

**IN THE CIRCUIT COURT OF COLE COUNTY
STATE OF MISSOURI**

Public Service Commission)
of the State of Missouri,)
)
Petitioner,)
)
v.)
)
I-70 Mobile City, Inc.)
d/b/a I-70 Mobile City Park,)
)
Respondent.)

Case No. 22AC-CC05836

ORDER AND JUDGMENT

Findings of Fact

1. On April 22, 2022, the Staff of the Missouri Public Service Commission (Staff) filed *Staff's Complaint* (Complaint) against Respondent I-70 Mobile City, Inc. d/b/a I-70 Mobile City Park (Mobile City or Respondent) before the Commission pursuant to Section 386.390, RSMo (Cum. Supp. 2018). (Complaint, Petitioner's Hearing Ex. C).

2. Staff's Complaint alleged that Respondent Mobile City is operating as a "sewer corporation" pursuant to Section 386.020(49), RSMo, a "water corporation" pursuant to Section 386.020(59), and a "public utility" pursuant to Section 386.020(43), RSMo (Cum. Supp. 2019) without the required certification or other authority from the Commission in violation of Section 393.170, RSMo (Cum. Supp. 2018). (Complaint, Pet. Hearing Ex. C).

3. In its *Answer and Affirmative Defenses of I-70 Mobile City, Inc.* filed to the Commission, Respondent denied that it is a “water corporation,” a “sewer corporation,” or a “public utility” subject to the jurisdiction of the Commission. (Respondent Ex. I, Pgph. C).

4. On June 3, 2022, Staff served *Complainant's Request For Permission For Entry Upon Land For Inspection* (Request) upon Respondent pursuant to Missouri Rule of Civil Procedure 58.01(a)(2). (Request, Pet. Hearing Ex. C).

5. Staff's Request enumerated six inspection requests:

1. The I-70 Mobile City Wastewater Treatment Facility and lagoon, as more fully described in the Missouri State Operating Permit issued by the Department of Natural Resources to I-70 MHP and included as Attachment A to the Complaint.

2. Water service connections that are visible.

3. Sewer service connections that are visible.

4. A representative number of water meters located in I-70 Mobile City (approximately 20 percent) plus the master meter to I-70 MHP.

5. System appurtenances that are at or above grade, including access to any structures containing systems-related components.

6. Photographs of the above-listed locations. (Request, Pet. Hearing Ex. C).

6. Staff requested permission to enter Mobile City's business premises beginning at 11:00 a.m. on July 6, 2022, for the purpose of inspecting, measuring, surveying, photographing, testing or sampling designated property within the scope of Rule 56.01(b). (Request, Pet. Hearing Ex. C).

7. Respondent objected to Staff's Request on June 13, 2022. (Docket Sheet, Pet. Hearing Ex. C).

8. At Respondent's request, the Commission's Regulatory Law Judge assigned to the Complaint case held a discovery conference between the parties on June 30, 2022. (Pet. Hearing Ex. A).

9. On July 8, 2022, Staff filed a *Motion to Compel Discovery* (Motion). (Motion, Pet. Hearing Ex. C).

10. In its Motion, Staff explained that a Staff attorney contacted Mobile City and inquired about a site visit to Mobile City's property on a voluntary basis prior to filing formal discovery. (Motion, Pet. Hearing Ex. C).

11. In response to that inquiry, Staff's attorney received an email from Mobile City's attorney, stating "my client does not consent to a 'site visit,' although I understand you are permitted under discovery rules to seek Entry Upon Land for Inspection. I'm happy to discuss via phone." (Motion, Pet. Hearing Ex. C).

12. Staff's Motion included an affidavit from Staff Engineer Andrew Harris, stating that the scope of the photographs to be taken will be to capture images of the assets with enough background to demonstrate the location of the assets, to document the water and/or sewer service connections provided to residents of Mobile City, to document the condition and quality of the equipment used for provision of safe water and/or sewer service, and to examine the discharge from the wastewater treatment system and document any visible impacts on human health and the environment. Harris stated

Staff does not intend to enter, inspect or take photographs of Respondent's business office or any of the residents' homes. (Motion, Pet. Hearing Ex. C).

13. On July 27, 2022, the Public Service Commission issued its *Order Granting Staff's Motion To Compel and Denying Respondent's Request For A Protective Order* (Order). (Pet. Hearing Ex. A).

14. In its Order, the Commission found that Staff seeks information related to the physical structure and layout of the water and sewer systems in order to understand how the systems are set up and how they operate. (Pet. Hearing Ex. A).

