

**STATE OF MISSOURI
PUBLIC SERVICE COMMISSION**

At a session of the Public Service Commission held at its office in Jefferson City on the 7th day of December, 2023.

The Staff of the Missouri Public Service Commission,
Complainant,
v.
I-70 Mobile City, Inc. d/b/a I-70 Mobile City Park.
Respondent.

File No. WC-2022-0295

ORDER DENYING MOTION FOR SUMMARY DETERMINATION

Issue Date: December 7, 2023

Effective Date: December 7, 2023

This order denies I-70 Mobile City, Inc. d/b/a I-70 Mobile City Park's (Respondent) *Amended Motion for Summary Determination*.

Background

On April 22, 2022, the Staff of the Missouri Public Service Commission (Staff) filed a complaint with the Commission against Respondent alleging the unlawful provision of water and sewer services to the public, for gain, without certification or other authority from the Missouri Public Service Commission, in violation of Section 393.170.2, RSMo. The Commission consolidated the sewer complaint, File No. SC-2022-0296, into this file on May 31, 2022.

On November 23, 2022, Respondent filed a motion for summary determination. Due to an ongoing discovery dispute that motion was continued until the Commission's Staff (Staff) had sufficient discovery to answer the motion as permitted under Commission

Rule 20 CSR 4240-2.117(1)(D). Respondent filed an Amended motion for summary determination on September 22, 2023. That motion is the subject of this order.

On October 20, 2023, Staff filed *Staff Response in Opposition to I-70 Mobile City, Inc. D/B/A I-70 Mobile City Park's Amended Motion for Summary Determination* arguing that issues of material fact exist concerning whether I-70 Mobile City Park is engaging in the unlawful provision of water and sewer services to the public for gain without certification or other authority from the Commission. Staff also argues that the pleading does not meet the requirements imposed under Commission Rule 20 CSR 4240-2.117(1)(B), which requires the moving party to state with particularity in separately numbered paragraphs each material fact as to which the movant claims there is no genuine issue. Staff states that many of Respondent's paragraphs in its Statement of Material Facts for which there is No Genuine Issue contain multiple factual statements. Many of the paragraphs contain no material facts.

On October 30, 2023, Respondent filed its Motion to *Strike Staff's Response in Opposition to Amended Motion for Summary Determination*. Respondent's motion asks the Commission to 1) strike Staff's response to Respondent's *Amended Motion for Summary Determination*, 2) deem the facts set forth in its motion admitted, and 3) grant summary determination in Respondent's favor.

Respondent has requested to present oral argument in support of its motion. Commission Rule 20 CSR 4240-2.117(G) states that the Commission may hear argument on a motion for summary determination. The Commission does not find that oral argument is necessary for this motion.

Respondent, as the party requesting summary determination, has the burden of

establishing a right to judgment as a matter of law.¹

Amended Summary Determination Motion

Respondent's motion acknowledges that factual disputes may exist concerning whether it meets the statutory definitions of a water corporation, a sewer corporation, or a public utility, and whether Respondent owns facilities that meet the statutory definitions of a water or sewer system.²

Respondent states it does not believe a private mobile home community can be devoted to a public use.³ Respondent's *Amended Motion for Summary Determination* is focused on demonstrating that its systems are not devoted to public use.

Respondent's amended motion puts forth facts for the Commission's consideration. Respondent's facts include information about the content of the mobile home park, leasing and rental eligibility, contracting for water and sewer services, and general information concerning how tenants are billed for water and sewer services. Some of the motion's paragraphs set out multiple facts.

Relevant Law

Section 386.390.1, RSMo, authorizes the Commission to hear and decide complaints "setting forth any act or thing done or omitted to be done by any corporation, person or public utility in violation, or claimed to be in violation, of any provision of law subject to the commission's authority, of any rule promulgated by the commission, of any utility tariff, or of any order or decision of the commission...".

Commission Rule 20 CSR 4240-2.117(1)(E) provides that the Commission may

¹ *Wilmes v. Consumers Oil Co. of Maryville*, 473 S.W. 3d 705, 714 (Mo. App. W.D. 2015).

² Amended Motion for Summary Determination, Page 2, September 22, 2023.

³ Amended Motion for Summary Determination, Page 3, September 22, 2023.

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.

Commission Rule 4 CSR 240-2.117(1)(B) states: “Motions for summary determination shall state with particularity in separately numbered paragraphs each material fact to which movant claims there is no genuine issue, with specific references to the pleadings, testimony, discovery, or affidavits that demonstrate the lack of issue as to such facts.”

