

In the Circuit Court of St Louis County
State of Missouri

State ex rel Missouri

Barney Bennett Janice Shands and

George Goldman et al

)14sl Cc 02207

Plaintiffs

v

Lewis and Clark 195 LLC

et al

Defendants

Plaintiffs' Memo of law on TRO

Comes now Plaintiff s and submit

1 The burden would be on the persons claiming there is no jurisdiction.

2 The rule of administrative law and the right to remove a case from court is when

a there is need for administrative expertise and an administrative record ,

b the statute so requires it

c there can be adequate relief .

3Even more so, as the caselaw shows there is no general exclusion for PSC ¹

4 As in Pretsky v. Southwestern Bell Tel. Co., 396 S.W.2d 566 (Mo.1965), -there are a myriad of cases

¹In fact Ameren has even contended Plaintiffs Shands, Goldman and Bennett cannot file a complaint based on an claimed CSR that the complaint has to be by the account holder and thus their TRO would go ahead.

against the utilities including for collection of amounts that are not due and unfair means of collection such as a here a disconnection for amounts known not to be due.

5. Even more so where where an agency is a creature of statute, its authority is limited to what is in its enabling statute.

For the PSC , its jurisdiction instead is set out in RS 386.390, and 393.140 RSMo 1994. Neither apply here to require PSC pre filing,

RS Mo 386.390 which states:
Complaint, who may make--procedure to hear--service of process, how had--time and place of hearing, how fixed.

386.390. 1. Complaint **may** be made by the commission of its own motion, or by the public counsel or any corporation or person, chamber of commerce, board of trade, or any civic, commercial, mercantile, traffic, agricultural or manufacturing association or organization, or any body politic or municipal corporation, by petition or complaint in writing, **setting forth any act or thing done or omitted to be done by any corporation, person or public utility, including any rule, regulation or charge heretofore established or fixed by or for 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;** provided, that no complaint shall be entertained by the commission, except upon its own motion, as to the reasonableness of any rates or charges of any gas, electrical, water, sewer, or telephone corporation, unless the same be signed by the public counsel or the mayor or the president or chairman of the board of aldermen or a majority of the council, commission or other legislative body of any city, town, village or county, within which the alleged violation occurred, or not less than twenty-five consumers or purchasers, or prospective consumers or purchasers, of such gas, electricity, water, sewer or telephone service.
...(emphasis added)

As in the highlighted section :

A . does not require or mandate any filing,(as with other agencies such as the MHRC which requires a discrimination charge and right to sue letter before filing in court) , it uses the term “may” not shall which is permissive

B . does not extend to all complaints of any kind; only those claimed to be violation of .. rule, regulation or charge heretofore established or fixed by or for 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”.. It does not include common law or torts, just “provision of law.

As in Turner v Clayton, ___ SW3d ___, (Mo 2010), on statutory construction:

....The seminal rule of statutory construction is to ascertain the intent of the legislature from the language used and to consider the words used in their plain and ordinary meaning. State ex rel. Unnerstall v. Berkemeyer, 298 S.W.3d 513, 519 (Mo. banc 2009)..This Court enforces statutes as they are written, not as they might have been written. City of Wellston v. SBC Commc'ns, Inc. , 203 S.W.3d 189, 192 (Mo. banc 2006). It is presumed that the General Assembly legislates with knowledge of existing laws.State ex rel. Broadway-Washington Assocs., Ltd. v. Manners , 186 S.W.3d 272, 275 (Mo.banc 2006).

It is submitted the term “provision of law” is for parts of a written statute or contract, not for common law or equity or tort. If it was intended to cover all instances, it would have said , all instances , arising out of common law, tort or statute; it would not have used the phrase “provision of law”.

The other statute is also no help to the utilities.

While Mo RS 393.140 provides for added authority, it is not general omnipotent authority. Instead it is limited to specifics (again showing there was no intention of the Mo legislature to remove the courts from any and all matters relating to a utility). Rather it lists specifics:

General powers of commission in respect to gas, water, electricity and sewer services.

