BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

DERALD MORGAN, RICK AND CINDY GRAVER, WILLIAM AND GLORIA PHIPPS, and DAVID LOTT, Complainants, v. CARL RICHARD MILLS, CARRIAGE OAKS ESTATES, DISTINCTIVE DESIGNS, and CARING AMERICANS TRUST FOUNDATION, INC. (f/k/a Caring Americans Foundation, Inc.) Respondents.	)	File No. WC-2017-0037

COMPLAINANTS' POST-HEARING BRIEF

COME NOW Complainants Derald Morgan, Rick and Cindy Graver, William and Gloria Phipps, and David Lott ("Complainants") by and through counsel, and hereby submit the following Post-Hearing Brief:

Introduction

This case involves a dispute between several homeowners in a subdivision and the developer of that subdivision and requires the Public Service Commission ("PSC") to answer two questions: (1) whether a developer that controls all aspects of the management and operation of a water and sewer system is subject to the Public Service Commission's jurisdiction; and (2) whether an entity that provides water and sewer services to customers and charges those customers for the operation and management of the water and sewer system "operates for gain" despite netting at a loss for the year. The answer to both questions is "yes." The PSC has jurisdiction to regulate public utilities, which includes both water and sewer corporations. §

386.250(3) and (4), RSMo. Because the water and sewer system corporation has members other than those who receive water and sewer services, the Public Service Commission has jurisdiction over the Non Profit. In fact, the Non Profit was created by Mr. Mills merely to circumvent the power of the PSC and maintain control over the manner in which the water and sewer systems are operated. In the present case, none of the Complainants receiving utility service were ever members of the Non Profit, nor were they members of Caring Americans, the entity that transferred the water and sewer system to the Non Profit. Complainants have no control or say over the operations of the water and sewer system, and there is nothing preventing the Non Profit from providing water and sewer service to other persons or entities. In fact, under the Bylaws of the Non Profit, Mr. Mills can vote on behalf of the undeveloped lots that are *not* currently connected to the water and sewer system. In other words, the Bylaws allow those who do not receive services to vote. Those votes are made by Mr. Mills. Accordingly, the way the Non Profit is organized under its Bylaws frustrates the entire purpose of the statute that allows not-for-profits to be exempt from the jurisdiction of the PSC.

The purpose of the statute requiring that a not-for-profit operate *only* for the benefit of its members is that by having all the customers as members, the customer-members have the *power* to set their own rates and manage their own services. It's essentially a form of democratic governance of the utility that allows those who pay for and receive the utility services the opportunity to influence and control the services they receive. In the present case, none of the owners receiving utility service are members of the Non Profit and they do not have the power to set their own rates or manage their own services. The Bylaws do not create a democratic process of governance by the customers; it creates a dictatorship controlled by Carl Mills. Mr. Mills sets the rates and decides how the water and sewer system will be managed. Complainants have no

control or say over the operations of the water and sewer system. This type of arrangement makes Complainants highly susceptible to abusive billing practices and incompetent management with no recourse. This is precisely the type of abuse the Public Service Commission regulations are designed to protect against. Furthermore, Complainants have no choice but to use the services provided by the Non Profit since the Carriage Oaks Estates Declaration restricts the owners from installing their own well and septic system.

Secondly, Respondent's entities operated "for gain." Mr. Mills' testified that he set a flat rate based on a quote given to him by another utility company. This rate was charged to homeowners irrespective of actual use or cost. While Mr. Mills may have exercised poor business judgment that resulted in a net loss for certain years, the entities still operated for the purpose of generating money. Even Mr. Mills' admitted that there was no evidence in the record that he didn't make a profit. Moreover, there is a distinction between operating a business "for gain" and actually realizing a gain or profit. A business owner can provide services to customers, charge those customers, and still have costs that exceed revenue. The fact that he operates at a loss does not change his status as an entity operating for gain. In other words, a mismanaged company that charges consumers for services is still a business that operates "for gain" even if the outcome is a loss. For those reasons, the Public Service Commission should exercise its jurisdiction over Respondents and subject them to the rules and regulations of the Public Service Commission. Absent the PSC's regulation of Mr. Mills' conduct, Mr. Mills will have the power and ability to operate the water and sewer system in any manner he sees fit. Such a fate can be avoided by simply requiring Mr. Mills' entities to follow the same laws, rules, and regulations that other public utilities follow. Complainants ask that the Commission to do just that.

