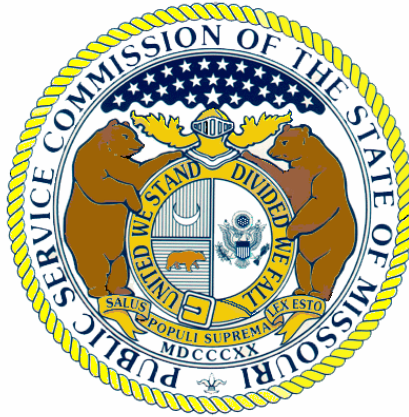


**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI**



The Staff of the Missouri Public Service
Commission,

Complainant,

v.

Suburban Water and Sewer Company,

Respondent.

Case No. WC-2007-0452 et al.

REPORT AND ORDER

**Issue Date: August 28, 2007
Effective Date: September 7, 2007**

BEFORE THE PUBLIC SERVICE COMMISSION

OF THE STATE OF MISSOURI

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

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Appearances

Shelley E. Syler Brueggemann, Senior Counsel, and **Steven C. Reed**, Litigation Counsel, Missouri Public Service Commission, Post Office Box 360, Jefferson City, Missouri 65102, for the Staff of the Missouri Public Service Commission.

Tom Harrison and Matthew Volkert, Van Matre, Harrison, and Volkert, P.C., 1103 East Broadway, Columbia, Missouri 65201, for Suburban Water and Sewer Company.

Christina Baker, Assistant Public Counsel, Post Office Box 2230, Jefferson City, Missouri 65102, for the Office of the Public Counsel.

REGULATORY LAW JUDGES: Benjamin H. Lane, Regulatory Law Judge and Morris L. Woodruff, Deputy Chief Regulatory Law Judge

REPORT AND ORDER

Syllabus: The Commission finds in favor of Staff on its Complaint and authorizes the Commission's General Counsel, pursuant to Section 386.600, RSMo 2000, to file a petition in the circuit court of his choosing to seek any applicable penalties against Suburban Water and Sewer Company for violations of Counts V, VI, VII, and VIII of Staff's Complaint.

FINDINGS OF FACT

The Missouri Public Service Commission, having considered all the competent and substantial evidence upon the whole record, makes the following findings of fact. The positions and arguments of all of the parties have been considered by the Commission in making this decision. Failure to specifically address a piece of evidence, position, or

argument of any party does not indicate that the Commission has failed to consider relevant evidence, but indicates rather that the omitted material was not dispositive of this decision.

Procedural History

On May 29, 2007, the Staff of the Commission filed a complaint against Suburban Water and Sewer Company and Gordon Burnam. The complaint contained ten counts alleging that Suburban and Gordon Burnam, owner and president of Suburban, have violated several provisions of a disposition agreement entered into in Case No. WR-2005-0455, to resolve Suburban's request for a rate increase. That disposition agreement was approved by the Commission in an order issued on June 16, 2005.

By a notice issued on June 4, 2007, pursuant to Commission Rule 4 CSR 240-2.070(7), the Commission served a copy of Staff's complaint on Suburban and Burnam. Subsequently, on June 8, 2007, Staff filed a First Amended Complaint. The Commission notified the respondents of the filing of the amended complaint on June 11, 2007.

On May 21, 2007, the Office of the Public Counsel filed an application asking the Commission to open a case for investigation and requested that the Commission hold a local public hearing. Public Counsel was concerned about Suburban's stated intention to cease providing water service to its customers on July 1, 2007. Public Counsel's application was assigned Case No. WO-2007-0444. Acting on its own motion, on June 5, 2007, the Commission consolidated WO-2007-0444 with Staff's complaint, WC-2007-0452.

Suburban and Burnam filed timely answers on July 11, 2007. On July 24, 2007, the Commission found that it does not have jurisdiction over Gordon Burnam as an individual and granted his motion to be dismissed from Staff's complaint.

Staff asked that the Commission expedite its consideration of Staff's complaint. For that reason, an evidentiary hearing was held before the Commission on July 26 and 27, 2007. The Commission did not permit the parties to prefile testimony. Instead, all testimony was heard live at the hearing. In addition, a local public hearing was held in Columbia, Missouri, on July 23, 2007, at which the Commission heard the comments and concerns of Suburban's customers. The parties offered closing arguments at the conclusion of the evidentiary hearing. The parties did not file written briefs.