15. The Commission's Order found that the information listed in Staff's Request is relevant to the Complaint because the Request could establish what real estate, fixtures and personal property Respondent owns, operates, controls or manages, and how Respondent actually uses this property to provide water and sewer services. (Pet. Hearing Ex. A).

16. The Commission found that the information sought in Staff's Request is likely to lead to the discovery of admissible evidence because it involves the physical structure of the water and sewer systems. (Pet. Hearing Exhibit A).

17. The Commission found that the issue raised in Staff's Complaint is of utmost importance in determining whether an entity should be regulated by the Commission for the provision of safe and adequate service. (Pet. Hearing Ex. A).

18. The Commission found that the discovery was not cumulative or duplicative because the only way Staff can ascertain that Respondent is providing the

services as it professes is by physically examining the water and sewer systems. (Pet. Hearing Exhibit A).

19. Further, the Commission found that Staff's Request would not impose an unreasonable burden upon Respondent because the water and sewer systems occupy a large physical presence, and Staff expressed no desire to enter any residence or disrupt the daily operations of Respondent. (Pet. Hearing Ex. A).

20. In response to Respondent's assertion that it would be burdened because its president resides out of state and desires to be present for any in-person inspection, the Commission found that is a preference of Respondent's president and not a requirement for an in-person inspection. The Commission found that someone manages day-to-day operations and manages the property in the president's absence, so that person should be available to show Staff the water and sewer system. (Pet. Hearing Exhibit A).

21. The Commission found that Staff's request was not made for the purpose of vexing or harassing Respondent. (Pet. Hearing Exhibit A).

22. Based on these findings and conclusions, the Commission's July 27 Order granted Staff's *Motion to Compel*, denied Respondent's motion for a protective order, and directed Respondent to provide Staff access to the property for the purpose of inspecting the water and sewer system and taking photographs of the systems. (Pet. Hearing Exhibit A).

23. On September 14, 2022, the Commission issued its *Order Directing The Commission's General Counsel To Seek Enforcement of the Commission's Order In Circuit Court*, noting that Respondent has refused to comply with the Commission's

Order, and as provided by statute that Order may only be enforced by action of the circuit court. (Pet. Hearing Ex. B).

24. Staff's Complaint against Respondent Mobile City remains pending before the Commission in Commission Docket No. WC-2022-0295. (WC-2022-0295 Docket Sheet, Pet. Hearing Exhibit C).

25. No testimony has been filed in WC-2022-0295 and the Commission has not held a hearing on Staff's Complaint. (Docket Sheet, Pet. Hearing Ex. C).

Conclusions of Law

26. Pursuant to Section 536.073.2, RSMo (2016), this Court has jurisdiction to enforce an administrative order requiring a party in an administrative agency proceeding to permit entrance upon land and inspection of property for purposes of discovery.

Section 536.073.2, RSMo states in relevant part:

Except as otherwise provided by law, no agency discovery order which:

...

(2) Permits entrance upon land or inspection of property without permission of the owner...

... shall be enforceable except upon order of the circuit court of the county in which the hearing will be held or the circuit court of Cole County at the option of the person seeking enforcement, after notice and hearing.

27. Under Section 536.073.2, the circuit court considers only the "limited issue" of the enforceability of an administrative agency discovery order. *Mo. Dept. of Pub. Safety v. Troupe*, 555 S.W.3d 475, 478 (Mo. Ct. App. W.D. 2018).

28. Therefore, this Court need only determine whether or not the Commission's Order is enforceable.

29. Commission Rule 20 CSR 4240-2.090(1) provides that discovery before the Commission "...may be obtained by the same means and under the same conditions as in civil actions in the circuit court."

30. Section 386.020(49), RSMo (Cum. Supp. 2019) defines "sewer corporation" as including "every corporation, company, association, joint stock company or association, partnership or person, their lessees, trustees or receivers appointed by any court, owning, operating, controlling or managing any sewer system, plant or property, for the collection, carriage, treatment, or disposal of sewage anywhere within the state for gain, except that the term shall not include sewer systems with fewer than twenty-five outlets..."

31. Section 386.020(50), RSMo defines "sewer system" as including "all pipes, pumps, canals, lagoons, plants, structures and appliances, and all other real estate, fixtures and personal property, owned, operated, controlled or managed in connection with or to facilitate the collection, carriage, treatment and disposal of sewage for municipal, domestic or other beneficial or necessary purpose..."

32. Section 386.020(59), RSMo defines "water corporation" as including "every corporation, company, association, joint stock company or association, partnership and person, their lessees, trustees, or receivers appointed by any court whatsoever, 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...”

