

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

The Staff of the Missouri Public Service Commission,

Complainant,

v.

Aspen Woods Apartment Associates, LLC, Barry Howard, Aspen Woods Apartments, Sapal Associates, Sachs Investing Co., Michael Palin, Jerome Sachs, and National Water & Power, Inc.

Respondents.

Case No. WC-2010-0227

AMENDED COMPLAINT

COMES NOW the Staff of the Missouri Public Service Commission, by and through the Chief Staff Counsel's Office of the Missouri Public Service Commission, and pursuant to Section 386.390 RSMo 2000¹, respectfully states as follows:

Introduction

1. This Amended Complaint arises from the Respondents' unlawful provision of water and sewer services to the public for gain, without certification or other authority from the Missouri Public Service Commission (Commission).

Complainant

2. Complainant is the Staff of the Missouri Public Service Commission (Staff), acting through the Commission's Chief Staff Counsel Office (CSCO) as authorized by Section 386.390.1 and Commission Rule 4 CSR 240-2.070 (1). Section 386.390.1 provides that a "[c]omplaint may be made....in writing, setting forth any act or thing done or omitted to be done

¹ All statutory references are to the Missouri Revised Statutes (2000) unless otherwise stated.

by any corporation, person or public utility....in violation, or claimed to be in violation, of any provision of law, or of any rule or order or decision of the commission...."

Respondents

3. Respondent Aspen Woods Apartment Associates, LLC (Aspen Associates), is registered as a domestic limited liability company for the purpose of real estate investment and listed in active status with the Missouri Secretary of State (SOS). Aspen Associates' principal place of business and mailing address is 770 Township Line Road, Suite 150, Yardley, PA 19067. Aspen Associates' registered agent in Missouri is CSC-Lawyers Incorporating Service Company, and may be served at 221 Bolivar Street, Jefferson City, MO 65101.

4. Respondent National Water & Power, Inc. (NWP) is a foreign for profit corporation, administratively dissolved by the Missouri SOS on August 29, 2006, for failure to file a correct and current annual report. NWP's principal place of business is 22 Executive Park, Irvine, CA 92614. NWP's registered agent is The Corporation Company, and may be served at 120 South Central Avenue, Clayton, MO 63105.

Allegations Common To All Counts

5. Aspen Associates owns, operates, controls, and/or manages individually, and/or through the use of an authorized agent, several apartment complexes: Madison at Aspen Woods, located in Florissant, MO; Madison at Seven Trails, located in Ballwin, MO; and Madison at Walnut Creek, located in Kansas City, MO. All three apartment complexes are hereafter referenced collectively as the "Aspen Associates' Apartment Properties."

6. Madison at Aspen Woods consists of approximately 452 units ranging from one bedroom apartments to three bedroom townhouses at the following streets in Florissant:

Santiago Drive, Monfort Drive, Nottinghill Row, Sir Christopher Lane, and New Halls Ferry Road. *See Exhibit A.*²

7. Madison at Seven Trails consists of approximately 532 apartment units ranging from one bedroom to three bedroom apartments located on or near Seven Trails Drive, Ballwin, MO.

8. Madison at Walnut Creek consists of approximately 350 units ranging from one bedroom to two bedroom apartment homes located on or near NE Parvin Road, Kansas City, MO.

9. Pursuant to Section 386.020 (60) RSMo (Supp. 2008), a “water system” includes:

all....pipes, flumes, canals, structures and appliances, and all other real estate, fixtures and personal property, owned, operated, controlled or managed in connection with or to facilitate the diversion, development, storage, supply, distribution, sale, furnishing or carriage of water for municipal, domestic or other beneficial use.

10. Pursuant to Section 386.020 (59) RSMo (Supp. 2008), a “water corporation”

includes:

every corporation, company, association, joint stock company or association, partnership and person, their lessees, [or] trustees....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....

11. Pursuant to Section 386.020 (50) RSMo (Supp. 2008), a “sewer system”

includes:

all pipes, pumps, canals, lagoons, plants, structures and appliances, and all other real estate, fixtures and personal property, owned, operated, controlled or managed in connection with or to facilitate the collection, carriage, treatment and

² All Exhibits attached hereto are fully incorporated by reference as though fully set out herein.

disposal of sewage for municipal, domestic or other beneficial or necessary purpose....

12. Pursuant to Section 386.020 (49) RSMo (Supp. 2008), a “sewer corporation” includes:

every corporation, company, association, joint stock company or association, partnership or person, their lessees, [or] trustees....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....

13. Pursuant to Section 386.020 (43) RSMo (Supp. 2008), “Public utility” includes “every....water corporation.... and sewer corporation....and each thereof is hereby declared to be a public utility and to be subject to the jurisdiction, control and regulation of the commission and to the provisions of this chapter....”

14. Pursuant to Section 386.020 (48) RSMo (Supp. 2008), “Service” includes:

not only the use and accommodations afforded consumers or patrons, but also any product or commodity furnished by any corporation, person or public utility and the plant, equipment, apparatus, appliances, property and facilities employed by any corporation, person or public utility in performing any service or in furnishing any product or commodity and devoted to the public purposes of such corporation, person or public utility, and to the use and accommodation of consumers or patrons....

