

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

The Staff of the Missouri Public Service)
Commission,)
)
Complainant,)
v.)
)
Hurricane Deck Holding Company,)
Chelsea Rose Land Owners Association,)
Inc., Gregory D. Williams, Debra J.)
Williams, and Charles H. Williams,)
)
Respondents.)

Case No. WC-2006-0303

**STAFF’S REPLY TO RESPONDENTS’ SUGGESTIONS IN
OPPOSITION TO STAFF’S MOTION FOR SUMMARY
DISPOSITION**

COMES NOW the Staff of the Missouri Public Service Commission (Staff) and
for its Reply to Respondents’ Suggestions in Opposition to Staff’s Motion for Summary
Disposition respectfully states as follows:

Argument

A. Respondent Hurricane Deck Holding Company is a “water corporation” within the meaning of Section 386.020(58) RSMo (2000) (Supp. 2005).

A “water corporation” subject to regulation by the Missouri Public Service Commission (Commission) as a public utility is defined to include “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 RSMo (2000) (Supp. 2005). The Missouri Court of Appeals has held that this definition can apply to a not-for-profit corporation that provided water service to residents of only two subdivisions. *Osage Water Co. v. Miller County Water Authority, Inc.*, 950 S.W.2d 569, 574-75 (Mo. App. S.D. 1997). The court in *Osage Water* equated the “for gain” language in Section 386.020 to the provision of water service for “compensation.” *Id.* at 574. The Commission has inferred that a property owners’ association that proposed to render regular bills for water and sewer services to their customers after taking control of the water and sewer systems from the predecessor utility company would be operating for compensation and that therefore the property owners’ association would be a public utility subject to Commission regulation if the utility company were dissolved and the association took over control of the facility. *In the Matter of the Joint Application of South Jefferson County Utility Company and the Summer Set Property Owners Association for Cancellation of a Certificate of Convenience and Necessity and Associated Tariff Sheets*, Case No. WD-2006-0157, 2005 Mo. PSC LEXIS 1580 (November 23, 2005).

Because a property owners association operating a water system for compensation fits the definition of a “water corporation” in Section 386.020(58), a property owners association is not automatically immune from Commission jurisdiction. *In the Matter of the Application of Wilden Heights Water Company for an Order Authorizing its Sale to the Wilden Heights Homeowners Association*, Case No. WO-2003-0086, 2002 Mo. PSC LEXIS 1627 (November 27, 2002). The Commission has developed a list of factors to be examined in making a determination as to whether a property owners association operating or controlling a utility should be subject to Commission jurisdiction:

- (a) The Association was organized as a not-for-profit corporation for the benefit of the property owners.
- (b) All customers currently served by the subject water utility assets are members of the Association.
- (c) Only members of the Association will be served by the subject water utility assets.
- (d) The Association's action regarding water utility matters will be under the control of the members that are also the customers served by the subject water utility assets.
- (e) The Association owns the subject water assets and thus has control over such assets.

In the Matter of the Application of Camelot Estates Association to Sell and Transfer Its Water Franchise, Works or System to Camden County PWSD # 3, a Water District Organized Pursuant to Section 247.010, et seq., of the Revised Statutes of Missouri, Case No. WM-2006-0310, 2006 Mo. PSC LEXIS 708 (June 1, 2006). If all five of the above factors are present, the Commission's policy is generally to decline to assert jurisdiction. *Id.*

In this case, the control of the property owners association that Respondents contend should be allowed to control the utility is in the hands of the same persons who are the officers of Respondent HDHC. There is no evidence that there are any members of the Chelsea Rose Land Owner's Association other than the individual Respondents. The record contains no evidence either that the persons who have incorporated the association are served by the water and sewer systems at issue or that the association's actions with regard to utility matter will be controlled by members who are also customers. Because the elements generally relied upon by the Commission to decline jurisdiction over a property owners association are not present in this case, Respondent CRLOA would be subject to the jurisdiction of the Commission if the association has control of the disputed facilities.

Respondent Hurricane Deck Holding Company (HDHC) sent out assessments to residents of the subdivisions served by the water system at issue. In their Response, Respondents claim that this amount was meant to assess to each homeowner that homeowner's proportionate share of the provision of water and sewer services. By sending out the assessments, Respondent HDHC sought to be compensated for the cost of providing service. Because they sought to be compensated, Respondents HDHC and Chelsea Rose Land Owners Association (CRLOA) meet the definition of a facility operating "for gain" and therefore meet the definition of a water corporation subject to Commission regulation. The fact that the money was allegedly deposited into CRLOA's account and that the money was allegedly returned to the residents pending resolution of this case is not material to the conclusion that either HDHC or CRLOA could meet the requisite definition of a water corporation to subject it to Commission regulation.

B. Respondent HDHC is a "sewer corporation" within the meaning of Section 386.020(48) RSMo (2000) (Supp. 2005).

A "sewer corporation" subject to regulation of a public utility is defined to include 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 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." Section 386.020(48) RSMo (2000) (Supp. 2005).

