

**STATE OF MISSOURI
PUBLIC SERVICE COMMISSION**

At a session of the Public Service
Commission held at its office in
Jefferson City on the 24th day
of July, 2007.

The Staff of the Missouri Public Service
Commission,

Complainant,

v.

Suburban Water and Sewer Co. and
Gordon Burnam,

Respondents.

Case No. WC-2007-0452 et al.

**ORDER GRANTING IN PART AND DENYING IN PART RESPONDENT
GORDON BURNAM'S MOTION TO DISMISS**

Issue Date: July 24, 2007

Effective Date: July 24, 2007

On May 29, 2007,¹ the Staff of the Missouri Public Service Commission filed an eleven-count complaint against Suburban Water and Sewer Co. ("Suburban") and its corporate President, Gordon Burnam (referred to collectively as "Respondents"). Staff seeks a Commission order finding that the Respondents violated many of the terms of a unanimous disposition agreement with Staff and the Office of the Public Counsel ("OPC") which was approved by the Commission in June 2005, shortly after it was executed by Mr. Burnam as President on behalf of Suburban on May 26, 2005. Staff also seeks an order authorizing the Commission's General Counsel to seek monetary penalties against

¹ Unless otherwise indicated, all dates specified in this order refer to the calendar year 2007.

Respondents for the alleged violations in circuit court pursuant to Sections 386.570 and/or 386.580, RSMo 2000.²

On June 7, in a pleading contending that the Commission “lacks personal jurisdiction and subject matter jurisdiction over Respondent Gordon Burnam,” counsel for Mr. Burnam entered a special appearance for the limited purpose of challenging the Commission’s jurisdiction over him. On June 13, Staff filed a pleading, with a supporting legal memorandum, responding to Mr. Burnam’s jurisdictional claims. Staff argued that the Commission does have both personal jurisdiction over Mr. Burnam and subject matter jurisdiction over this case, explaining that the Commission can and should exercise its personal jurisdiction over Mr. Burnam so that if financial penalties are ultimately assessed by the circuit court, his personal assets can be reached to satisfy Suburban’s obligations if Suburban does not have sufficient assets to cover the amount of any penalty assessed against it. On June 15, Mr. Burnam filed a more detailed Motion to Dismiss or Alternative Motion for More Definite Statement, in which he once again raised the issues of personal and subject matter jurisdiction. Staff filed its response to this pleading on June 26, and on July 6, Mr. Burnam filed his rejoinder to Staff’s response. Therefore, these issues have been fully briefed and are now ripe to be decided.

² All statutory references are to RSMo 2000. On June 8, Staff filed a ten-count first amended complaint against Respondents which dropped one of the original eleven counts. Later, on July 11, Staff dismissed one of the remaining ten counts, leaving nine.

Jurisdictional Issues

In his Motion to Dismiss or Alternative Motion for More Definite Statement, Mr. Burnam raises the issues of personal and subject matter jurisdiction, arguing that 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 Mr. Burnam in his individual capacity, including to make any findings pursuant to Sections 386.570 or 386.580. For the reasons given below, the motion is granted in part and denied in part.

This complaint case involves the Commission's Order Approving Small Company Rate Increase issued on June 16, 2005 in Case No. WR-2005-0455 ("Order"). In the Order, the Commission formally adopted a five-page "Unanimous Agreement Regarding Disposition of Small Water Company Rate Increase Request" ("Disposition Agreement" or "DA") entered into by Staff, OPC, and Suburban in May 2005. As authorized by Section 393.140(2),³ the Order expressly directed Suburban to comply with the terms of the DA. In its complaint, Staff alleges that both Suburban and Mr. Burnam violated the Commission's Order, and are, therefore, subject to financial penalties under Sections 386.570 and/or 386.580.

It is undisputed that Suburban is a water corporation and public utility duly organized and existing under the laws of Missouri which possesses a certificate of convenience and necessity issued by the Commission to provide water service to the Bon-Gor Estates

³ In relevant part, Section 393.140(2) provides that the Commission "shall . . . have power to order such reasonable improvements as will best promote the public interest, preserve the public health and protect those using . . . gas, electricity, water, or sewer system[s]," and shall also "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 gas corporations, electrical corporations, water corporations, and sewer corporations."

subdivision in Boone County, Missouri, and that Mr. Burnam, as Suburban's President, negotiated and personally signed the DA on behalf of Suburban. It is also undisputed that neither the DA nor the Order explicitly impose any personal obligations on Mr. Burnam to do or refrain from doing anything.

Section 386.250(5) states that the "jurisdiction, supervision, powers and duties of the public service commission . . . shall extend under this chapter . . . [t]o all public utility corporations *and persons* whatsoever subject to the provisions of this chapter as herein defined[.]" Accordingly, the Commission may exercise jurisdiction, supervision, and power over Mr. Burnam as long as: (1) he is a "person" as that term is defined in Chapter 386; and (2) he is "subject to" any provision of Chapter 386 on an individual basis.

