

**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI**

The Staff of the Missouri Public Service Commission,)	
)	
)	
Complainant,)	
)	
v.)	<u>Case No. WC-2007-0452</u>
)	
Suburban Water and Sewer Co. and Gordon Burnam,)	
)	
)	
Respondents.)	

STAFF’S OPPOSITION TO RESPONDENT GORDON BURNAM’S MOTION TO DISMISS AND ALTERNATIVE MOTION FOR MORE DEFINITE STATEMENT

COMES NOW the Staff of the Missouri Public Service Commission (Staff) and for its Opposition to Respondent Gordon Burnam’s Motion to Dismiss and Alternative Motion for More Definite Statement respectfully states as follows:

Background and Procedural History

1. Staff asserts that the Missouri Public Service Commission (Commission) does have personal jurisdiction over Respondent Gordon Burnam (Burnam) as an owner, officer, agent, or employee of a public utility regulated by the Commission.
2. On June 8, 2007, Staff filed its First Amended Complaint and Motion for Expedited Treatment against Respondent Suburban Water and Sewer Co. (Suburban) and Burnam. Staff’s Complaint is based on violations of the Commission’s Report and Order issued in Case No. WR-2005-0455. The Commission’s Report and Order adopted a Unanimous Stipulation and Agreement entered into by all of the parties to the rate case. Burnam’s signature appears on the Unanimous Stipulation and Agreement as President of

Suburban. Burnam was Suburban's sole representative in the negotiations that gave rise to the Unanimous Stipulation and Agreement in Case No. WR-2005-0455.

3. Burnam is the President and sole shareholder of Suburban.

4. Suburban possesses a certificate of convenience and necessity issued by the Commission to provide water service to the Bon-Gor Estates subdivision in Boone County, Missouri. A legal description of the service area is contained in the tariff on file with the Commission.

5. Suburban is a corporation duly organized and existing under Missouri law.

Opposition to Motion to Dismiss

6. Staff hereby adopts and restates all of the statements contained in paragraphs 1-5.

7. Several sections of Chapters 386 and 393 of the Revised Statutes of Missouri refer to the Commission's authority of individual officers, agents, and employees of public utilities subject to the Commission's jurisdiction. Specifically, Section 386.580 states that it is a misdemeanor for an officer, agent or employee of a regulated public utility to commit or fail to commit certain acts. The Commission does not have the authority to adjudicate Burnam guilty of a misdemeanor. However, the Commission does have the authority to determine whether Burnam has committed certain acts or omissions as an officer, agent, or employee of a regulated public utility that may be subject to the penalty provided for by the legislature in Section 386.580. Any criminal proceeding would be brought in circuit court by the appropriate prosecuting authority. However, the Commission may determine in the first instance whether any of the acts or omissions of Burnam as an officer, agent, or employee of Suburban should be brought to

the attention of the proper prosecuting authority for possible criminal proceedings in circuit court.

8. The Commission has been granted jurisdiction over “all public utility corporations and persons whatsoever subject to the provisions of this chapter herein defined. . . .” Section 386.250(5), RSMo (2000). Chapter 386 of the Revised Statutes of Missouri sets out the powers and duties of the Commission. Several provisions of Chapter 386 refer to “persons.”¹ Section 386.020(58) uses the word “person” in its enumeration of the entities that can be considered a water corporation subject to the jurisdiction of the Commission. The Section outlining the penalty for violations of Commission order provides that: [i]n construing and enforcing the provisions of this chapter relating to penalties, the act, omission, or failure of any officer, agent, or employee of any corporation, person, or public utility, acting within the scope of his official duties of employment, shall in every case be and be deemed to be the act, omission, or failure of such corporation, person, or public utility.” Section 386.570.3 RSMo (2000). Section 386.580 provides:

Every officer, agent or employee of any corporation or public utility, who violates or fails to comply with, or who procures, aids or abets any violation by any corporation, person or public utility of any provision of the constitution of this state or of this or any other law, or who fails to obey, observe or comply with any order, decision, decree, rule, direction, demand or requirement, or any part or provision thereof, of the commission, or who procures, aids or abets any corporation, person or public utility in their or its failure to obey, observe and comply with any such order, decision, decree, rule, direction, demand or requirement, or any part or provision thereof, in a case in which a penalty has not herein been provided for such officer, agent or employee, is guilty of a misdemeanor and is punishable by a fine not exceeding one thousand dollars, or by imprisonment in a county jail not exceeding one year, or by both such fine and imprisonment.

¹ The statutory references in this section are meant to be illustrative rather than exhaustive.

It is presumed that all of the words in a statute have a purpose and that the General Assembly did not enact meaningless legislation or intend an absurd result. *Marston v. Juvenile Justice Center of the 13th Judicial Circuit*, 88 S.W.3d 534, 537 (Mo.App. W.D. 2002). It is presumed that “the legislature intended for its words to have substantive effect.” *Id.*

Chapter 386 clearly confers personal jurisdiction over “persons” such as Burnam. The Commission has been granted personal jurisdiction over officers, agents, and employees of public utilities or persons who are acting as public utilities. In this case, Staff has alleged that Suburban failed to abide by the Commission’s Report and Order in Case No. WR-2005-0455 because of the actions and inactions of Burnam as President of Suburban. Burnam was acting in the scope of his official duties in negotiating and signing the Unanimous Stipulation and Agreement to dispose of Case No. WR-2005-0455. As President of Suburban and signatory to the agreement (which became a Commission order upon the Commission’s adoption of the agreement), Burnam also had the responsibility to ensure that Suburban abided by the terms of the agreement. Interpretation of the numerous provisions of Chapter 386 that refer to “persons” in a manner that would exclude Burnam from the personal jurisdiction of the Commission would render the statutory language in those provisions of Chapter 386 meaningless. The legislature clearly did not intend such an absurd result.

9. Requiring Burnam to use his personal funds for penalty assessed against Suburban would not constitute an unconstitutional taking of private property. Suburban is required to abide by the terms of the Unanimous Stipulation and Agreement in Case No. WR-2005-0455. This agreement became an Order of the Commission when the

Commission adopted the agreement in its Report and Order in Case No. WR-2005-0455. Suburban was represented by Burnam in the negotiations that led to the Unanimous Stipulation and Agreement. Neither Suburban nor Burnam challenged the Commission's Order adopting the agreement, either by seeking a rehearing before the Commission or by seeking a writ of review in circuit court. "In all collateral actions or proceedings the orders and decisions of the commission which have become final shall be conclusive." Section 386.550, RSMo. Burnam may not now collaterally attack the Commission's Order in Case No. WR-2005-0452. In this case, Staff asserts that Suburban is indistinguishable from Burnam, despite the corporate entity.

10. The Missouri Supreme Court has set out situations in which an individual may be responsible for the debts of a corporation. There are three elements that must be satisfied: "(1) control, not mere majority or complete stock control, but complete domination, not only of finances, but of policy and business practice in respect to the transaction attacked so that the corporate entity as to this transaction had at the time no separate mind, will or existence of its own; and (2) such control must have been used by the corporation to commit fraud or wrong, to perpetrate the violation of statutory or other positive legal duty, or dishonest and unjust act in contravention of plaintiff's legal rights; and (3) the control and breach of duty must proximately cause the injury or unjust loss complained of." *66, Inc. v. Crestwood Commons Redevelopment Corp.*, 998 S.W.2d 32, 40 (Mo.banc 1999). All three elements are satisfied in this case. First, Burnam is the President of Suburban and has complete control over the company. He negotiated the Unanimous Stipulation and Agreement that is the subject of this action on behalf of Suburban and was its only representative in the negotiations. Suburban did not have a

