "Water and Sewer Issues" to the homeowners in the Chelsea Rose Service Area.

18. Respondent Hurricane Deck Holding Company's December 30, 2005 letter informed the homeowners in the Chelsea Rose Service Area that Osage Water Company had gone into receivership. The letter also claimed that Hurricane Deck Holding Company's water and sewer facilities had never been transferred to Osage Water Company and that Articles of Incorporation had been filed for Respondent Chelsea Rose Land Owners Association. The letter stated an intention to transfer Respondent Hurricane Deck Holding Company's interest in the Chelsea Rose Service Area's water and sewer facilities to Respondent Chelsea Rose Land Owners Association.

19. Respondent Debra J. Williams signed this letter on behalf of Respondent Hurricane Deck Holding Company.

20. Staff asserts that the following facts are true:

Included with the December 30, 2005 letter was a document entitled "HDHC Quarterly Water and Sewer Assessment." This assessment billed homeowners for water and sewer services for the period between September 22, 2005 and December 30, 2005. Each homeowner was billed

\$52.48. Homeowners were directed to make the payments payable to Hurricane Deck Holding Company. The total number of homeowners billed was thirty (30).

The Respondents do not deny the authenticity of the letter described by Staff. However, they deny that the affected homeowners were billed for water and sewer services. Instead, they assert that the homeowners were “assessed their proportionate share of the costs of operation of common amenities of the subdivisions in which they reside, including a water supply and distribution system and a sewer plant and sewer collection system.”

The Respondents further assert that Hurricane Deck Holding Company, Gregory D. Williams, Debra J. Williams and Charles H. Williams did not receive any funds as a result of the December 30, 2005 assessments. Instead, the funds that were received were deposited to the account of the Chelsea Rose Land Owners Association. The Chelsea Rose Land Owners Association subsequently returned those funds to the homeowners.

Finally, the Respondents assert that Hurricane Deck Holding Company is the owner of the water and sewer utility systems which it has constructed within its development project.

Staff’s reply does not deny the truth of the Respondents’ assertions, but Staff does deny that those facts alter Staff’s conclusion that either Hurricane Deck Holding Company or Chelsea Rose Home Owners Association is operating a water and sewer utility without proper authority.

Based on the uncontested assertions of the parties, the Commission finds that the following facts are true:

A December 30, 2005 letter, issued on the letterhead of Hurricane Deck Holding Company and signed by Debra J. Williams as Secretary of that corporation, asked each homeowner receiving water and sewer service from the water and sewer systems owned by Hurricane Deck Holding Company to pay \$52.48 for water and sewer services for the period between September 22, 2005 and December 30, 2005. Homeowners were directed to make the payments payable to Hurricane Deck Holding Company. The total number of homeowners billed was thirty (30).

Hurricane Deck Holding Company, Gregory D. Williams, Debra J. Williams and Charles H. Williams did not receive any funds as a result of the December 30, 2005 assessments. Instead, the funds that were received were deposited to the account of the Chelsea Rose Land Owners Association. The Chelsea Rose Land Owners Association subsequently returned those funds to the homeowners.

21. No Respondent has a certificate of convenience and necessity authorizing provision of water and sewer service to the public.

22. No Respondent has a current permit from the Missouri Department of Natural Resources authorizing the operation of a sewer system in the Chelsea Rose Service Area.

23. In a letter dated January 20, 2006, Respondent Gregory D. Williams stated “[t]he water and sewer system serving the Chelsea Rose development is owned by Hurricane Deck Holding Company.”

CONCLUSIONS OF LAW

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

1. Commission Rule 4 CSR 240-2.117(1) establishes the procedure for the filing of a motion for summary determination in cases before the Commission.

2. Commission Rule 4 CSR 240-2.117(1)(E) provides that the Commission may grant a motion for summary determination if the pleadings, testimony, discovery, affidavits, and memoranda on file show that there is no genuine issue as to any material fact, that any party is entitled to relief as a matter of law as to all or any part of the case, and the Commission determines that the granting of summary determination is in the public interest.

