

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

The Staff of the Missouri Public Service Commission,)	
)	
)	
Complainant,)	
)	<u>Case No. WC-2007-0452</u>
v.)	
)	
Suburban Water and Sewer Co. and Gordon Burnam,)	
)	
)	
Respondents.)	

STAFF’S OPPOSITION TO RESPONDENT SUBURBAN WATER AND SEWER CO.’S MOTION TO DISMISS

COMES NOW the Staff of the Missouri Public Service Commission (Staff) and for its Opposition to Respondent Suburban Water and Sewer Co.’s Motion to Dismiss respectfully states as follows:

Background and Procedural History

1. Respondent Suburban Water and Sewer Co. (Suburban) holds a certificate of convenience and necessity issued by the Missouri Public Service Commission (Commission) to provide water service to the Bon-Gor Estates subdivision in Boone County, Missouri. (Case No. 17652). The legal description of Suburban’s service area is contained in Suburban’s tariff on file with the Commission.
2. Suburban is a “water corporation” as defined by Section 386.020(58), RSMo and a “public utility” as defined by Section 386.020(42), RSMo.
3. Suburban is a corporation duly organized and existing under Missouri law.
4. On June 8, 2007, Staff filed its First Amended Complaint and Motion for Expedited Treatment in the above-captioned case. In its Complaint, Staff alleges that

Suburban violated several terms of a Unanimous Stipulation and Agreement entered into to by Suburban, Staff, and the Office of Public Counsel to dispose of Case No. WR-2005-0455.

5. In its Report and Order for Case No. WR-2005-0455, the Commission adopted the parties' Unanimous Stipulation and Agreement and ordered the parties to abide by its terms. The Order required Suburban to take several actions to improve the safety and adequacy of its water service.

6. Suburban did not request rehearing of Case No. WR-2005-0455 and did not pursue a Writ of Review in circuit court.

7. On June 15, 2007, Suburban filed its Motion to Dismiss Case No. WC-2007-0452.

Opposition to Motion to Dismiss

8. Staff hereby adopts and restates all of the statements contained in paragraphs 1-7.

9. Chapter 386, RSMo created the Missouri Public Service Commission and delegates to it the powers and duties described therein. The creation and delegation of authority to the Commission is a valid exercise of the state's police powers.

"Specifically, the Commission, either upon its own motion or upon complaint of an interested party, may determine the reasonableness of rates to be charged and the adequacy of service to be performed by such utilities, and to require such service to be furnished to any person lawfully entitled thereto. The power to determine such matters, in the first instance, is vested exclusively in the Commission and not in the courts." *State*

ex. rel. Taylor v. Nangle, 227 S.W.2d 655, 657 (Mo.banc 1950) (*cert. denied*, 71 S.Ct. 57, 340 U.S. 824, 95 L.Ed. 605).

10. In its Complaint, Staff seeks a hearing to determine whether Suburban is in violation of the Commission's Report and Order issued in Case No. WR-2005-0455. Staff requests that, if the Commission determines violations exist, the Commission give its general counsel authority to institute an action in circuit court to impose appropriate penalties. Sections 386.570, 386.600, RSMo.

11. The Commission does not have the authority to render a judicial decision; however, the Commission does have the authority to resort to the courts to enforce its orders. *Nangle*, 227 S.W.2d at 657-58. In this case, Staff seeks permission for an action to be instituted in circuit court at such time as the Commission makes a determination that one of its orders has been violated. The Commission clearly has the statutory authority to make such a determination in the first instance. Indeed, the Commission has exclusive primary jurisdiction over the subject matter of this case. *Id.* at 657.

12. As an administrative agency, the Commission does not have the authority to decide constitutional issues. *Fayne v. Dept. of Social Services*, 802 S.W.2d 565, 567 Mo. App. W.D. 1991). Staff addresses the constitutional claims raised here in order to respond to Suburban's claims and to preserve the issues for review in the circuit court. *Tate v. Dept. of Social Services*, 18 S.W.3d 3, 7 (Mo. App. E.D. 2000).