15. Residents of Aspen Associates’ Apartment Properties receive water and sewer service through the use of the properties’ water and sewer systems.

16. The *Apartment Lease Contract* for Aspen Associates’ Apartment Properties sets out that a resident must promptly notify Aspen Associates’ designated representative of “overflowing sewage, uncontrollable running water....water leaks....or other conditions that pose a hazard to property, health, or safety.” See Exhibit B³, Paragraph 25.

³ Complainant redacted Exhibits B, C, and F to maintain customer confidentiality. The Complainant retains the originals of said exhibits.

17. Additionally, Paragraph 25 of the *Apartment Lease Contract* states that Aspen Associates:

....may change or install utility lines or equipment serving the apartment if the work is done reasonably without substantially increasing your utility costs. We may turn off equipment and interrupt utilities as needed to avoid property damage or to perform work. If utilities malfunction or are damaged by fire, water, or similar cause, you [the resident(s)] must notify our representative immediately.

18. Aspen Associates and/or an authorized agent obtain water for Madison at Aspen Woods and Madison at Seven Trails from Missouri American Water Company (Missouri-American), a Missouri corporation originally certificated on December 30, 1983, by the Commission in Case No. WM-84-22.

19. Aspen Associates obtain wastewater management for Madison at Aspen Woods and Madison at Seven Trails from the Metropolitan St. Louis Sewer District (MSD).

20. Aspen Associates and/or an authorized agent obtain water and wastewater management for Madison at Walnut Creek from the Kansas City Water Services Department.

21. Both Missouri-American and MSD send service bills for each building of the Madison at Aspen Woods complex to Aspen Associates and/or an authorized agent at the mailing address of 2990 Santiago Drive, Florissant, MO 63033-2659.

22. Both Missouri-American and MSD send service bills for each building of the Madison at Seven Trails complex to Aspen Associates and/or an authorized agent at the mailing address of 500 Seven Trails Drive, Ballwin, MO 63011.

23. The Kansas City Water Services Department sends service bills for water and wastewater management at Madison at Walnut Creek to Aspen Associates and/or an authorized agent at the mailing address of 1300 NE Parvin Road, Kansas City, MO 64116.

24. Aspen Associates and/or an authorized agent contract with Respondent NWP to provide utility billing services to the residents of the Aspen Associates' Apartment Properties. See Exhibits C, D, and E.

25. The *Apartment Lease Contract* for Aspen Associates' Apartment Properties includes a legally controlling *Utility Addendum* for water and sewer service, with the utility bill calculated by Respondent NWP based on square footage, usage and occupancy per apartment home. See Exhibit C, Paragraph 9.

26. In Paragraph 2 of Exhibit C, the *Utility Addendum* specifies that Aspen Associates or Respondent NWP "...will calculate your allocated share of the utility services in accordance with state and local laws. If allowed by state law, we at our sole discretion may change the above methods of determining your allocated share of the utility services, by written notice to you."

27. Further, the *Utility Addendum*, Exhibit C, beginning in paragraph 3 sets out that a customer must pay a utility bill issued by Aspen Associates or Respondent NWP

within 5 days of the date when the utility bill is issued....or the payment will be late. If a payment is late, you will be responsible for a late fee in the amount of \$_____ [left blank]. The late payment of a bill or failure to pay any utility bill is a material and substantial breach of the Lease and we will exercise all remedies available under the Lease, up to and including eviction for nonpayment. To the extent there is a billing fee for the production of any utility bill or set-up charge or initiation fee by our billing company, you shall pay such fees in the amount of \$10.00.

28. Paragraph 4 of the *Utility Addendum* provides:

You [resident(s)] will be charged for the full period of time that you were living in, occupying, or responsible for payment of rent or utility charges on the apartment. If you breach the Lease, you will be responsible for utility charges for the time period you were obligated to pay the charges under the Lease, subject to our mitigation of damages. In the event you fail to timely establish utility services, we may charge you for any utility service billed to us for your apartment

and may charge a reasonable administration fee for billing for the utility service in the amount of \$3.25.

29. Paragraph 5 of the *Utility Addendum* provides “[w]hen you move out, you will receive a final bill which may be estimated based on your prior utility usage. This bill must be paid at the time you move out or it will be deducted from the security deposit.” *See* Exhibit C.

30. Respondent NWP’s letter explains the responsibility of customers for payment of the following fees: a Monthly Service Fee of \$3.02; a Late Fee of \$7.00 if payment is not received by the due date provided by Respondent NWP on the resident’s bill; a Returned Check Fee of \$25.00; and a one-time only New Account Fee of \$10.00. *See* Exhibit D.

31. A review of customer accounts shows Respondent NWP has charged customers the stated monthly service fee of \$3.02, late fees, and a new account fee of \$10.00. *See* Exhibit F.

32. Respondent NWP’s service bill to each customer states “[t]he bill you have received is from NWP Service Corporation, a provider of billing and collection services for the apartment community where you reside as disclosed in your lease, and is not from the retail public utility.” *See* Exhibit F.