33. Section 386.020(60), RSMo defines a “water system” as including “all reservoirs, tunnels, shafts, dams, dikes, headgates, pipes, flumes, canals, structures and appliances, and all other real estate, fixtures and personal property, owned, operated, controlled or managed in connection with or to facilitate the diversion, development, storage, supply, distribution, sale, furnishing or carriage of water for municipal, domestic or other beneficial use.”

34. Pursuant to Section 386.020(43), RSMo, every water corporation and sewer corporation as defined in Section 386.020 is a “public utility” that shall be subject to the jurisdiction, control and regulation of the Commission and to the provisions of Chapters 386 and 393.

35. In determining whether a corporation is or is not a public utility, the important thing is “what it actually does.” *State ex rel. M.O. Danciger & Co. v. Pub. Serv. Comm’n. of Mo.*, 205 S.W. 36, 39 (Mo. 1918).

36. The Public Service Commission has exclusive jurisdiction over all public utility corporations, including all water corporations and all sewer corporations within Missouri. Sections 386.250, RSMo (2016); 386.020(43), (49), (59), RSMo.

37. Matters within the primary jurisdiction of the Commission are to be decided by the Commission in the first instance, and not by the courts. *State ex. rel. Taylor v. Nangle*, 227 S.W.2d 655, 657 (Mo.banc 1950).

38. The Commission has the duty to determine, in the first instance, whether an entity alleged to be offering utility service unlawfully is a public utility subject to its jurisdiction. *State v. Carroll*, 620 S.W.2d 22, 24 (Mo. Ct. App. S.D. 1981); *State ex rel. & to Use of Cirese v. Ridge*, 138 S.W.2d 1012, 1014-15 (Mo. banc 1940); *State ex rel. & to Use of Kansas City Power & Light Co. v. Buzard*, 168 S.W.2d 1044, 1046 (Mo. banc 1943).

39. Section 386.510, RSMo (Cum. Supp. 2019) provides:

No court in this state, except the supreme court or the court of appeals, shall have jurisdiction or authority to review, reverse, correct or annul any order or decision of the commission or to suspend or delay the executing or operation thereof, or to enjoin, restrain or interfere with the commission in the performance of its official duties.

40. Missouri Rule of Civil Procedure 56.01(a) provides that parties may obtain discovery by, among other things, seeking permission to enter upon land or other property, for inspection and other purposes.

41. Missouri Rule 56.01(b)(1) provides:

“[p]arties may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action... provided the discovery is proportional to the needs of the case considering the totality of the circumstances, including but not limited to, the importance of the issues at stake in the action, the amount in controversy, the parties’ relative access to relevant information, the parties’ resources, the importance of the discovery in resolving the issues, and whether the burden or expenses of the proposed discovery outweighs its likely benefit.”

42. Missouri Rule of Civil Procedure 58.01(a)(2) permits any party to serve on any other party a request to “[p]ermit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of

inspection and measuring, surveying, and photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of Rule 56.01(b).”

43. Rule 58.01(b)(1) provides that, in consecutively numbered paragraphs, the request shall “[s]et forth with reasonable particularity each item or category of items to be inspected” and “[s]pecify a reasonable time, place, and manner of making the inspection and performing the related acts...”

Analysis

The issue in this case under Section 536.073.2, RSMo is the enforceability of the Commission’s July 27, 2022, Order directing Respondent to permit an inspection of its water and sewer facilities by the Commission’s Staff for purposes of discovery in Staff’s administrative Complaint against Respondent now pending before the Commission.

Respondent has filed a Motion To Stay this case unless and until the Commission rules on a motion for summary determination that Respondent has filed to the Commission. However, Section 386.510, RSMo prohibits this Court from interfering with the Commission in the performance of its official duties. The Commission is authorized to decide the merits of Staff’s Complaint, and this Court cannot interfere with that duty by instructing the Commission how to proceed in that underlying case. The Court’s authority under Section 536.073.2 pertains only to the enforceability of the Commission’s discovery Order. The Court will decide this discovery matter on the merits of the Commission’s *Petition* so that the underlying matter before the Commission may proceed. Respondent’s Motion for Stay is overruled.