393.140. The commission shall:

(1) Have general supervision of all gas corporations, electrical corporations, water corporations and sewer corporations having authority under any special or general law or under any charter or franchise to lay down, erect or maintain wires, pipes, conduits, ducts or other fixtures in, over or under the streets, highways and public places of any municipality, for the purpose of furnishing or distributing water or gas or of furnishing or transmitting electricity for light, heat or power, or maintaining underground conduits or ducts for electrical conductors, or for the purpose of collecting, carrying, treating, or disposing of sewage, and all gas plants, electric plants, water systems and sewer systems owned, leased or operated by any gas corporation, electrical corporation, water corporation, or sewer corporation.

(2) Investigate and ascertain, from time to time, the quality of gas or water supplied and sewer

service furnished by persons and corporations, examine or investigate the methods employed by such persons and corporations in manufacturing, distributing and supplying gas or electricity for light, heat or power and in transmitting the same, and in supplying and distributing water for any purpose whatsoever, and in furnishing a sewer system, and have power to order such reasonable improvements as will best promote the public interest, preserve the public health and protect those using such gas, electricity, water, or sewer system, and those employed in the manufacture and distribution thereof, and have power to order reasonable improvements and extensions of the works, wires, poles, pipes, lines, conduits, ducts and other reasonable devices, apparatus and property of gas corporations, electrical corporations, water corporations, and sewer corporations.

(3) Have power, by order, to fix from time to time standards for the measurement of the purity or illuminating power of gas to be manufactured, distributed or sold by persons or corporations for lighting, heating or power purposes, to prescribe from time to time the efficiency of the electric supply system, of the current supplied and of the lamps furnished by the persons or corporations generating and selling electric current, and to fix from time to time standards for the measurement of the purity or pressure of water to be distributed or sold by persons or corporations for any purpose whatsoever, and to fix from time to time the standards for designing, constructing, operating and maintaining sewer systems of sewer corporations, including sewers, sewage pumping stations, sewage treatment works, primary treatment facilities, sludge digestion and disposal facilities, secondary treatment facilities, disinfection facilities, and any and all facilities related thereto; provided, however, that such standards shall be supplemental to and in no way set standards lesser than the minimum standards adopted by the state water pollution board, and by order to require gas so manufactured, distributed or sold to equal the standards so fixed by it, and to prescribe from time to time the reasonable minimum and maximum pressure at which gas shall be delivered by said persons or corporations. For the purpose of determining whether the gas manufactured, distributed or sold by such persons or corporations for lighting, heating or power purposes conforms to the standards of illuminating power, purity and pressure, and for the purpose of determining whether the efficiency of the electric supply system, of the current supplied and of the lamps furnished, and for the purpose of determining whether the water furnished or sold conforms to the standard of purity and pressure, and for the purpose of determining whether the sewer system conforms to the standards for designing, constructing, operating and maintaining sewer systems, and conforms to the orders issued by the commission, the commission shall have power, of its own motion, to examine and investigate the plants and methods employed in manufacturing, delivering and supplying gas, electricity or water, and the collecting, carrying, treating and disposing of sewage, and shall have access, through its members or persons employed and authorized by it, to make such examinations and investigations to all parts of the manufacturing plants owned, used or operated for the manufacture, transmission or distribution of gas or electricity by any such person or corporation, and to all parts of the systems owned, used or operated for the supplying and distribution of water and the collecting, carrying, treating and disposing of sewage by any such person or corporation. Any employee or agent of the commission who divulges any fact or information which may come to his knowledge during the course of any such inspection or examination, except insofar as he may be directed by the commission, or by a court or judge thereof, or authorized by law, shall be guilty of a misdemeanor.