separate mind, will, or existence in the negotiations. Second, Staff has alleged a violation of a positive legal duty. Suburban, as a regulated public utility subject to the jurisdiction of the Commission, has a legal duty to obey Commission Orders. Suburban's failure to obey the Commission's Report and Order in Case No. WR-2005-0452 is the basis for Staff's Complaint. Furthermore, Suburban was granted an increase in rates as a result of Case No. WR-2005-0452. The rate increase granted to Suburban was conditioned on Suburban's agreement that it would perform several actions to better serve its customers. Following Case No. WR-2005-0452, Suburban filed and implemented revised tariff sheets showing the increased rates and began collecting these increased rates. Suburban's collection of the increased rates without fulfilling the conditions of the Commission's Order constitutes a fraud. Burnam's control of Suburban and the breach of Suburban's duty (caused by Burnam), caused the injury that is the basis of Staff's Complaint. There is no evidence in the record that any person other than Burnam could have caused the conditions imposed on Suburban in the Commission's Order to be carried out or that there is any other person responsible for the company's failure to fulfill its obligations to the Commission or to its customers.²

11. As an administrative agency, the Commission does not have the authority to decide constitutional issues. *Fayne v. Dept. of Social Services*, 802 S.W.2d 565, 567 Mo. App. W.D. 1991). Staff addresses the constitutional claims raised here in order to respond to Burnam's claims and to preserve the issues for review in the circuit court. *Tate v. Dept. of Social Services*, 18 S.W.3d 3, 7 (Mo. App. E.D. 2000).

² Staff reiterates that it is not attempting to seek double penalties in circuit court. In the event that penalties are assessed, Staff wants to ensure that Burnam's personal assets can be reached to satisfy the obligations of the company in the event that the company does not have sufficient assets to cover the amount of any penalty assessed against it.

12. A statute is presumed to be constitutional. *Conseco Financing Services Corp. v. Missouri Department of Revenue*, 195 S.W.3d 410, 414 (Mo.banc 2006). A statute will be upheld against a constitutionality challenge “‘unless it clearly and undoubtedly contravenes the constitution and plainly and palpably affronts fundamental law embodied in the constitution.’” *Id.*, quoting *In re Marriage of Kohring*, 999 S.W.2d 228, 231 (Mo.banc 1999).

13. Sections 386.570 and 386.580 do not violate Article I, Section 31 of the Missouri Constitution because they do not unconstitutionally delegate the authority to make any rule fixing a fine or imprisonment as punishment. The penalties set forth in Sections 386.570 and 386.580 were established by the legislature, not by the Commission. Furthermore, the statutes do not automatically result in penalty or imprisonment merely upon a finding of a violation by the Commission. Rather, the statutes and Commission rules provide for a hearing to be had before the Commission to determine whether a violation has occurred. In the case of Section 386.570, once the Commission makes an initial finding of a violation, the Commission may then authorize its general counsel to bring an action in circuit court. It is the circuit court that determines the actual penalty amount and assesses the penalty, not the Commission. In the case of Section 386.580, Staff does not contend that the Commission may impose the criminal sanctions set out by the legislature in this Section. Rather, the Commission has the authority to conduct a hearing to determine whether a person subject to the Commission’s jurisdiction has committed an act it deems punishable by this Section. The Commission could then share its findings with the proper prosecuting authority. The

prosecuting authority would seek the appropriate penalty in circuit court, not the Commission.

14. Chapter 386, RSMo created the Missouri Public Service Commission and delegates to it the powers and duties described therein. The creation and delegation of authority to the Commission is a valid exercise of the state's police powers.

“Specifically, the Commission, either upon its own motion or upon complaint of an interested party, may determine the reasonableness of rates to be charged and the adequacy of service to be performed by such utilities, and to require such service to be furnished to any person lawfully entitled thereto. The power to determine such matters, in the first instance, is vested exclusively in the Commission and not in the courts.” *State ex. rel. Taylor v. Nangle*, 227 S.W.2d 655, 657 (Mo.banc 1950) (*cert. denied*, 71 S.Ct. 57, 340 U.S. 824, 95 L.Ed. 605).