This Court finds Staff's Request complies with the form and contents required by Rule 58.01. The Court finds Staff's Request and the Commission's Order is within the scope of Rule 56.01 because the Commission Staff's Complaint against Respondent Mobile City pending before the Commission alleges that Respondent is operating as a "water corporation," a "sewer corporation" and a "public utility" as defined in Section 386.020, RSMo without a certificate or other authority from the Commission as required by Section 393.170, RSMo. Respondent denies it meets those statutory definitions. Thus, Staff's underlying Complaint creates a controversy regarding the water and sewer facilities that Respondent owns and operates, how Respondent uses those facilities to provide water and sewer service to its tenants, and whether Respondent's use of those facilities meets the statutory definition of "public utility." The Staff inspection as ordered by the Commission in its Order is therefore relevant to the subject matter of the Complaint and reasonably calculated to lead to the discovery of admissible evidence in the Complaint case.

The Staff inspection ordered by the Commission is not duplicative or cumulative of existing discovery. The physical details of Respondent's water and sewer facilities, and whether Respondent is actually providing water and sewer service as it professes, can only be confirmed by an in-person inspection. Entrance upon land for purposes of inspection are authorized by Missouri's discovery rules and are a reasonable means for the Commission to gather evidence to inform its decision regarding Staff's Complaint.

Finally, the Court does not find that Staff's inspection as ordered by the Commission creates an unreasonable burden upon Respondent that outweighs the value

of the information at issue. Staff's request is reasonably limited to specific facilities. The water and sewer infrastructure Staff seeks to inspect occupies a large physical presence in a public area, and Staff expressly states no intent to enter Respondent's business offices or any tenant residences. There is no reason to conclude Staff's inspection will be obtrusive or disruptive to the Respondent's business activities or to its tenants. The Court concludes the Staff inspection as ordered by the Commission in its July 27, 2022, Order complies with Rule 56.01 and should be enforced as provided in Section 536.073.2, RSMo.

Respondent argues that Staff should not be permitted to inspect Respondent's property until the Commission first determines whether it has jurisdiction over Respondent in the underlying case. But the Commission's jurisdiction over Respondent is precisely the contested issue in the underlying Staff Complaint case, and Staff's Request is reasonably calculated to lead to the discovery of admissible evidence that will assist the Commission in deciding the jurisdictional issues before it. Parties before the Commission must have access to reasonable discovery so they can present a complete, accurate and detailed record to the Commission to aid its determination of such jurisdictional issues.

Respondent argues that Staff's Complaint is barred by the doctrines of unclean hands and laches. Those arguments go beyond the scope of this limited proceeding regarding the enforceability of the Commission's discovery Order under Section 536.073.2, RSMo that is before this Court. Those arguments must be presented to the Commission for its determination in the underlying Complaint case.

Respondent further argues that Staff's Complaint to the Commission fails to state a claim upon which relief can be granted. In support of this argument, Respondent offers documents from a previous Commission case (Respondent's Exhibits A, B, C, D and E as offered separately and as attached to Respondent's Exhibit F). Whether Staff's Complaint states a claim upon which relief can be granted is within the Commission's exclusive, primary jurisdiction and must be decided by the Commission in the first instance, not by the Court in this matter. Under 536.073.2, this Court must make its ruling based on whether the Commission's discovery Order permitting Staff's inspection of Respondent's property complies with the rules of discovery. Respondent's proffered evidence related to previous Commission cases involving prior jurisdictional determinations is not relevant to this proceeding under the limited scope set forth in Section 536.073.2. Accordingly Petitioner's Motion in Limine is granted and Respondent's Exhibits A, B, C, D, and E as offered separately and as attached to Respondent's Exhibit F are not admitted to the hearing record, and the Court will exclude consideration of any issues within the exclusive primary jurisdiction of the Commission.

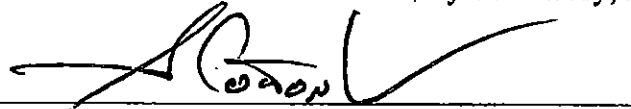
WHEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT, pursuant to Section 536.073.2, RSMo, that the Commission's *Petition For Order To Permit Entrance Upon Land And Inspection of Property* is hereby granted. Respondent shall permit Staff to conduct the inspection as set forth in Staff's Request, as ordered by the Commission in its July 27, 2022, *Order Granting Staff's Motion To Compel and Denying Respondent's Request For A Protective Order*. Staff and Respondent shall agree upon a reasonable date and time for the inspection, not to exceed

30 days beyond the effective date of this order. Should Respondent not submit to the inspection as required by this order, the Commission may impose sanctions, consistent with the statutes and regulations governing the Commission, as the Commission sees fit.

That Respondent's Motion for Stay is hereby overruled.

That Petitioner's Motion In Limine is hereby granted.

SO ORDERED this 29th day of January, 2023:

A handwritten signature in black ink, appearing to be 'S. B. V.', written over a horizontal line.

Judge, Circuit Court of Cole County, Missouri