

**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</u>
Suburban Water and Sewer Co. and Gordon)	
Burnam,)	
Respondents.)	

**STAFF’S MEMORANDUM IN SUPPORT OF ITS
MOTION FOR SUMMARY DETERMINATION**

COMES NOW Counsel for the Staff of the Missouri Public Service Commission ("Staff"), and for its memorandum of law in support of its Motion for Summary Determination states as follows:

In Case No. WR-2005-0455 the Commission granted Suburban Water and Sewer Company a revenue increase of \$4,192 based upon Suburban’s commitment to undertake certain improvements to the system. The Commission ordered Suburban to perform its promises set forth in the Unanimous Disposition Agreement signed by Gordon Burnam, the Staff and the Office of Public Counsel. Suburban accepted the revenue increase and committed to fulfilling its promises evidenced in the Disposition Agreement.

Suburban has failed and refused to comply with the Commission’s Orders, claiming that its operating revenues are insufficient and, remarkably, that the Commission has no authority over it. Summary Judgment is appropriate in this case. There is no genuine issue of material fact at issue in Counts V, VII, VIII, IX, and X. If Suburban has a defense, it is a legal one.

THE STANDARD FOR SUMMARY DETERMINATION

Summary determination or judgment is appropriate when no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. Rule 74.04. “The purpose of summary judgment ... is to identify cases (1) in which there is no genuine dispute as to the facts and (2) the facts as admitted show a legal right to judgment for the movant.” *ITT Commercial Finance Corp. v. Mid-American Marine Supply Corp.*, 854 S.W.2d 371, 380 (Mo. 1993). The Staff, as the claimant, is entitled to judgment on Counts V, VII, VIII, IX and X once it shows “that there is no genuine dispute as to those material facts upon which the claimant would have had the burden of persuasion at trial.” *Id.* at 381. A genuine issue of fact is one that is “real and substantial ...consisting not merely of conjecture, theory and possibilities.” *Id.* at 378. Suburban admits it has not complied with the Commission’s Order in Case No. WR-2005-0455, thus there is no factual dispute. But Suburban appears to claim a defense in inadequate operating revenues. In other words, Suburban claims its performance is impossible. When the non-moving party claims an affirmative defense, the claimant must establish that the affirmative defense fails as a matter of law. *Id.* at 381.

ANALYSIS

Impossibility of Performance

Suburban claims in its Notice of Satisfaction filed June 28, 2007, that it is neither able nor required to perform its contract or comply with the Commission’s June 16, 2005 Order in WR-2005-0455. Suburban’s claim that it is not required to comply with the Commission’s Order is not worth a response.

Suburban’s claim that it is not able to comply implies the defense of impossibility of performance. The Missouri Supreme Court has held that when “a party to a contract is obligated

to a performance that is possible to be performed, the party must make good unless performance is rendered impossible by an Act of God, the law, or the other party.” *Farmer’s Elec. V. Mo. Dept. of Corrections*, 977 S.W.2d 266, 271 (Mo. banc 1998). Obviously, Suburban’s performance of the Disposition Agreement was possible. Suburban specifically agreed to perform certain improvements as part of the resolution of its 2005 rate increase. Now Suburban claims that it is unable to comply with the Commission’s Order. But neither Act of God, the law, nor the Commission has prevented Suburban from doing what Suburban promised and the Commission ordered.

“A party claiming impossibility as a defense must demonstrate that it took virtually every action within its powers to perform its duties under the contract.” *Id.* at 158. Suburban makes no claims that it has taken any action to perform its obligations. Regarding Counts V, VII, VIII, IX, and X, Suburban has not performed its obligations under the Disposition Agreement approved in Case No. WR-2005-0455.

Further, the Disposition Agreement has the force and effect of law. Section 386.550 provides that Commission orders are conclusive in all collateral actions or proceedings. “[I]n so far as the Public Service Commission makes rules and orders within its legislative authority with reference to those matters and duties with which it is charged by legislative enactment, those rules and orders become, by virtue of its delegated legislative authority, the law of the land, and rights and duties accruing under them are to be enforced accordingly.” *Missouri Valley Realty Co., v. Cupples Station Light, Heat & Power Co.*, 199 S.W. 151, 153 (Mo. 1917). The Commission ordered Suburban to comply with the Disposition Agreement in the Order issued June 16, 2005. Not only is Suburban in breach of its agreement, it has violated the law, claiming in the Notice of Satisfaction that it is not required to obey the Commission.

Commission Orders Cannot be Collaterally Attacked

Suburban's efforts to collaterally attack the Commission's June 16, 2005 Order in WR-2005-0455, claiming an inability to perform, is likewise futile. Suburban's claim that the Commission's order is unfair or that the 2005 rate case should be reopened because of changing circumstances is not cognizable. In all collateral actions or proceedings the orders and decisions of the Commission which have become final shall be conclusive." Section 385.550. Once final, the Commission's Order cannot be collaterally attacked. *State of Missouri ex rel. Mid-Missouri Telephone Co., v. Public Service Commission*, 867 S.W.2d 561, 565 (Mo. App. 1993) and *State of Missouri ex rel. Licata, Inc. v. Public Service Commission*, 829 S.W.2d 515 (Mo. App. 1992).

COUNT V

Count V claims Suburban has failed to install meters on all buildings. Suburban replies that it is neither able nor required to do so. Suburban's response is an admission that it has failed to install meters on all buildings. If Suburban had installed meters on all buildings it would say so. The Notice of Satisfaction, page 2, paragraph 2.e. refers to "three meters", likely meant to read "these meters." But in any event, whether Suburban has failed to install meters on three buildings or only one, it is in violation of the Commission's June 16, 2005 Order.

COUNT VII

Count VII claims Suburban has failed to install flush valves. Suburban replies that it is neither able to nor required to install flush valves. Since it claims it is not able to install flush valves, Suburban obviously has not done so. Since Suburban claims the Commission cannot require it to install flush valves, it obviously has not done so.

COUNT VIII

Count VIII claims Suburban has failed to install a standpipe inlet. Suburban responds that it is neither able nor required to do so. Suburban claims the condition of the standpipe will not allow it to do the work. In other words, Suburban has not installed the standpipe inlet. It is clear Suburban stands in defiance of the Commission's authority and has failed to install the inlet.

COUNT IX

Count IX claims Suburban has failed to contract with a certified operator. Suburban answers that it is neither able nor required to do so. In other words, Suburban has failed to contract with a certified operator. Had Suburban done as ordered by the Commission, it would say so.

COUNT X

Count X claims Suburban has not provided quarterly reports regarding monthly usage data. The affidavit of Kofi Boateng speaks for itself. In spite of its assertions otherwise, Suburban has not done as it promised nor has it complied with the Commission's Order. Suburban's bare allegations do not create a genuine issue of material fact.

WHEREFORE, the Staff respectfully submits this memorandum in support of its Motion for Summary Determination.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been mailed, hand-delivered, transmitted by facsimile or electronically mailed to all counsel of record this 9th day of July 2007.

/s/ *Steven C. Reed*