Statement of Facts

The Subdivision and Parties

Complainants are property owners in Carriage Oaks Estates subdivision. (Complainant Ex. 10, p.3:20-29). Carriage Oaks Estates is a residential subdivision in Reed Springs, Missouri. (Ex. 10, p. 3: 20-29). Currently, there are seven lots that have homes that are connected to the water and sewer assets but there are 33 lots altogether. (Tr. 154: 8-18). Those unsold and undeveloped lots remain owned by the Respondents. (Tr. 153: 25; 154: 1-2).

The subdivision was developed by an entity called Mills Properties, Ltd. d/b/a Distinctive Designs ("Distinctive Designs") and is subject to the restrictive covenants found in the Declaration for Carriage Oaks Estates. The Declaration of the subdivision creates a homeowners' association to govern the subdivision. (Ex. 10; p. 4, 5-6; 25-27; p. 5: 1-3). Respondent Carl Mills also resides in the same subdivision. (Tr. P. 72:18-25). Mr. Mills, through his various entities, controls both the homeowners' association and the organization that operates and manages the water system. (Ex. 10, p. 5: 3-16). Because of his status as developer of the subdivision, Mr. Mills dictates what assessments are levied by the homeowners' association for water and sewer services. (Ex. 10; p. 5: 3-16). Those amounts are then paid directly to entities that are solely owned by him. (Ex. 10, p. 5: 3-16).

The entities

Distinctive Designs is a fictitious name for Mills Properties Group, Ltd. (Tr. 133: 21-25; 134: 1-25). This entity is the construction company used to develop Carriage Oaks Estates and was responsible for creating the roads, water and sewer lines for the subdivision. (Tr. 133: 21-25; 134: 1-25). Mills Properties Group, Ltd. is owned by Mr. Mills' Trust for which Mr. Mills is the sole beneficiary. (Tr. 136; 1-22). Carriage Oaks, LLC is also an entity owned by his Trust. (Tr.

141: 6-11). This entity was formed when Mr. Mills' wife passed away. (Tr. 138: 17-22). The personal trust is an umbrella entity for Mills Properties Group, Ltd., Carriage Oaks, LLC, and Distinctive Designs. (Tr. 141: 6-11). The Trust was the original owner of the water and sewer assets. (Tr. 141: 25; 142: 1-3). Mr. Mills, by virtue of controlling the developing entity, currently controls the homeowners' association and has controlled every entity that has owned the water and sewer system. (Ex. 10; p. 5: 3-16). Mr. Mills' Trust owned the water and sewer system before Carriage Oaks, LLC. (Tr. 74: 10-25). In 2016, Carriage Oaks, LLC transferred the water and sewer system to Caring Americans Trust Foundation, Inc ("Caring Americans"). (Tr. 77: 1-13). Caring Americans is a non-profit corporation organized for charitable and educational purpose and was not formed as a water and company. (Tr. 143: 1-25. Mr. Mills was the founder of Caring Americans. Tr. 144: 1-3). Complainants are not members, shareholders, or owners of Caring Americans. (Tr. 144: 6-25).

The Transfers

After its inception, Carriage Oaks, LLC and Distinctive Designs owned, operated, maintained the water and sewer systems that provide service to the residents of Carriage Oaks Estates. In 2016, Respondent Carl Mills caused the ownership of the waste water treatment facility and water facility that serves Carriage Oaks Estates to be transferred to Caring Americans Trust Foundation, Inc. ("Caring Americans"). (Tr. 77: 1-13).

In 2017, Caring Americans purported to transfer the water and sewer system to the Carriage Oaks Not-for-Profit Water and Sewer Corporation (Tr. 100: 16-23). Caring Americans did not make a showing to the Commission by seeking approval of the transfer with the Commission. (Tr. 100: 16-23). In fact, Mr. Mills "didn't even know [the] PSC existed." Tr. 100: 16-23).

