

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

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

**RESPONDENT'S MOTION FOR RECONSIDERATION
AND APPLICATION FOR REHEARING**

COMES NOW Respondent Suburban Water and Sewer Co., by and through undersigned counsel, and for its Motion for Reconsideration and Application for Rehearing states as follows:

Background

1. On May 21, 2007, the Office of the Public Counsel ("Public Counsel") filed its Application to Open a Case for Investigation and Request for Local Public Hearing before the Commission regarding Respondent in Case No. WO-2007-0444 ("OPC Case").

2. On May 29, 2007, the Staff ("Staff") of the Commission filed a complaint before the Commission against Respondent and Gordon Burnam in Case No. WC-2007-0452 ("PSC Complaint Case"). The PSC Complaint Case relates to alleged violations of a unanimous disposition agreement and related Commission order in Respondent's small company water rate case, Case No. WR-2005-0455 ("Disposition Agreement"). Gordon Burnam was subsequently dismissed from that complaint.

3. The Commission consolidated the OPC Case and the PSC Complaint Case and held two hearings: a local public hearing in the OPC Case on July 23, 2007, and an evidentiary hearing in the PSC Complaint Case on July 26-27, 2007.

4. On August 28, 2007, the Commission entered a Report and Order in the OPC Case and the PSC Complaint Case with an effective date of September 7, 2007 ("PSC Order"), and this PSC Order is the subject of this Motion for Reconsideration and Application for Rehearing.

Motion for Reconsideration and Application for Rehearing

5. Respondent incorporates by reference all of the foregoing allegations and statements in paragraphs 1-4 above.

6. Respondent, pursuant to 386.500 RSMo. and 4 CSR 240-2.160, requests the Commission to reconsider the PSC Order and/or grant Respondent a rehearing in the PSC Complaint Case in the following respects.

7. The PSC Order is invalid because it was entered pursuant to Section 386.570, which is unconstitutional and void in that it violates 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." Section 386.570 violates this provision in that it purports 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.

8. The PSC Order is invalid insofar as it finds that the Staff proved the allegations in Counts III, IV, and VI-X and authorizes the Staff to pursue any remedies in circuit court, because those allegations relate to requirements in the Disposition Agreement without stated deadlines, and the Commission cannot find violations of requirements without deadlines, to-wit:

a. The Commission does not have the statutory authority to interpret the Disposition Agreement to imply or otherwise supply a deadline and then find a violation

of such a deadline (and authorize the Staff to pursue it in circuit court), because it cannot make findings or otherwise adjudicate any matter in a case under Section 386.570 RSMo. "[T]he Public Service Commission is purely a creature of statute, its powers are limited to those confirmed by statute..." Utilicorp United Inc. v. Plat-Clay Elec. Co-op., Inc., 799 S.W.2d 108, 109 (Mo. App. W.D. 1990); State Ex Rel. Kansas City v. Public Service Comm'n, 228 S.W.2d 738, 739 (Mo. 1950) (stating "the Public Service Commission is not a court[,] it has no judicial power..., [and] [t]he orders which it issues on not judgments or adjudications."; Gains v. Gibbs, 709 S.W.2d 541, 543 (Mo. App. S.D. 1986) (stating "the Public Service Commission is not a court...it has no power to construe or enforce contracts [and]...[t]he orders of the Commission are not judgments or adjudications.")). Contrary to the Staff's assertion, the Commission has no power or authority to interpret the terms of the Disposition Agreement in accordance with general contract law and imply a reasonable deadline. The Commission's function is limited to issuing prospective orders and to rulemaking. To the extent deadlines were omitted from the Disposition Agreement, they cannot now be supplied.

b. The Commission also cannot interpret the Disposition Agreement to imply or otherwise supply a deadline and then find a violation of such a deadline (and authorize the Staff to pursue it in circuit court), because Section 386.570 and the PSC Order are unconstitutional and void as applied in this case in that 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 without warning and for acts or omissions which are delayed or rendered impossible due to financial inability or otherwise. See State v. Young, 695 S.W.2d 882, 884 (Mo. banc 1985) (requiring

"guidance, through explicit standards, ... avoiding possible arbitrary and discriminatory application."). The Staff never made a demand on Respondent for compliance and never gave it any other reasonable notice of potential violations before initiating this case. This is contrary to due process.

c. The Commission also cannot interpret the Disposition Agreement to imply or otherwise supply a deadline and then find a violation of such a deadline (and authorize the Staff to pursue it in circuit court), because penal statutes must be strictly and narrowly construed. 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"). To impose a deadline where none existed before would be to expand the Disposition Agreement and Respondent's liability under the Disposition Agreement, which is contrary to settled principles of statutory interpretation.

d. The Commission also cannot interpret the Disposition Agreement to imply or otherwise supply a deadline and then find a violation of such a deadline (and authorize the Staff to pursue it in circuit court), because any such deadline would be imposed after the fact, without Respondent's consent, and without giving Respondent any prior notice and opportunity to comply before penalties could be assessed. Further, if the Commission were to supply deadlines in accordance with general contract

principles, these could in no event precede a demand for performance, which is a requirement under contract law.