A summary judgment motion that fails to set forth each material fact in separately numbered paragraphs and fails to specifically reference the record is legally defective and cannot serve as the basis to grant summary judgment. *Hanna v. Darr*, 154 S.W.3d 2, 5 (Mo.App.2004).

Devoted to Public Use

The requirement that a utility be devoted to public use prior to regulation does not exist in statute, but has evolved through Missouri case law.

State ex rel. M.O. Danciger & Company v. Public Serv. Comm’n, 205 S.W. 36, (Mo. banc 1918), sets out that the fundamental characteristic of a public calling is indiscriminate dealing with the general public. *Danciger* quotes that “If a man holds himself out to do it for every one who asks him, he is a common carrier; but if he does not do it for every one, but carries for you and me only, that is a matter of special

contract.”⁴ *Danciger* proposes that before a utility can be regulated it must be devoted to a public use.⁵ This requirement does not exist in Missouri statutes. The Court stated that the test for determining if a company was devoting its services to the public use was whether the fundamental characteristic of a public calling is an indiscriminate dealing with the general public.⁶ The court further states that, “in determining whether a corporation is or is not a public utility, the important thing is, not what its charter says it may do, but what it actually does.”⁷

State ex rel. Cirese v. Public Service Commission, 178 S.W.2d 788 (Mo.App.1944), held that an entity was a public utility where it sold electricity to customers within a several block area of downtown Kansas City, because it offered its services indiscriminately to all persons within the area it was capable of serving. The court noted that it did not overlook that the entity sold service only under private contract.

In *Osage Water Co. v. Miller County Water Auth., Inc.*, the Court refines the requirement that a facility be devoted to the public use before they are subject to Commission regulation.⁸ The court in *Osage Water* found service to the two subdivisions satisfied *Danciger*. The *Osage Water* court stated:

The record is void of any testimony which suggested that Defendant has 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.

This refinement addresses both the geographic area of service indicating that a smaller

⁴ *Danciger*, 205 S.W. at 42.

⁵ *Danciger*, 205 S.W. at 40.

⁶ *Danciger*, 205 S.W. at 42.

⁷ *Danciger*, 205 S.W. at 39.

⁸ *Osage Water Co. v. Miller County Water Auth., Inc.*, 950 S.W.2d 569 (Mo. App. S.D. 1997)

service area would qualify for regulation. The Commission currently regulates small systems encompassing single subdivisions. The court notes the lack of refusal of service as further evidence that the entity was devoted to public use.

In *Hurricane Deck Holding Co. v. Public Serv. Com'n*, the Court further refined what it is for a utility to be devoted to a public use.⁹ The court in *Hurricane Deck* held that the Commission did not err in finding that Hurricane Deck was operating as a public utility subject to its regulation. The court reviewed the Commission's order in that case, which stated:

The key fact in 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 services 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.

These cases address the requirement that before an entity can be subject to regulation by the Commission it must be devoted to a public use. The case law indicates that if an entity providing utility services holds itself out within a defined area as the provider for that area and offers service in that area within its capabilities it meets the threshold for devoted to public use.

Discussion

Commission Rule 20 CSR 4240-2.117(1)(B) requires the moving party, Respondent, to "state with particularity in separately numbered paragraphs each material fact as to which the movant claims there is no genuine issue." Multiple paragraphs in Respondent's motion set out multiple material facts in violation of the Commission's summary determination rule. Respondent's motion is legally defective.

⁹ *Hurricane Deck Holding Co. v. Public Serv. Com'n*, 289 S.W.3d 260 (Mo. App. W.D. 2009).

The summary determination motion also does not address whether Respondent meets the statutory definition of a water or sewer corporation. “Instead, the Motion for Summary Determination focuses upon the lack of any public use inherent in the landlord-tenant relationship in a private mobile home community and recreational vehicle lot.”¹⁰ The question is whether Respondent’s provision of water or sewer services is devoted to public use.

Whether a utility is devoted to public use is not a checkbox analysis because devoted to public use developed through Missouri case law. Unlike the statutory requirement defining a sewer corporation as having greater than 25 outlets, an evaluation of whether an entity is devoted to the public use is more nuanced. If a summary determination motion were to demonstrate that a sewer system had 24 outlets, the issue would be conclusively determined and the moving party would be entitled to judgment as a matter of law. Here Respondent must successfully address all requirements derived from case law to determine if an entity is devoted to public use.

