

**STATE OF MISSOURI
PUBLIC SERVICE COMMISSION**

At a session of the Public Service
Commission held at its office in
Jefferson City on the 13th day of
December, 2007.

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| The Staff of the Missouri Public Service Commission, |) | |
| |) | |
| |) | |
| Complainant, |) | |
| |) | |
| v. |) | <u>Case No. WC-2008-0079</u> |
| |) | |
| Universal Utilities, Inc., and |) | |
| Nancy Carol Croasdell, |) | |
| |) | |
| Respondents. |) | |

**ORDER STRIKING ANSWER AND ENTERING DEFAULT JUDGMENT
AS SANCTION FOR REFUSAL TO COMPLY WITH DISCOVERY ORDER**

Issue Date: December 13, 2007

Effective Date: December 23, 2007

On November 14, 2007, the Staff of the Commission filed a motion asking the Commission to issue a judgment in default against the Respondents, Universal Utilities, Inc., and Nancy Carol Croasdell. The basis of Staff's motion is the Respondents' refusal to respond to certain data requests propounded by Staff, even after the Commission granted Staff's motion to compel those responses. The Respondents have not responded to Staff's motion for default judgment.

The Commission's rule on sanction for failure to comply with discovery orders is found at 4 CSR 240-2.090(1). That rule states "[s]anctions for abuse of the discovery process or failure to comply with commission orders regarding discovery shall be the same

as those provided for in the rules of civil procedure.” The applicable civil procedure rule is Rule 61.01(b)(1). That rule indicates that for a party’s failure to answer interrogatories, an appropriate sanction is “[a]n order striking pleadings or parts thereof, or dismissing the action or proceeding or any part thereof, or render a judgment by default against the disobedient party.” A judgment by default is a drastic punishment for failure to comply with a discovery order, but the courts have said “it is properly invoked where a party has shown a contumacious and deliberate disregard for the authority of the court.”¹

In this case, Staff served 28 data requests on the Respondents on September 26, 2007. Counsel for the Respondents objected to those data requests on October 9. However, the Respondents' sweeping objections to Staff's data requests were merely a listing of nearly every conceivable objection that could be made to a discovery request. The Respondents made no attempt to relate any of their general objections to any of the individual data requests made by Staff.

On October 19, Staff filed a motion asking the Commission to compel the Respondents to answer the data requests. The Respondents did not respond to that motion. On November 1, the Commission granted Staff's motion to compel and ordered the Respondents to answer Staff's data requests no later than November 8. The Respondents ignored the Commission's order and did not answer Staff's data requests. Staff's motion for a default judgment followed on November 14.

Through their refusal to comply with the Commission's discovery order and their refusal to even respond to Staff's motion for default judgment, the Respondents have displayed an utter disdain for the authority of the Commission. Still, the entry of a default

¹ *Karolat v. Karolat*, 151 S.W.3d 852, 857 (Mo. App. W.D. 2004).

judgment for a refusal to answer data requests is a severe sanction. In another type of case, the Commission might be inclined to impose a lesser sanction to try to force the Respondents to comply. However, in the circumstances of this case, default judgment is appropriate.

Staff's complaint alleges that the Respondents are operating water and sewer systems in one or more locations in Missouri without having obtained the statutorily required certificate of convenience and necessity from this Commission. Staff seeks authority to proceed to circuit court to seek the imposition of civil penalties against the Respondents for that violation of Missouri statute.

In a 1981 case, the Missouri Court of Appeals, Southern District, held that the Commission has exclusive jurisdiction to first determine, after a proper hearing, that a party is unlawfully operating a public utility. The Commission must make that determination before it can seek penalties in circuit court for that unlawful operation.² For that reason, Staff had to file this complaint with the Commission before it could proceed to circuit court to enforce the law by seeking penalties against the Respondents.

However, in 1993, the general assembly passed a statute that says, "[a]n administrative order authorizing the commencement of any such suit [for civil penalties] shall not be considered as evidence of the violations alleged in any such suit."³ In other words, no holding the Commission can make in this case can be given any preclusive effect in a subsequent action in circuit court. If General Counsel seeks penalties in circuit court, it must prove its case before the circuit court as if this complaint before the

² *State v. Carroll*, 620 S.W.2d 22 (Mo. App. S.D. 1981)

³ Section 516.103, RSMo 2000.