The Operations of Suburban

Suburban first received a certificate from this Commission to operate as a public water utility on April 12, 1973, in Case No. 17652.¹ Suburban was created to provide water and sewer service to BonGor Lake Estates, a residential subdivision near Columbia in Boone County, Missouri. The BonGor Lake Estates development was started by Gordon Burnam and his wife Bonnie, and, in fact, the development's name is derived from their names, Bonnie and Gordon.² The Burnams built most of the houses in the subdivision, although some were built by other builders.³ At one time, the Burnams also owned and rented out the multi-family units built in the subdivision. The Burnams sold their interest in those units in 1986.⁴

Suburban currently provides water service to 39 single-family residences, and 108 duplex and fourplex apartment units in BonGor Lake Estates.⁵ Suburban initially provided

¹ Staff's First Amended Complaint, Paragraph 4. Suburban admitted the truth of this paragraph in its answer.

² Transcript, Page 36, Lines 22-25.

³ Transcript, Page 39, Lines 4-6.

⁴ Transcript, Page 41, Lines 4-8.

⁵ Transcript, Page 37, Lines 1-13.

sewer service to the subdivision as well, but the sewer service was sold some years ago and is now operated by the Boone County Regional Sewer District.⁶

Gordon Burnam is president of Suburban. He and his wife are also the only shareholders and directors of Suburban.⁷ Suburban currently has no employees.⁸ Paula Belcher, a vice-president and employee of Vista Home Management Company, another company owned by the Burnams, supervises the day-to-day operations of the Suburban water system from Vista's office.⁹ The labor costs of running Suburban are billed to Suburban by Vista.¹⁰

Suburban is not a profitable company. For 2006, the company's profit and loss statement shows total revenue of \$22,994, with total operating expenses of \$37,031, for a net loss of \$14,036 for the year.¹¹ The company's balance sheet for 2006 shows total assets of \$16,175 and total liabilities of \$12,319. The Burnams must regularly inject personal funds into the company to keep it solvent.¹²

Gordon Burnam is 76 years old; his wife, Bonnie, is 73.¹³ Both have recently had open-heart surgery¹⁴ and have essentially retired to Florida.¹⁵ The Burnams would very much like to get out of the water business.¹⁶

⁶ Transcript, Page 40, Lines 19-25.

⁷ Transcript, Page 36, Lines 2-15.

⁸ Transcript, Page 41, Lines 1-3.

⁹ Transcript, Page 647, Lines 8-14.

¹⁰ Transcript, Page 356, Lines 13-23.

¹¹ Exhibit 32.

¹² Transcript, Page 134, Lines 18-21.

¹³ Transcript, Page 130, Lines 1-2.

¹⁴ Transcript, Page 129, Lines 12-13.

¹⁵ Transcript, Page 123, Lines 2-3.

On January 31, 2007, Gordon and Bonnie Burnam, as directors and shareholders of Suburban, resolved to dissolve the corporation and cease operations as of July 1, 2007.¹⁷ At that time, legal counsel for the corporation mailed a certified letter to Dale Johansen, the head of the Commission's water and sewer department, describing Suburban's decision to dissolve and cease operations.¹⁸ The certified mail receipt shows that Shawn Watson signed for the letter. Shawn Watson is not, however, an employee of the Commission and Dale Johansen testified that he did not receive the letter at the time it was sent.¹⁹

On March 30, 2007, Suburban sent a letter to its customers informing them that the company would cease operations on July 1, 2007, and that their water service would be "shut off, indefinitely," at that time.²⁰ That shut-off letter caused consternation among Suburban's customers and brought Suburban's situation to the attention of Staff and the Public Counsel. Staff responded by filing this complaint for penalties, and by filing an action for an injunction in the Circuit Court of Boone County. On June 25, 2007, Gordon and Bonnie Burnam, as directors and shareholders of Suburban, resolved to postpone the dissolution of Suburban.²¹ Four days later, on June 29, the Circuit Court issued a preliminary injunction, ordering the defendants, Gordon Burnam and Suburban, to "continue to provide safe and adequate supply of water to Bon Gor Estates pending approval of any changes by Mo Public Service Commission."²²

¹⁶ Transcript, Page 126, lines 22-23.

¹⁷ The corporate documents describing that decision are Exhibits 18 and 19.

¹⁸ The letter is Exhibit 34.

¹⁹ Transcript, Page 568, Lines 9-13.

²⁰ The letter is Exhibit 15.

²¹ The corporate documents describing that decision are Exhibits 16 and 17.

²² 13th Judicial Circuit Case No. 07BA-CV02632 – Missouri Public Service v. Suburban Water et al. Docket

Although Suburban's attempt to discontinue service on July 1, 2007, is an underlying current throughout this proceeding, it is not the basis for the complaint that is before the Commission. Rather, Staff's complaint is based on Suburban's failure to comply with the requirements of a 2005 disposition agreement that formed the basis for resolution of Suburban's request for a rate increase.

