

**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 SUBURBAN WATER AND SEWER CO.'S MOTION TO DISMISS

COMES NOW Respondent Suburban Water and Sewer Company, by and through undersigned counsel, and for its Motion to Dismiss.

Background

1. The Missouri Public Service Commission ("Commission") is a state administrative agency established by the Missouri General Assembly to regulate public utilities operated within the State of Missouri, pursuant to the Public Service Commission Law, Chapters 386, 392, and 393 of the Missouri Revised Statutes.

2. On or about June 8, 2007, the general counsel for the Commission filed a First Amended Complaint ("Complaint"), together with a Motion to Expedite, against both Respondent Suburban Water and Sewer Company ("Suburban") and Respondent Gordon Burnam.

3. The Complaint generally requests relief pursuant to Sections 386.570 and 386.580 RSMo. for each of the various counts, all of which are based upon and relate to alleged violations of an Order Approving Small Company Rate Increase and Approving Tariff (Case No. WR-2005-0455), issued June 16, 2005 and effective June 30, 2005, including the Unanimous

Agreement Regarding Disposition of Small Water Company Rate Increase Request dated May 31, 2005 and incorporated therein (collectively, 'Order'). The Commission claims in each case that the Order was authorized pursuant to Section 393.140(2).

4. Suburban possesses a certificate of convenience and necessity granted by the Commission and is a water corporation and public utility, each as defined in Chapter 386 RSMo.

5. Suburban is a general business corporation incorporated and validly existing in the State of Missouri under and by virtue of Chapter 351 RSMo.

Motion to Dismiss

For its Motion to Dismiss, Suburban states the following:

6. Suburban hereby restates and incorporates by reference all of the statements contained in paragraphs 1 through 5 above.

7. For the reasons enumerated below, there is no constitutional, statutory, or other valid authority or delegation giving the Commission or its general counsel the jurisdiction, power, or authority to request or obtain relief against, including to make any findings or impose any penalties, pursuant to either of Sections 386.570 or 386.580, and accordingly the Complaint should be dismissed as against Suburban.

8. Sections 386.570 and 386.580 are unconstitutional and void in that they violate Article I, Section 31 of the Missouri Constitution, which provides that "no law shall delegate to any ... administrative agency authority to make any rule fixing a fine or imprisonment as punishment for its violation." Both Sections 386.570 and 386.580 violate this provision in that both purport to delegate blanket authority to the Commission to adopt rules and issue orders and requirements, the violation of which automatically result in fines and/or imprisonment. Without limiting the generality of the foregoing, cf. Op.Atty.Gen, No. 19 (June 11, 1953) (stating that

only violations of statutory requirements, and not mere agency rules or orders, may result in prosecutions).

9. To the extent the Commission is being requested to adjudicate any issues or make any findings relating to the Complaint or the allegations contained therein, the Commission is without jurisdiction or authority to do so, because its exercise of any such function would constitute an invalid delegation of powers and a violation of due process and the Doctrine of Separation of Powers under the U.S. and Missouri Constitutions as well as constitutional and statutory rights enjoyed by an accused in criminal prosecutions, such as the right to trial by jury, which Suburban has not waived. The Commission cannot engage in any judicial or other fact-finding function for purposes of Section 386.570, which is penal in nature, or Section 386.580, which would result in a misdemeanor. Without limiting the generality of the foregoing, see Percy Kent Bag Co. v. Mo. Comm'n on Human Rights, 632 S.W.2d 480, 484 (Mo. banc 1982) (quoting favorably the statement that "Agencies may not be delegated power to administer what is deemed to be criminal law, and agencies may not serve when juries are required.").

10. Sections 393.140(2), 386.570, and 386.580 and the Order are unconstitutional and void as applied in this case, because they are vague and contrary to due process and do not convey to a person of ordinary intelligence a sufficiently definite warning that they may result in penalties for acts or omissions which are impossible due to financial inability or otherwise. Even the Complaint itself is unclear in that it does not identify any knowledge or purpose by Suburban. Without limiting the generality of the foregoing, see State v. Young, 695 S.W.2d 882, 884 (Mo. banc 1985) (requiring "guidance, through explicit standards, ... avoiding possible arbitrary and discriminatory application.").

11. The Order is unconstitutional and void because it does not afford an adequate rate of return and, thus, constitutes 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, see Duquesne Light Co. v. Barasch, 488 U.S. 299, 308 (1989) (stating that a utility rate must afford sufficient compensation to the utility company, or it would constitute an unconstitutional taking by the regulatory commission).

12. All claims made and penalties sought for violations of the Order are barred by the applicable statute of limitations. Without limiting the generality of the foregoing, Section 556.036 provides for a one-year statute of limitations for all misdemeanors, and any alleged offenses by Suburban would pre-date this period of time.

13. The Complaint fails to state a claim upon which relief may be granted, because it fails to allege all necessary elements of each claimed violation.

WHEREFORE, Respondents request that the Commission dismiss Respondent Suburban Water and Sewer Company from the Complaint and 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 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: June 15, 2007