Commission never happened.⁴

In questioning whether an adversarial hearing was still required before a state agency could seek penalties in circuit court, the Missouri Court of Appeals recognized that “[e]nactment of §516.103 apparently renders the [administrative] hearing merely a moot court for the proceeding to follow in circuit court.”⁵ However, that question was not before the court in that case and the court made no decision on whether a contested hearing before the Commission is required.

Therefore, as required by previous court decision, the Commission offered the Respondents an opportunity to contest Staff’s allegations before possibly having to again contest those allegations before the circuit court. Perhaps aware that this case before the Commission is just a “moot court” before the binding action that could follow in circuit court, the Respondents have chosen to ignore the authority of the Commission.

Respondents are free to choose to defend themselves for the first time in circuit court, but there is no reason to delay resolution of this case by trying to force them to comply with discovery before this Commission. By their refusal to comply with the Commission’s discovery order, the Respondents have shown a “contumacious and deliberate disregard for the authority of the court.” As a sanction for their refusal to comply with the Commission’s discovery order, the Commission will strike the Respondents’ answers and will enter a default judgment against them.

Missouri courts have held that a default judgment imposed as a sanction under the rules of discovery is not a true default judgment. Rather “the remedy is imposed on the

⁴ See. *State ex rel. Mo. Div. of Transp. v. Sure-Way Transp., Inc.*, 884 S.W.2d 349 (Mo. App. W.D. 1994).

⁵ *Id.* at 353, FN 5.

presumption that no merit exists in asserted defenses or claims in light of the failure to produce information. Thus, the judgment does not come by default in the ordinary sense and is treated as a judgment upon trial by the court.”⁶ As a result, the usual procedures governing motions to set aside the default do not apply.⁷ For this case before the Commission, that means Commission Rule 4 CSR 240-2.070(9) allowing seven days to file a motion to set aside a default in a complaint case does not apply. If the Respondents wish to dispute this order, they will need to file an application for rehearing before the effective date of the order.

The Commission finds that the allegations in Staff’s First Amended Complaint are established. Specifically, the Commission finds that Respondent Universal Utilities, Inc., and Respondent Nancy Carol Croasdell are water corporations, sewer corporations, and public utilities, as those terms are defined by Missouri statute, at each and every location they operate in Missouri. The Commission further finds that Respondent Universal Utilities, Inc., and Respondent Nancy Carol Croasdell have violated Section 393.170 RSMo by providing water and sewer services without Commission authority since January 31, 2003, and that each and every days’ violation of law is a separate and continuing offense. Finally, the Commission finds that Respondent Universal Utilities, Inc., and Respondent Nancy Carol Croasdell are subject to penalties and that the General Counsel is authorized to proceed to circuit court to collect penalties for each and every day’s violation of law extending back to January 31, 2003.

⁶ *State ex rel Eddy v. Rolf*, 145 S.W.3d 429, 433 (Mo. App. W.D. 2004).

⁷ *Id.*

IT IS ORDERED THAT:

1. Staff's Motion for Default Judgment is granted.
2. The Answer of Universal Utilities, Inc., and Nancy Carol Croasdell to Staff's First Amended Complaint is struck as a sanction for failure to comply with the Commission's Order Granting Staff's Motion to Compel Discovery.
3. A default judgment is entered against Universal Utilities, Inc., and Nancy Carol Croasdell.
4. The facts alleged in Staff's First Amended Complaint are found to be established.
5. The Commission's General Counsel is authorized to file an action in the circuit court of its choosing to collect penalties against Universal Utilities, Inc., and Nancy Carol Croasdell, as allowed by Sections 386.570 and 386.600, RSMo 2000.
6. This order shall become effective on December 23, 2007.

BY THE COMMISSION



Colleen M. Dale
Secretary

(S E A L)

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

Woodruff, Deputy Chief Regulatory Law Judge