

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

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

**RESPONDENT GORDON BURNAM'S REPLY TO
STAFF'S OPPOSITION TO RESPONDENT'S MOTION TO DISMISS
AND ALTERNATIVE MOTION FOR MORE DEFINITE STATEMENT**

COMES NOW Respondent Gordon Burnam ("Burnam"), by and through undersigned counsel, and for his Reply to Staff's Opposition to his Motion to Dismiss or Alternative Motion for More Definite Statement 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. In its First Amended Complaint, the staff for the Missouri Public Service Commission ("Commission") have requested that the Commission find that both Respondent Suburban Water and Sewer Company ("Suburban") and Burnam have violated the subject order so as to permit the staff to seek penalties against both Suburban and Burnam pursuant to Section 386.570 RSMo.

3. Burnam is replying herein only to portions of Staff's Opposition to his Motion to Dismiss or Alternative Motion for More Definite Statement, but he has raised other arguments in his Motion to Dismiss or Alternative Motion for More Definite Statement, none of which are

hereby abandoned or waived. In particular, Burnam is replying to the arguments contained in paragraphs 8 and 10 thereof asserting the authority to seek penalties against Burnam under Section 386.570.

4. The staff raises two arguments in this particular regard, namely: (1) that the Commission has authority to seek penalties against all "persons" under Section 386.570, and (2) that the Commission can pierce the corporate veil to assert Suburban's debts (including its debts for penalties assessed under Section 386.570, if any) against Burnam.

5. All of the alleged violations arise out of the subject disposition agreement, which was signed by and an obligation of Suburban, not Burnam, for purposes of Section 386.570. Suburban was the signatory, and it was responsible for any required compliance. Burnam signed as its agent on its behalf. Wired Music, Inc. of the Great Midwest v. Great River Steamboat Co., 554 S.W.2d 466, 468 (Mo. App. 1977) (stating that "an individual who signs an instrument on behalf of another party ... e.g., president ... the liability is the principal's and not the individual signing for the principal."). This is confirmed by the statutory text itself, which reads: "In 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 (emphasis added). Thus, even if the staff's argument that the Commission has authority over all persons were correct, which it is not, the only "person" that could have violated the agreement was Suburban, and the Commission cannot find that Burnam was personally responsible for any required compliance under that agreement, or that he personally violated that agreement, in each case for purposes of Section 386.570.

6. Further, in general the Commission does not have authority over all persons, only public utilities. It is without dispute that Suburban, not Burnam, is the water corporation and public utility. It is also without dispute that the Commission only has the authority to regulate "public utilities" and could not have entered the subject order against Burnam. Section 386.020(42) RSMo. ("Public utility' includes every ... water corporation ..., as ... defined in this section, and each thereof is hereby declared to be a public utility and to be subject to the jurisdiction, control and regulation of the commission and to the provisions of this chapter"); Section 386.250(3) RSMo. ("The jurisdiction, supervision, powers and duties of the public service commission herein created and established shall extend under this chapter: ... To all water corporations"); State ex rel. Danciger v. Public Service Commission, 205 S.W. 36 (Mo. 1918). In Danciger, the Missouri Supreme Court held that "It is certainly fundamental that the business done by respondent either constitutes him a 'public utility,' or it does not. If he is a public utility, he is such within the whole purview, and for all inquisitorial and regulatory purposes of the Public Service Commission Act." The Danciger case and its progeny clearly hold that the Commission can only regulate public utilities. See also Khulusi v. Southwestern Bell Yellow Pages, 916 S.W.2d 227 (Mo. App. W.D. 1996); Osage Water Co. v. Miller County Water Authority, 950 S.W.2d 569, 574 (Mo. App. S.D. 1997). In all these cases, the courts reached this conclusion notwithstanding that they were interpreting statutes that used the word "person." Danciger, 205 S.W. at 40 (citing the definition of "electrical corporation," the predecessor of Section 386.020(15), which used the term "person"); Khulusi, 916 S.W.2d at 231 (citing the definition of "telecommunications company," the predecessor of Section 386.020(51), which used the term "person"); Osage Water, 950 S.W.2d at 573-574 (citing the definition of "water corporation," the predecessor of Section 386.020(58), which used the term "person").