For the same reasons that Respondent HDHC and Respondent CRLOA meet the definition of a "water corporation," Respondent HDHC and Respondent CRLOA meet

the definition of a “sewer corporation” in Section 386.020(48) RSMo and are subject to regulation by the Commission. Staff incorporates its arguments and citations set out in section A above in support of its position on this point.

C. Respondent Hurricane Deck Holding Company’s provision of water and sewer services to the residents of the Chelsea Rose Service Area constitutes service to the public and a certificate of convenience and necessity issued by the Commission is required.

A public utility¹ is required to hold a certificate of convenience and necessity from the Commission. Section 393.170 RSMo (2000) The Missouri Court of Appeals has held that a not-for-profit company that provided water and sewer services to the residents of two subdivisions was a public utility. *Osage Water Co.*, 950 S.W.2d at 574-75. Merely because the area that an entity offers service to has relatively small geographic limitations does not prevent the entity from being a public utility. As long as that entity provides service to any and all residents in a particular area, that entity provides service to the general public. In reaching the conclusion that the not-for-profit company served the general public, the court in *Osage Water* reasoned that “the record was void of any testimony which suggested that Defendant had refused to provide water service to any of the residents in the two subdivisions at issue. Indeed, the testimony suggested that Defendant has undertaken the responsibility to provide water service to everyone within its capability, not merely for particular persons.” *Id.* at 575.

The record in this case indicates that Respondent HDHC has undertaken the responsibility to build, maintain, and operate water and sewer facilities for all residents of

¹ The definition of public utility under Missouri law includes water corporations and sewer corporations. Section 386.020(42) RSMo (2000) (Supp. 2005). Public utilities are subject to the jurisdiction of the Commission. *Id.*

the Chelsea Rose Service Area. There is nothing in the record to indicate that Respondent HDHC has refused to provide water and sewer service to particular residents of the service area. The assessments mailed by Respondent HDHC in December of 2005 were sent to all residents in order to recover a proportionate share of the cost of service from each of them. Respondent HDHC and Respondent CRLOA are public utilities and are therefore required to hold certificates of convenience and necessity issued by the Commission in order to provide water and sewer service.

D. As a public utility, Respondents are required to have a permit from the Missouri Department of Natural Resources.

Persons who build, erect, alter, replace, operate, use or maintain any water contaminant source, point source or wastewater treatment facility which discharges to waters of the state are required to have a permit from the Missouri Department of Natural Resources (MDNR). 10 C.S.R. 20-6.010(5)(A). Staff incorporates the arguments and citations set out in section C above to support its argument that Respondent HDHC is a public utility providing sewer service to the public for gain. As a public utility, Respondent HDHC is also a “sewer utility” within the meaning of 4 C.S.R. 240-60.010(J) and is subject to regulation by the Commission. Staff is entitled to relief because Respondent HDHC is not in compliance with Commission rule 4 C.S.R. 240-60.020(1) and MDNR rule 10 C.S.R. 20-6.010(5)(A).

E. As a public utility subject to the Commission’s jurisdiction, Respondent HDHC is required to obtain authorization from the Commission prior to a transfer of assets.

Staff relies on the arguments and citations set out in section C above in support of its argument that Respondent HDHC is a public utility subject to Commission regulation. A water or sewer corporation subject to Commission regulation is prohibited from selling, assigning, leasing, or transferring its facilities without first obtaining authorization from the Commission. Section 393.190.1 RSMo (2000). Respondents have expressed an intention to transfer the water and sewer systems of Respondent HDHC to Respondent CRLOA. If such a transfer was attempted or made without Commission approval, Staff would be entitled to relief based on Respondent HDHC's violation of Section 393.190.1 RSMo.

F. Because Respondent HDHC is a public utility within the meaning of Section 386.020(42), it is subject to Commission regulation and its failure to comply with the Commission's statutes and rules entitles Staff to relief.

Staff relies upon the arguments set out in sections A, B, and C above in support of its arguments that Respondent HDHC is a public utility and that the Commission may exert jurisdiction over a not-for-profit entity like Respondent CRLOA because the entity does not meet the factors that are generally present for the Commission to decline to exert jurisdiction.

Because Respondent HDHC is a public utility and because Respondent CRLOA would be a public utility if it operated, owned, managed, or controlled the disputed water and sewer facilities, Respondents have committed statutory and rule violations that entitle Staff to relief.

Conclusion

The undisputed facts establish that Respondent HDHC is a public utility subject to the Commission's jurisdiction. Resolution of this case by summary disposition is appropriate because Respondent's status as a public utility and its admitted failure to comply with Commission statutes and rules entitles Staff to relief.

WHEREFORE, Staff respectfully requests summary disposition of this case pursuant to 4 C.S.R. 240-2.117

Respectfully submitted,

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Certificate of Service

I hereby certify that copies of the foregoing have been mailed, hand-delivered, transmitted by facsimile or electronically mailed to all counsel of record this 18th day of August 2006.

/s/ Peggy A. Whipple