

**STATE OF MISSOURI
PUBLIC SERVICE COMMISSION**

At a session of the Public Service
Commission held at its office in
Jefferson City on the 19th 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 DENYING RESPONDENT SUBURBAN WATER AND SEWER CO.'S
MOTION TO DISMISS**

Issue Date: July 19, 2007

Effective Date: July 19, 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 sole shareholder and 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 386.580, RSMo 2000.²

On June 15, Suburban filed a Motion to Dismiss. Staff filed its response to this pleading on June 26, and no rejoinder to Staff's response has been filed. Therefore, the motion has been fully briefed and is now ripe to be decided.

Jurisdictional Issues

In its Motion to Dismiss, Suburban raises the issue of 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 Suburban, including to make any findings pursuant to Section 386.570. For much the same reasons given in the Commission's order of July 19 denying very similar claims advanced by Respondent Gordon Burnam, the motion is denied.

In this case, Staff has alleged that both Respondents failed to abide by 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. Furthermore, as authorized by Section 393.140(2),³ the Commission expressly directed Suburban to comply with the terms of the DA. Staff alleges

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.

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."

that Suburban has not complied with the Order, and that this noncompliance was due, in whole or in part, to the actions and inactions of Mr. Burnam, who, as Suburban's President and sole shareholder, negotiated and personally signed the DA on Suburban's behalf and had a responsibility to ensure that the company abided by the terms of the DA and the Order.

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 Suburban as long as: (1) it is a "public utility" as that term is defined in Chapter 386; and (2) it is "whatsoever subject to" any provision of Chapter 386.

That Suburban is a "public utility" for jurisdictional purposes could not be any clearer, because Section 386.025(42) states that as used in Chapter 386, the term "[p]ublic utility" includes every . . . water corporation . . . as . . . defined in this section, and each thereof is hereby declared to be a public utility and to be subject to the jurisdiction, control and regulation of the commission and to the provisions of this chapter." Meanwhile, Section 386.025(58) defines "water corporation" to include "every corporation, company, association, joint stock company or association, partnership and person . . . owning, operating, controlling or managing any plant or property, dam or water supply, canal, or power station, distributing or selling for distribution, or selling or supplying for gain any water[.]"⁴ Since it is undisputed that Suburban is a water corporation duly organized and

⁴ Likewise, Section 386.250(3) provides that the jurisdiction, supervision, powers and duties of the Commission "shall extend under this chapter . . . [t]o all water corporations, and to the land, property, dams, water supplies, or power stations thereof and the operation of same within this state[.]"

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 subdivision in Boone County, Missouri, Suburban obviously qualifies as a “public utility” for Chapter 386 jurisdictional purposes.

As to the second prong of the Section 386.250(5) test, it is also perfectly clear that Suburban is “subject to” a provision of Chapter 386, since it could be found liable for monetary penalties in the circuit court under the express 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.⁵

Moreover, Section 386.570.3 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.

As Suburban is a corporation and a “public utility” for jurisdictional purposes and Staff’s complaint is sufficient to put the company on notice that it is alleged to have failed, omitted or neglected to obey, observe or comply with an order, direction, demand or requirement of the Commission as prescribed by Section 386.570, Suburban is clearly “subject to the

⁵ While the Commission does not have the authority to render a judicial decision, it does have the authority to resort to the courts to enforce its orders. *State ex. rel. Taylor v. Nangle*, 227 S.W.2d 655, 657-58 (Mo. banc 1950). Therefore, once the Commission has held an evidentiary hearing resulting in an order finding that violations of Chapter 386 have occurred, the circuit court has the authority to impose monetary penalties for those violations under Section 386.570.1. And it is the circuit court that enters a judgment fixing the amount of the penalty actually levied, not the Commission.

provisions of” Chapter 386 as required by Section 386.250(5). Accordingly, the Commission has subject matter jurisdiction over this complaint as it relates to Suburban.⁶

Constitutional Issues

In its Motion to Dismiss, Suburban also attacks Sections 386.570 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 Suburban’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.”⁷ Accordingly, the Commission must “presume [a] statute is constitutional and has no power to declare it otherwise.”⁸ Nevertheless, given that “it is the duty of courts of competent jurisdiction to review justiciable constitutional claims put before them,”⁹ 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.”¹⁰

⁶ As Staff’s complaint sufficiently sets forth each alleged violation of the Commission’s Order by each Respondent and also requests that Staff be permitted to seek monetary penalties against both Respondents in circuit court, this also disposes of Suburban’s claim that Staff’s complaint does not state a claim upon which relief may be granted. See, e.g., *State v. Davis*, 830 S.W.2d 27 (Mo. App. S.D. 1992), where the court held that the Commission’s petition seeking penalties for violations of the law or refusals to follow orders of the Commission stated a claim upon which relief could be granted. The petition in the *Davis* case stated that the defendants failed to maintain a safe and adequate water supply, failed to install adequate storage capacity, and overcharged customers.

⁷ *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).

⁸ *Missouri Bluffs Golf Joint Venture v. St. Charles County Bd. of Equalization*, 943 S.W.2d 752, 755 (Mo. App. E.D. 1997).

⁹ *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)).

¹⁰ *Missouri Bluffs*, 943 S.W.2d at 755. In this case, of course, the proper forum would be the circuit court.

This analysis does not, however, apply to Suburban'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,"¹¹ 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."¹²

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 evidence that the DA was not voluntarily entered into by Suburban, which was represented by its President and sole shareholder, Gordon Burnam.

Meanwhile, the basis of Staff's complaint against the Respondents is their 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

¹¹ *State ex rel. Harline v. Public Serv. Comm'n*, 343 S.W.2d 177, 184 (Mo. App. W.D. 1960).

¹² *StopAquila.Org v. Aquila, Inc.*, 180 S.W.3d 24, 39 (Mo. App. W.D. 2005).

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. 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, Suburban is precluded from collaterally attacking it on constitutional grounds in this proceeding. Therefore, Suburban's various constitutional challenges to the Commission's final Order of June 16, 2005 are rejected.¹³

Other Issues

Suburban 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 Suburban would pre-date this period of time."¹⁴ Suburban is incorrect. Section 386.570.2 provides that "[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 has been and continues to be in violation of the Order, and that each day it remains in violation of the Order constitutes 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

¹³ 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.")

¹⁴ Suburban is evidently referring to Section 386.580, which makes it a misdemeanor punishable by a fine of up to one thousand dollars, or by imprisonment in a county jail not exceeding one year, or by both such fine and imprisonment, for an "officer, agent or employee of any corporation or public utility" to do or neglect to do certain things. There is no need to quote the statute in its entirety.

proceeding against Suburban. Indeed, Staff does not claim (and the Commission does not find) that the Commission has the authority to conduct criminal proceedings. Staff merely asserts that the Commission has the ability to determine whether sufficiently serious violations of a Commission order have occurred to bring them to the attention of the proper prosecuting authority.

IT IS ORDERED THAT:

1. Respondent Suburban Water and Sewer Co.'s Motion to Dismiss, which it filed on June 15, 2007, is denied.
2. This order shall become effective on July 19, 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.

Lane, Regulatory Law Judge