(4) Have power, in its discretion, to prescribe uniform methods of keeping accounts, records and books, to be observed by gas corporations, electrical corporations, water corporations and sewer corporations engaged in the manufacture, sale or distribution of gas and electricity for light, heat or power, or in the distribution and sale of water for any purpose whatsoever, or in the collection, carriage, treatment and disposal of sewage for municipal, domestic or other necessary beneficial purpose. It may also, in its discretion, prescribe, by order, forms of accounts, records and memoranda to be kept by such persons and corporations. Notice of alterations by the commission in the required method or form of keeping a system of accounts shall be given to such persons or corporations by the commission at least six months before the same shall take effect. Any other and additional forms of accounts, records and memoranda kept by such corporation shall be subject to examination by the commission.

(5) Examine all persons and corporations under its supervision and keep informed as to the methods, practices, regulations and property employed by them in the transaction of their business. Whenever the commission shall be of the opinion, after a hearing had upon its own motion or upon complaint, that the rates or charges or the acts or regulations of any such persons or corporations are unjust, unreasonable, unjustly discriminatory or unduly preferential or in any wise in violation of any provision of law, the commission shall determine and prescribe the just and reasonable rates and charges thereafter to be in force for the service to be furnished, notwithstanding that a higher rate or charge has heretofore been authorized by statute, and the just and reasonable acts and regulations to be done and observed; and whenever the commission shall be of the opinion, after a hearing had upon its own motion or upon complaints, that the property, equipment or appliances of any such person or corporation are unsafe, insufficient or inadequate, the commission shall determine and prescribe the safe, efficient and adequate property, equipment and appliances thereafter to be used, maintained and operated for the security and accommodation of the public and in compliance with the provisions of law and of their franchises and charters.

(6) Require every person and corporation under its supervision and it shall be the duty of every person and corporation to file with the commission an annual report, verified by the oath of the president, treasurer, general manager or receiver, if any, thereof. The verification shall be made by said official holding office at the time of the filing of said report, and if not made upon the knowledge of the person verifying the same, shall set forth the sources of his information and the grounds of his belief as to any matters not stated to be verified upon his knowledge. The report shall show in detail the amount of its authorized capital stock and the amount thereof issued and outstanding; the amount of its authorized bonded indebtedness and the amount of its bonds and other forms of evidence of indebtedness issued and outstanding; its receipts and expenditures during the preceding year; the amount paid as dividends upon its stock and as interest upon its bonds; the names of its officers and the aggregate amount paid as salaries to them and the amount paid as wages to its employees; the location of its plant or plants and system, with a full description of its property and franchises, stating in detail how each franchise stated to be owned was acquired; and such other facts pertaining to the operation and maintenance of the plant and system, and the affairs of such person or corporation as may be required by the commission.

Such reports shall be in the form, cover the period and be filed at the time prescribed by the commission. The commission may, from time to time, make changes and additions in such forms. When any such report is defective or believed to be erroneous, the commission shall notify the person or corporation making such report to amend the same within a time prescribed by the commission. Any such person or corporation which shall neglect to make any such report or which shall fail to correct any such report within the time prescribed by the commission shall be liable to a penalty of one hundred dollars and an additional penalty of one hundred dollars for each day after the prescribed time for which it shall neglect to file or correct the same, to be sued for in the name of the state of Missouri. The amount recovered in any such action shall be paid to the public school fund of the state. The commission may extend the time prescribed for cause shown.

(7) Have power, either through its members or inspectors or employees duly authorized by it, to enter in or upon and to inspect the property, buildings, plants, factories, powerhouses, ducts, conduits and offices of any such corporations or persons.

(8) Have power to examine the accounts, books, contracts, records, documents and papers of any such corporation or person, and have power, after hearing, to prescribe by order the accounts in which particular outlays and receipts shall be entered, charged or credited.

(9) Have power to compel, by subpoena duces tecum, the production of any accounts, books, contracts, records, documents, memoranda and papers. In lieu of requiring production of originals by subpoena duces tecum the commission or any commissioner may require sworn copies of any such books, records, contracts, documents and papers, or parts thereof, to be filed with it. The commission may require of all such corporations or persons specific answers to questions upon which the commission may need information, and may also require such corporations or persons to file periodic reports in the form, covering the period and filed at the time prescribed by the commission. If such corporation or person shall fail to make specific answer to any question or shall fail to make a periodic report when required by the commission as herein provided within the time and in the form prescribed by the commission for the making and filing of any such report or answer, such corporation or person shall forfeit to the state the sum of one hundred dollars for each and every day it shall continue to be in default with respect to such report or answer. Such forfeiture shall be recovered in an action brought by the commission in the name of the state of Missouri. The amount recovered in any such action shall be paid to the public school fund of the state.