3. Commission Rule 4 CSR 240-2.117(F) provides that if the Commission grants a motion for summary determination but does not thereby resolve the entire case, it shall hold a hearing to resolve the remaining issues.

4. Section 386.020(58), RSMo Supp. 2005, 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.

5. Section 386.020(48), RSMo Supp. 2005, 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.

6. Section 393.170, RSMo 2000, provides that no water or sewer corporation may construct or operate a water or sewer system without first obtaining the permission and approval of the Commission.

7. The regulations of the Missouri Department of Natural Resources, specifically 10 CSR 20-6.010(5)(A), require the owner or operator of a wastewater treatment facility that discharges to waters of the state to obtain an operating permit before any discharge occurs.

8. Commission Regulation 4 CSR 240-60.020 requires a sewer utility to operate a sewage treatment facility in compliance with the laws and regulations of the state and local health authority.

9. The definition of “sewer utility” for purposes of 4 CSR 240-60 is found at 4 CSR 240-60.010(J) and is the same as the definition of “sewer corporation” found in Section 386.020(48), RSMo Supp. 2005.

10. Section 393.190.1, RSMo 2000, provides that no water or sewer corporation may sell or otherwise transfer its water or sewer system without having first obtained authorization to do so from the Commission.

11. Section 386.570, RSMo 2000, provides that “any corporation, person or public utility” that violates, or fails to obey any law is subject to a penalty of between \$100 and \$2,000 for each offense.

12. Section 386.600, RSMo 2000, authorizes the general counsel of the Commission to file an action in any circuit court in Missouri to recover a penalty authorized by statute.

DECISION

Staff’s complaint contains five separate counts and Staff’s seeks summary determination in its favor on all five counts. The Commission will address each count in turn.

Count I

The first count of Staff's complaint alleges that "the Respondents, or some of them," are operating the water and sewer systems serving the Chelsea Rose Service Area as water and sewer corporations and are thus subject to the jurisdiction of the Commission. The facts alleged in Staff's motion for summary determination establish that Hurricane Deck Holding Company has claimed ownership of the water and sewer systems serving the Chelsea Rose Service Area. The Respondents do not dispute that fact. The facts also establish that Hurricane Deck Holding Company has billed the residents of that service area for water and sewer service.

The Respondents argue that Hurricane Deck Holding Company is not operating a public water and sewer utility because it is merely offering such services to the residents of a particular subdivision and not to the public at large. However, a review of the controlling cases, including the cases cited by the Respondents, indicates that they do not support such a distinction.

In State ex rel M.O. Danciger & Co. v. Public Service Commission,¹ the Missouri Supreme Court reversed a decision of the Public Service Commission that had found the Danciger company to be a public electric utility. Mr. Danciger was the owner of a pre-prohibition brewery in Weston, Missouri. The brewery installed electric generation equipment to power the lights and machinery at its plant. The brewery found that it had extra generating capacity so Mr. Danciger began allowing his friends within a few blocks of the brewery to string electric lines to tap into the brewery's generator and purchase available electric power. The local newspaper was one of these friends allowed to buy

¹ 275 Mo. 483, 205 S.W. 36, (Mo 1918)

electric power until the paper published an editorial supporting prohibition. The next day, Danciger cut the electric line running to the newspaper office.

Based on the unique facts of that case, the Supreme Court found that Danciger was not operating as a public utility because it was not offering electric service to the public. Rather, the company was merely offering electric service to select friends within a few blocks of the brewery. As a result, Danciger and the brewery had no legal obligation to continue to provide electric service to the prohibition-supporting newspaper. Nevertheless, the Danciger court supported the general view that a company that supplies a utility service to the public may be regulated as a public utility.

