

**STATE OF MISSOURI
PUBLIC SERVICE COMMISSION**

At a session of the Public Service
Commission held at its office in
Jefferson City on the 1st day of
July, 2008.

The Staff of the Missouri Public Service
Commission,

Complainant,

v.

Suburban Water and Sewer Company,
Inc., and Gordon Burnam,

Respondents.

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Case No. WC-2008-0030

**ORDER DEFERRING RULING ON RESPONDENT
GORDON BURNAM'S MOTION TO DISMISS**

Issue Date: July 1, 2008

Effective Date: July 1, 2008

In this complaint, which was filed on July 27, 2007, the Staff of the Missouri Public Service Commission sought Commission orders: (1) directing Staff to investigate the quality of water supplied by Suburban Water and Sewer Company, Inc. ("Suburban") and Gordon Burnam and the methods employed by them in supplying and distributing water for any purpose; (2) directing Staff to file a recommendation concerning that investigation; (3) setting this matter for a full evidentiary hearing; and (4) requiring Suburban and Mr. Burnam to make reasonable improvements to the water system to promote the public interest, preserve the public health, and protect Suburban's customers. On August 6, 2007, the Commission issued an order directing its Staff to promptly commence the specified investigation, and to file a report concerning the results of that investigation no later than

September 20, 2007. Staff has already done so. On February 21, 2008, the Commission entered an order setting this matter for a full evidentiary hearing in Room 310 on Tuesday, Wednesday, and Thursday, July 8-10, 2008, beginning at 8:30 a.m. each day, leaving only the last item for the Commission's consideration.

On September 6, 2007, Respondent Gordon Burnam filed a Motion to Dismiss, in which he argued that he was not subject to the Commission's jurisdiction in his individual capacity. On September 17, 2007, Staff filed its Opposition to Mr. Burnam's motion to dismiss, and on September 27, Mr. Burnam filed a Reply to Staff's Opposition. The matter has been fully briefed by the parties and is ripe for consideration.

Jurisdictional Issues

In his Motion to Dismiss, Mr. Burnam argues that because "there is no constitutional, statutory, or other valid delegation or authority giving the Staff or the Commission the jurisdiction, power, or authority to request or obtain relief against Burnam, in his individual capacity, including to make any findings or order any relief against him under Sections 393.130 and 393.140 RSMo.," the "complaint in this case should be dismissed as against Burnam." The Commission disagrees.

It is undisputed that Suburban is a water corporation and public utility duly organized and existing under the laws of Missouri which 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, and that Mr. Burnam is a shareholder, a director, and an officer (*i.e.*, the President) of Suburban. It is also undisputed that in this proceeding, Staff seeks a Commission order requiring both Suburban *and* Mr. Burnam to make reasonable improvements to the Bon-Gor Estates water system to promote the public

interest, preserve the public health, and protect the public. Staff seeks such an order pursuant to Section 393.140(2), which provides that the Commission shall “[i]nvestigate and ascertain, from time to time, the quality of . . . water supplied . . . by *persons* and corporations, examine or investigate the methods employed by such *persons* and corporations . . . in supplying and distributing water for any purpose whatsoever, . . . and have power to order such reasonable improvements as will best promote the public interest, preserve the public health and protect those using such . . . water . . . system, . . . 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 . . . water corporations[.]” Staff is also proceeding under Section 393.130.1, which provides that “[e]very . . . water corporation . . . shall furnish and provide such service instrumentalities and facilities as shall be safe and adequate and in all respects just and reasonable.”

Section 386.020(42) states that a “public utility” includes “every . . . water corporation . . . as . . . defined in this section,” and provides that “each thereof is hereby declared to be a public utility and to be subject to the jurisdiction, control and regulation of the commission[.]” Meanwhile, Section 386.250(3) states that the “jurisdiction, supervision, powers and duties of the public service commission . . . shall extend under this chapter . . . [t]o all water corporations, and to the land, property, dams, water supplies, or power stations thereof and the operation of same within this state[.]” Furthermore, Section 386.250(5) states that the “jurisdiction, supervision, powers and duties of the public service commission . . . shall extend under this chapter . . . [t]o all public utility corporations and *persons* whatsoever subject to the provisions of this chapter as herein defined[.]” Read

together, these statutes make it perfectly clear that the Commission may exercise jurisdiction, supervision, and power over Mr. Burnam personally as long as he may properly be considered a “water corporation” for jurisdictional purposes.