Suburban initially requested a rate increase in a letter sent to the Commission on December 1, 2004. Thereafter, following the procedures established in the Commission's rule regarding rate increases requested by small water utilities,²³ the Commission's Staff conducted an extensive review of the operations and expenses of Suburban.²⁴ Ultimately, Staff and the Public Counsel entered into a disposition agreement with Suburban. Gordon Burnam signed that agreement on behalf of Suburban on May 26, 2005. In that document, the three signatory parties agreed to terms by which Suburban's request for a rate increase should be resolved.²⁵ The Commission approved that disposition agreement in an order issued in Case No. WR-2005-0455, on June 16, 2005, effective June 30, 2005.²⁶ In that order, the Commission directed Suburban to "comply with the terms of the Agreement Regarding Disposition of Small Company Rate Increase Request."²⁷

Suburban had requested a \$7,000 increase in its annual revenues. The disposition agreement provided for an annual revenue increase of \$4,192. It also set out sixteen specific, numbered, paragraphs, some of which describe actions that Suburban would be

Entry June 29, 2007.

²³ Commission Rule 4 CSR 240-3.635.

²⁴ Transcript, Page 537, Lines 6-17.

²⁵ The disposition agreement is Exhibit 55.

²⁶ Exhibit 2.

²⁷ Id.

required to take to improve the operation of its water system. Staff's complaint alleges that Suburban failed to comply with eight of those paragraphs.

The Allegations of Staff's Complaint

Count I and Count II

Staff's First Amended Complaint alleged that Suburban violated paragraphs (6) and (7) of the disposition agreement by failing to refund certain customer deposits and overcharges. Subsequently, Staff dismissed Count II in a pleading filed on July 11. Staff dismissed Count I at the hearing.²⁸ Since Counts I and II have been dismissed, the Commission will not further address them in this report and order.

Count III

In Count III, Staff alleges that Suburban failed to comply with paragraph (8) of the disposition agreement. Paragraph (8) provides as follows:

That the Company will develop and distribute to all customers a brochure detailing the rights and responsibilities of the utility and its customers.

Staff's chief witness regarding Count III was Debbie Bernsen, a Management Utility Analyst III for the Commission.²⁹ Bernsen explained that Commission Rule 4 CSR 240-13.040(3) requires a utility to prepare a brochure, describing, in layman's terms, the rights and responsibilities of the utility and its customers under the Commission's regulations.³⁰ Suburban should have prepared the brochure required by the regulation thirty years ago when the rule went into effect.³¹ When, during the course of her review of Suburban for the 2005 rate increase, she noticed that the company did not have such a brochure, she added

²⁸ Transcript, Page 32, Lines 4-5.

²⁹ Transcript, Page 300, Lines 9-11.

³⁰ Transcript, Page 303, Lines 9-13.

a requirement for the company to prepare such a document to the disposition agreement.³² Although this paragraph of the disposition agreement does not include a specific deadline for Suburban to complete the task, Bernsen testified that in her opinion, a utility could prepare a brochure meeting the requirements of the rule in a few hours using a simple word processor.³³

Suburban finally prepared a brochure describing the rights of its customers in June 2007, and distributed that brochure to its customers.³⁴ Bernsen testified that Suburban's brochure did not meet all the enumerated requirements of the Commission's regulation, and on that basis concluded that the June 2007 brochure does not meet the requirements of the Commission's rule or the disposition agreement.³⁵ Staff has not contacted Suburban to advise it of the deficiencies in its brochure because of the pending litigation between Staff and Suburban.³⁶

Count IV

Count IV of Staff's complaint alleges that Suburban failed to comply with paragraph (9) of the disposition agreement. That paragraph provides as follows:

That the Company will develop a continuous property record system for plant that at a minimum includes the date plant is placed in service, the purchase price of plant and the dates of retirement of property.

³¹ Transcript, Page 307, Lines 20-25.

³² Transcript, Page 303, Lines 18-22.

³³ Transcript, Page 315, Lines 10-23.

³⁴ Suburban's brochure is Exhibit 6.

³⁵ Transcript, Page 316, Lines 7-16.

³⁶ Transcript, Page 553, Lines 7-23.