(10) Have power in all parts of the state, either as a commission or through its members, to subpoena witnesses, take testimony and administer oaths to witnesses in any proceeding or examination instituted before it, or conducted by it, in reference to any matter under sections 393.110 to 393.285.

(11) Have power to require every gas corporation, electrical corporation, water corporation, and sewer corporation to file with the commission and to print and keep open to public inspection

schedules showing all rates and charges made, established or enforced or to be charged or enforced, all forms of contract or agreement and all rules and regulations relating to rates, charges or service used or to be used, and all general privileges and facilities granted or allowed by such gas corporation, electrical corporation, water corporation, or sewer corporation; but this subdivision shall not apply to state, municipal or federal contracts. Unless the commission otherwise orders, no change shall be made in any rate or charge, or in any form of contract or agreement, or any rule or regulation relating to any rate, charge or service, or in any general privilege or facility, which shall have been filed and published by a gas corporation, electrical corporation, water corporation, or sewer corporation in compliance with an order or decision of the commission, except after thirty days' notice to the commission and publication for thirty days as required by order of the commission, which shall plainly state the changes proposed to be made in the schedule then in force and the time when the change will go into effect. The commission for good cause shown may allow changes without requiring the thirty days' notice under such conditions as it may prescribe. No corporation shall charge, demand, collect or receive a greater or less or different compensation for any service rendered or to be rendered than the rates and charges applicable to such services as specified in its schedule filed and in effect at the time; nor shall any corporation refund or remit in any manner or by any device any portion of the rates or charges so specified, nor to extend to any person or corporation any form of contract or agreement, or any rule or regulation, or any privilege or facility, except such as are regularly and uniformly extended to all persons and corporations under like circumstances. The commission shall have power to prescribe the form of every such schedule, and from time to time prescribe by order such changes in the form thereof as may be deemed wise. The commission shall also have power to establish such rules and regulations, to carry into effect the provisions of this subdivision, as it may deem necessary, and to modify and amend such rules or regulations from time to time.

(12) In case any electrical corporation, gas corporation, water corporation or sewer corporation engaged in carrying on any other business than owning, operating or managing a gas plant, electric plant, water system or sewer system which other business is not otherwise subject to the jurisdiction of the commission, and is so conducted that its operations are to be substantially kept separate and apart from the owning, operating, managing or controlling of such gas plant, electric plant, water system or sewer system, said corporation in respect to such other business shall not be subject to any of the provisions of this chapter and shall not be required to procure the consent or authorization of the commission to any act in such other business or to make any report in respect thereof. But this subdivision shall not restrict or limit the powers of the commission in respect to the owning, operating, managing or controlling by such corporation of such gas plant, electric plant, water system or sewer system, and said powers shall include also the right to inquire as to, and prescribe the apportionment of, capitalization, earnings, debts and expenses fairly and justly to be awarded to or borne by the ownership, operation, management or control of such gas plant, electric plant, water system or sewer system as distinguished from such other business. In any such case if the owning, operating, managing or controlling of such gas plant, electric plant, water system or sewer system by any such corporation is wholly subsidiary and incidental to the other business carried on by it and is inconsiderable in amount and not general

in its character, the commission may by general rules exempt such corporation from making full reports and from the keeping of accounts as to such subsidiary and incidental business.

End of quote .

None apply here.

- This is **not about supervision on if laying down of wires**, pipes, conduits, ducts or other fixtures in, over or under the streets, highways and public places of any municipality, for the purpose of furnishing or distributing water or gas or of furnishing or transmitting electricity for light, heat or power, or maintaining underground conduits or ducts for electrical conductors, or for the purpose of collecting, carrying, treating, or disposing of sewage, and all gas plants, electric plants, water systems and sewer systems owned, leased or operated by any gas corporation, electrical corporation, water corporation, or sewer corporation.