That Mr. Burnam is a "person" for jurisdictional purposes could not be any clearer, since Section 386.020(39) expressly states that as used in Chapter 386, the term "[p]erson" includes an individual, and a firm or copartnership[.]" However, it is far from clear, on the record now before the Commission, that Mr. Burnam is personally "subject to" any provision of Chapter 386 under which he could be found to be liable for monetary penalties.

Staff argues that Mr. Burnam could be found individually liable for monetary penalties in the circuit court under the terms of Section 386.570.1, which states:

Any corporation, person or public utility which violates or fails to comply with any provision of the constitution of this state or of this or any other law, or which fails, omits or neglects to obey, observe or comply with any order, decision, decree, rule, direction, demand or requirement, or any part or provision thereof, of the commission in a case in which a penalty has not herein been provided for such corporation, person or public utility, is subject

to a penalty of not less than one hundred dollars nor more than two thousand dollars for each offense.⁴

Staff argues that the Commission has jurisdiction over Mr. Burnam under Section 386.570.1 because Suburban's alleged noncompliance with the Order was due, at least in part, to his actions and inactions as Suburban's President. The problem with Staff's argument is that the statute requires more – it requires a showing that the “person” regarding whom Staff proposes to seek a finding of personal liability in circuit court has failed, omitted, or neglected to obey, in whole or in part, a decision, decree, rule, direction, demand or requirement of the Commission. Since neither the DA nor the Order explicitly impose any personal obligations on Mr. Burnam to do or refrain from doing anything, Staff has failed to meet the pleading requirements of Section 386.570.1. Therefore, the Commission finds that it has no jurisdiction over Mr. Burnam under Section 386.570.1.

Staff also cites Section 386.570.3, which provides:

In construing and enforcing the provisions of this chapter relating to penalties, the act, omission or failure of any officer, agent or employee of any corporation, person or public utility, acting within the scope of his official duties of employment, shall in every case be and be deemed to be the act, omission or failure of such corporation, person, or public utility.

This statute is of no assistance to Staff in establishing the Commission's jurisdiction over Mr. Burnam, though, since it simply indicates that the act, omission, or failure of any

⁴ Section 386.600 authorizes the Commission to seek such penalties in the circuit court. It provides, in pertinent part:

An action to recover a penalty or a forfeiture under this chapter or to enforce the powers of the commission under this or any other law may be brought in any circuit court in this state in the name of the state of Missouri and shall be commenced and prosecuted to final judgment by the general counsel to the commission.

The Commission may only initiate an action seeking the recovery of financial penalties in circuit court after holding a hearing. *State ex rel. Sure-Way Transp., Inc. v. Division of Transp.*, 836 S.W.2d 23, 27 (Mo. App. W.D. 1992) (relying on *State v. Carroll*, 620 S.W.2d 22 (Mo. App. S.D. 1981)); see also *State ex rel. Cirese v. Ridge*, 138 S.W.2d 1012 (Mo. banc 1940).

corporate officer, agent, or employee acting within the scope of his official duties of employment shall always be and be deemed to be the act, omission, or failure of the *corporation* itself. However, the converse is not necessarily true. That is to say, Section 386.570.3 does *not* provide that the act, omission, or failure of a corporation shall always be deemed to be the act, omission, or failure of a *corporate officer, agent, or employee* acting within the scope of his official duties.

Staff further argues that Mr. Burnam could also be found individually liable by the circuit court under the terms of Section 386.580, which prescribes *criminal* penalties (including imprisonment and/or a fine) for an even broader range of conduct:

Every officer, agent or employee of any corporation or public utility, who violates or fails to comply with, or who procures, aids or abets any violation by any corporation, person or public utility of any provision of the constitution of this state or of this or any other law, or who fails to obey, observe or comply with any order, decision, decree, rule, direction, demand or requirement, or any part or provision thereof, of the commission, or who procures, aids or abets any corporation, person or public utility in their or its failure to obey, observe and comply with any such order, decision, decree, rule, direction, demand or requirement, or any part or provision thereof, in a case in which a penalty has not herein been provided for such officer, agent or employee, is guilty of a misdemeanor and is punishable by a fine not exceeding one thousand dollars, or by imprisonment in a county jail not exceeding one year, or by both such fine and imprisonment.