Staff's chief witness regarding Count IV was Kofi Boateng Agyenim, a utility regulatory auditor III for the Commission.³⁷ Boateng testified that a continuous property records system is a procedure by which the costs of utility plant is segregated and maintained by units of plant. He explained that such a method of bookkeeping provides a great deal of useful information when the company's records are being reviewed.³⁸ Boateng acknowledged that the continuous property records system he described is not defined by any Commission regulation.³⁹ Although this paragraph of the disposition agreement does not include a specific deadline for Suburban to complete the task, Boateng testified that Suburban should have been able to put together a continuous property records system in a day or two.⁴⁰

On July 9, 2007, after Staff filed its complaint, Suburban provided Staff with what it described as a continuous property records system.⁴¹ Suburban's property records system includes the dates the plant was placed in service, the purchase price of the plant, and the dates the plant is expected to be retired, which is the specific information described in paragraph (9) of the disposition agreement. Boateng, however, testified that the property records system submitted by Suburban was not sufficient because it is not continuous in that it does not include interim costs incurred regarding the plant during its life.⁴²

³⁷ Transcript, Page 342, Lines 3-5.

³⁸ Transcript, Page 344, Lines 2-14.

³⁹ Transcript, Page 366, Lines 21-24.

⁴⁰ Transcript, Page 349, Lines 6-15.

⁴¹ Transcript, Page 346, Lines 7-9. Suburban's submitted property record system is Exhibit 3.

⁴² Transcript, Pages 348-349, Lines 18-25, 1-5.

Count V

Count V of Staff's complaint alleges that Suburban failed to comply with the requirement of the tenth paragraph of the disposition agreement.⁴³ That paragraph provides as follows:

That the Company will install meters for all buildings no later than August 31, 2005.

Staff's chief witness regarding Count V was Martin Hummel. Hummel is an engineer and a certified water operator, employed by the Commission since 1989.⁴⁴ Hummel inspected Suburban's water system as part of the investigation in the 2005 rate case. At that time, he noted that water service to several buildings was not metered. In response, he added the meter requirement to the disposition agreement.⁴⁵ He inspected Suburban's system again after Staff filed this complaint, and confirmed that three buildings still do not have meters or meter boxes. He also found a number of buildings that have a meter box, but do not have a meter.⁴⁶ Hummel also clarified that this provision required Suburban to install meters to all buildings, not necessarily to all customers within a building.⁴⁷ In his testimony, Gordon Burnam confirmed that Suburban has not installed meters on all buildings as required by this paragraph of the disposition agreement.⁴⁸

The installation of meters for all customers is vitally important because without customer meters, Suburban has no means to determine how much water is flowing to its

⁴³ The tenth and eleventh paragraphs of the disposition agreement are not numbered. But there are two requirements described between paragraph (9) and (12), so they will be identified as paragraphs 10 and 11.

⁴⁴ Transcript, Page 376-377, Lines 23-25, 1-7.

⁴⁵ Transcript, Page 379, Lines 16-21.

⁴⁶ Transcript, Page 386, Lines 22-25.

⁴⁷ Transcript, Page 462, Lines 3-10.

customers, and how much is being lost to leaks on the system. Until Suburban can determine how much water is flowing through its system and how much is being lost along the way, it cannot reasonably evaluate any other repairs that may need to be made to that system.⁴⁹ Furthermore, without meters in place to allow a proper evaluation of the water system, it will be difficult for Suburban to find another entity willing to purchase its system.

Count VI

Count VI of Staff's complaint alleges that Suburban failed to comply with the requirement of the eleventh paragraph of the disposition agreement. That paragraph provides as follows:

That the Company will implement a ten year replacement program for existing meters.

Staff's chief witness regarding Count VI was again Martin Hummel. Hummel described a ten-year meter replacement program as a company prescribed procedure that would ensure that all customers' meters are either no more than ten years old, or that a meter more than ten years old has been tested to ensure that it is properly calibrated and working properly.⁵⁰ The Commission's rule regarding the testing and replacement of customer meters requires that a meter either be replaced or tested every ten years.⁵¹ Since it costs less to replace a meter than to have a meter removed and tested, most small companies simply replace their old meters.⁵² Normally, a company using a ten-year meter replacement program would replace ten percent of its meters each year. Hummel testified

⁴⁸ Transcript, Page 50, Lines 4-6.

⁴⁹ Transcript, Page 458, Lines 17-20.

⁵⁰ Transcript, Page 389, Lines 2-10.

⁵¹ Commission Rule 4 CSR 240-10.030(38)(A).

