BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

The Staff of the Missouri Public Service Commission,	)	
Complainant,	)	
v.	)	Case No. WC-2022-0295 SC-2022-0296
I-70 Mobile City, Inc. d/b/a I-70 Mobile City Park,	)	
Respondent.	)	

LEGAL MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY DETERMINATION

Respondent I-70 Mobile City, pursuant to 20 CSR 4240-2.117, and in support of its Amended Motion for Summary Determination, sets forth the following legal memorandum in support of that Motion:

Introduction

By its Complaint herein, the Commission Staff attempts to extend the PSC's jurisdiction over utilities to include mobile home communities and recreational vehicle lots where the landlord divides its utilities bill and costs between tenants. The Commission has never attempted to exercise regulatory authority over owners of mobile home communities and recreational vehicle lots in Missouri, or to assess them for the costs of the Commission resources dedicated to regulating mobile home communities and recreational vehicle lots. The ramifications of making mobile home community and recreational vehicle lot owners regulated utilities are substantial. It could have a significant impact upon hundreds of mobile home community and recreational vehicle lot owners, and upon hundreds of thousands of mobile home community and recreational

vehicle lot tenants.

Any such extension of Commission jurisdiction should be accomplished through the legislative process, or at a minimum through the Commission's rulemaking process, so that interested stakeholders would have proper notice, equal opportunity for participation, and equitable, competitively neutral sharing of the benefits and burdens of such regulation.

Instead of even-handed legislation or rulemaking, Staff seeks to exert jurisdiction by a complaint against I-70 Mobile City, one owner of a mobile home community and recreational vehicle lot under the present complaint. This attempt at extending the Commission's jurisdiction by Complaint against only one of hundreds of mobile home community and recreational vehicle lot owners is inappropriate. It creates a disparate competitive impact upon I-70 Mobile City, which must stand the expense of defending this action, while other landlords do not. I-70 Mobile City seeks an order of Summary Determination to the effect that the Commission has no jurisdiction over it, or that the Commission will not assert jurisdiction, assuming arguendo that the Commission possesses such jurisdiction.

I-70 Mobile City recognizes that there could be disputes of fact as to whether I-70 Mobile City meets the statutory definition of a water corporation[1], a sewer corporation[2], or a public utility[3]. I-70 Mobile City recognizes that there could be disputes of fact as to whether I-70 Mobile City owns facilities that meet the statutory definitions of a water system[4] or sewer system[5]. Therefore, its Motion for Summary Determination does not focus upon

[1] 386.020 (59) RSMo.
[2] 386.020 (49) RSMo.
[3] 386.020 (43) RSMo.
[4] 386.020 (60) RSMo.
[5] 386.020 (50) RSMo.

those statutory definitions.

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. The Missouri courts, and ensuing decisions of this Commission, have recognized that, in addition to meeting statutory definitions giving rise to Commission jurisdiction, to be subject to Commission jurisdiction the service in question must be "devoted to public use". I-70 Mobile City does not believe a private mobile home community and recreational vehicle lot can be considered devoted to a public use.

Standard for Granting Summary Determination (Summary Judgment)

The standard of review for summary judgment is well established in Missouri. A court should grant summary judgment when the "moving party has demonstrated, on the basis of facts as to which there is no genuine dispute, a right to judgment as a matter of law." *ITT Commercial Fin. Corp. v. Mid Am. Marine Supply Corp.,* 854 S.W.2d 371, 376 (Mo. banc 1993). "'Genuine' implies that the issue, or dispute, must be a real and substantial one—one consisting not merely of conjecture, theory and possibilities." *Id.* at 378. A defending party may establish a right to judgment as a matter of law by showing any one of the following: (1) facts that negate any one of the elements of the claimant's cause of action, (2) the non-movant, after an adequate period of discovery, has not and will not be able to produce evidence sufficient to allow the trier of fact to find the existence of any one of the claimant's elements, or (3) there is no genuine dispute as to the existence of each of the facts necessary to support the movant's properly-pleaded affirmative defense. *Id.* at 381.

Facts contained in affidavits or otherwise in support of a party's motion are accepted as true unless contradicted by evidence in the non-moving party's

response to the summary judgment motion. *Id.* at 376. Once a movant establishes a right to judgment as a matter of law, the non-moving party must come forward with evidence beyond the pleadings showing that one or more material facts are genuinely disputed. *Id.* at 381. The non-moving party may not rely on mere allegations and denials of the pleadings, but must use affidavits, depositions, answers to interrogatories, or admissions on file to demonstrate the existence of a genuine issue for trial. *Id.* "Only evidence that is admissible at trial can be used to sustain or avoid summary judgment." *Weltmer v. Signature Health Services, Inc.*, 417 S.W.3d 856, 862 (Mo. App. E.D. 2014).

