

3. The Staff, in its First Amended Complaint, also requested for expedited treatment of this case. The Commission granted expedited treatment, by order dated June 28, 2007, and agreed to issue its decision in this case by no later than August 20, 2007.

Response to Motion

4. Respondent hereby incorporates by reference its allegations and statements in paragraphs 1-3 above.

A. Response to the Request to Address any Statute Limitations Issue

5. To the extent that the Staff's first request in the Motion is simply a request, for whatever legal reason, for the Commission to reconsider its decision not to abide by its earlier order granting expedited treatment, Respondent has no particular objection or other response at this time. However, Respondent notes that the Staff never before in its filings in this case raised this issue as a reason for expedited treatment.

6. To the extent the first request in the Motion is asking the Commission to make any conclusions of law relating to the statute of limitations applicable to the claims in this case or to take any other action relative to the same, Respondent objects on the same basis as it objects to the Staff's second request in the Motion, as further described below.

7. Respondent has previously raised the statute of limitations as a defense (in its Motion to Dismiss, filed on or about June 15, 2007, and in its Answer) and may continue to raise the same throughout these proceedings and any subsequent proceedings. Respondent expressly does not waive any statute of limitations but reserves the right to raise any and all defenses, including under applicable statutes of limitations.

B. Objections to the Request to Fix Specific Dates within which Suburban's Performance Was Reasonably Due

8. Respondent asserts three separate bases for overruling the Staff's second request in the Motion.

9. First, Respondent asserts that sustaining the second request in the Motion would prejudice Respondent's defense in this case, for the following reasons:

a. Respondent, in its defense of this case, noted specifically at the hearing that the purpose of this case was merely to authorize the Staff to initiate an action in circuit court and not to make any findings or take any other actions. (Tr. pp. 26-29). Respondent's defense at said hearing was premised on this concept.

b. Staff cannot now request the Commission to make additional findings not requested in its First Amended Complaint, after the hearing, because that would deny Respondent the opportunity to prepare and present an appropriate defense and, thereby, due process of law.

10. Second, Respondent asserts that sustaining the second request in the Motion at this particular stage of the proceedings is improper as a matter of law, for the following reasons:

a. As noted above, the First Amended Complaint does not ask the Commission to interpret the terms of the disposition agreement or to make findings relative to the same.

b. For the Commission to take any such actions would be to permit the Staff to amend the First Amended Complaint after the Commission has already held a hearing in this case and taken it under advisement. Respondent did not waive or consent to any such amendment before or at the hearing and does not do so at this time.

c. Although there was evidence admitted at the hearing relating to the deadlines for performance in the disposition agreement, Respondent viewed such

evidence purely as relating to establishing that there was uncertainty as to deadlines and undermining whether or not a violation even occurred and not to establishing the actual deadlines for such performance. If Respondent believed that the Commission were going to make findings as to the actual deadlines, Respondent may have put on additional evidence as to those deadlines.

d. The Staff has previously attempted to amend its First Amended Complaint, when it filed its Motion Under Section 393.140 to Order Suburban Water and Gordon Burnam to Make Reasonable Improvements to Promote the Public Interests, Preserve the Public Health, and Protect Consumers of Suburban Water and Sewer Company on or about July 10, 2007. Respondent timely objected, arguing that such earlier motion was merely a back-door attempt to amend the First Amended Complaint. At the hearing in this case, Judge Lane and the Commission overruled said motion, agreeing with Respondent and finding that Staff was in fact attempting to amend the First Amended Complaint. (Tr. pp. 58-64). At that time, Judge Lane noted: "The Commission feels that it's important to keep this matter limited to the issues that are expressly raised in the first amended petition, and that is whether or not Suburban violated or failed to comply with the Disposition Agreement and the Commission's June 2005 Order approving that agreement, and if that is true, deciding whether or not to authorize general counsel to seek penalties in circuit court." (Tr. p. 64, ln. 5-13).

e. Respondent contends that for the Staff and general counsel to make another attempt, at this stage of the proceedings, to amend its First Amended Complaint is not only unwarranted but, under Rule 55.03(c) of the Missouri Rules of Civil Procedure, sanctionable.

11. Third, and of paramount importance, Respondent asserts that sustaining the second request in the Motion is improper as a matter of law, regardless of the time it is raised, for the following reasons:

a. The Commission does not have the statutory authority to make findings or conclusions of law 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). The Commission is not authorized to make any findings under Section 386.570.

b. The Commission is limited to authorizing the Staff to initiate an action in circuit court, the Commission may not adjudicate or take any other action which would constitute an adjudication in this case. See 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.").

c. Finally, Respondent notes that the findings would be irrelevant in the circuit court in any event, and that the Staff's sole reason for requesting such findings would be to attempt to improperly influence the judge and/or jury and they have no other reason for requesting the same.

C. Response to Request to Bifurcate the Commission's Report and Order

12. If the Commission determines to make any findings, over Respondent's objections (and without waiving the same), then Respondent agrees with the premise of the Staff's third request in the Motion, but not as to its application here.

13. Specifically, if the Commission determines to make any findings, Respondent contends that said findings and order should be bifurcated, but only as follows:

a. The Commission's sole function in this case is to determine whether there is a basis for asserting violations of the terms of the disposition agreement so as to warrant an action in circuit court. It is not authorized or permitted to make any findings, and should not do so.

b. If the Commission makes any findings, these would not be admissible at any subsequent proceeding. Therefore, any such findings should be separate from its order authorizing the Staff to pursue an action in circuit court.

c. Further, any such order should not incorporate by reference any findings, as this would be confusing and difficult to deal with at the circuit court. Rather, the order itself should simply state that the Staff is authorized to pursue an action in circuit court.

WHEREFORE, Respondent respectfully requests this Commission overrule the Motion and to issue its final decision, in its discretion, in an order that only states whether or not the Staff is authorized to pursue an action in circuit court, and for such other and further relief as the Commission deems just and proper in the circumstances.

Request for Prompt Determination and Leave to Amend Respondent's Pleadings

14. Respondent hereby incorporates by reference its allegations and statements in paragraphs 1-13 above.

15. In the event the Commission does determine to make any additional findings, over Respondent's objections (and without waiving the same), then Respondent may desire to amend its pleadings, including its Notice of Satisfaction in this case, in order to submit additional evidence of compliance with the disposition agreement after the hearing.

WHEREFORE, Respondent respectfully requests this Commission to make a decision on the Motion promptly so as to give Respondent sufficient time to pursue an amendment of its pleadings in this case, if it so determines.

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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: August 27, 2007