13. Sections 386.570 and 386.580 do not violate Article I, Section 31 of the Missouri Constitution because they do not unconstitutionally delegate the authority to make any rule fixing a fine or imprisonment as punishment. The penalties set forth in Sections 386.570 and 386.580 were established by the legislature, not by the

Commission. Furthermore, the statutes do not automatically result in penalty or imprisonment merely upon a finding of a violation by the Commission. Rather, the statutes and Commission rules provide for a hearing to be had before the Commission to determine whether a violation has occurred. In the case of Section 386.570, once the Commission makes an initial finding of a violation, the Commission may then authorize its general counsel to bring an action in circuit court. It is the circuit court that determines the actual penalty amount and assesses the penalty, not the Commission. In the case of Section 386.580, Staff does not contend that the Commission may impose the criminal sanctions set out in this Section. Rather, the Commission has the authority to conduct a hearing to determine whether a person subject to the Commission's jurisdiction has committed an act it deems punishable by this Section. The Commission could then share its findings with the proper prosecuting authority. The prosecuting authority would seek the appropriate penalty in circuit court, not the Commission.

14. The Commission evidentiary hearing procedure does not deprive Respondent of its due process rights. Respondent has received notice of the Complaint, has the opportunity to answer the Complaint, and will have the opportunity to present evidence on its own behalf at the evidentiary hearing before the Commission. As explained above, if a finding of a violation is made by the Commission following hearing, the Commission may authorize its general counsel to proceed to circuit court for a penalty action. The Commission hearing is civil in nature and Staff has not requested criminal proceedings or any proceeding other than a hearing before the Commission to determine whether violations have occurred such that further proceedings in circuit court are warranted. Any criminal proceeding would necessarily be brought in circuit court by

the proper prosecuting authority. The purpose of the Commission hearing is to determine whether the Commission finds that Staff has made a sufficient showing of violations to warrant bringing a penalty action in circuit court or contacting the proper prosecuting authority.

15. A statute is presumed to be constitutional. *Conseco Financing Services Corp. v. Missouri Department of Revenue*, 195 S.W.3d 410, 414 (Mo.banc 2006). A statute will be upheld against a constitutionality challenge “‘unless it clearly and undoubtedly contravenes the constitution and plainly and palpably affronts fundamental law embodied in the constitution.’” *Id.*, quoting *In re Marriage of Kohring*, 999 S.W.2d 228, 231 (Mo.banc 1999).

16. Sections 393.140(2), 386.570, and 386.580 are not unconstitutional as applied in this case because they are not vague in violation of Respondent’s due process rights. A statute is unconstitutionally vague if “[persons] of common intelligence must necessarily guess at its meaning” or if the statute fails to give sufficient guidance to those against whom the statute will be applied to avoid potential arbitrary or discriminatory application. *Id.* (internal citations omitted). The challenged sections clearly state which actions or omissions on the part of persons or entities subject to the Commission’s jurisdiction can lead to penalties, including violations of a Commission order. The challenged Commission Order itself adopted a Unanimous Stipulation and Agreement entered into by the parties and the obligations of each party are clearly set forth in the agreement. Suburban did not challenge the agreement or the Order adopting it either by filing a motion for rehearing before the Commission or by requesting a writ of review from the circuit court. Suburban’s vagueness challenge amounts to an impermissible

collateral attack. (See, *infra*). Furthermore, Suburban should not now be allowed to claim unfamiliarity to an agreement to which it was a party.

17. It is a well-settled maxim that “ignorance of the law is no excuse.” “Parties are presumed to know the law and cannot normally avoid an act or deed on the ground that they were ignorant of the law.” *General Motors Corp. v. City of Kansas City*, 895 S.W.2d 59, 62 (Mo. App. W.D. 1995). As a regulated public utility, Suburban is presumed to know the law applicable to it, including Chapters 386 and 393 of the Revised Statutes of Missouri. Suburban has a duty to comply with these chapters, and under these chapters Suburban may be penalized for violations of those chapters and Commission Orders authorized by those chapters. Public utilities are charged with the duty to obey lawful Commission orders or be subject to a penalty. Sections 386.570 and 386.580, RSMo. Suburban may not avoid that duty, or the penalty for violating that duty, by claiming ignorance of the law.