The Commission agrees with Staff that Mr. Burnam could be tried and found guilty of a misdemeanor by a court of competent jurisdiction pursuant to Section 386.580 if a duly authorized prosecuting authority pleaded and then proved beyond a reasonable doubt that he personally procured, aided, or abetted Suburban in *its* failure to obey, observe, or comply with the Commission's Order of June 16, 2005.⁵ Staff contends that the

⁵ Staff acknowledges, of course, that the Commission does not have the authority to adjudicate Mr. Burnam guilty of a misdemeanor, and any such criminal proceeding would have to be brought in a court of competent jurisdiction by the appropriate prosecuting authority.

Commission should exercise jurisdiction over Mr. Burnam under Section 386.580 for the limited purpose of determining whether any of his acts or omissions as an officer, agent, or employee of Suburban should be brought to the attention of the proper prosecuting authority for possible criminal proceedings.⁶ However, in the Commission's view, that is far too slender a reed upon which to exercise jurisdiction over Mr. Burnam. Accordingly, the Commission finds that it has no jurisdiction over Mr. Burnam under Section 386.580.

Staff's final argument in support of its claim that Mr. Burnam could be found individually liable for monetary penalties in the circuit court is based on the legal principle of "piercing the corporate veil." As explained by the Missouri Supreme Court, an individual may be held responsible for the debts of a corporation if the following three things are proven:

- (1) control, not mere majority or complete stock control, but complete domination, not only of finances, but of policy and business practice in respect to the transaction attacked so that the corporate entity as to this transaction had at the time no separate mind, will or existence of its own; and
- (2) such control must have been used by the corporation to commit fraud or wrong, to perpetrate the violation of statutory or other positive legal duty, or dishonest and unjust act in contravention of plaintiff's legal rights; and
- (3) the control and breach of duty must proximately cause the injury or unjust loss complained of.⁷

Staff then goes on to argue that it can prove all three elements in this case, highlighting some of the evidence that might be adduced to establish them.

⁶ To be precise, Staff's position is that the Commission may conduct an evidentiary hearing to determine whether a person subject to the Commission's jurisdiction has committed an act or omission the Commission deems punishable under Section 386.580. The Commission may then share its factual findings with the proper prosecuting authority, who would then decide whether to initiate a criminal misdemeanor prosecution in a court of competent jurisdiction. In short, Staff asserts that the Commission has the ability to hold a hearing to determine whether sufficiently serious violations of a Commission order have occurred to bring them to the attention of the proper prosecuting authority.

⁷ *66, Inc. v. Crestwood Commons Redevelopment Corp.*, 998 S.W.2d 32, 40 (Mo. banc 1999).

The Commission finds Staff's veil-piercing arguments to be premature. Assuming the Commission was to find, after an evidentiary hearing, that Suburban violated the Order of June 16, 2005 and authorized its General Counsel to seek monetary penalties against Suburban for the violations in circuit court pursuant to Section 386.600, nothing the Commission has said in this order precludes Staff from attempting to prove to the circuit court, on the basis of evidence adduced at the circuit court level, that Suburban and Mr. Burnam should *both* be held liable to pay any monetary penalties imposed by the court on Suburban under Section 386.570.1 on a "piercing the corporate veil" theory of joint and several liability.⁸

Constitutional Issues

In his Motion to Dismiss, Mr. Burnam also attacks Sections 386.570, 386.580, and 393.140(2) on numerous and sundry state and federal constitutional grounds. Although Staff has thoroughly responded to those claims in its pleadings, the Commission will not address Mr. Burnam's constitutional claims in this order, since "[a]dministrative agencies lack the jurisdiction to determine the constitutionality of statutory enactments [and] [r]aising the constitutionality of a statute before such an body is to present to it an issue it has no authority to decide."⁹ Accordingly, the Commission must "presume [a] statute is constitutional and has no power to declare it otherwise."¹⁰ Nevertheless, given that "it is the

⁸ This also disposes of Mr. Burnam's claim that Staff's complaint does not state a claim upon which relief may be granted, as well as his Alternative Motion for More Definite Statement.

⁹ *Duncan v. Missouri Bd. for Architects, Professional Engineers & Land Surveyors*, 744 S.W.2d 524, 531 (Mo. App. E.D. 1988) (citing *Joplin v. Indus. Comm'n of Missouri*, 329 S.W.2d 687, 689 (Mo. banc 1959)). See also *State ex rel. Kansas City Terminal Ry. v. Public Serv. Comm'n*, 272 S.W. 957, 960 (Mo. 1925) (Public Service Commission has no power to declare the validity or invalidity of city ordinance); *State ex rel. Missouri Southern R.R. v. Public Serv. Comm'n*, 168 S.W. 1156, 1164 (Mo. banc 1914) (Public Service Commission has no power to declare statutes unconstitutional).