9. The PSC Order is invalid insofar as it authorizes the Staff to pursue remedies in circuit court for any and all alleged violations of the Disposition Agreement, because those remedies are barred by the applicable statute of limitations.

10. Further, the PSC Order is invalid insofar as it finds that the Staff proved the allegations in Counts III, IV, and VI-VIII and authorizes the Staff to pursue any remedies in circuit court, for the following reasons:

a. With respect to Counts III and IV, the Staff, in its first amended complaint, requested only that the Commission address alleged violations of the Disposition Agreement and authorize the Staff to initiate an action in circuit court based on those violations. The complaint does not ask the Commission to find violations of any rules or laws other than the Disposition Agreement. Thus, whether or not Respondent's brochure or continuous property record system comply with the Commission's rules is irrelevant and outside the scope of the pleadings. These items do comply with the express terms of the Disposition Agreement.

b. With respect to Count VI, the complaint also does not ask the Commission to find a violation of its rules but only whether Respondent violated the Disposition Agreement. There was significant confusion at the trial, even among witnesses for the Staff, as to what a ten year replacement plan requires. Accordingly, whether Respondent's intent to replace meters as needed and to replace all of them within ten years complies with the Commission's rules is, again, irrelevant and outside the scope of the pleadings. It is arguable that this would comply with the express terms

of the Disposition Agreement, which must be strictly construed. Further, it is the Staff's burden to prove an alleged violation, and their inconsistent testimony and general confusion as to their own opinion about this requirement shows that they have no idea what this requires, let alone enough proof that will enable the Commission to find a violation of a requirement.

c. With respect to Counts VII and VIII, it is the Staff's burden to prove an alleged violation, and their evidence at trial did not show that Respondent's existing flush valve does not provide for adequate flushing or that Respondent's existing inlet was not high enough. Their evidence on these two points consisted only of testimony that: (a) Respondent had not installed any new or additional flush valves, and (b) Respondent had not installed a new inlet and Mr. Hummel suspected that the existing inlet was not high enough. This evidence is simply not enough to warrant the Commission to find a violation occurred and to authorize the Staff to go to circuit court.

11. Respondent, pursuant to 386.500 RSMo., requests the Commission to reconsider the PSC Order to the extent it has found the Staff has proved its allegations in Counts III, IV, and V-VII (and authorized the Staff to pursue remedies for the alleged violations in circuit court), which correspond to the requirements in the Disposition Agreement relating to the customer brochure, the continuous property record system, the meter installation, the meter replacement program, and the flush valves. Respondent believes this is appropriate in light of its recent work outlined on the attached Notice of Satisfaction, which is being filed in another case pending before the Commission (Case No. WC-2008-0030). Respondent is entitled to submit these new facts, after the hearing in this case and while the PSC Order is pending, by virtue of 386.500, which states that the Commission may consider facts "including those arising

since the making of the order or decision.” Therefore, Respondent requests a reconsideration and/or rehearing as to its current compliance with the above-described requirements of the Disposition Agreement.

WHEREFORE, Respondent respectfully requests the Commission to reconsider the PSC Order and/or grant Respondent a rehearing in the PSC Complaint Case on the following issues:

a. The Commission cannot enter an order against Respondent under Section 386.570 RSMo. at all, because that statute is unconstitutional in violation of Article I, Section 31 of the Missouri Constitution.

b. The Commission cannot enter an order against Respondent for any alleged violations of the Disposition Agreement where there was no stated deadline for performance, because the Commission cannot make any findings to imply or supply a deadline due to statutory limitations on its power and authority and requirements of due process, because the Disposition Agreement must be construed strictly and narrowly as a matter of statutory interpretation, and because the Staff never made a demand for performance.

c. The Commission cannot enter an order against Respondent for any and all alleged violations of the Disposition Agreement, because the deadlines (either express or, subject to Respondent’s objections above, implied) passed before the applicable statute of limitations.

d. The Commission cannot enter an order against Respondent either finding a violation of, or authorizing the Staff to seek penalties for, Counts III, IV, VI, VII, and VIII, for the following reasons:

i. As to Counts III and IV, the first amended complaint only alleged violations of the Disposition Agreement, not the Commission's rules, so any alleged violations of the rules are outside of the scope of the pleadings; and

ii. As to Count VI, the first amended complaint only alleged violations of the Disposition Agreement, not the Commission's rules, so any alleged violations of the rules are outside of the scope of the pleadings, and the Staff failed to carry its burden of proof as to what this term of the Disposition Agreement required; and

iii. As to Counts VII and VIII, the Staff failed to carry its burden of proof as to what this term of the Disposition Agreement required and whether Respondent in fact has violated the same.

e. The Commission should reconsider its order concerning Respondent's current compliance with Counts V-VIII, in light of the new facts outlined above and on the attachment.

/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

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 at said attorney's business e-mail address.

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