That view was explicitly reaffirmed a few years later in State ex rel. Cirese v. Public Service Commission.² In that case, Cirese owned a factory that produced excess electricity. When the Public Service Commission sought to regulate the company's sale of electricity, Cirese relied on the Danciger decision to argue that the company should not be regulated as a public utility. However, rather than merely offering to sell electricity to a few friends, Cirese indiscriminately offered electric service to outside customers that he solicited through newspaper advertisements and handbills. Again, the court held that a company that offers a utility service to the public can be regulated as a public utility. More recently, in the other case cited by the Respondents, Osage Water Company v. Miller County Water Authority,³ the Court of Appeals found that a company that offers water service to the public for compensation meets the definition of a public utility even if it is operating as a nonprofit corporation and is only providing service to a few subdivisions.

² 178 S.W. 2d 788 (Mo. App. K.C. 1944)

³ 950 S.W.2d 569 (Mo. App. S.D. 1997)

The key fact is that by sending out bills to the residents, Hurricane Deck Holding Company offered service to all residents of the given subdivisions. It is not purporting to merely offer service to a few friends. By offering water and sewer utility services to the public, even if that public is confined to the residents of a few subdivisions, Hurricane Deck Holding Company has made itself subject to regulation as a public utility.

Hurricane Deck Holding Company also argues that it is not a public utility because it has never received any payment from customers for the operation of its water and sewer systems. Instead, it contends that the payments that were received from customers were initially turned over to Chelsea Rose Land Owners Association, and ultimately were returned to the customers. However, the statutory definition of water corporation and sewer corporation do not include a requirement that the owner of the corporation actually receive payment for such services. Rather, the definition depends upon an intent to supply water or sewer service for gain or compensation. Sending a bill to customers for the provision of water and sewer service meets the definition of operating a system for gain, regardless of whether any customer actually pays the bill.

Therefore, the Commission concludes that Hurricane Deck Holding Company is offering water and sewer service to the public for gain and meets the statutory definition of a water and sewer corporation. As such, it is subject to the Commission's regulation. Granting Staff's motion for summary determination is in the public interest so that the public can be assured that if Hurricane Deck Holding Company provides service to the public, it provides safe and adequate service. There is no genuine issue as to any material fact and Staff is entitled to relief as a matter of law. Staff's motion for summary determination

regarding Count I of its complaint, as applied to Respondent Hurricane Deck Holding Company, will be granted.

The allegations in Count I of Staff's complaint are not, however, limited to Hurricane Deck Holding Company. Staff alleges that all, or at least some, of the Respondents are subject to the Commission's jurisdiction as public utilities. Aside from Hurricane Deck Holding Company, the other Respondents are Chelsea Rose Land Owners Association, Inc., and Gregory D. Williams, Debra J. Williams, and Charles H. Williams, as individuals. The facts described in Staff's motion for summary determination establish that Hurricane Deck Holding Company stated an intention to turn over the water and sewer system serving the Chelsea Rose Service Area to the Chelsea Rose Land Owners Association. Staff does not, however, describe any facts that would indicate that the Chelsea Rose Land Owners Association ever took possession of that water and sewer system, or that the Association ever offered water and sewer services to the public. Rather, it was Hurricane Deck Holding Company that possessed the water and sewer system and offered service to the public. While the proceeds resulting from Hurricane Deck Holding Company's solicitation of payment for water and sewer service were deposited for a time in the account of Chelsea Rose Land Owners Association, that fact alone is not sufficient to conclude that the Association was offering water and sewer service to the public. In sum, Staff has not presented sufficient evidence to indicate that Chelsea Rose Land Owners Association is a public utility subject to the Commission's regulation. Therefore, a genuine issue of material fact remains and Staff is not entitled to relief as a matter of law. For that reason, Staff's motion for summary determination regarding Count I of its complaint, as applied to Respondent Chelsea Rose Land Owners Association, must be denied.

Similarly, Count I of Staff's complaint alleges that the three named individuals – Gregory D. Williams, Debra J. Williams, and Charles H. Williams – are operating as public utilities subject to regulation by the Commission. Again, the motion for summary determination does not describe sufficient facts to establish that any of these people, as individuals, rather than as corporate officers on behalf of Hurricane Deck Holding Company, are offering water or sewer service to the public. Therefore, a genuine issue of material fact remains and Staff is not entitled to relief as a matter of law. For that reason, Staff's motion for summary determination regarding Count I of its complaint, as applied to Respondents Gregory D. Williams, Debra J. Williams, and Charles H. Williams, must be denied.