For the same reasons as the Commission dismissed the complaint against Aspen Woods for lack of jurisdiction, it should dismiss the complaint against I-70 Mobile City

The Commission previously dismissed a nearly identical complaint against Aspen Woods Apartment Associates, LLC in 2010. In that complaint, like here, the Commission sought to extend its jurisdiction. Exhibit 1. In *Aspen Woods*, the Commission sought to regulate owners of apartments for this first time in the Commission's history. The Commission Staff claimed the Apartment owners, who divided utility bills and costs among tenants, met the statutory definition of a water corporation, sewer corporation, public utility, and that the facilities owned by Aspen Woods met the statutory definitions of water systems and sewer systems. Exhibit 1.

Aspen Woods, in a Motion for Summary Determination, argued the Commission lacked jurisdiction because Aspen Woods did not indiscriminately dedicate their property for the provisions of utility service to the general public. The National Apartment Association also argued the Commission did not have jurisdiction because the legislature regulates the landlord-tenant relationship (under Chapters 441, 534, and 535), and did not delegate that authority to the

Commission. The jurisdictional issue was briefed extensively.

On January 13, 2011, The Commission issued and Order Staying the Complaint and Opening Workshop. A true and accurate copy of the order is attached as Exhibit 2. In that Order, the Commission recognized the jurisdictional issue, explaining:

> The issues involved in this matter involve a complex interplay between the statutes and regulations governing public utilities, consumer protection, and contract law. Any ultimate decisions regarding the interpretation and application of law and policy in this matter will have a major affect on Missouri citizens receiving utility service in landlord tenant relationships. Consequently, the Commission will stay this action and open a workshop to allow all stakeholders the opportunity to accurately delineate the full reach of the Commission's jurisdiction and what appropriate regulations and mechanisms are required to ensure safe and adequate utility services are being provided to this segment of Missouri ratepayers at just and reasonable rates.

Exhibit 2. The Commission indicated it would open a separate file to "investigate the proper regulation of utility services provided in Missouri landlord-tenant relationships." Exhibit 2.

On January 19, 2011, the Commission issued an "Order Opening Investigation and Workshops, Directing Notice, and Directing Filing" noting that "any ultimate decisions regarding the interpretation and application of law and policy in this matter will have a major affect on Missouri citizens receiving utility service in landlord-tenant relationships." Exhibit 3.

Nine months later, in September 2011, the Commission issued an "Order Closing Investigation and Workshops." In that order, the Commission explained:

> The Commission has since had further time to evaluate the reasons that prompted the investigation and has concluded that there is no reason to further explore those issues. The Commission's jurisdiction and its duties are defined in the pertinent chapters of the Missouri Revised Statutes. There is no action the Commission could take to alter the

extent of its jurisdiction or statutory duties.

Exhibit 4.

On October 15, 2011, the Commission issued an "Order dismissing Complaint" in the Aspen Woods Case stating the "Staff['s] Complaint against Aspen Woods…is dismissed for lack of jurisdiction." Exhibit 5.

There is no justification for the Commission to decide differently here. The Staff's Complaint should be dismissed for lack of jurisdiction for all of the reasons stated herein, just as in Aspen Woods.

The Missouri Public Service Commission Does Not Have Explicit Jurisdiction over Mobile Home Community and Recreational Vehicle Lot Owners

The Missouri Public Service Commission is a creature of statute, and its jurisdiction is controlled by statute.[6] The Commission is not a court. It is a creature of the Legislature. Its jurisdiction, powers, and duties are fixed by statute.[7] A basic tenet of administrative law provides that "an administrative agency has only such jurisdiction or authority as may be granted by the legislature.[8] If the Commission lacks the statutory power, it is without subject matter jurisdiction, and subject matter jurisdiction cannot be enlarged or conferred by consent or agreement of the parties.[9]

There is no statute conferring jurisdiction to the Commission to regulate the manner in which mobile home community and recreational vehicle lot owners "pass through", divide, or allocate water and sewer costs among tenants. Section 386.250 RSMo, while it confers jurisdiction over water

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[6] *State ex rel. Smithco Transport Co. v. PSC*, 307 SW2d 361, 374 (Mo. App. 1957).
[7] *State ex rel. Doniphan Tel. Co. v PSC*, 369 SW2d 572, 575 (Mo. 1963).
[8] *Carr v. North Kansas City Beverage Co.*, 49 SW3d 205, 207 (Mo. App. 2001).
[9] *Carr*, supra, at p 207.

companies and sewer companies, makes no mention of such jurisdiction.