¹⁰ *Missouri Bluffs Golf Joint Venture v. St. Charles County Bd. of Equalization*, 943 S.W.2d 752, 755 (Mo. App. E.D. 1997).

duty of courts of competent jurisdiction to review justiciable constitutional claims put before them,”¹¹ the Commission “may hear evidence from [the parties] to develop a factual record in which the constitutionality of the statute[s] may be determined later, in the proper forum.”¹²

This analysis does not, however, apply to Mr. Burnam’s additional claims that the Order *itself* is unconstitutional since it constitutes a taking of private property without just compensation due to an inadequate rate of return and is void for vagueness. This is because those claims constitute collateral attacks on a final order of the Commission, which are expressly prohibited by Section 386.550. Section 386.550, which has long been held by Missouri appellate courts to be “declaratory of the law’s solicitude for the repose of final judgments,”¹³ states: “In all collateral actions or proceedings the orders and decisions of the commission which have become final shall be conclusive.” Accordingly, the courts have held that “final Commission orders are conclusive in all collateral actions or proceedings.”¹⁴

The DA, which effectively granted Suburban a yearly revenue increase of \$4,192, reflects that it was the product of “negotiations” and “compromises” between Suburban, Staff, and OPC after Staff had performed an audit of Suburban’s books and records, a review of the company’s general business practices, an inspection of its facilities, and a review of Suburban’s operation of its facilities. There is nothing in the record to suggest that the parties were not acting at arm’s length, and the record also does not contain any

¹¹ *Fayne v. Dept. of Social Services*, 802 S.W.2d 565, 567 (Mo. App. W.D. 1991) (citing *State ex rel. Hughes v. Southwestern Bell Tel. Co.*, 179 S.W.2d 77, 81 (Mo. 1944)).

¹² *Missouri Bluffs*, 943 S.W.2d at 755. In this case, of course, the proper forum would be the circuit court.

¹³ *State ex rel. Harline v. Public Serv. Comm’n*, 343 S.W.2d 177, 184 (Mo. App. W.D. 1960).

¹⁴ *StopAquila.Org v. Aquila, Inc.*, 180 S.W.3d 24, 39 (Mo. App. W.D. 2005).

evidence that the DA was not voluntarily entered into by Suburban, which was represented throughout the process by its President, Gordon Burnam.

Meanwhile, the basis of Staff's complaint against Suburban is its subsequent failure to carry out most of the positive requirements upon which that rate increase was conditioned. The Commission's records show that neither Mr. Burnam nor Suburban challenged the Order adopting the DA in Case No. WR-2005-0455, either by filing a motion for rehearing before the Commission under Section 386.500, by requesting a writ of review from the circuit court pursuant to Section 386.510, or even by returning to the Commission and formally requesting an additional rate increase under the applicable procedures. Because there has been no proper challenge to the Commission's Order in Case No. WR-2005-0455, it is final and conclusive and under Section 386.550, Mr. Burnam is precluded from collaterally attacking it on constitutional grounds in this proceeding. Therefore, Mr. Burnam's various constitutional challenges to the Commission's final Order of June 16, 2005 are rejected.¹⁵

Other Issues

Mr. Burnam also contends that "[a]ll claims made and penalties sought for violations of the Order are barred by the applicable statute of limitations," noting that because Section 556.036 provides for a one-year statute of limitations for all misdemeanors, "any alleged offenses by Burnam would pre-date this period of time." He is incorrect. Section 386.570.2 provides that "[e]very violation of the provisions of this or any other law


¹⁵ See, e.g., *State ex rel. Mid-Missouri Tel. Co. v. Public Serv. Comm'n*, 867 S.W.2d 561, 564-65 (Mo. App. W.D. 1993) (court refused, on the basis of § 386.550, to consider the merits of a point on appeal in which the appellants claimed that certain final orders of the Commission "constituted an unconstitutional taking" since they "lost the right to attack the decision collaterally" when they did not "follow[] the correct procedures for challenging a PSC decision.")

or of any order, decision, decree, rule, direction, demand or requirement of the commission, or any part thereof, by any corporation or person or public utility is a separate and distinct offense, and in the case of a continuing violation each day's continuance thereof shall be and be deemed to be a separate and distinct offense." Meanwhile, Section 556.036 does not act as a bar to Staff's complaint because Staff is not instituting a criminal misdemeanor proceeding against Mr. Burnam. As explained *supra*, Staff does not claim (and the Commission does not find) that the Commission has the authority to conduct criminal proceedings.

IT IS ORDERED THAT:

1. As indicated within the body of this order, Respondent Gordon Burnam's Motion to Dismiss or Alternative Motion for More Definite Statement, which he filed on June 15, 2007, is granted in part and denied in part.
2. This order shall become effective on July 24, 2007.

BY THE COMMISSION



Colleen M. Dale
Secretary

(S E A L)

Davis, Chm., Murray, Gaw, Clayton,
and Appling, CC., concur.

Lane, Regulatory Law Judge