Carriage Place Not-for-Profit Water and Sewer Corporation

Since Caring Americans' transfer of the water and sewer assets to the Non Profit, the Non Profit has operated and managed the water and sewer system. Mr. Mills controls the Non Profit. The Non Profit Bylaws are drafted in a manner that allow members to hold more than one Membership Interest and allows a single member to receive multiple votes based on the number of membership interests held. (Ex. 10, p. 6: 1-28). The Non Profit also allow prospective utility consumers to be members even though these consumers do not receive water and sewer services, the lots are undeveloped, and the lots are all owned by Mr. Mills. (Ex. 10, p. 6: 1-28). In other words, Mr. Mills gets to vote on behalf of these lots even though these lots do not pay assessments for the water and sewer services.

Voting and Control

There are 11 members of the homeowners' association. (Tr. 149: 18-20). Under the Declarations, each lot is entitled to one vote at meetings of the Association. (Tr. 149: 21-24). Mr. Mills owns at least 23 lots. (Tr. 150: 14-25). The Developer (Mr. Mills' entity) has 10 votes to every one vote of the lot owners. (Tr. 66: 24-25; 67:1) .. Accordingly, as Developer, Mr. Mills essentially gets 230 votes at Association meetings. (Tr. 161: 1-10).

Currently, the lot owners have no choice and no input on what the homeowners' association does or how the water and sewer system is operated and managed. (Ex. 10: p. 5: 3-27). The undeveloped lots owned by Mills do not have to pay any assessment for water and sewer services. (Tr. 153: 25; 154: 1-2). Despite not paying any assessments, Mr. Mills has exercised voting power on behalf of those lots.

Only seven lots are actually connected to the water and sewer system. (Tr. 154: 8-18). The Association assessed each owner actually connected to the water and sewer lines. (Tr. 155:

11-23). The Bylaws for Carriage Oaks Not-for-Profit however give voting rights to the undeveloped lots for which there is no water and sewer connection. (Ex. 10, p. 6: 10-28).

Mr. Mills upgraded the water system in a manner that benefits the future unsold lots. Despite receiving this benefit, Mr. Mills' does not pay assessments for those lots. The lots that will eventually use upgraded system do not currently pay assessments. P. 189.

The Fees

The Association has been charged a fee every year for expenses associated with the operation of the water and sewer system. From 2014 through 2016, the yearly assessment for the water and sewer services was $1250 per each lot owner who is connected to the system. (Ex. 11, Tr. 55; 16-25; 56:1-25; Tr. 155: 3-23). Mr. Mills testified that a fee of $6,450.00 is charged to the Association each year and then that amount is paid by the members of the Association. (Tr. 88: 1-14; Tr. 155:3-23). According to Mr. Mills, the total reflects two parts. (Tr. 88: 1-14). The first part of the cost is for "management of the sewer and water utilities and so forth." (Tr. 88: 1-14). This first cost equals about $4,000.00. (Tr. 88: 1-14). The other part was for the maintenance and was about $2,250.. (Tr. 88: 1-14). This total amount was based on a quote from White River Valley Environmental. (Tr. 88:1-18). Distinctive Designs was the entity that charged the $6450 to the Association each year. (Tr. 90: 5-25). Mr. Mills' entity charged a flat rate for the services. (Tr. 151: 15-22). .An entity solely owned by Mr. Mills that did not own the water and sewer system was charging for the maintenance and management. (Tr. 91:4-9). In 2017, the annual assessment for the water and sewer system increased to $1750 for each lot owner with a connection to the water and sewer system.(Tr. 61: 23-25; 62: 1-7). Mr. Morgan was never told what the additional increases were for. (Tr. 62: 3-12; 64:1-16).

Mr. Mills' contends that his entity did not operate "for gain" because he "operated at a loss." (Tr.124: 2023). His entity, Distinctive Designs, was receiving money for operating and maintaining the system. (Tr. 124: 24-25; 125: 1-25; 126: 1-25). Mr. Mills could not clearly testify whether the $6,450 reflected solely out-of-pocket expenditures or if there was a profit and stated, "This only started to begin to take it where it should have came [sic] out of years earlier and, you know, begin to pay for those services." (Tr. 130: 7-18). Mr. Mills' admitted that there was nothing in the record demonstrating that he didn't profit. (Tr. 121: 10-18).

