

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

**In the Matter of the Application of)
Central Jefferson County Utilities, Inc.)
for an Order Authorizing the Transfer)
and Assignment of Certain Water and)
Sewer Assets to Jefferson County)
Public Sewer District and in Connection)
Therewith, Certain Other Related)
Transactions.)**

Case No. SO-2007-0071, et al.

**STAFF’S REPORT ON THE EFFECT
AN ORDER APPROVING ASSET TRANSFER
WOULD HAVE ON THE COMMISSION’S
ABILITY TO SEEK PENALTIES**

COMES NOW the Staff of the Missouri Public Service Commission and, for its Report on the Effect an Order Approving Asset Transfer Would Have on the Commission’s Ability to Seek Penalties, states to the Missouri Public Service Commission as follows:

Procedural Background

1. On November 29, 2006, the Commission ordered the Staff to investigate and report on the impact a Commission order approving the transfer of the assets of Central Jefferson County Utilities, Inc. (“Central Jefferson” or “the Company”) to the Jefferson County Public Sewer District (“the Sewer District”) could have on the Commission’s ability to seek penalties against the Company for violation of any Commission rule, statute or Company tariff provision.

The Penalty Statutes

2. Section 386.570.1¹ subjects those who violate the Public Service Commission Law to penalties ranging from \$100 per day to \$2000 per day. It provides as follows:

¹ All statutory citations are to RSMo 2000, as currently supplemented.

1. Any corporation, person or public utility which violates or fails to comply with any provision of the constitution of this state or of this or any other law, or which fails, omits or neglects to obey, observe or comply with any order, decision, decree, rule, direction, demand or requirement, or any part or provision thereof, of the commission in a case in which a penalty has not herein been provided for such corporation, person or public utility, is subject to a penalty of not less than one hundred dollars nor more than two thousand dollars for each offense.

In the case of a continuing violation, each day's continuance thereof constitutes a separate and distinct offense. See § 386.570.2.

3. Section 386.600 authorizes the Commission to seek such penalties in the circuit court.

It provides, in part, as follows:

An action to recover a penalty or a forfeiture under this chapter or to enforce the powers of the commission under this or any other law may be brought in any circuit court in this state in the name of the state of Missouri and shall be commenced and prosecuted to final judgment by the general counsel to the commission.

4. These statutes authorize the Commission to seek penalties for failing to provide safe and adequate service. See *State v. Davis*, 830 S.W.2d 27 (Mo. App. W.D. 1992), where the court held that the Commission's petition seeking penalties for violations of the law or refusals to follow orders of the Commission stated a claim upon which relief could be granted. The petition in the *Davis* case stated that the defendants failed to maintain a safe and adequate water supply, failed to install adequate storage capacity and overcharged customers.

Contested Hearing Required

5. However, the Commission may only initiate such a lawsuit seeking penalties after holding a contested hearing. "The courts have ruled that the Division cannot act only on the information of its staff to authorize the filing of a penalty action in circuit court; it can authorize a penalty action only after a contested hearing." *State ex rel. Sure-Way Transp., Inc. v. Division of Transp., Dept. of Economic Development, State of Mo.*, 836 S.W.2d 23, 27 (Mo. App. W.D. 1992) (relying on *State v. Carroll*, 620 S.W.2d 22 (Mo. App. 1981)); see also *State ex rel. Cirese*

v. Ridge, 138 S.W.2d 1012 (Mo. banc 1940). If, but only if, the Commission determines after a contested hearing that Central Jefferson failed to provide safe and adequate service, as required by law, the Commission may then authorize its general counsel to bring a penalty action in the circuit court, as provided in § 386.600.

Jurisdiction Required

6. The issue that is critical in the instant case is whether the Commission can conduct the required contested hearing *after* Central Jefferson transfers its utility assets. The Commission can only conduct such a hearing if it has jurisdiction over the respondent.

7. The Commission possesses only those powers that are conferred upon it by statutes, either expressly, or by clear implication as necessary to carry out the powers specifically granted. *State ex rel. Utility Consumers' Council of Missouri, Inc. v. Public Service Commission*, 585 S.W.2d 141 (Mo. 1979).