33. Respondent NWP’s service bill to each customer also includes billing dispute information mandating billing disputes be submitted in writing to NWP “....no later than 45 days after the billing date on which the error or problem appeared” to preserve a customer’s “rights”, and be investigated by NWP. However, no timelines or requirements are set out for NWP’s responses. *See* Exhibit F.

34. Respondent NWP's service bill to each customer includes contact information for NWP's Resident Services Department where a customer can make inquiries, and find service, conservation, billing, and other information regarding a bill. *See* Exhibit F.

**COUNT I—Respondent Aspen Associates and Respondent NWP
Are Subject to Regulation by the Commission**

35. Complainant hereby adopts by reference and re-alleges the allegations set out in Paragraphs one (1) through thirty-four (34) above.

36. Respondent Aspen Associates and Respondent NWP, individually and/or jointly, are a water corporation and sewer corporation owning, operating, managing and/or controlling the water and sewer services of Aspen Associates' Apartment Properties for gain as defined in Sections 386.020 (59) and (49) RSMo (Supp. 2008), respectively, and thus public utilities as defined in Section 386.020 (43), RSMo (Supp. 2008) and are subject to the Commission's jurisdiction.

WHEREFORE, the Staff prays that the Commission will give notice to the Respondents as required by law and after hearing, find that Respondent Aspen Associates and Respondent NWP are individually and/or jointly a water corporation and a sewer corporation within the intendments of Section 386.020 (59) and (49) RSMo (Supp. 2008), and thus public utilities within the intendments of Section 386.020 (43) RSMo (Supp. 2008), subject to the jurisdiction, regulation and control of this Commission.

**COUNT II— Unauthorized Provision of Water and Sewer Services and
Rates by Apartment Respondents and Respondent NWP**

37. Complainant hereby adopts by reference and re-alleges the allegations set out in Paragraphs one (1) through thirty-six (36) above.

38. Section 393.170 provides in part, “1. No....water corporation or sewer corporation shall begin construction of a....water system or sewer system without first having obtained the permission and approval of the commission.”

39. Neither the Respondent Aspen Associates nor Respondent NWP individually and/or jointly possess a Certificate of Convenience and Necessity issued by this Commission authorizing the provision of water and/or sewer services to the public for gain in the known service areas of Aspen Associates’ Apartment Properties. Respondent Aspen Associates and Respondent NWP, individually and/or jointly have violated Section 393.170 by the conduct described above.

40. Section 393.130.1 RSMo (Supp. 2008) provides “[a]ll charges made or demanded by any such....water corporation or sewer corporation for....water, sewer or any service rendered or to be rendered shall be just and reasonable and not more than allowed by law or by order or decision of the commission.”

41. Section 393.140 (11) grants the Commission the power to require all water and sewer corporations to file with the Commission all rates and charges made or otherwise enforced, along with any supplemental agreements, rules or regulations.

42. Respondent Aspen Associates and Respondent NWP, individually and/or jointly have violated Sections 393.130.1 and 393.140 (11) by the conduct described above.

43. Section 393.150 provides that the Commission may, with or without complaint, enter upon a hearing to determine the propriety of some or all of Respondent Aspen Associates’ and/or Respondent NWP’s water and sewer rates.

WHEREFORE, the Staff prays that the Commission will give notice to the Respondents as required by law, and after hearing, find that the Respondent Aspen Associates and Respondent

NWP, individually and/or jointly are subject to the Commission's authority to set rates, and determine the just and reasonable rates to charge for Respondent Aspen Associates' and/or Respondent NWP's water and sewer services.

COUNT III—Authority to Seek Penalties

44. Complainant hereby adopts by reference and re-alleges the allegations set out in Paragraphs one (1) through forty-three (43) above.

45. Section 386.570 provides:

1. Any corporation, person or public utility which violates or fails to comply with any provision....of this or any other law, or which fails, omits or neglects to obey, observe or comply with any order, decision, decree, rule, direction, demand or requirement....of the commission....such corporation, person or public utility, is subject to a penalty of not less than one hundred dollars nor more than two thousand dollars for each offense.

2. Every violation....by any corporation or person or public utility is a separate and distinct offense, and in case of a continuing violation each day's continuance thereof shall be and be deemed to be a separate and distinct offense.

3. In construing and enforcing the provisions of this chapter relating to penalties, the act, omission or failure of any officer, agent or employee of any corporation, person or public utility, acting within the scope of his official duties of employment, shall....be deemed to be the act, omission or failure of such corporation, person or public utility.

46. Section 386.600 provides, in part,

“[a]n action to recover a penalty...or to enforce the powers of the commission...may be brought in any circuit court in this state....and shall be commenced and prosecuted to final judgment by the general counsel....”

WHEREFORE, the Staff prays that the Commission will give such notice to the Respondents as is required by law and, after hearing, in the event that any of the conduct herein described is determined to be a violation of any law of the State of Missouri or of any order,

decision, or rule of the Commission, deem each day that such violation existed to be a separate offense and authorize its General Counsel to proceed in Circuit Court to seek such penalties as are authorized by law against any and all Respondents.

Respectfully submitted,

/s/Jennifer Hernandez
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