18. Sections 393.140(2), 386.570 and 386.580 are not contrary to Suburban’s procedural due process rights. Respondent has been afforded reasonable due process in that it has received timely notice of the Complaint and will have an opportunity to be heard. Sections 386.570 and 386.580 set out with reasonable specificity the acts or omissions that are the subject of the statute and afford notice to a person of reasonable intelligence that violation of these Sections could result in civil or criminal penalties. (See, *supra*).

19. Suburban did not timely request a rehearing after the Commission issued its Report and Order in Case No. WR-2005-0455 pursuant to Section 386.500, RSMo. Suburban likewise did not timely seek review of the Commission’s Order in circuit court

pursuant to Section 386.510, RSMo. “In all collateral actions or proceedings the orders and decisions of the commission which have become final shall be conclusive.” Section 386.550, RSMo. Because Suburban did not timely challenge the Commission’s Report and Order, the Report and Order is final and Suburban is precluded from collaterally attacking the validity of the Commission’s Report and Order in Case No. WR-2005-0455 in this proceeding. *State ex. rel. Harline v. Public Service Commission of Missouri*, 343 S.W.2d 177, 184 (Mo. App. 1960).

20. Because the Commission’s Report and Order in Case No. WR-2005-0455 was not timely challenged by Suburban, the Order is final and conclusive. Suburban is precluded from collaterally attacking the Report and Order by claiming that the Report and Order constitutes an unconstitutional taking.

21. The Commission’s Order adopted the parties’ Unanimous Stipulation and Agreement. This Unanimous Stipulation and Agreement bears the signature of Respondent Gordon Burnam as President of Suburban. Suburban originally came to the Commission asking for a rate increase that would increase its yearly revenue approximately \$7,000 per year. The Unanimous Stipulation and Agreement is the product of negotiations between the parties, and grants a rate increase sufficient to increase yearly revenues by approximately \$4,000. This rate increase was conditioned upon Suburban taking several actions to improve the safety and adequacy of its water service. Suburban’s failure to take any of the actions upon which its rate increase was conditioned is the basis of Staff’s Complaint. Suburban did not seek a review of this Order, nor did Suburban ever return to the Commission formally requesting an additional rate increase. There is nothing in the record to suggest that the parties were not acting at

arm's length. The record also does not contain evidence that the Unanimous Stipulation and Agreement was not voluntarily entered into by Suburban, which was represented by its President, Gordon Burnam, a sound businessman. The law favors freedom of contract, and the law also will not protect a party merely because the party may have made a bad bargain. *Vondera v. Chapman*, 180 S.W.2d 704, 705 (Mo. 1944).

22. Staff's Complaint is not time-barred. Section 386.570(2) provides "[e]very violation of the provisions of this or any other law 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." Staff alleges that Suburban continues to be in violation of the Commission's Report and Order in Case No. WR-2005-0455 and that each day Suburban remains in violation of the Order constitutes a separate and distinct offense.

23. Section 556.036 does not act as a bar to Staff's Complaint because Staff is not instituting a criminal misdemeanor proceeding. As explained above, Staff does not purport that the Commission has the authority to conduct criminal proceedings. Staff merely asserts that the Commission has the ability to determine whether a serious enough violation of a Commission order has occurred to bring the violation to the attention of the proper prosecuting authority.

24. Staff's Complaint states a claim upon which relief can be granted. Staff's Complaint sufficiently sets out each alleged violation of the Commission's Order in Case No. WR-2005-0455. (See, *State v. Davis*, 830 S.W.2d 27, 30 (Mo. App. S.D. 1992),

holding that a complaint that alleged that defendants failed to maintain a safe and adequate water supply, failed to install adequate storage capacity, and overcharged customers was sufficient to state a claim upon which relief could be granted).

WHEREFORE, Staff requests that the Commission deny Suburban's Motion to Dismiss.

Respectfully submitted,

/s/ Jennifer Heintz

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Certificate of Service

I hereby certify that copies of the foregoing have been served via electronic mail to Christina Baker, Office of the Public Counsel, at Christina.Baker@ded.mo.gov; and to Thomas M. Harrison and Matthew S. Volkert, Attorneys for Respondent Suburban Water and Sewer Company, and for Respondent Gordon Burnam, at tom@vanmatre.com and matt@vanmatre.com on this 26th day of June, 2007.

/s/ Jennifer Heintz