-This is **not about the quality of gas or water supplied and sewer service or the need to order** such reasonable improvements as will best promote the public interest, preserve the public health and protect those using such gas, electricity, water, or sewer system,

-This is **not about the standards for the measurement of** .. the purity or pressure of water to be distributed or sold by persons or corporations for any purpose whatsoever,

-This is **not about what kind of bookkeeping or account records** were kept

- This is **not about whether a rate or tariff** was fair.

- This is **not about whether they filed an annual** report and who verified it

-This is **not about a refusal to permit an inspection** of its property, buildings, plants, factories, powerhouses, ducts, conduits and offices of any such corporations or persons.

- This is **not about , after hearing, to which particular outlays and receipts** shall be entered, charged or credited.

- This is **not about the refusal to honor** a subpoena,

- This is **not about the right in cases rightfully before it per 393.110 to 393.285 to require testimony or to make sure they print and keep open to public inspection schedules** showing all rates and charges or ion seeing if not regulated that the business is kept separate.

In short is not about anything in the list of powers at RS Mo 393.140.

. **Even general supervisory authority should not mean that PSC could take away the license , does not mean could interfere with a common law property claim, any more than the right of Courts and ODC to supervise and regulate lawyers means cannot sue lawyers for damages or**

the right to license doctors and general supervisory control over them does not mean doctors cannot be sued for malpractice and other torts before filing with them first.

6 This is confirmed in Pretsky v SWBell (where outrageous conduct was first established on the collection actions of a phone co) and other cases, on which the court take judicial notice, where there are a myriad of cases against the utilities for damages including for collection of amounts that are not due and unfair means of collection, such as a here a disconnection for amounts known not to be due.

6. The TRO and counts against the utilities, they are not based on any PSC rule, tariff, regulation or statute or such other kind of written provision; they are based on common law, equity and torts, that would not owe for what is stolen or criminally charged in your name and that it would be ultra vires/outside any allowed authority for LCTCA officers or property managers to have allowed LCTCA accounts to be used for others outside 9953 Lewis and Clark

7. The PSC jurisdiction is for the setting of rates, tariffs and rules and licensing of utilities. It is not for damages with no requirement as for MCHR (Ch 213) on discrimination claims (as the legislature would have to set) that have to pre file with PSC.

This limit is even confirmed in Section 386.500.2 where when it limits causes of action, it is very clear and limits only those actions that arise "out of any order or decision of the [PSC]".

The causes of action here does not arise out of an order or decision of PSC, they arise from common law including as in the Declaration and the fact this is a condo assn.

8 This is not about an energy standard such as Evans v Empire 346 S.W.3d 313 (Mo App2011) where "James Evans, Kelly Cardin, and Power Source Solar ("Appellants") filed suit against Empire District Electric Company ("Empire") and the Missouri Public Service Commission ("PSC") seeking a declaratory judgment that section 393.1050[1] (the Renewable Energy Standard) is invalid."

⁹This is more like *RASTER v AMERISTAR CASINOS, INC.* 280 SW 3d 487 (Mo App 2010) where

the Eastern District Court of Appeals stated:

claims of primary jurisdiction claimed by a casino (another regulated industry) tried to claim had to go to the gaming commission on a breach of contract action and MMPA action :

.The plaintiffs appeal the judgment of the trial court dismissing their two claims brought under the Missouri Merchandising Practices Act (MMPA) and their two breach-of-contract claims against the defendants Ameristar Casinos, Inc. and Ameristar Casino St. Charles Inc. ..

