

BEFORE THE MISSOURI PUBLIC SERVICE COMMISSION

Staff of the Public Service Commission)	
)	
Complainant,)	
)	
v.)	Case No. WC-2008-0079
)	
Universal Utilities, Inc. and Nancy Carol)	
Croasdell,)	
)	
Respondents.)	

**RESPONDENTS' APPLICATION FOR REHEARING
AND MOTION TO DISMISS**

COME NOW Respondents, pursuant to § 386.500, RSMo. and 4 CSR 240.160(1), and submit this Application for Rehearing on the grounds that the Commission lacked jurisdiction to issue its December 13, 2007 Order Striking Answer and Entering Default Judgment as Sanction for Refusal to Comply With Discovery Order ("Order").

I. The Commission Has No Subject Matter Jurisdiction

"Questions of jurisdiction may be raised at any point."¹ A tribunal must *sua sponte* determine if it has subject matter jurisdiction.² As set forth in detail below, Respondents are not a public utility under the Commission's regulatory purview. As a creature of statute, the Commission has no jurisdiction to issue any Order concerning Respondents.³ Accordingly, the Commission should reconsider its Order and dismiss this matter for lack of subject matter jurisdiction.

¹ *Gosserand v. Gosserand*, 230 S.W.3d 628, 631 (Mo.App. W.D. 2007) quoting *Davis v. Davis*, 799 S.W.2d 127, 130 (Mo.App. 1990).

² See *Gilstrap v. Gilstrap*, --- S.W.3d ----, 2007 WL 2826941 (Mo.App. W.D. 2007).

³ See *State ex rel. GS Technologies Operating Co., Inc. v. Public Service Commission*, 116 S.W.3d 680, 696 (Mo.App. W.D. 2003).

II. As a Matter of Law, Respondents are Not a Public Utility

As the Commission notes in its Order, the judgment in this case "does not come by default in the ordinary sense and is treated as a judgment upon trial by the court."⁴ Nothing in the pleadings and evidence before the Commission justifies the finding and conclusion that Respondents are a public utility under Chapter 386 Revised Statutes of Missouri because as a matter of law, Respondents are not a public utility.

A. "Public Utility" Defined

A public utility is defined as "every ... water corporation ... sewer corporation ... as ... defined in this section, 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." A water corporation is,

... 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

Sewer corporation includes,

... 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

⁴ Order at 5.

⁵ § 386.020(58), RSMo.

⁶ § 386.020(48), RSMo.

“To constitute a public utility and be subject to regulation by the Commission, a service must be devoted to public use.”⁷ To be a public utility, a business or enterprise must be impressed with a public interest and that those engaged in the conduct thereof must hold themselves out as serving or ready to serve all members of the public, who may require it, to the extent of their capacity.⁸ A company's mode of operation and the nature of its service are controlling in determining whether it is a public utility.⁹

Critical to determining whether a service is devoted to public use is whether it is a matter of private contract between the company and customer.¹⁰ If service is provided only via private contract, the company is plainly engaged in private business and is not a public utility.¹¹ Moreover, an entity is not a public utility if there is no explicit professing of public service or undertaking to provide service to the public generally.¹²

B. Universal Utilities Is Not a Public Utility Under Missouri Law

Universal is not a water or sewer corporation; therefore, is not a public utility as defined by Chapter 386.020, RSMo. Until the third quarter of 2007, Universal provided only meter reading, billing, collecting, and accounting services to Blue Acres Mobile Home Park ("Blue Acres") and Green Hills Mobile Home Park ("Green Hills"). Universal never owned or resold any water or other utility service. Universal currently reads meters and sends invoices to tenants of Blue Acres and Green Hills. The invoices are for rent and include a

⁷ *Khulusi v. Southwestern Bell Yellow Pages, Inc.*, 916 S.W.2d 227, 232 (Mo.App.1995) (citing *State ex rel. M.O. Danciger & Co. v. Public Serv. Comm'n*, 275 Mo. 483, 205 S.W. 36, 40 (Mo. banc 1918)).

⁸ *See City of Englewood v. City & County of Denver*, 123 Colo. 290, 229 P.2d 667, 672-73 (Colo. banc 1951).

⁹ *See* 94 C.J.S. *Waters* § 247 (1956).

¹⁰ *See Khulusi* 916 S.W.2d at 232.

¹¹ *See State ex rel. M.O. Danciger and Company*, 205 S.W. at 40.

¹² *Id.*

variable component based upon water usage, waste disposal, and other factors. Universal does not collect invoiced amounts for the landlords. Universal never sold any water or other utility service to the tenants of Blue Acres or Green Hills. These services in no way fall under the type of water or sewer service as contemplated by Chapter 386.

Public utilities contemplated by Chapter 386 include only those entities undertaking to supply an entity with water or sewer for municipal and domestic purposes.¹³ Respondents do not fit this description. Universal simply provides an administrative service to the owners/landlords of Blue Acres and Green Hills. That is, Universal was merely acting as an agent for these landlords on two separate single tracts of property. Universal has never held itself out to provide any services to the public generally. Universal has provided Staff all prior and current agreements entered into with Blue Acres.¹⁴ Universal conducts no other business in the State of Missouri. A simple review of these agreements demonstrates that, as a matter of law, it is impossible for the services performed on the property of individual landlords, at their request, to constitute the offering of public utility services.

If Staff's theory upon which it asks the Commission to assert jurisdiction were accepted, every landlord owning a building or residence would be considered a public utility, subject to the Commission's jurisdiction merely because the landlord owns the water or sewer lines that run through their property. Moreover, every recreational vehicle park offering "utility hook-ups" would also be a public utility. Obviously, this is a preposterous interpretation contrary to the intent of Chapter 386, RSMo. Likewise, an entity does not become a public utility by entering into a private contract with a landlord to charge tenants variable amounts for water, gas, and electric usage.

¹³ See 78 Am.Jur.2d *Waterworks & Water Companies* § 1 (1975).

¹⁴ The agreements with Green Hills are in all material respects the same.

Finally, Universal is not a public utility because it does not devote its service to public use, is engaged with Blue Acres and Green Hills only under private contract for specific services, and does not profess to provide public service. Because Universal provided its administrative services only through private contracts with Blue Acres and Green Hills, it clearly engaged in private business out of the realm of public use. Universal cannot be classified as a public utility unless it engages in public service or holds itself out to serve the general public for compensation.¹⁵ Universal has done neither of these things and therefore, is not a public utility within the Commission's jurisdiction.

III. Conclusion

For the foregoing reasons, Respondents request the Commission to grant rehearing and reconsideration of its Order and dismiss this matter for lack of jurisdiction.

Dated: December 21, 2007

Respectfully submitted,

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¹⁵ *Id.*

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Motion to Dismiss Staff's Amended Complaint and Suggestions in Support has been hand-delivered, transmitted by e-mail or mailed, First Class, postage prepaid, this 21st day of December, 2007, to:

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