

4. On or about July 27, 2007, the Staff ("Staff") of the Commission filed its complaint before the Commission against Burnam and Suburban in this case, requesting the Commission to order both respondents to make improvements to Suburban's water system, and on or about August 6, 2007, the Commission issued notice of the complaint.

5. On or about May 29, 2007, the Staff had filed a separate complaint before the Commission against both respondents in Case No. WC-2007-0452 ("PSC Complaint Case"); on or about July 24, 2007, the Commission dismissed Burnam from the PSC Complaint Case because he was not subject to its regulation; and on or about August 28, 2007, after a hearing, the Commission entered a Report and Order in the PSC Complaint Case, again reiterating that Burnam was not subject to its regulation.

Motion to Dismiss

6. Respondent incorporates by reference all of the foregoing allegations and statements in paragraphs 1-5 above.

7. For the reasons enumerated below, there is no constitutional, statutory, or other valid delegation or authority giving the Staff or the Commission the jurisdiction, power, or authority to request or obtain relief against Burnam, in his individual capacity, including to make any findings or order any relief against him under Sections 393.130 and 393.140 RSMo., and accordingly the complaint in this case should be dismissed as against Burnam.

8. Sections 386.020(42) and (58) and 386.250(3), which establish the scope of the Commission's jurisdiction over public utilities in general (and water utilities in particular), read in pertinent part as follows:

"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 "Water corporation" includes every corporation,

company, association, joint stock company or association, partnership and person ... 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

and

The jurisdiction, supervision, powers and duties of the public service commission herein created and established shall extend under this chapter: ... To all water corporations, and to the land, property, dams, water supplies, or power stations thereof and the operation of same within this state

9. Sections 393.130.1 and 393.140(2), which govern utilities' obligations to provide service and permit the Commission to investigate and order improvements, and which are the basis for the complaint in this case, read in pertinent part as follows:

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....

and

The Commission shall ... Investigate and ascertain, from time to time, the quality of ... water supplied ... by persons and corporations, examine or investigate the methods employed by such persons and corporations ... and in supplying and distributing water for any purpose whatsoever, ..., and have power to order reasonable improvements and extensions of the works, wires, poles, pipes, lines, conduits, ducts and other reasonable devices, apparatus and property of ... water corporations

A. The Commission Has No Jurisdiction, Power, or Authority Over or With Respect to Burnam Because He Is Not a Public Utility or Otherwise Subject to its Regulation, and the Commission May Not Enter an Order or Award any Other Relief Against Him

10. The Commission has no jurisdiction, power, and authority over Burnam, as a matter of law, because its jurisdiction, power, and authority extend only to public utilities, and more specifically in the case of a water utility, to "water corporations." A person is not subject to Commission regulation as a water utility unless they meet two qualifications. First, they must sell water to the public for compensation. See Osage Water Co. v. Miller County Water

Authority, 950 S.W.2d 569, 574 (Mo. App. S.D. 1997). Second, they must own, operate, control, or manage plant or property used in distributing, selling, or supplying water. Section 386.020(58) RSMo. Suburban holds itself out as providing water service; owns, controls, manages, and operates the facilities; and sells the water. In its complaint, the Staff admits that Suburban is the entity subject to regulation and does not allege that Burnam has a certificate of convenience and necessity, supplies water, or is himself a public utility in any other respect. Therefore, it is without dispute that Suburban, not Burnam, is the regulated public utility.

11. The Commission only has the authority to regulate "public utilities" and cannot enter an order against Burnam to cause him personally to make improvements or provide water service. 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., 950 S.W.2d at 574.

12. The Commission itself, in the context of the PSC Complaint Case, has already ruled that Burnam is not subject to its regulation. However, the Staff is re-raising the same arguments again in this case. The Staff's position is contrary to the statute and the Commission's own prior rulings.