. plaintiffs brought suit, contending that the defendants' actions violated the MMPA and constituted a breach of contract. For their MMPA claim, the plaintiffs alleged that the defendants' representation regarding the changes in the point-award formulas, and the defendants' failure to timely and adequately disclose its falsity, was an "unlawful practice" within the meaning and scope of the MMPA. ..., the defendants also contended that plaintiffs' petition should be dismissed because the Missouri Gaming Commission had primary jurisdiction over the matter.:

Before addressing the plaintiffs' final point on appeal, we pause to address a challenge to the trial court's jurisdiction. The defendants contend that, in the event we conclude the petition states a claim, the court should nevertheless dismiss the petition and defer the issues raised by the plaintiffs' petition to the Missouri Gaming Commission under the doctrine of primary jurisdiction. The defendants argue that the plaintiffs' cause of action falls under the Commission's jurisdiction because the Commission has promulgated specific regulations controlling the advertisement and promotional activities of casinos. We are not persuaded.

The plaintiffs should not be deprived of their statutory and common-law remedies merely because the defendants' activities are regulated. There are many regulatory bodies in this state. The establishment of the Board of Healing Arts does not deprive an injured patient of his medical-malpractice claim. Likewise, the establishment of the Gaming Commission does not deprive a casino customer of statutory and common-law remedies. We conclude that strict regulation exists due to the checkered history of legalized gambling, not to deprive casino customers of their legal remedies. The defendants effectively argue that the plaintiffs' statutory and common-law remedies are repealed by implication. Repeals of statutory provisions by implication, however, are disfavored. See *StopAquila.org v. City of Peculiar*, 208 S.W.3d 895, 905 n.14 (Mo. banc 2006). Furthermore, "where the legislature intends to preempt a common law claim, it must do so clearly." *Overcast v. Billings Mutual Insurance Company*, 11 S.W.3d 62, 69 (Mo. banc 2000). "[U]nless a statute clearly abrogates the common law either expressly or by necessary implication, the common law rule remains valid." In *re Estate of Parker*, 25 S.W.3d 611, 614 (Mo.App. W.D. 2000). Nothing in the statute creating the Gaming Commission expressly or implicitly abrogates

the plaintiffs' common-law and statutory remedies.

Moreover, we fail to perceive how the doctrine of primary jurisdiction applies. Under the doctrine of primary jurisdiction, courts generally will not decide a controversy involving a question within the jurisdiction of an administrative tribunal until after the tribunal has rendered its decision.

Killian v. J & J Installers, Inc., 802 S.W.2d 158, 160 (Mo. banc 1991). This policy of restraint applies (a) where administrative knowledge and expertise are demanded to determine technical, intricate fact questions, and (b) where uniformity is important to the regulatory scheme. Id.; MCI Metro Access Transmission Services, Inc. v. City of St. Louis, 941 S.W.2d 634, 644 (Mo.App. E.D. 1997). The instant case does not fall within these circumstances.

end of quote emphasis added.

10. In fact as in Cooper v Chrysler, 361 SW3d 60 (Mo App 2011) there on workers compensation, it was again confirmed the concept of primary jurisdiction was limited to when "(1) where administrative knowledge and expertise are demanded; (2) to determine technical, intricate fact questions; (3) where uniformity is important to the regulatory scheme." Killian, 802 S.W.2d at 160. See Deckard, 31 S.W.3d at 14. In other words, the primary jurisdiction doctrine applies to questions involving "administrative expertise, technical factual situations and regulatory systems in which uniformity of administration is essential." Jones v. Jay Truck Driver Training Center, 709 S.W.2d 114, 115 (Mo. 64*64 banc 1986), overruled on other grounds by McCracken v. Wal-Mart Stores East, LP, 298 S.W.3d 473, 479, 479 n. 3 (Mo. banc 2009).

None apply here. As in Raster, they are common claims that need no technical expertise and are the kinds of issues court handle every day. about agency and who owes for when , accounts or property is taken without proper consent or authority. It is properly heard with the other claims especially where

all are parties .

Wherefore for these reasons Plaintiffs submit as well as alleged there is no PSC issue to limit the TRO.

/s/

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_Certificate of Service

The undersigned certifies she faxed a copy to entered counsel (Davis. Wulff, Sanner, Hentz, Spoeneman, Gianino, Harry, Callis) as well as Zucker and Giboney on 9/29.2014/s/ Susan Mello