15. The Commission does not have the authority to render a judicial decision; however, the Commission does have the authority to resort to the courts to enforce its orders. *Nangle*, 227 S.W.2d at 657-58. In this case, Staff seeks permission for an action to be instituted in circuit court at such time as the Commission makes a determination that one of its orders has been violated. The Commission clearly has the statutory authority to make such a determination in the first instance. Indeed, the Commission has exclusive primary jurisdiction over the subject matter of this case. *Id.* at 657.

16. Sections 393.140(2), 386.570, and 386.580 are not unconstitutional as applied in this case because they are not vague in violation of Respondent's due process rights. A statute is unconstitutionally vague if “[persons] of common intelligence must necessarily guess at its meaning” or if the statute fails to give sufficient guidance to those

against whom the statute will be applied to avoid potential arbitrary or discriminatory application. *Conseco*, 195 S.W.3d at 414 (internal citations omitted). The challenged sections clearly state which actions or omissions on the part of persons or entities subject to the Commission's jurisdiction can lead to penalties, including violations of a Commission order. The challenged Commission Order itself adopted a Unanimous Stipulation and Agreement entered into by the parties and the obligations of each party are clearly set forth in the agreement. Burnam did not challenge the agreement or the Order adopting it either by filing a motion for rehearing before the Commission or by requesting a writ of review from the circuit court. Burnam's vagueness challenge amounts to an impermissible collateral attack. (See, *infra*). Furthermore, Burnam should not now be allowed to claim unfamiliarity to an agreement to which he is a signatory on behalf of Suburban.

17. It is a well-settled maxim that "ignorance of the law is no excuse." "Parties are presumed to know the law and cannot normally avoid an act or deed on the ground that they were ignorant of the law." *General Motors Corp. v. City of Kansas City*, 895 S.W.2d 59, 62 (Mo. App. W.D. 1995). As President of a regulated public utility, Burnam is presumed to know the applicable law, including Chapters 386 and 393 of the Revised Statutes of Missouri. Suburban and Burnam have a duty to comply with these chapters, and under these chapters Suburban and Burnam may be penalized for violations of those chapters and Commission Orders authorized by those chapters. Public utilities and their officer, agents, and employees are charged with the duty to obey lawful Commission orders or be subject to a penalty. Sections 386.570 and 386.580, RSMo.

Burnam may not avoid that duty, or the penalty for violating that duty, by claiming ignorance of the law.

18. Sections 393.140(2), 386.570 and 386.580 are not contrary to Burnam's procedural due process rights. Burnam has been afforded reasonable due process in that he has received timely notice of the Complaint and will have an opportunity to be heard. Sections 386.570 and 386.580 set out with reasonable specificity the acts or omissions that are the subject of the statute and afford notice to a person of reasonable intelligence that violation of these Sections could result in civil or criminal penalties.

19. Neither Suburban nor Burnam requested a rehearing after the Commission issued its Report and Order in Case No. WR-2005-0455 pursuant to Section 386.500, RSMo. Neither Suburban nor Burnam sought review of the Commission's Order in circuit court pursuant to Section 386.510, RSMo. "In all collateral actions or proceedings the orders and decisions of the commission which have become final shall be conclusive." Section 386.550, RSMo. Because there was no timely challenge to the Commission's Report and Order, the Report and Order is final and Burnam is precluded from collaterally attacking the validity of the Commission's Report and Order in Case No. WR-2005-0455 in this proceeding. *State ex. rel. Harline v. Public Service Commission of Missouri*, 343 S.W.2d 177, 184 (Mo. App. 1960).

20. Because the Commission's Report and Order in Case No. WR-2005-0455 was not timely challenged, the Order is final and conclusive. Burnam is precluded from collaterally attacking the Report and Order by claiming that the Report and Order constitutes an unconstitutional taking.