Argument

Mr. Mills' entities were operating "for gain."

The PSC has jurisdiction to regulate public utilities, which includes both water and sewer corporations. Section 386.020(59) RSMo., defines a water corporation as "every corporation...and person...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." (emphasis added). Further, Section 386.020(49) RSMo., defines a sewer corporation as "every corporation...or person...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 water systems with fewer than twenty-five outlets." Both Carriage Oaks and Caring Americans are public utilities subject to PSC regulation because they operate the water and sewer systems at Carriage Oaks Estates subdivision for gain.

While "for gain" is not defined in the Public Service Commission Act, courts have interpreted its meaning. One such case where the term was interpreted is *Hurricane Deck Holding Co. v. Public Service Com'n of State,* 298 S.W.3d 260 (Mo. Ct. App. W.D. 2009). In

Hurricane, one of the issues before the court was whether a subdivision developer was operating a water and sewer system "for gain." *Id.* The court noted that the phrase "for gain" was not specifically defined in the Public Service Commission Act; however, the court relied on the dictionary definition of gain in finding that "for gain" means "the operation of a water or sewer system for the purpose of receiving compensation." *Id.* at 267; see also *Osage Water Co. v. Miller County Water Auth., Inc.,* 950 S.W.2d 569, 574 (Mo. App. S.D. 1997). The court ultimately held that the developer was operating for gain, or compensation, when it sent a letter to homeowners itemizing costs for the water and sewer systems, and requesting payment from the homeowners. *Id.* Whether the developer received compensation or not was of no consequence to the court, it was the mere act of requesting compensation. *Id.* The court concluded that the developer was a "public utility" subject to PSC regulation. *Id.*

Here, Mr. Mills and his entities were clearly operating "for compensation" and requested such compensation. From 2014 through 2016, the yearly assessment for the water and sewer services was $1250 per each lot owner who is connected to the system. (Ex. 11, Tr. 55; 16-25; 56:1-25; Tr. 155: 3-23). Mr. Mills testified that a fee of $6,450.00 is charged to the Association each year and then that amount is paid by the members of the Association. (Tr. 88: 1-14; Tr. 155:3-23). According to Mr. Mills, this amount was a flat rate and based on a quote provided by another utility company. He presented no evidence as to whether this amount was actually less than or more than the actual costs of operating the system. In fact, he admitted that there was no evidence in the record that he could point to that would demonstrate he did not profit. (Tr. 121: 10-18).

But even if he didn't "profit", Respondents have conflated "for gain" with the idea of operating an entity that yields compensation above actual costs. There are plenty of businesses that operate for the purpose of receiving compensation but have years at which they operate at a loss. This does not change the purpose of their business—to receive compensation. There is ample evidence from the record that Mr. Mills' entities operated "for gain." Mr. Mills admitted that his entity that operated the water and sewer system billed the Association $6450. This was a flat fee that was billed to the Association and paid by Complainants. Each year Respondents send an invoice to the Association requesting compensation for the "services" it provides in maintaining and operating the water and sewer system. This amount was paid by the Association members. It is immaterial whether Mr. Mills' entity actually made a profit because it is clear his entities requested and received compensation.

The PSC retains jurisdiction over the Non Profit.

The PSC has jurisdiction to regulate public utilities, which includes both water and sewer corporations. § 386.250(3) and (4), RSMo. The Non Profit was created by the Respondents merely to circumvent the power of the PSC and maintain control over the manner in which the water and sewer systems are operated. Despite Respondents' attempts to avoid the jurisdiction of the PSC, the PSC maintains jurisdiction because the Non Profit serves all lot owners indiscriminately regardless of whether they are a member of the Non Profit.

