

**STATE OF MISSOURI
PUBLIC SERVICE COMMISSION**

At a session of the Public Service Commission held at its office in Jefferson City on the 18th day of March, 2009.

Shawnee Bend Development Company, L.L.C.,
Petitioner,
v.
Lake Region Water & Sewer Company,
f/k/a Four Seasons Water & Sewer Company,
Respondent.

File No. WC-2009-0116

ORDER GRANTING MOTION TO DISMISS

Issue Date: March 18, 2009

Effective Date: March 28, 2009

Shawnee Bend Development Company, L.L.C., filed a request for the Commission to arbitrate a dispute between Shawnee Bend Development and Lake Region Water & Sewer Company, f/k/a Four Seasons Water & Sewer Company, a public utility, under Section 386.230, RSMo. Lake Region filed its answer to the petition for arbitration, including a motion to dismiss the arbitration citing a failure of Shawnee Bend to exhaust other contractually required remedies¹ before filing this matter at the

¹ Article IV, Paragraph F of the agreement, which is the subject of this dispute, states that:

In the event of a dispute between the parties with respect to this Agreement, which the parties have negotiated in good faith to an impasse, the parties agree to submit the dispute to the Water and Sewer Department of the PSC for informal and non-binding mediation. If no resolution is produced by such informal mediation, the parties agree to submit such controversy to the PSC with the commissioners to act as arbitrators under the provision of section 386.230 RSMo. Each party shall bear its own attorney fees and costs associated with such dispute.

Commission. Shawnee Bend also raised other affirmative defenses in its response. The Commission now takes up the motion to dismiss the arbitration.

The Commission is a creature of statute and only has the powers granted to it by the legislature.² The Commission is granted authority under Section 386.230, RSMo, to arbitrate “[w]hensoever any public utility has a controversy with another public utility or person **and all the parties to such controversy agree in writing** to submit such controversy to the commission as arbitrators. . . .”³ Thus, in order for the Commission to arbitrate this matter, the parties must first agree in writing to such arbitration.

Although the written contract contains a provision indicating conditional agreement to arbitration, Lake Region states that it does not agree to submit this matter to the Commission for arbitration because that condition has not been met.⁴ Shawnee Bend alleges that some informal contact with the Water and Sewer Department Staff has been made.⁵ In order for the Commission to determine if there has been an agreement to arbitrate this matter, it would have to interpret the meaning of that arbitration clause of the agreement and its condition precedent of submitting the issue to informal mediation by the Water and Sewer Department Staff.⁶

² *State ex rel. Utility Consumers' Council of Mo., Inc. v. Pub. Serv. Comm'n*, 585 S.W.2d 41, 49 (Mo. banc 1979).

³ Emphasis added.

⁴ *Response of Lake Region Water & Sewer Co. to Petition for Arbitration*, (filed November 6, 2008).

⁵ *Notice of Arbitration (Petition of Arbitration) and Statement of Claim Pursuant to R.S.Mo. § 386.230 and Contract* (“Petition”), filed September 30, 2008, paras. 24-25.

⁶ Article IV, Paragraph F.

The Commission cannot interpret the contract of the parties as it has no authority to do so.⁷ Thus, the Commission cannot determine whether the condition precedent to the submission of the contract for arbitration has been reached. Without the written consent of *both* parties, the Commission cannot proceed with an arbitration and this matter must be dismissed.

Furthermore, the actual controversy at issue is strictly the result of a contract dispute. In fact, the remedies and alternative requested in the petition are titled “Enforcement of Contract,” “Quantum Meruit/unjust enrichment,” and “Rescission of Contract with Restitution. . . .”⁸ Even if both parties agree to submit the controversy, the Commission could not hear it. Section 386.230, RSMo, cannot give the Commission authority to hear controversies beyond its jurisdiction. For example, just because a utility has a dispute with its employee for worker’s compensation, jurisdiction would not be vested in the Commission simply because Section 386.230, RSMo, says that the Commission may arbitrate such matters. Likewise, just because the parties have a contract dispute does not mean that this type of controversy may be heard by the Commission. Therefore, the Commission determines that a remedy for breach of contract lies with the court, and not with the Commission.

⁷ See, *State ex rel. GS Technologies Operating Co., Inc. v. Public Service Commission*, 116 S.W.3d 680, 696, (Mo. App. W.D. 2003):

While the “Commission does have exclusive jurisdiction of all utility rates,” “when a controversy arises over the construction of a contract or of a rate schedule upon which a contract is based, and a claim of an overcharge is made, only the courts can require an accounting or render a judgment for the overcharge.” *Wilshire Constr. Co. v. Union Elec. Co.*, 463 S.W.2d 903, 905 (Mo. 1971). This is so because the Commission “cannot ‘enforce, construe nor annul’ contracts, nor can it enter a money judgment.” *Id.* (quoting *May Dep’t Stores Co. v. Union Elec. Light & Power Co.*, 107 S.W.2d 41, 49 (Mo. 1937)). Likewise, the Commission does not have the authority to do equity or grant equitable relief. *Am. Petroleum Exch. V. Pub Serv. Comm’n*, 172 S.W.2d 952, 955 (Mo. 1943).

⁸ Petition, pp. 10-12.

THE COMMISSION ORDERS THAT:

1. The motion to dismiss filed by Lake Region Water & Sewer Company is granted.
2. This order is effective on March 28, 2009.

BY THE COMMISSION

A handwritten signature in black ink, appearing to read 'Colleen M. Dale', written over a horizontal line.

Colleen M. Dale
Secretary

(S E A L)

Clayton, Chm., Murray, Davis,
Jarrett, and Gunn, CC., concur.

Dippell, Deputy Chief Regulatory Law Judge