Respondent puts forth a minimal amount of material facts to support its contention that it is not devoted to public use. Respondent states it does not offer rental of the lots to the general public indiscriminately. Respondent admits I-70 Mobile City Park is a mobile home community with 141 rental areas. Respondent admits that some of these rental areas are parking or storage areas. Respondent admits that water for the mobile home park is provided by Bates City. Respondent admits that it is billed for the water and sewer services. Respondent admits it bills its leased tenants for reimbursement of water and sewer service. Respondent states that its contracts for water and sewer services are

¹⁰ *Legal Memorandum in Support of Motion for Summary Determination*, Page 3, September 22, 2023.

contained in its leases and that it only leases lots to persons who sign a lease contracting for water and sewer services and agree to be billed for those services. Respondent admits that it offers water and sewer connections to tenants that meet specific criteria and execute a contract. Respondent allocates costs for water and sewer service based upon those lease contracts. Respondent states that some leases offer rental space but no water or sewer service. Respondent states that it does not provide water or sewer services to all individuals who rent spaces or land at I-70 Mobile City.

Respondent frames its argument to address the devoted to public use factors as set forth in case law. Respondent asserts, at paragraph 22 of its motion, the legal conclusion that it does not provide water or sewer services to the public. In support, Respondent argues that it does not offer leases to the general public indiscriminately and that tenants must meet eligibility requirements to lease lots in the mobile home park. Respondent's argument conflates the requirements for establishing a lease in I-70 Mobile City Park with the requirements for receiving water and sewer service. The Commission is not concerned with the eligibility of individuals to rent at I-70 Mobile City Park, but with what requirements there are to receive water or sewer service.

Respondent argues its provision of service is a special contract between itself and potential tenants, whereby tenants can only receive water or sewer service through the execution of a lease containing those terms. However, eligibility criteria are not unusual and many public utilities use service agreements prior to providing service. The *Cirese* case showed that a private contract does not prevent an entity from being devoted to public use. The only available option to rent a lot at I-70 Mobile City Park is to sign a lease. The fact that the utility service agreement is contained in a lease between a

landlord and a tenant does not place it beyond Commission's jurisdiction.

Respondent states that not all of its tenants are offered water or sewer services and that not all of its tenants receive water and sewer service under their leases. However, that does not address whether Respondent is holding itself out as the water and sewer service provider for I-70 Mobile City Park. Not all of the 141 rental areas are receiving water or sewer services, because not all of those rental areas need them. Tenants renting spots to park vehicles or for storage would not need water or sewer services. Respondent has not included any specific criteria for receiving water or sewer service beyond establishing a lease. Much like *Osage Water*, the motion is void of any material fact suggesting that Respondent has refused to provide water or sewer service to any of the tenants of mobile city park who may have requested those services or on what specific basis.

Respondent's motion does not contain sufficient material facts to support its contention that it is not devoted to public use. Therefore, Respondent's motion does not entitle it to judgment as a matter of law because Respondent has not met its burden to show that they are not providing water or sewer services indiscriminately to the public within I-70 Mobile City Park. Respondent has only established that they are not renting lots indiscriminately to the general public and that not all rental areas receive water or sewer service. Respondent fails to provide supporting material facts necessary to determine whether they are devoted to public use.

Additionally, Respondent's motion is legally defective because it failed to follow the rules governing motions for summary determination. The Commission need not address the sufficiency of Staff's response because Respondent's motion is defective on

its face and fails to meet its burden.

The Commission further finds that it would not be in the public interest to grant Respondent's motion for summary determination, because, as *Danciger* notes, it is not what an entity says it does but how it is actually operating that determines whether it is devoted to public use.

THE COMMISSION ORDERS THAT:

1. Respondent's motion for oral argument on the *Amended Motion for Summary Determination* is denied.
2. Respondent's Motion for Summary Determination is denied.
3. This order shall be effective when issued.



BY THE COMMISSION

A handwritten signature in black ink that reads "Nancy Dippell".

Nancy Dippell
Secretary

Rupp, Chm., Coleman, Holsman, Kolkmeier
and Hahn CC., concur.

Clark, Senior Regulatory Law Judge

STATE OF MISSOURI

OFFICE OF THE PUBLIC SERVICE COMMISSION

I have compared the preceding copy with the original on file in this office and I do hereby certify the same to be a true copy therefrom and the whole thereof.

WITNESS my hand and seal of the Public Service Commission, at Jefferson City, Missouri, this 7th day of December 2023.



Nancy Dippell

Nancy Dippell
Secretary

MISSOURI PUBLIC SERVICE COMMISSION

December 7, 2023

File/Case No. WC-2022-0295

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Enclosed find a certified copy of an Order or Notice issued in the above-referenced matter(s).

Sincerely,



**Nancy Dippell
Secretary**

Recipients listed above with a valid e-mail address will receive electronic service. Recipients without a valid e-mail address will receive paper service.