The Commission previously dismissed a complaint against a mobile home park operator that provided water and sewer services to those renting pads.[10] The Commission found the property owner was only providing services to a "limited group" of "tenants" – because it was "not providing water service to the public generally" it was not a "public utility." *Id.*

Furthermore, here, it is undisputed that I-70 does not provide water or sewer service "for gain" – falling outside the statutory definitions of water corporation, sewer corporation, and public utility. Statement of Material Facts, ¶26.

It does not appear that the Commission has, during its existence, attempted to regulate the manner in which mobile home community and recreational vehicle lot owners charge tenants for water and sewer usage.

If the Commission did assume jurisdiction of mobile home community and recreational vehicle lot owners, there would have to be a change in the nature of its regulatory activities. There would need to be a change in the way its assessments are allocated, among other things.

If the Missouri Public Service Commission obtains or asserts Jurisdiction Over Mobile Home Community and Recreational Vehicle Lot Owners, it should be done by Legislation or Rulemaking

There may be differences of opinion as to whether there is a need for the state to regulate mobile home community and recreational vehicle lot owners, mobile home communities and recreational vehicle lots, tenants, and the "passing through" the costs of utility service by landlords to tenants. However,

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[10] *Re: Norman Goad Construction Company*, 21 Mo.P.S.C. (N.S.) 614 (1977); see also *Orler v. Folsom Ridge, LLC*, 2007 WL 2066385 (2007) (the Commission dismissed complaints for lack of jurisdiction against an association that offered water and sewer "on an optional basis to a discrete group of people[.]").

there should be no dispute that the preferred manner of doing so be deliberate, fair, and even handed. Logic, common sense, and good governance dictate that such an important assumption of state police power should be done via the legislative process.

If the Commission believes it presently possesses statutory jurisdiction over landlords and tenants sufficient to regulate the "passing through" of utility service charges, the appropriate method for the Commission to exercise this jurisdiction is to promulgate rules and regulations equally applicable to all.

The Complaint process is not the correct method of asserting jurisdiction over landlords and tenants. It is not even handed. Today, I-70 Mobile City appears to be the only landlord having its costs of doing business increased by the attempted exercise of Commission jurisdiction.

A Private Mobile Home Community and Recreational Vehicle Lot is not devoted to the public use, and is therefore not subject to Regulation by the Missouri Public Service Commission

Since the inception of the Missouri Public Service Commission, the statutes conferring regulatory jurisdiction to the Commission incorporate a threshold requirement that the utility explicitly professes to have dedicated its private property to public use. *State ex rel M.O. Danciger & Co. v MoPSC*, 205 S.W. 36, 40; 275 Mo. 483 (Mo. 1918). In this 1918 case of first impression in Missouri, the *Danciger* court, at page 42, after a review of decisions of other jurisdictions, determined:

> The fundamental characteristic of a public calling is indiscriminate dealing with the general public. As Baron Alderson said in the leading case: 'Everybody who undertakes to carry any one who asks him is a common carrier. The criterion is whether he carries for particular persons only, or whether he carries for every one. 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 you and me only, that is a matter

of special contract.

Danciger, at page 40, also stated:

> for the operation of the electric plant must of necessity be for a public use, and therefore be coupled with a public interest; otherwise the Commission can have no authority whatever over it. The electric plant must, in short, be devoted to a public use before it is subject to public regulation.

The *Danciger* court held that a company owning an electric plant which entered into private contracts to supply certain entities with excess power production was not subject to Commission regulatory authority, as the offering was not devoted to the public use.

In *State ex rel. Buchanan County Power Transmission Company v Baker*, 9 S.W.2d 589 (Mo. App. 1928), a company purchased electrical power at a supply point in Buchanan County, delivered the power to a different delivery point, also in Buchanan County, via a transmission line the company owned, and at the delivery point sold the power to a single customer. The issue was whether this company was a public utility subject to the centralized taxing authority of the State Tax Commission, or whether the company was not a public utility and therefore taxable by the local assessor. Applying the *Danciger* devotion to public use requirement analysis, Baker held that merely purchasing, transmitting, and selling a commercial product (here electricity), without more, contained no implication of public service. It was held the company was not a public utility.

