

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

The Staff of the Missouri Public)	
Service Commission,)	
Complainant,)	
)	
v.)	Case No. WC-2008-0030
)	
Suburban Water and Sewer Company)	
and)	
Gordon Burnam,)	
Respondents.)	

**RESPONDENT GORDON BURNAM'S MOTION TO STRIKE AND ALTERNATIVE
REPLY TO STAFF'S OPPOSITION TO RESPONDENT'S MOTION TO DISMISS**

COMES NOW Respondent Gordon Burnam ("Burnam"), by and through undersigned counsel, and for his Motion to Strike and Alternative Reply to Staff's Opposition to his Motion to Dismiss states as follows:

1. Burnam has entered his appearance specially for the purpose of contesting this tribunal's jurisdiction over him. Nothing contained herein is a waiver of those rights to object or a submission to this tribunal's jurisdiction.

2. This filing relates to the Staff's Opposition to Respondent Gordon Burnam's Motion to Dismiss, dated September 17, 2007 ("Staff's Opposition"), and Burnam has raised other arguments in his Motion to Dismiss, none of which are hereby abandoned or waived.

Motion to Strike

3. Burnam incorporates the foregoing paragraphs herein by reference.

4. For his Motion to Strike, Burnam notes that the deadline for a response to his Motion to Dismiss was 4:00 p.m. on September 16, 2007. 4 CSR 240-2.080(11) and (15). The Staff filed the Staff's Opposition at 4:50:39 p.m. on September 17, 2007, as evidenced by the

EFIS timestamp. Therefore, the Staff's Opposition was untimely and should be struck in its entirety and disregarded.

WHEREFORE, Respondent Gordon Burnam moves to strike the Staff's Opposition as untimely and requests the Commission to refuse to consider the same or any arguments therein and for such other and further relief as the Commission deems just and proper.

Alternative Reply

5. Burnam incorporates the foregoing paragraphs herein by reference.

6. In the alternative, in the event the foregoing Motion to Strike is not granted, this Reply serves four primary purposes: (a) to reply to the arguments contained in paragraphs 5-16 and 18 in the Staff's Opposition regarding their position that Burnam is personally subject to the Commission's jurisdiction, (b) to reply to the arguments contained in paragraphs 19-20 therein that the Commission cannot determine any constitutional matter, (c) to dispute the false and misleading accusations contained in paragraphs 10 and 11 therein, and (d) to object to the general irrelevance and even incoherence of paragraphs 17 and 21-25 therein.

7. First, the Staff generally argues that Burnam is personally subject to regulation premised on a "piercing the corporate veil" theory, which the Staff attempts to support with allegations of various "misdeeds and unethical acts." This argument misses the point, however, because this issue is one of jurisdiction, not equity.

- a. The Commission's jurisdiction is limited to the express grant of authority under the statute. See State ex rel. Utility Consumers' Council of Missouri v. Public Service Commission, 585 S.W.2d 41, 49 (Mo. banc 1979) (holding that, when determining the Commission's jurisdiction, "neither convenience, expediency or necessity are proper matters for consideration" (quotations and

citations omitted)). Further, an administrative agency cannot use equitable principles to expand its jurisdiction. See Soars v. Soars-Lovelace, Inc., 142 S.W.2d 866, 871 (Mo. 1940) (holding that a state agency cannot enlarge its statutory jurisdiction based upon equitable theories). All of the factual allegations and innuendo in the Staff's Opposition are, therefore, irrelevant to establishing the scope of the Commission's jurisdiction.

- b. A careful reading of the two statutes at issue here, as cited in the Complaint in this case, is instructive. Section 393.130.1 states: "every *water corporation* ... shall furnish and provide such service instrumentalities and facilities as shall be safe and adequate and in all respects just and reasonable" (emphasis added). Section 393.140 states: "The commission shall: (1) Have general supervision of *all ... water corporations ... having authority under any special or general law or under any charter or franchise* to ... [install improvements for] furnishing or distributing water" (emphasis added). It is clear on the face of the Complaint that Burnam is not a water corporation himself, does not furnish service himself, and, most importantly, does not hold a certificate of convenience and necessity or tariff and thus is not authorized to provide service himself. (Staff's Complaint, paragraphs 2, 5, 6, and 14).
- c. In the Staff's Opposition, there are several paragraphs (14-16) that argue Burnam is subject to regulation by virtue of Sections 386.570 and 386.580. However, those statutes are not asserted bases for Commission action (and thus its jurisdiction) in the Complaint and are, therefore, irrelevant. Furthermore, in the separate complaint case brought under those statutes,