8. The statutes that confer power on the Commission are remedial in nature and should be liberally construed, so as to enforce the purpose for which they were enacted. *Utility Consumers' Council of Missouri, supra*.

Jurisdiction Under Section 386.250 (3), (4), and (5)

9. Section 386.250 describes the jurisdiction of the Commission. It provides, in part, as follows:

The jurisdiction, supervision, powers and duties of the public service commission herein created and established shall extend under this chapter:

...

(3) To all water corporations, and to the land, property, dams, water supplies, or power stations thereof and the operation of same with this state ...

(4) To all sewer systems and their operations within this state and to persons or corporations owning, leasing, operating or controlling the same;

(5) To all public utility corporations and persons whatsoever subject to the provisions of this chapter as herein defined.

...

10. Section 386.020 defines the key terms in the foregoing statute. It is beyond dispute that Central Jefferson *presently* is a “water corporation,” that it is a “public utility,” and that it is a corporation owning, leasing, operating or controlling a “sewer system” within the state. Therefore, the jurisdiction of the Commission *presently* extends to Central Jefferson.

11. The definitions in § 386.020 are, however, written in the present tense, and it is possible that the Company’s status as such might change, if and when the Commission issues an order approving the transfer of the Company’s assets. The Company might cease to be a “water corporation,” the owner of a “sewer system,” or a “public utility,” once it transfers its assets to the Sewer District. It might therefore be argued that, at such time, Paragraphs (3), (4), and (5) of § 386.250 would no longer give the Commission jurisdiction over the Company. But see the discussion below, in Paragraphs **15-18** of this Report.

12. This does not mean, however, that the Commission could not pursue in circuit court a lawsuit seeking penalties from the Company, as authorized by §§ 386.570 and 386.600. In such case, the tribunal exercising jurisdiction would be the circuit court, whose jurisdiction is not limited by the constraints that are imposed on the Commission’s jurisdiction by § 386.250. But, as noted above, in Paragraph **5**, the Commission cannot file a circuit court lawsuit against the Company for penalties without first complying with the requirements enunciated in the *Sure-Way* case.

13. The Western District has held, though, in a driver’s license suspension case, that “[o]nce jurisdiction is validly acquired, the department retains jurisdiction over the case until a final judgment has been rendered.” See *Jenkins v. Director of Revenue*, 858 S.W.2d 257 (Mo. App. W.D. 1993), citing *Sheets v. Labor & Industrial Relations Commission*, 622 S.W.2d 391 (Mo. App. 1991). For a decision to be final, the agency must have arrived at a terminal,

complete resolution of the case. *Id.*, citing *Dore & Associates Contracting v. Department of Labor*, 810 S.W. 2d 72, 75-76 (Mo. App. 1990).

14. It would therefore appear that if a complaint is filed against the Company, in which the complainant seeks an order from the Commission authorizing the general counsel to file suit in circuit court seeking penalties, and if this complaint is filed *before* the Company completes its transfer of assets or before it ceases providing water and sewer service, the Commission would retain jurisdiction of that complaint until it renders a final decision in that complaint case. The Commission's final decision could occur even after the Company finished transferring its assets. If the Commission did then authorize the general counsel to file suit in circuit court for penalties, the general counsel could initiate the circuit court action, even after the complete transfer of assets.

Jurisdiction Under Section 386.250 (7)

15. There is, however, another provision of § 386.250 that provides additional statutory authority for the Commission's continuing exercise of jurisdiction over Central Jefferson. Paragraph (7) of the statute provides that the Commission's jurisdiction, supervision, powers and duties also extend "[t]o such other and further extent, and to all such other and additional matters and things, and in such further respects as may herein appear, either expressly or impliedly."

16. Section 386.390 governs the procedure for hearing complaints before the Commission. Subsection 1 provides, in part, as follows:

1. Complaint may be made by the commission of its own motion, or by [others], by petition or complaint in writing, setting forth any act or thing done or omitted to be done *by any corporation, person or public utility*, including any rule, regulation or charge heretofore established or fixed by or for any corporation, person or public utility, in violation, or claimed to be in violation, of any provision of law, or of any rule or order or decision of the commission. (Emphasis supplied.)