In *State ex rel. Lohman & Farmers Mutual Telephone Company v Brown*, 19 S.W.2d 1048 (Mo. 1929), the telephone company operated a telephone exchange for itself, except for one line it invited the public to use. The company was ordered by the Public Service Commission to file schedules of rates and charges (tariffs). The Circuit Court upheld this order, but the Supreme Court

reversed. The single line the public was invited to use was determined to be devoted to public use, and subject to Commission regulation. However, the Supreme Court held that the other operations were not subject to public use, and not subject to regulation.

In *City of St. Louis v Mississippi River Fuel Corporation*, 97 F. 2d 726 (8th, Cir. 1938), the city attempted to apply a gross receipts tax, applicable to entities furnishing gas for public use. The Mississippi River Fuel Corporation supplied natural gas to 14 industrial customers within the city pursuant to special contracts. In holding the tax did not apply to Mississippi River Fuel, the Eighth Circuit Court of Appeals applied the law of Missouri (principally *Danciger*) and held that the ordinance applied to the sale of gas to the public generally and indiscriminately, and not to particular persons upon special contract.

In *State ex rel. and to Use of Cirese v PSC*, 178 S.W.2d 788 (Mo. App. 1944), the issue was whether Mr. and Ms. Cirese were unlawfully engaged in selling electricity to the public without a certificate of public convenience and necessity. The Cireses had electrical power generation facilities, provided service to their own properties, provided service to tenants living in the Cirese properties, and also were preparing to extend their provision of service to 500 additional customers. The Court found that the Cireses were not a public utility "insofar as their facilities and activities are confined to the manufacture, distribution and sale of electrical energy to themselves and to their own buildings and tenants thereof" (emphasis added), 178 S.W.2d 790. The Cirese activities in soliciting or serving customers other than themselves and their tenants were concluded to be devoted to public use, and subject to Commission regulation.

The applicability of *Cirese* to the facts under review here is readily

apparent. *Cirese* held that a landlord selling utility services to its own tenants has not devoted the proper to public use, and is not subject to Commission jurisdiction. I-70 Mobile City has done no more than what the Cireses did. Just as the Cireses were not subject to regulation with respect to electricity sold to their own tenants, I-70 Mobile City here is not subject to regulation for allocating water and sewer charges to the tenants of I-70 Mobile City.

In *Khulusi v Southwestern Bell Yellow Pages*, 916 S.W.2d 227 (Mo. App. 1996), plaintiff had been wrongfully excluded from a directory. He sued for damages, and suffered an adverse summary judgment. On appeal this result was affirmed. Plaintiff contended that the Southwestern Bell Yellow Pages operation constituted a public utility. The Appeals Court upheld the trial court, finding that the Yellow Pages was a matter of private contract for the publishing of advertisements in the classified section of a telephone directory, not a public service, and not devoted to the public use.

In *Osage Water Company v Miller County Water Authority*, 950 S.W.2d 569 (Mo. App. 1997), Osage Water sought to condemn certain real property in order to begin providing water service, even though Miller County Water was already providing that service from the same property Osage Water sought to condemn. The trial court ruled against Osage Water. On appeal, Osage Water challenged the trial court's conclusion that Miller County Water was a public utility not subject to condemnation. In affirming the trial court with respect to the "devotion to public use" element of public utility status, the Court of Appeals relied on the following facts (1) that there was no evidence Miller County Water refused to provide service, (2) that Miller County undertakes to provide water service to everyone within its capability, and not merely for particular persons, and (3) that Miller County had undertaken the responsibility to provide water service to all.

In its July 24, 1986 Report and Order in the *Matter of the Investigation into WATS Resale by Hotels*, et al., Case Nos. TO-84-222, *et al.*, 29 Mo. P.S.C. (N.S.) 535, this Commission ruled that hotels reselling telephone service to their tenants were not subject to Commission regulation:

> Based on the above analysis, the Commission finds that hotels and motels which resell telephone service to their own tenants incidental to other terms in a lease are not holding themselves out to provide telephone service to the public generally and indiscriminately. Therefore, the Commission concludes that such hotels or motels are not subject to its jurisdiction and therefore are not required to be certificated pursuant to Section 392.260 RSMo 1978.

The Commission's decision in *WATS Resale* is of obvious applicability here. Hotels reselling telephone service to their tenants have not devoted the hotel to public use. If that is true, then mobile home community and recreational vehicle lot owners providing service to their tenants also have not devoted their mobile home community and recreational vehicle lots to public use.