⁵² Transcript, Pages 501-502, Lines 17-25, 1-19.

that Suburban could have implemented a ten-year meter replacement program in six weeks.⁵³

Suburban claims that it has a ten-year meter replacement program. Suburban indicates its plan is to immediately replace any meters that fail. All other meters are to be replaced within ten years.⁵⁴ Suburban has not actually taken any steps to determine the age of its meters and to set up a schedule for testing the meters.⁵⁵ Gordon Burnam, concedes that Suburban has not implemented an actual plan to replace meters.⁵⁶

Count VII

Count VII of Staff's complaint alleges that Suburban failed to comply with the requirement of paragraph (12) of the disposition agreement. That paragraph provides as follows:

That the Company will install flush valves with the flushing capability of at least 3 feet per second in all mains.

Staff's witness, Everett Baker, an environmental engineer for DNR, explains that flush valves are necessary to allow a water company to remove contamination from the system. Suburban currently has only one flush valve on its system and that is not enough to properly flush its system.⁵⁷ Dale Johansen, manager of the Commission's water and sewer department, testified that Suburban would need to hire an engineer to evaluate its water system to determine where the additional flush valves should be placed. Suburban might also need to obtain a construction permit from DNR before adding the valves to its mains.

⁵³ Transcript, Page 393, Lines 9-18.

⁵⁴ Transcript, Pages 658-659, Lines 23-25, 1.

⁵⁵ Transcript, Page 659, Lines 15-23.

⁵⁶ Transcript, Page 50, Lines 7-21, and Page 92, Lines 9-21.

⁵⁷ Transcript, Pages 230-231, Lines 7-25, 1-23.

Based on those factors, Johansen estimated that it would take approximately one year for Suburban to install the needed flush valves.⁵⁸

Gordon Burnam concedes that flush valves are needed, and indicates it would cost approximately \$6,000 to install the valves.⁵⁹ However, Suburban has not installed any additional valves.⁶⁰

Count VIII

Count VIII of Staff's complaint alleges that Suburban has failed to comply with the requirement of paragraph (13) of the disposition agreement. That paragraph provides as follows:

That the Company will replace the standpipe with an inlet high enough to provide adequate circulation and detention time.

Staff's witness, Everett Baker explained that Suburban's standpipe, used to store pumped water before it is distributed through the system to customers, is in poor condition. A number of leaks from the standpipe have been patched and that likely means that the interior of the standpipe is severely pitted. That means the standpipe likely needs to be entirely replaced.⁶¹

The requirement found in the disposition agreement does not, however, necessarily require Suburban to replace the entire standpipe. If the standpipe were found to be repairable, the requirement would be satisfied if the inlet inside the existing standpipe were raised.⁶² However, Staff contemplated that the entire standpipe would need to be

⁵⁸ Transcript, Pages 504-505, Lines 5-25, 1-7.

⁵⁹ Transcript, Page 15, Lines 18-20.

⁶⁰ Transcript, Pages 50-51, Lines 22-25, 1.

⁶¹ Transcript, Pages 221-222, Lines 9-25, 1-7.

⁶² Transcript, Page 506, Lines 4-6.

replaced.⁶³ Staff estimated that it would take Suburban at least eight months, to replace the standpipe.⁶⁴

The importance of raising the inlet was explained by Everett Baker. If the inlet to the standpipe is too close to the outlet, water will not be retained in the standpipe for a sufficient amount of time. Instead, the water will “short-circuit” by shooting straight from the inlet to the outlet in a matter of seconds.⁶⁵ If the water is not retained in the standpipe for a sufficient period, the chlorination of the water does not have time to take effect. Not only does that present a health risk, but it also contributes to a rotten-egg smell caused by hydrogen sulfide that has been noted by Suburban’s customers. Chlorine neutralizes the hydrogen sulfide smell, but if the water is not retained long enough for the chlorine to act, the water will stink.⁶⁶

Suburban has not raised the standpipe inlet, nor has it replaced the entire standpipe.⁶⁷ In its defense, Suburban explains that it will cost \$100,000 to \$110,000 to replace the standpipe.⁶⁸

Count IX

Count IX of Staff’s complaint alleges that Suburban failed to comply with the requirement of paragraph (14) of the disposition agreement. That paragraph provides as follows:

⁶³ Transcript, Page 398, Lines 10-23.

⁶⁴ Transcript, Page 400, Lines 14-19.

⁶⁵ Transcript, Page 240, Lines 11-18.

⁶⁶ Transcript, Page 237, Lines 14-23.

⁶⁷ Transcript, Page 51, Lines 2-6.

⁶⁸ Transcript, Page 743, Lines 19-22.

That the Company will contract with a certified operator to maintain the Company's well and distribution system.