Section 386.020(58) defines “water corporation” as “every corporation, company, association, joint stock company or association, partnership 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[.]” Mr. Burnam is clearly a “person” for jurisdictional purposes, since Section 386.020(39) expressly states that the term “[p]erson” includes an individual, and a firm or copartnership[.]”

The more important question, though, is whether Mr. Burnam is a person who owns, operates, controls, or manages plant or property used in distributing, selling, or supplying water for gain. He is most definitely a shareholder, director and President of Suburban (which is itself a water corporation), but is that sufficient to make Mr. Burnam a water corporation as well? Unfortunately, Section 386.020(58) does not specify what *degree* of corporate ownership, operation, control, or management is required before an individual such as Mr. Burnam may properly be considered to be a water corporation for jurisdictional purposes.

Staff alleges that Gordon Burnam’s ownership, operation, control and management of Suburban is so complete and pervasive that Suburban is Burnam’s alter ego, and that Suburban has no separate mind, will or existence of its own. Staff also claims that Burnam used that control to commit a fraud on Suburban’s customers and violate Suburban’s positive legal duty to furnish and provide such service instrumentalities and facilities as

shall be safe and adequate and in all respects just and reasonable. Finally, Staff contends that Burnam's control of Suburban and the aforementioned fraud and breach of duty proximately caused the injuries that are the basis of Staff's complaint.

Staff should be given the opportunity to present evidence at the hearing to prove its allegation that Burnam, as an individual, meets the statute's definition of a water corporation. Accordingly, the Commission will defer ruling on Burnam's Motion to Dismiss until after it hears the evidence presented at the hearing.

Constitutional Issues

In his Motion to Dismiss, Mr. Burnam also attacks Sections 393.130 and 393.140 on constitutional grounds. He argues that if the Commission was to apply those statutes to him in his personal capacity and ultimately order him to expend his personal funds to enable Suburban to make improvements or continue to operate, there would be an illegal taking of private property without just compensation. Although this claim is premature and Staff has responded to it in its Opposition, the Commission will not address Mr. Burnam's constitutional claims in this order, since "[a]dministrative agencies lack the jurisdiction to determine the constitutionality of statutory enactments [and] [r]aising the constitutionality of a statute before such an body is to present to it an issue it has no authority to decide."¹ Accordingly, the Commission must "presume [a] statute is constitutional and has no power to declare it otherwise."² Nevertheless, given that "it is the duty of courts of competent

¹ *Duncan v. Missouri Bd. for Architects, Professional Engineers & Land Surveyors*, 744 S.W.2d 524, 531 (Mo. App. E.D. 1988) (citing *Joplin v. Indus. Comm'n of Missouri*, 329 S.W.2d 687, 689 (Mo. banc 1959)). See also *State ex rel. Kansas City Terminal Ry. v. Public Serv. Comm'n*, 272 S.W. 957, 960 (Mo. 1925) (Public Service Commission has no power to declare the validity or invalidity of city ordinance); *State ex rel. Missouri Southern R.R. v. Public Serv. Comm'n*, 168 S.W. 1156, 1164 (Mo. banc 1914) (Public Service Commission has no power to declare statutes unconstitutional).

² *Missouri Bluffs Golf Joint Venture v. St. Charles County Bd. of Equalization*, 943 S.W.2d 752, 755 (Mo. App. E.D. 1997).

jurisdiction to review justiciable constitutional claims put before them,”³ the Commission “may hear evidence from [the parties] to develop a factual record in which the constitutionality of the statute[s] may be determined later, in the proper forum.”⁴ Accordingly, while the Commission must reject Mr. Burnam’s “as-applied” constitutional challenges, the parties are free to make whatever factual record they wish on those issues during the evidentiary hearing.

IT IS ORDERED THAT:

1. The Commission will defer ruling on Respondent Gordon Burnam’s Motion to Dismiss until after it hears the evidence presented at the hearing.
2. This order shall become effective on July 1, 2008.

BY THE COMMISSION



Colleen M. Dale
Secretary

(S E A L)

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

Woodruff, Deputy Chief Regulatory Law Judge

³ *Fayne v. Dept. of Social Services*, 802 S.W.2d 565, 567 (Mo. App. W.D. 1991) (citing *State ex rel. Hughes v. Southwestern Bell Tel. Co.*, 179 S.W.2d 77, 81 (Mo. 1944)).

⁴ *Missouri Bluffs*, 943 S.W.2d at 755. In this case, of course, the proper forum would be the circuit court.