13. In the complaint, the Staff's allegations concerning Burnam revolve around the fact that he is an officer, director, and shareholder of Suburban and makes decisions on its behalf. This does not make him a public utility or subject to regulation as such. See Section

386.570.3 RSMo. (providing that any act, omission, or failure of an individual acting on behalf of a public utility "shall in every case be and be deemed to be the act, omission or failure of such" public utility); Wired Music, Inc. of the Great Midwest v. Great River Steamboat Co., 554 S.W.2d 466, 468 (Mo. App. 1977) (discussing general principal-agent concepts). Again, the Commission, in the PSC Complaint Case, has already noted that Section 386.570.3 (cited above) attributes the acts of an officer to the utility but not vice versa and that Burnam is not subject to its regulation.

14. The only claimed basis for asserting jurisdiction over Burnam is in his capacity as an officer, director, and/or shareholder of Suburban, and nothing in the statute permits the exercise of this jurisdiction for purposes of Sections 393.130 or 393.140. The only provision in Chapters 386 or 393 that imposes liability on an officer of a public utility is in Section 386.580, which is a criminal statute with its own requirements.

15. Finally, the Staff cannot, by simply alleging a "piercing the corporate veil" theory, bootstrap its or the Commission's authority to extend to persons other than public utilities for purposes of Sections 393.130 or 393.140. The Commission cannot alter its jurisdiction, because this is established by and limited to the express grant in the statute. See Dir., State Department of Public Safety v. Murr, 11 S.W.3d 91, 96 (Mo. App. W.D. 2000) (noting that an "administrative agency enjoys no more authority than that which is granted to it by statute"); 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 Suburban, not Burnam, is responsible for any requisite compliance with its obligations as such.

16. The Commission cannot expand its jurisdiction beyond what is expressly delegated by Chapters 386 and 393 RSMo., particularly as violations of these chapters may give rise to civil and criminal penalties under Sections 386.570 and 386.580 RSMo. See State v. Davis, 830 S.W.2d 27, 29 (Mo. App. S.D. 1992) (addressing Section 386.570 and stating that "[p]enal provisions of a statute, or of a statute penal in nature are always strictly construed...."); United Pharmacal Co. of Mo. v. Mo. Bd. Of Pharmacy, 208 S.W.3d 907, 912 (Mo. banc 2006) (holding that "when a party could possibly face a criminal penalty for violating a civil statute, ... [any] ambiguity ... must be resolved against the government"); Article I, Section 11 of the Missouri Constitution (stating that no person may be imprisoned for debt).

17. In sum, the Commission has no power to enter an order or award any other relief against Burnam to force him to act as a public utility, when he has never been subject to its regulation in the first place.

B. The Commission Cannot Take Private Property without Just Compensation and So May Not Enter an Order Against Burnam under Sections 393.130 or 393.140

18. Sections 393.130 and 393.140 cannot be expanded to apply to Burnam, including for any failure to contribute or apply his own funds to enable Suburban to make improvements or continue to operate, because this would constitute a taking of private property without just compensation and due process in violation of the Fifth and Fourteenth Amendments to the U.S. Constitution and Article I, Sections 10 and 26 of the Missouri Constitution. Without limiting the generality of the foregoing, cf. State ex rel. Southwestern Bell Tel. Co. v. Public Service Comm'n, 416 S.W.2d 109, 114 (Mo. 1967) (stating that the Commission could not order a telephone company to make any investment in a particular area where the company never

professed to offer service in that area, because such an order would constitute an unconstitutional taking). Any order entered against Burnam that directly or indirectly requires him to function as a public utility would be unconstitutional and in violation of his fundamental rights.

WHEREFORE, Respondent Gordon Burnam requests that the Commission dismiss him from the complaint in this case and from any and all other proceedings before the Commission, 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 e-mailed to each attorney who represents any party to the foregoing action to said attorney's business address.

/s/ Matthew S. Volkert
Dated: September 6, 2007