In order for a company to be considered a public utility subject to the jurisdiction of the PSC, its services must be devoted to the public use. *State ex rel. M.O. Danciger & Company v. Public Serv. Comm'n*, 205 S.W. 36 (Mo. banc 1918). "The right to regulate under the present law must be measured by the public interest." *Id.* at 42. In other words, an entity is a public utility if it provides service to the general public indiscriminately. *Id.*

A not-for-profit corporation, on the other hand, must have all of its members as utility customers, and operate the utility *only* for the benefit of its members. See *In the Matter of Rocky Ridge Ranch Property Owners Association for an Order of the Public Service Commission Authorizing Cessation of the PSC Jurisdiction and Regulation Over its Operations*, Case No. WD-93-307 (Mo. P.S.C.). Sections 393.921 and 393.839, RSMo. state that: "No person shall become a member of a nonprofit [sewer or water] company unless such person shall *agree* to use services furnished by the company when such shall be available through its facilities." (emphasis added). The ability to agree to use services implies choice. The lot owners have no choice as to what water and sewer utility to use because there is no other option. They do not currently agree to be members of the Non Profit. Despite not being members, they do receive the services of the Non Profit. Additionally, the lots for which there is no connection are considered members under the Non-Profit's bylaws. For those reasons, the Non Profit currently does not operate only for the benefit of members.

The purpose of the statute requiring that a not-for-profit operate only for the benefit of its members is that by having all the customers as members, the customer-members have the power to set their own rates and manage their own services. In the present case, none of the owners receiving utility service are members of the Non Profit and they do not have the ability to set their own rates or manage their own services. The owners at Carriage Oaks Estates subdivision have no control or say over the operations of the water and sewer system. Furthermore, Complainants have no choice but to use the services provided by the Non Profit since the Carriage Oaks Estates Declaration restricts the owners from installing their own well and septic system. Accordingly, the Complainants are at the mercy of the Non Profit, which is controlled by Respondents.

Additionally, the Non Profit was not created in compliance with Sections 393.839.1, 393.921.1, 393.839.7, and 393.921.7. The Bylaws are currently drafted in such a manner that gives Respondents more voting power than allowed in Sections 393.839.7 and 393.921.7, RSMo. Sections 393.839.7 and 393.921.7, RSMo. require that each member be entitled to "one vote on each matter submitted to a vote at a meeting." Article II, Section 2 of the Bylaws violate the "one member, one vote" requirement by allowing members to hold "more than one Membership Interest." Because Respondents would hold more than one Membership Interest, they would be entitled to multiple votes on any particular matter. Likewise, the Bylaws violate Sections 393.839.1 and 393.921.1, RSMo. by allowing prospective utility consumers to be members. Sections 393.839.1 and 393.921.1, RSMo. limit membership to persons who "agree to use services furnished by the company when such shall be available through its facilities." The water and sewer utility services have been in operation for nearly twenty years. Accordingly, they are presently available and membership must be limited to those persons receiving utility services in order for the Non Profit to comply with Chapter 393.

Conclusion

In order to prevent Respondents from engaging in abusive practices, the Public Service Commission must exercise jurisdiction over Respondents. Complainants are at the mercy of Respondents since they have no choice but to accept the water and sewer services provided by the Non Profit. They are forced to accept such services because the utility services are offered by no other utility and the Declaration prohibits them from installing their own well and septic system. Despite being forced to accept the utilities provided by the Non Profit, Complainants have no ability to vote or influence the decisions related to the operation of the water and sewer system because they are not members of the Non Profit. Even if they were members with voting

rights, Respondents would control the manner in which the Non Profit is operated because the Bylaws are written in such a way as to give Respondents votes for each lot they own. Since Respondent, the developer of the subdivision, owns the majority of the lots, Respondents control how the Non Profit is operated it.

Respectfully submitted,

SCHENEWERK & FINKENBINDER,
ATTORNEYS AT LAW, LLC

By: */s/ Karl Finkenbinder*
Karl Finkenbinder, Mo. Bar No. 59425
Jacqueline Bryant, Mo. Bar No. 64755
100 Prairie Dunes Dr. Ste. 200
Branson, Missouri 65616
[417] 334.7922;
[417] 334.7923 FAX
Email: karl@sfalawfirm.com
COUNSEL FOR COMPLAINANTS

CERTIFICATE OF SERVICE

The undersigned attorney certifies that a true and accurate copy of the foregoing was served on opposing counsel this 28 day of February, 2018, via electronic mail.

/s/Karl Finkenbinder
Karl Finkenbinder