21. The Commission's Order adopted the parties' Unanimous Stipulation and Agreement. This Unanimous Stipulation and Agreement bears the signature of Burnam as President of Suburban. Suburban, through Burnam, originally came to the Commission asking for a rate increase that would increase its yearly revenue approximately \$7,000 per year. The Unanimous Stipulation and Agreement is the product of negotiations between the parties, and grants a rate increase sufficient to increase yearly revenues by approximately \$4,000. This rate increase was conditioned upon Suburban taking several actions to improve the safety and adequacy of its water service. Suburban's failure to take any of the actions upon which its rate increase was conditioned is the basis of Staff's Complaint. Suburban did not seek a review of this Order, nor did Suburban or Burnam ever return to the Commission formally requesting an additional rate increase. There is nothing in the record to suggest that the parties were not acting at arm's length. The record also does not contain evidence that the Unanimous Stipulation and Agreement was not voluntarily entered into by Suburban, which was represented by its President, Gordon Burnam, a sound businessman. The law favors freedom of contract, and the law also will not protect a party merely because the party may have made a bad bargain. *Vondera v. Chapman*, 180 S.W.2d 704, 705 (Mo. 1944).

22. Staff's Complaint is not time-barred. Section 386.570(2) provides "[e]very violation of the provisions of this or any other law or of any order, decision, decree, rule, direction, demand or requirement of the commission, or any part thereof, by any corporation or person or public utility is a separate and distinct offense, and in the case of a continuing violation each day's continuance thereof shall be and be deemed to be a separate and distinct offense." Staff alleges that Burnam continues to be in violation

of the Commission's Report and Order in Case No. WR-2005-0455 and that each day Burnam remains in violation of the Order constitutes a separate and distinct offense.

23. Section 556.036 does not act as a bar to Staff's Complaint because Staff is not instituting a criminal misdemeanor proceeding. As explained above, Staff does not purport that the Commission has the authority to conduct criminal proceedings. Staff merely asserts that the Commission has the ability to determine whether a serious enough violation of a Commission order has occurred to bring the violation to the attention of the proper prosecuting authority.

24. Staff's Complaint states a claim upon which relief can be granted. Staff's Complaint sufficiently sets out each alleged violation of the Commission's Order in Case No. WR-2005-0455. (See, *State v. Davis*, 830 S.W.2d 27, 30 (Mo. App. S.D. 1992), holding that a complaint that alleged that defendants failed to maintain a safe and adequate water supply, failed to install adequate storage capacity, and overcharged customers was sufficient to state a claim upon which relief could be granted.

Response to Motion for a More Definite Statement

25. Staff hereby adopts and restates the statements and arguments made in paragraphs 1-24.

26. Staff's Complaint is not general and vague. Staff's Complaint alleges each count of its Complaint against Suburban as a corporation and against Burnam as the officer, employee, or agent of the corporation responsible for each act or omission alleged in each count of the Complaint. As explained above, Staff contends that Suburban has no will, mind, or existence separate from Gordon Burnam with respect to Staff's allegations.

27. Respondents may properly answer the Complaint without amendment.

WHEREFORE, Staff requests that the Commission deny Respondent Gordon Burnam's Motion to Dismiss and deny Respondent Gordon Burnam's Motion for More Definite Statement.

Respectfully submitted,

/s/ Jennifer Heintz

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Certificate of Service

I hereby certify that copies of the foregoing have been served via electronic mail to Christina Baker, Office of the Public Counsel, at Christina.Baker@ded.mo.gov; and to Thomas M. Harrison and Matthew S. Volkert, Attorneys for Respondent Suburban Water and Sewer Company, and for Respondent Gordon Burnam, at tom@vanmatre.com and matt@vanmatre.com on this 26th day of June, 2007.

/s/ Jennifer Heintz