Suburban acknowledges that despite its efforts to find a certified operator it has not done so.⁶⁹ Staff agrees that it can be hard for a small water company to find a certified operator,⁷⁰ particularly when the water system is in poor condition. In the words of Martin Hummel, "[t]he system has to have flush valves and meters in order for it to be attractive to a certified operator; otherwise, you're not ever gonna get a certified operator."⁷¹ However, Dale Johansen, testifying for Staff, offered an opinion that Suburban should have been able to hire a certified operator in three to six months.⁷²

Count X

Count X of Staff's complaint alleges that Suburban failed to comply with the requirement of paragraph (15) of the disposition agreement. That paragraph provides as follows:

That the Company will provide quarterly reports regarding monthly customer meter usage data and monthly master meter usage data to the Auditing Staff of the Commission for the period July 1, 2005 through December 31, 2006.

Staff explained that it sought quarterly reports from Suburban so it could monitor water usage on the system to determine the company's progress in dealing with the problems identified in the rate increase case.⁷³ The first quarterly report should have been filed a

⁶⁹ Transcript, Page 51, Lines 8-22.

⁷⁰ Transcript, Page 292, Lines 11-14.

⁷¹ Transcript, Pages 466-467, Lines 23-25, 1.

⁷² Transcript, Page 508, Lines 13-22.

⁷³ Transcript, Page 352, Lines 17-24.

month after the end of the first quarter of the reporting period. In this case that means the first quarterly report should have been filed by October 31, 2005.⁷⁴

Suburban provided monthly master meter usage data to Staff in June 2007, after this complaint was filed, but it did not provide customer meter usage data.⁷⁵ Gordon Burnam admitted that Suburban did not provide the quarterly reports required by the disposition agreement.⁷⁶

CONCLUSIONS OF LAW

The Missouri Public Service Commission has reached the following conclusions of law regarding Staff's complaint:

1. Suburban is a "Water Corporation" and "Public Utility," as those terms are defined at Subsections 386.020 (58) and (42), RSMo Supp. 2006. As such, it is subject to regulation by this Commission.
2. Subsection 393.140(1), RSMo 2000, gives the Commission general supervisory authority over all Missouri water corporations.
3. Subsection 393.130.1, RSMo Supp. 2006, requires every water corporation to "furnish and provide such service instrumentalities and facilities as shall be safe and adequate and in all respects just and reasonable."
4. Subsection 386.390.1, RSMo 2000, authorizes the Commission to bring a complaint against a public utility on its own motion.

⁷⁴ Transcript, Page 352, Lines 2-5.

⁷⁵ The information provided by Suburban is Exhibit 4.

⁷⁶ Transcript, Page 52, Lines 6-10.

5. As the party bringing a complaint, Staff has the burden of proving its allegations.⁷⁷

6. Section 386.360.1, RSMo 2000, provides:

[w]henever the commission shall be of the opinion that a public utility, municipal gas system, person or corporation is failing or omitting or about to fail or omit to do anything required of it by law or by order or decision of the commission, or is doing anything or about to do anything or permitting anything or about to permit anything to be done, contrary to or in violation of law or of any order or decision of the commission, it shall direct the general counsel to the commission to commence an action or proceeding in any circuit court of the state of Missouri in the name of the commission for the purpose of having such violations or threatened violations stopped and prevented either by mandamus or injunctions.

7. Section 386.570.1, RSMo 2000, provides that any public utility that fails to comply with any provision of law, or with any “order, decision, decree, rule, direction, demand or requirement” of the Commission “is subject to a penalty of not less than one hundred dollars nor more than two thousand dollars for each offense.”

8. The General Counsel of the Commission is authorized by Section 386.600, RSMo 2000, to bring an action in circuit court to recover a penalty against a public utility.

9. Commission Rule 4 CSR 240-13.040(3) provides as follows:

A utility shall prepare, in written form, information which in layman’s terms summarizes the rights and responsibilities of the utility and its customers in accordance with this chapter. The form shall be submitted to the consumer services department of the Missouri Public Service Commission, and to the Office of the Public Counsel. This written information shall be displayed prominently, and shall be available at all utility office locations open to the general public, and shall be mailed or otherwise delivered to each residential customer of the utility if requested by the customer. The information shall be delivered or mailed to each new customer of the utility upon commencement of service and shall be available at all times upon request. The written information shall indicate

⁷⁷ *State ex rel. GS Technologies Operating Co., Inc. v. Pub. Serv. Comm’n*, 116 S.W.3d 680 (Mo. App. W.D. 2003).

conspicuously that it is being provided in accordance with the rules of the commission, and shall contain information concerning, but not limited to:

- (A) Billing and estimated billing procedures;
- (B) Methods for customer verification of billing accuracy;
- (C) Customer payment requirements and procedures;
- (D) Deposit and guarantee requirements;
- (E) Conditions of termination, discontinuance and reconnection of service;
- (F) Procedures for handling inquiries;
- (G) Explanation of meter reading procedures which would enable a customer to read his/her own meter;
- (H) A procedure where a customer may avoid discontinuance of service during a period of absence;
- (I) Complaint procedures under 4 CSR 240-2.070;
- (J) The telephone number and address of a customer services office of the Missouri Public Service Commission, the commission's 800 telephone number, and the statement that the company is regulated by the Missouri Public Service Commission;
- (K) The address and telephone number of the Office of Public Counsel and a statement of the function of that office; and
- (L) If the utility is a gas distribution company, and explanation of the function of the purchase gas adjustment clause.

10. Commission Rule 4 CSR 240-10.030(38)(A) requires that customer meters of the type used by Suburban be tested for accuracy once every ten years.

11. Other than the requirement that meters be installed no later than August 31, 2005, which is described in Count V of Staff's complaint, none of the requirements that Staff is attempting to enforce contain a specific deadline for their completion. In the absence of a specific deadline, Staff asks the Commission to impose a reasonable time limit for the completion of these tasks. In support of that position, Staff cites contract law for the proposition that when no time is specified in an agreement, "performance must be made within a reasonable time."⁷⁸

The Commission is not attempting to enforce any sort of contract between Staff and Suburban, but the analogy proposed by Staff is sound. When the disposition agreement

between Staff, Public Counsel, and Suburban was approved by the Commission, and the Commission ordered Suburban to comply with its terms, that agreement effectively became an order of the Commission. Staff's complaint therefore asks the Commission to enforce an order of the Commission. While the Commission's order does not contain specific deadlines for compliance, it is apparent that the Commission did not expect Suburban to comply with that order whenever it got around to it. The Commission expected Suburban to obey its order within a reasonable time.

DECISION

In deciding this case, the Commission will address each of the remaining counts in Staff's complaint. The Commission will then determine whether Staff should be authorized to proceed to circuit court to seek monetary penalties and relief through mandamus or injunction for any violations of the Commission's order.

Count III

Suburban failed to produce any sort of brochure for two years after it was ordered to do so in the Commission's June 16, 2005 order. When it did finally produce a brochure in June 2007, that brochure failed to contain the information explicitly required by the Commission's rule, a rule to which Suburban has been subject for many years. Suburban could reasonably have complied with this requirement soon after the June 30, 2005 effective date of the Commission's Order accepting the disposition agreement. In any event, any reasonable interpretation of the disposition agreement would find Suburban should have complied with this requirement long ago.

⁷⁸ *Millington v. Masters*, 96 S.W.3d 822 (Mo. App. S.D. 2002).

However, Suburban has at least attempted to comply with this requirement. It would not be appropriate to seek a penalty against Suburban for its delay in complying with this requirement. Instead, the Commission will direct Suburban to work with Staff to improve its customer brochure. The Commission will order Suburban to complete and distribute its new brochure by November 1, 2007.

Count IV

Suburban failed to produce any sort of continuous property record system for two years after it was ordered to do so in the Commission's June 16, 2005 order. When it did finally produce the required information in June 2007, that information failed to meet the expectations of Staff. Suburban could reasonably have complied with this requirement soon after the June 30, 2005 effective date of the Commission's Order accepting the disposition agreement. In any event, any reasonable interpretation of the disposition agreement would find Suburban should have complied with this requirement long ago.

However, while the information produced by Suburban is not what Staff expected, it does meet the explicit minimum requirements set out in the disposition agreement. Suburban was late in complying with the requirement, but its delay is not so egregious as to justify the imposition of monetary penalties.

Count V

Suburban was required to install meters for all buildings no later than August 31, 2005. It did not do so by August 31, 2005, and it had not done so at the time of the hearing nearly two years later. This is a key requirement and Staff will be authorized to seek penalties and relief through mandamus or injunction for Suburban's failure to comply.

Count VI

Suburban was required to implement a ten-year replacement program to ensure that its customer meters are checked at least once every ten years to ensure that they are operating properly. Suburban could reasonably have complied with this requirement soon after the June 30, 2005 effective date of the Commission's Order accepting the disposition agreement. In any event, any reasonable interpretation of the disposition agreement would find Suburban should have complied with this requirement long ago.

Suburban's claim that its ten-year plan simply puts off for ten years the replacement of customer meters that have not obviously failed is an insult to the Commission. The Commission's rule requires all customer meters to be tested at least once every ten years. Many of Suburban's meters may already be more than ten years old. Suburban professes not to know the age of its meters. Delaying testing or replacement of those meters for another ten years will simply push Suburban further out of compliance with the Commission's rule. Staff will be authorized to seek penalties and relief through mandamus or injunction for the violation of this provision of the disposition agreement.