which was for the specific purpose of addressing many of the alleged "misdeeds" asserted in the Staff's Opposition, the Commission found that Burnam was not subject to its regulation. (Order Granting in Part and Denying in Part Respondent Gordon Burnam's Motion to Dismiss in Case No. WC-2007-0452, issued July 27, 2007, pp. 4-7; Report and Order in that case, issued August 28, 2007, p. 3).

Therefore, the Commission has no jurisdiction over Burnam under Section 393.130 or 393.140.

8. Second, the arguments concerning the Commission's inability to address constitutional questions in paragraphs 19 and 20 cite irrelevant authority and are without merit. First, the Staff cites Fayne v. Dept. of Social Services, 802 S.W.2d 565 (Mo. App. W.D. 1991), which stated that the administrative hearing commission, in an appeal of an administrative agency decision, could not adjudicate constitutional issues. As noted in Duncan v. Missouri Bd. for Architects, Professional Engineers and Land Surveyors, 744 S.W.2d 524, 531 n.3 (Mo. App. E.D. 1988), which is the case cited for this proposition in Fayne, there is a difference between asking an administrative agency to rule on the constitutionality of a statute and asking it to constitutionally apply a statute. Burnam is not challenging the constitutionality of Sections 393.130 or 393.140 *per se* in this case; rather, he is challenging the Commission's jurisdiction and ability to apply these statutes to him personally. Thus, all the Staff's arguments concerning the presumed constitutionality of statutes are irrelevant. The Staff are essentially arguing that the Commission *must* apply these statutes to Burnam as requested in the Complaint and the Commission *cannot* refrain from applying these statutes in this manner to the extent a defense is premised on a constitutional concept, which is absurd. The Commission can determine not to unconstitutionally apply these statutes, and this is what Burnam is now asking it to do.

9. Third, although a motion to dismiss is not a proper forum in which to make factual arguments, there is a patently false and misleading factual allegation contained in the Staff's Opposition, in paragraphs 10 and 11 therein. Specifically, the Staff claims that Burnam "deliberately instruct[ed] employees to not do actions that were agreed to and memorialized in writing....," pointing to the failure to read meters and deliberately mischaracterizing his prior testimony. In fact, at the hearing in the other complaint case, Burnam stated that he believed Suburban was not required to read meters because it was expressly authorized to charge a flat rate. (Transcript in Case No. WC-2007-0452 for hearing on July 26-27, 2007, Vol. 2, pp. 80-83, ln. 19-4, and p. 156, ln. 11-17). It is undisputed that Suburban's tariff does expressly so provide. (Tr. Vol. 2, pp. 263-264, ln. 14-4). Regardless, this, just as the other fact-based arguments discussed above, is irrelevant to the question of jurisdiction.

10. Finally, there are a number of irrelevant arguments contained in the Staff's Opposition, namely paragraphs 17 and 21-25 therein, some of which are confusing and frankly incomprehensible. For example, paragraphs 17 and 21-24 refer to collateral attacks on a 2005 rate case and penalties and possible circuit court actions relating to that case, none of which are at issue in this case in any respect. The inclusion of those paragraphs is mystifying. Paragraph 25 cites to another case, State v. Davis, 830 S.W.2d 27 (Mo. App. S.D. 1992), which was a circuit court case brought under Section 386.570 and in which the issue of jurisdiction was not raised or decided, and it is completely inapposite to this case and the arguments raised herein.

WHEREFORE, Respondent Gordon Burnam reiterates his request that the Commission grant his Motion to Dismiss and for such other and further relief as the Commission deems just and proper.

/s/ Matthew S. Volkert
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The undersigned certifies that a complete and conformed copy of the foregoing document was filed electronically and mailed to each attorney who represents any party to the foregoing action, by U.S. Mail, postage prepaid in the proper amount, at said attorney's business address.

/s/ Matthew S. Volkert
Dated: September 27, 2007