Count II

The second count of Staff's complaint alleges that "the Respondents, or some of them," are violating Section 393.170, RSMo 2000, by operating a water and sewer system without authorization from the Commission. As with Count I of the complaint, the facts alleged in Staff's motion for summary determination establish that Hurricane Deck Holding Company has claimed ownership of the water and sewer systems serving the Chelsea Rose Service Area. The facts also establish that Hurricane Deck Holding Company has billed the residents of that service area for water and sewer service. Therefore, Hurricane Deck Holding Company is offering water and sewer service to the public for gain and meets the statutory definition of a water and sewer corporation. Hurricane Deck Holding Company has not obtained authority from the Commission to operate a water and sewer system and has, therefore, violated Section 393.170, RSMo 2000. Granting Staff's motion for summary determination is in the public interest so that the public can be assured that if

Hurricane Deck Holding Company provides service to the public, it provides safe and adequate service. There is no genuine issue as to any material fact and Staff is entitled to relief as a matter of law. Staff's motion for summary determination regarding Count II of its complaint, as applied to Respondent Hurricane Deck Holding Company, will be granted.

Once again, the facts described in Staff's motion for summary determination do not establish that Chelsea Rose Land Owners Association or the three named individuals have operated a water and sewer system in violation of the statute. For that reason, Staff's motion for summary determination regarding Count II of its complaint, as applied to Respondents Chelsea Rose Land Owners Association, Gregory D. Williams, Debra J. Williams, and Charles H. Williams, must be denied.

Count III

The third count of Staff's complaint alleges that "the Respondents, or some of them," are operating a sewer system without having obtained the required permit from the Missouri Department of Natural Resources. Because of the failure to obtain that permit, Staff alleges that the "Respondents, or some of them," are in violation of a Commission rule, 4 CSR 240-60.020, which requires the operator of a sewer utility to comply with the laws and regulations of the state and local health authority. As the Commission has previously found, Hurricane Deck Holding Company is operating as a public sewer utility subject to regulation by the Commission. As such, it is also subject to regulation by the Missouri Department of Natural Resources. Its failure to comply with the regulations of the Missouri Department of Natural Resources places Hurricane Deck Holding Company out of compliance with Commission Rule 4 CSR 240-60.020. Granting Staff's motion for summary determination is in the public interest so that the public can be assured that if

Hurricane Deck Holding Company provides service to the public, it provides safe and adequate service. There is no genuine issue as to any material fact and Staff is entitled to relief as a matter of law. Staff's motion for summary determination regarding Count III of its complaint, as applied to Respondent Hurricane Deck Holding Company, will be granted.

As the Commission has previously found, the facts described in Staff's motion for summary determination do not establish that Chelsea Rose Land Owners Association or the three named individuals have operated a sewer system in violation of the any statute or regulation. Therefore, a genuine issue of material fact remains and Staff is not entitled to relief as a matter of law. For that reason, Staff's motion for summary determination regarding Count III of its complaint, as applied to Respondents Chelsea Rose Land Owners Association, Gregory D. Williams, Debra J. Williams, and Charles H. Williams, must be denied.

Count IV

The fourth count of Staff's complaint alleges that "the Respondents, or some of them," have violated Section 393.190.1, RSMo 2000, by transferring the water and sewer systems serving the Chelsea Rose Service Area from Hurricane Deck Holding Company to the Chelsea Rose Land Owners Association without having obtained authorization from the Commission. The Commission has previously found that Hurricane Deck Holding Company is operating the water and sewer systems in question as a water and sewer utility. Therefore, it would have to obtain authorization from the Commission before transferring those systems to another entity. The Commission has not granted such authority.