Count VII

Suburban was required to install additional flush valves on its mains. Suburban could reasonably have complied with this requirement soon after the June 30, 2005 effective date of the Commission's Order accepting the disposition agreement. In any event, any reasonable interpretation of the disposition agreement would find Suburban should have complied with this requirement long ago. It did not do so. This is a key requirement and Staff will be authorized to seek penalties and relief through mandamus or injunction for Suburban's failure to comply.

Count VIII

Suburban was required to replace the standpipe with an inlet high enough to provide adequate circulation and detention time. Whether Suburban chose to replace the entire standpipe or just the inlet within the standpipe, it could reasonably have complied with this requirement Suburban could reasonably have complied with this requirement soon after the June 30, 2005 effective date of the Commission's Order accepting the disposition agreement. In any event, any reasonable interpretation of the disposition agreement would find Suburban should have complied with this requirement long ago. It did not do so. The fact that the repairs will be expensive does not excuse non-compliance with a requirement that is essential to the provision of safe and adequate service to Suburban's customers. This is a key requirement and Staff will be authorized to seek penalties and relief through mandamus or injunction for Suburban's failure to comply.

Count IX

Suburban was required to contract with a certified operator to maintain its well and distribution system. Despite reasonable efforts to either hire a certified operator or train an existing employee to fill that role, Suburban has thus far been unable to hire a certified operator. As acknowledged by Staff's witness, Suburban is unlikely to be able to find a certified operator willing to take responsibility for its system until it takes other steps to improve that system. Under the circumstances, it would be unreasonable to seek monetary penalties against Suburban for its failure to find a certified operator willing to operate its system.

Count X

Suburban was required to provide quarterly reports to Staff regarding monthly customer meter usage data and monthly master meter usage data. The first such quarterly report should reasonably have been provided to Staff by October 31, 2005. Suburban did not provide those reports.

Suburban should have complied with this requirement, but the filing of quarterly report will not have a direct impact on the quality of service provided to Suburban's customers. Therefore, Suburban's violation of this requirement is not so egregious as to justify the imposition of monetary penalties; however, Staff will be authorized to seek relief through mandamus or injunction for Suburban's failure to comply.

The Pursuit of Penalties in Circuit Court

The Commission is troubled by this case. The Commission will authorize its Staff to proceed to circuit court to seek monetary penalties and mandamus or injunction against Suburban because there does not seem to be any other means available to try to force that company to properly maintain its system and offer safe and adequate service to its customers. Nevertheless, the Commission does not believe that the imposition of monetary penalties against Suburban, a financially troubled company, will be a magic bullet to cure the problems facing this water system and other similarly situated systems in this state. Therefore, the Commission will direct its Staff to redouble its efforts to work with financially troubled small water and sewer systems to try to avoid problems like those now facing Suburban.

Public Counsel's Application in Case No. WO-2007-0444

Public Counsel's Application in Case No. WO-2007-0444 merely asks the Commission to open a case to facilitate an investigation regarding Suburban's plan to cease operations, and to hold a local public hearing. Both requests have been granted and no further relief is appropriate.

IT IS ORDERED THAT:

1. Staff proved the allegations contained in Counts III, IV, V, VI, VII, VIII, IX, and X of its complaint.
2. No later than November 1, 2007, Suburban Water and Sewer Company shall prepare and distribute a brochure detailing the rights and responsibilities of the utility and its customers that is acceptable to Staff.
3. The Commission's General Counsel is authorized, pursuant to Section 386.600, RSMo 2000, to file a petition in the circuit court of his choosing to seek any applicable penalties against Suburban Water and Sewer Company for violations of Counts V, VI, VII and VIII.
4. The Commission's General Counsel is authorized, pursuant to Section 386.360, RSMo 2000, to file a petition in the circuit court of his choosing to seek a writ of mandamus or injunction against Suburban Water and Sewer Company for violations of Counts V, VI, VII, VIII and X.

5. This Report and Order shall become effective on September 7, 2007.

BY THE COMMISSION

A handwritten signature in black ink, appearing to read 'Colleen M. Dale', written over a horizontal line.

Colleen M. Dale
Secretary

(S E A L)

Davis, Chm., Murray, Gaw, Clayton, and Appling, CC., concur
and certify compliance with the provisions
of Section 536.080, RSMo 2000.

Dated at Jefferson City, Missouri,
on this 28th day of August, 2007.