

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

The Staff of the Missouri Public Service Commission,)	
)	
Complainant,)	
v.)	<u>Case Nos. WC-2008-0030</u>
)	
Suburban Water and Sewer Company, Inc.,)	
and Gordon Burnam,)	
Respondents.)	

**STAFF’S OPPOSITION TO RESPONDENT GORDON BURNAM’S
MOTION TO DISMISS**

COMES NOW the Staff of the Missouri Public Service Commission (“Staff”),
by and through counsel, for its Opposition to Respondent Gordon Burnam’s Motion to
Dismiss 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 a public
utility regulated by the Commission.

2. On July 26 and 27, 2007, an evidentiary hearing was held in Case No. WC-
2007-0452 to determine if Suburban Water and Sewer Company had violated a
Commission Report and Order in Case No. WR-2005-0455. This Report and Order
adopted the terms of a disposition agreement in which Gordon Burnam as president of
Suburban signed via a Unanimous Stipulation and Agreement entered into by all of the
parties to the rate case. 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. On July 26, 2007, the Commission ruled from the bench, in the evidentiary
hearing that if “Staff wishes...to request the relief that’s sought [for future improvements,

then it] should be done in a separate complaint case with a separate evidentiary hearing.”
Transcript, Volume 2 at pg 60, also at 63 and 64.

4. On July 27, 2007, Staff filed its Complaint and Motion for Expedited Treatment against Respondent Suburban Water and Sewer Co. (“Suburban”) and Burnam. Staff’s current Complaint is based on Suburban’s failure and refusal to comply with the Commission’s Report and Order issued in Case No. WR-2005-0455, which has put the system and its customers at great risk and led to the additional disrepair of the system. This state of the system led to Staff filing this Complaint¹ requesting additional improvements to maintain safe and adequate service.

5. Burnam is still the President and a shareholder of Suburban.

Opposition to Motion to Dismiss

6. Staff hereby adopts and restates the statements set forth in paragraphs 1-4.

7. Staff’s allegations concerning Gordon Burnam do NOT revolve only “around the fact that he is an officer, director, and shareholder of Suburban and makes decisions on its behalf.” *Respondent Gordon Burnam’s Motion to Dismiss*, page 4, paragraph 8. Staff’s inclusion of Gordon Burnam as a respondent is based on the misdeeds and unethical acts committed by and at the direction of Burnam, under the protections of Suburban’s incorporation.

8. Suburban’s Notice of Dissolution,² where it stated that customers would lose water service effective July 1, 2007, was sent out at the direction of Gordon Burnam to “get the Commission’s...attention.” *Tr. Vol 2* at pg 73, lines 23-24. Gordon Burnam admitted that he was “sure [customers] were afraid when they got the letter” (*Tr. Vol 2* at

¹ Staff adopts and incorporates by reference the Complaint filed on July 27, 2007, in this case, where Staff alleges sufficient facts to support holding Gordon Burnam personally responsible.

² See Staff’s Complaint, Attachment A Notice of Dissolution.

pg 87, lines 2-3) that they would not have water as of July 1, 2007. However, the customers were never told there water would remain on. *Tr. Vol. 2* at pgs 85-86.

9. Black's Law Dictionary Seventh Edition defines actual fraud as a "concealment or false representation through a statement or conduct that injures another who relies on it in acting." (Bryan A. Garner, St. Paul, Minn., 1999). Gordon Burnam admitted under oath that the Notice of Dissolution, sent out March 30, 2007, was a deliberate mistatement to get the PSC's attention. This deliberate mistatement, asserting customers would lose water service on July 1, 2007, and therefore in place for three months, was never corrected by Suburban or Gordon Burnam. Testimony from Robert Smith, a rental property owner served by Suburban, established just one example of injury. Mr. Smith stated, that because of the Notice set for July 1, 2007, he was "losing tenants which is getting into my pocketbook because I'm having trouble renting the properties or maintaining tenants." (*Tr. Vol. 2* at pg 208, line 6-9).

10. Beyond the intentional and unethical deed of issuing a false Notice for when people's water would be shut off, the issue of deliberately instructing employees to not do actions that were agreed to and memorialized in writing, and where the Commission relied on those assertions, is of great concern also.

11. Gordon Burnam stated that Suburban stopped reading the meters on many of the buildings served by Suburban because Mr. Burnam "could not see any reason for reading the meters again because I was always gonna just charge them \$12.30," *Tr. Vol. 2* at pgs 80- 81, lines 8-10 on pg 81), even though item (10) specified meters would be installed for all buildings and (15) specified monthly meter usage data would be provided to Staff. (See WC-2005-0455, Disposition Agreement at page 8). Gordon Burnam directed

Suburban employees not to install the meters required, and cease reading some of the meters already read after the agreement was made and signed. Gordon Burnam never intended to comply with those terms of the disposition agreement. If the meters were in place and being continuously read as required then water loss from the system would have been visible by comparisons “between the amount being pumped by the well and the amount being metered to the customers.” *Tr. Vol.2* pg 232, line 2-6, and pgs 233-234. Consequently, system repairs could have taken this information into account and responded accordingly, rather than not at all.

12. These two specific examples are sound reasons to NOT grant Gordon Burnam’s Motion to Dismiss. Gordon Burnam should not be immunized from personal liability under the normal protections of a corporation.

13. Furthermore, Gordon Burnam established Suburban Water and Sewer Company, Inc. to aide in profiting off of his continuing development named Bon-Gor Estates. *Tr. Vol.2* at pgs 38-43. In order for a developer to sell homes and rent residences there must be water and sewer services. Even if a developer is selling property to a builder, an already existing water and sewer service is helpful incentive to solidifying that sale. The failure of Suburban and Mr. Burnam to invest and adjust rates as inflation required to maintain the water system at a minimally adequate level was due to Mr. Burnam’s decisions as president.

14. 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.

15. 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.”³ 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:

³ The statutory references in this section are meant to be illustrative rather than exhaustive.

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.

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.*

16. 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’s failure and refusal to comply with the Commission’s Report and Order in Case No. WR-2005-0455, because of the actions and inactions of Burnam as President of Suburban, led to the additional disrepair of the water system. 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.

17. 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.

18. 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. WC-2007-0452 is the basis for Staff's Complaint. Furthermore, Suburban was granted an increase in rates as a result of Case No. WR-2005-0455. 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-2005-0455, 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.⁴

19. 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).

20. 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).

21. 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*

⁴ 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.

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).

22. 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.

23. 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).

24. 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.

25. Staff's Complaint states a claim upon which relief can be granted. Staff's Complaint sufficiently sets out Gordon Burnam's deliberate failure and refusal to comply with the Commission's Order in Case No. WR-2005-0455, leading to further disrepair and failure to maintain a safe and adequate water supply. 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.

WHEREFORE, Staff requests that the Commission deny Respondent Gordon Burnam's Motion to Dismiss.

Respectfully submitted,

/s/ **Shelley Syler Brueggemann**

Shelley Syler Brueggemann

Senior Counsel

Missouri Bar No. 52173

Attorney for the Staff of the
Missouri Public Service Commission
P. O. Box 360
Jefferson City, MO 65102
(573) 526-7393 (Telephone)
(573) 751-9285 (Fax)
shelley.brueggemann@psc.mo.gov

Certificate of Service

I hereby certify that copies of the foregoing have been mailed, hand-delivered, transmitted by facsimile or electronically mailed to all counsel of record this 17th day of September 2007.

/s/ **Shelley Syler Brueggemann**