This statute authorizes the filing of complaints against not only “public utilities,” but also against “any corporation or person” who has failed to perform its obligation to the Commission. Central Jefferson is both a “corporation,” as that term is defined in § 386.020 (11), and a “person,” as that term is defined in § 386.020 (29). Section 386.390 may therefore authorize the filing of a complaint against Central Jefferson, regardless of whether the Company remains a “public utility” after it transfers its assets or ceases to provide utility service.

17. In enacting § 386.390, the General Assembly apparently intended to give the Commission the ability to rectify the wrongs that result from violation of the law or of rules, orders or decisions of the Commission. By enacting §§ 386.570 and 386.600, the General Assembly gave the Commission the enforcement tool it needs for this purpose, in the form of a penalty. All three of these statutes were first enacted in 1913, when the Commission was created, and have existed ever since then.

18. If the Commission approves the sale of Central Jefferson’s assets and the assets are transferred, the imposition of penalties pursuant to §§ 386.570 and 386.600 would become the Commission’s only remedy for any violations that Central Jefferson may have committed. And if the Commission cannot seek penalties against Central Jefferson merely because the Company has transferred its assets and ceased to be a “public utility,” so that Central Jefferson is able to escape accountability for the actions described in the Commission’s Order Directing Staff to Investigate and File a Report, that would defeat the General Assembly’s apparent purpose in enacting §§ 386.390, 386.570, and 386.600. That cannot have been the legislature’s intent.

Liberal Construction of the Statutes

19. As noted above, in Paragraph 8 hereof, the statutes in the Public Service Commission Law are to be liberally construed to enforce the purpose for which they were enacted. The

statutes discussed above were enacted in order to give the Commission the ability to enforce its orders, either through the imposition of penalties or otherwise. That purpose would be defeated if the Commission is deprived of the ability to seek penalties from a regulated utility that has fled the jurisdiction. And § 386.250 (7) expressly states that the Commission’s jurisdiction extends “to all such other and additional matters and things ... as may herein appear, either expressly or impliedly.” It seems clear that this jurisdiction extends “impliedly” to the penalties that §§ 386.570 and 386.600 expressly authorize.

20. There is another, practical, reason why the Commission’s jurisdiction should include the authority to seek penalties from Central Jefferson, even after its assets are transferred. That is because, to hold otherwise would require the Commission to choose between approving the transfer of the Company’s assets (if that is beneficial to the public interest), and rejecting the Company’s application for authority to transfer them (even though it is beneficial to the public interest) for the sole purpose of allowing the Commission to seek to impose penalties upon the Company.

The Statute of Limitations

21. In a case such as this, where the Commission would be seeking a penalty that would be payable to the school fund, the petition would have to be filed within two years after the commission of the offense. See § 516.390. This statute of limitations is not tolled by the pendency of an administration proceeding. See § 516.103.

Conclusion

22. The Staff concludes that the Commission may seek penalties against Central Jefferson in circuit court if it determines, after a contested hearing, that Central Jefferson has violated a statute, rule or order, or one of its own tariff provisions. The Commission could do

this pursuant to the jurisdiction granted by § 386.250 (3), (4), or (5), if a complaint is filed against the Company prior to the time that Central Jefferson transfers all of its utility assets to others or prior to the time that it ceases to provide water or sewer services in Missouri. The Commission could also do this pursuant to the jurisdiction granted by § 386.250 (7), even if the complaint is not filed until after the Company's assets are transferred. If the Commission authorizes him to do so, the general counsel could thereafter file suit in circuit court for penalties. In the circuit court lawsuit, the Commission could seek penalties for violations that occurred within the two years before suit is filed.

WHEREFORE, the Staff respectfully submits to the Commission this Report on the Effect an Order Approving Asset Transfer Would Have on the Commission's Ability to Seek Penalties.

Respectfully submitted,

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Certificate of Service

I hereby certify that copies of the foregoing have been mailed, hand-delivered, transmitted by facsimile or electronic mail to all counsel of record 13th day of December, 2006.

/s/ Keith R. Krueger