However, the facts alleged in Staff's motion for summary determination establish only that Hurricane Deck Holding Company has, in a letter to its customers, expressed an intention to transfer those water and sewer systems to Chelsea Rose Land Owners Association. Staff does not present sufficient facts to establish that such a transfer has actually occurred. Indeed, in Count IV of its complaint, Staff alleges that it does not know whether the transfer of the water and sewer system has already occurred. The existence of a letter stating an intention to transfer the water and sewer system at some future time does not establish a violation of Section 393.190.1, RSMo 2000, by any of the Respondents. Therefore, a genuine issue of material fact remains and Staff is not entitled to relief as a matter of law. For that reason, Staff's motion for summary determination regarding Count IV of its complaint, as applied to Respondents Hurricane Deck Holding Company, Chelsea Rose Land Owners Association, Gregory D. Williams, Debra J. Williams, and Charles H. Williams, must be denied.

Count V

The fifth count of Staff's complaint asks for authority for the Commission's general counsel to file a petition in circuit court to seek monetary penalties against the Respondents for violations of Missouri statutes and the Commission's regulations. The Commission has found that Hurricane Deck Holding Company has violated Missouri statutes and Commission regulations as alleged in counts I, II and III of Staff's complaint. Summary determination of this issue protects the public interest by enabling the Commission to enforce its regulations by seeking appropriate penalties for non-compliance. There is no genuine issue as to any material fact and Staff is entitled to relief as a matter of law. The general counsel will be authorized to seek monetary penalties against Hurricane Deck

Holding Company for those violations. The Commission has not found that any other Respondent has violated any Missouri statute or Commission regulation. Therefore, a genuine issue of material fact remains and Staff is not entitled to relief as a matter of law.

Further Proceedings

The Commission has found that Staff is entitled to summary determination against one of the Respondents on four of the five counts of its petition. Conversely, Staff's motion for summary determination as to the other count, and the other Respondents, will be denied. However, a denial of summary determination does not preclude Staff from proceeding to hearing to present whatever evidence it may have to support the allegations that have not been summarily determined. Commission Rule 4 CSR 240-2.117(F) provides that "[i]f the commission grants a motion for summary determination that does not dispose thereby of the entire case, it shall hold an evidentiary hearing to resolve the remaining issues." That means that Staff's complaint is not yet finally resolved.

In order to move this complaint to a prompt and final resolution, the Staff will be directed to file a pleading indicating whether it intends to present evidence to prove the allegations against the Respondents for which summary determination has been denied. In the alternative, Staff may file a motion asking leave to dismiss the allegations of its complaint for which summary determination has been denied. Until all allegations of Staff's complaint are finally resolved, this order must be treated as interlocutory and not yet subject to appeal. That also means that Staff may not proceed to file a petition in circuit court seeking penalties until all aspects of its complaint are finally resolved.

IT IS ORDERED THAT:

1. Staff's motion for summary determination regarding Counts I, II, III, and V of its complaint, as applied to Hurricane Deck Holding Company, is granted.
2. Staff's motion for summary determination regarding Counts IV of its complaint, as applied to Hurricane Deck Holding Company, is denied.
3. Staff's motion for summary determination regarding Counts I, II, III, IV, and V of its complaint, as applied to Chelsea Rose Land Owners Association, Gregory D. Williams, Debra J. Williams, or Charles H. Williams, is denied.
4. The general counsel is authorized to file a petition in circuit court seeking monetary penalties, as allowed by law, against Hurricane Deck Holding Company.
5. No later than September 11, 2006, the Commission's Staff shall file a pleading indicating whether it intends to present evidence to prove the allegations against the Respondents for which summary determination has been denied. In the alternative, Staff may file a motion asking leave to dismiss the allegations of its complaint for which summary determination has been denied.
6. This order shall become effective on September 20, 2006.

BY THE COMMISSION



Colleen M. Dale
Secretary

(S E A L)

Davis, Chm., Gaw, Clayton and Appling, CC., concur
Murray, C., absent

Woodruff, Deputy Chief Regulatory Law Judge