7. While it is true that Section 386.570 contains the verbage "corporation, person or public utility," this refers and is limited to corporations, persons or public utilities that are acting as public utilities. This and similar phrases containing the word "person" are used throughout Chapters 386 and 393. See, e.g., Sections 386.010, 386.250(5), 386.390.1, and 393.140 RSMo. As stated above, the Commission can only regulate public utilities under these Chapters and could not have entered the subject order against Burnam, and it is unreasonable to argue that it may impose penalties on someone that it cannot regulate, absent an express grant of authority to do so. On the contrary, penal provisions of statutes are construed narrowly. State v. Davis, 830 S.W.2d 27, 29 (Mo. App. S.D. 1992) (construing Section 386.570 and stating that "[p]enal provisions of a statute, or of a statute penal in nature are always strictly construed...."). Moreover, taking the staff's argument to its logical extreme, if the word person as used here included every person, the Commission could seek penalties against anyone for any illegal conduct. See Section 386.570 (stating "Any ... person ... which violates ... any provision of the constitution of this state or ... any other law ... is subject to a penalty"). The legislature cannot have intended such a result. State v. Moriarty, 914 S.W.2d 416, 423 (Mo. App. W.D. 1996) (noting that it is presumed that the legislature intended a "logical, rather than an absurd or unreasonable result.").

8. Thus, the only basis for asserting jurisdiction over Burnam is in his capacity as an officer and/or shareholder of Suburban, and nothing in the statute permits the exercise of this jurisdiction for purposes of Section 386.570. The only provision in the statute that imposes liability on an officer of a public utility is in Section 386.580, which has its own requirements. The proper reading of these two sections is that public utilities may be assessed penalties under Section 386.570, and officers or employees of public utilities may be prosecuted under Section

386.580. See Martinez v. State, 24 S.W.3d 10, 18 (noting that "one part of a statute should not be read in isolation ... it is proper that provision of the entire act be construed together and, if reasonably possible, all provisions should be harmonized."). In fact, under their express terms, no person can be liable for penalties under both sections for the same conduct, as both of them are limited to cases "in which a penalty has not herein been provided." Sections 386.570.1 and 386.580.

9. Finally, the Commission cannot, by simply alleging a "piercing the corporate veil" theory, bootstrap its authority to extend to persons other than public utilities for purposes of Section 386.570. It cannot alter its jurisdiction, because this is established by and limited to the express grant in 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 "the Public Service Commission's powers are limited to those conferred by ... statute[] ... [and] 'neither convenience, expediency or necessity are proper matters for consideration in the determination of' whether or not an act of the commission is authorized by the statute." (citations omitted)). Suburban, not Burnam, is the public utility and party to the disposition agreement, and Suburban, not Burnam, is responsible for any requisite compliance with that agreement. The Commission can in no event find that Burnam violated the agreement.

WHEREFORE, Respondents request that the Commission grant Respondent Gordon Burnam's Motion to Dismiss or Alternative Motion for More Definite Statement, specifically including by dismissing all counts to the extent requesting the authority to impose penalties against Respondent Gordon Burnam under Section 386.570 RSMo., and for such other and further relief as the Commission deems just and proper.

/s/ Matthew S. Volkert
Matthew S. Volkert, MO Bar Number 50631
Thomas M. Harrison, MO Bar Number 36617
Van Matre Harrison, and Volkert, P.C.
1103 East Broadway
P. O. Box 1017
Columbia, Missouri 65205
Telephone: (573) 874-7777
Telecopier: (573) 875-0017
matt@vanmatre.com
Attorneys for Respondent Suburban Water and
Sewer Company and Gordon Burnam

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: July 6, 2007