This Commission has previously adhered to the statutory requirement that, in order to be subject to the Commission's jurisdiction, the entity concerned must have devoted its private property to public use. In *Orler v Folsom Ridge, LLC*, WC-2006-0082, *et al.*, Report and Order of June 14, 2007, the Commission entertained a complaint by nine individuals that Folsom Ridge, LLC, including its related association ("Folsom Ridge", or "Association"), was illegally operating a water and sewer system without a certificate of convenience and necessity from the Commission. The threshold question was whether the Commission had jurisdiction over Folsom Ridge by virtue of it being a public utility.

The Commission's Order followed the analysis of *Danciger*, stating:

> The regulation and control of business of a private nature is sustained by reference to the police power, and even then it is sustained only when

> the courts have been able to say that a business is in character and extent of operation such that it touches the whole people and affects their general welfare. Consequently, the Court articulated the test for determining if a company was devoting its services to the public use when it summarized and stated: "The fundamental characteristic of a public calling is indiscriminate dealing with the general public." In a later case, the Court would further cement its interpretation holding that regardless if the statutes defining corporations falling under the jurisdiction of the Commission have expressly written the idea of the public use into them, it is nonetheless a requirement. (emphasis added)

After reviewing the physical circumstances of the area, facilities, and customers or potential customers, the Commission concluded that there was no evidence in the record that any non-member of the Association was receiving water or sewer service, and that service was not available without first becoming a member of the Association. The Association did not offer water and sewer service to all members of the general public within its service capabilities, but rather offers services to a discrete group of people who become members of the Association. Thus, while the water and sewer systems are available to all current Island residents, and to potential future Island residents, they are only being offered on an optional basis to a discrete group of people (members of the Association), not the general public. Therefore, Big Island could not be considered a public utility, and the Complaint was dismissed for lack of Commission subject matter jurisdiction.

Based on the undisputed material facts (supported by the affidavit of Jennifer Hunt, Exhibit 1), with respect to the mobile home community and recreational vehicle lot in question, I-70 Mobile City has not devoted its privately owned mobile home community and recreational vehicle lot to public use by indiscriminately offering occupancy and use of water and sewer services therein to the entire general public. The undisputed material facts establish that I-70's mobile home community and recreational vehicle lot is private

property. SMF, ¶27. I-70 Mobile City requires that tenants meet eligibility criteria, and must sign a written lease wherein they agree to the water and sewer allocation for which the tenants agree to pay I-70 Mobile City. SMF, ¶¶ 21, 29. I-70 does not offer lots to the general public. SMF, ¶¶ 21, 22, 28. Not only does I-70 not provide water and sewer service to the general public, but I-70 does not even provide water and sewer service to all tenants in the I-70 community. SMF, ¶¶ 23-24.

Applying the controlling precedent of *Danciger* and its progeny, in particular *Cirese* and *WATS Resale*, landlords, by passing through utility charges to their own tenants pursuant to private lease, have not devoted their lot's water and sewer facilities to the public use. It should be concluded that I-70 Mobile City is not subject to the Commission's jurisdiction. I-70 Mobile City does not hold itself out to provide lots to every prospective tenant that asks. I-70 Mobile City only does so for those whom it accepts. The mere ownership and leasing of occupancy in a mobile home community and recreational vehicle lot is in the nature of private commerce. There is no implication of public service in the ownership and leasing of private property. This is a matter of special or private contract, not an indiscriminate offering to the general public. Like the facts of the *Southwestern Bell Yellow Pages* case, letting mobile home community and recreational vehicle lots is more akin to the nature of a private contract for the publishing of advertisements in the classified section of a telephone directory. It does not equate to public service. It does not equate to a devotion to public use. The Commission has determined the same, specifically as to mobile home parks before, in *Norman Goad Construction Company*. There is no reasonable justification for a different result now.

Conclusion

Wherefore, on the basis of the Motion for Summary Determination, the

supporting affidavit of Jennifer Hunt, and this Legal Memorandum in Support of Summary Determination, I-70 Mobile City respectfully requests that the Commission enter an order of Summary Determination in favor of I-70 Mobile City, and against the Staff of the Missouri Public Service Commission, dismiss the Complaint, together with such other and further relief as is reasonably necessary to conclude this proceeding.

Respectfully submitted,

ELLINGER BELL

By: */s/ Stephanie S. Bell*

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served upon all of the parties of record or their counsel, pursuant to the Service List maintained by the Data Center of the Missouri Public Service Commission on September 22, 2023.

/s/ Stephanie S. Bell
Stephanie S. Bell