

BEFORE THE MISSOURI PUBLIC SERVICE COMMISSION

Staff of the Public Service Commission)	
)	
Complainant,)	
)	
v.)	Case No. WC-2008-0331
)	
Universal Utilities, Inc. and Nancy Carol)	
Croasdell,)	
)	
Respondents.)	

**RESPONDENTS' APPLICATION FOR REHEARING
AND MOTION TO DISMISS**

COME NOW Respondents, pursuant to § 386.500, RSMo. and 4 CSR 240.160(1), and submit this Application for Rehearing on the grounds that the Commission acted unlawfully, unjustly, and unreasonably when it issued its July 15, 2008 Order Denying Objection to Order and Motion to Dismiss of Universal Utilities, Inc. (the "Order"), for the reasons that follow.

I. The Commission Has No Subject Matter Jurisdiction

A tribunal always has "a duty to determine the question of their jurisdiction before reaching substantive issues." *Davidson Ins. Agency, Ltd. v. West Plains R-7 School Dist.*, 235 S.W.3d 89, 91 (Mo.App. S.D. 2007); *see also Greenpoint Credit, L.L.C. v. Missouri Dept. of Revenue*, 98 S.W.3d 553, 554-55 (Mo. banc 2003). Where the question of subject matter jurisdiction is raised, "[u]nless this question is resolved in favor of jurisdiction, the trial court is deprived of authority to do anything but dismiss the case." *Arrow Financial Services, L.L.C. v. Bichsel*, 207 S.W.3d 203, 208 (Mo.App. W.D. 2006); *see also Davidson Ins. Agency, Ltd. v. West Plains R-7 School Dist.*, 235 S.W.3d 89, 91 (Mo.App. S.D. 2007).

"Jurisdiction, once challenged, cannot be assumed and must be decided." *Basso v. Utah Power & Light Co.*, 495 F 2d 906, 910.

Furthermore, it is axiomatic that subject matter jurisdiction cannot be acquired by default. *See, e.g., State ex rel. Nixon v. McGee*, 213 S.W.3d 730, 732 (Mo.App. W.D. 2007)(subject matter jurisdiction not determined by a default). Consequently, it is folly for the Commission to attempt to use its default judgment as a basis for exercising subject matter jurisdiction over Universal. The default judgment has not determined the issue.

The Commission has an absolute duty to determine, on the merits, whether it has subject matter jurisdiction over Universal before reaching any substantive issue, and it has failed to do so. Until the Commission provides Universal with an affirmative determination of jurisdiction determined on the merits of the question, the Commission is "deprived of authority" to proceed otherwise.

Nevertheless, the Commission continues to proceed with discovery and insist that Universal comply with onerous discovery requests, without first determining whether it has jurisdiction to conduct discovery. As a result, Universal—having made a timely challenge to the jurisdiction of the Commission, having stood quite properly on that challenge, and having exercised its right to circuit court review (which is currently pending)—is now subject to the same burdensome discovery based upon a default judgment entered by the Commission after an illegal refusal to examine or determine a lawful basis for it to exercise its limited statutory jurisdiction over respondents.

Accordingly, the Commission should reconsider its Order and dismiss this matter for lack of subject matter jurisdiction, or at least stay this matter until the Circuit Court of Cole

County renders its determination regarding the Commission's subject matter jurisdiction in the pending Writ of Review case.

II. The Commission Has Never Acquired Subject Matter Jurisdiction Over Respondents

To the extent that the Commission relies for its subject matter jurisdiction upon its default Order in Commission Case No. WC-2008-0079, the Commission's reliance is misplaced because subject matter jurisdiction cannot be acquired by default. *See, e.g., State ex rel. Nixon v. McGee*, 213 S.W.3d 730, 732 (Mo.App. W.D. 2007)(subject matter jurisdiction not determined by a default).

Furthermore, Respondents are entitled to raise a defense to subject matter jurisdiction at any stage of Commission Case No. WC-2008-0079 or in a collateral proceeding. *See United Cemeteries Co. v. Strother*, 119 S.W.2d 762, 765 (Mo. 1938)(emphasis added).

III. Respondents are not subject to the jurisdiction of the Commission because Respondents are not a public utility.

Respondents are not a public utility because respondents provide no service devoted to public use. *See Khulusi v. Southwestern Bell Yellow Pages, Inc.*, 916 S.W.2d 227, 232 (Mo.App.1995), citing *State ex rel. M.O. Danciger & Co. v. Public Serv. Comm'n*, 275 Mo. 483, 205 S.W. 36, 40 (Mo. banc 1918). Respondents are not a public utility because respondents are not impressed with a public interest and do not hold themselves out as serving or ready to serve all members of the public who may require service, to the extent of their capacity. *See City of Englewood v. City & County of Denver*, 123 Colo. 290, 229 P.2d 667, 672-73 (Colo. banc 1951). Respondents are not a public utility because respondents provide services only pursuant to private contracts between the company and its customers. *See State ex rel. M.O. Danciger and Company*, 205 S.W. at 40. Respondents are not a public

utility in that Universal provides only a billing and bill collection service and does not own, sell, or furnish any water or sewer service.

For the foregoing reasons, respondents are not subject to the jurisdiction of the Commission.

IV. The Commission Has No Ability to Examine or Determine the Issue of Subject Matter Jurisdiction During the Pendency of the Writ of Review

It is settled law that while review of a Commission order is pending before a circuit court, the Commission loses jurisdiction to enter modified, extended, or new orders in the case until such time as the judgment of the circuit court becomes final and the Commission regains its jurisdiction to act in a manner not inconsistent with the decision of the circuit court. *State ex rel. Missouri Cable Telecommunications Ass'n v. Missouri*, 929 S.W.2d 768, 772 (Mo.App. W.D. 1996). Because of the pending Writ of Review in Cole County, which concerns the issue of subject matter jurisdiction, the Commission lacks jurisdiction to make further orders against Universal or to further litigate the issue of subject matter jurisdiction. Re-filing the matter as a "new" complaint case is simply a matter of form and does not alter the application of the legal principal that the Commission must await the determination of the Writ of Review, and only then may the Commission take further action against Universal.

Furthermore, the Commission's order is in direct conflict with the order of the Circuit Court of Cole County, cited in Universal's Motion to Dismiss.

V. Conclusion

For the foregoing reasons, respondents request the Commission to grant rehearing and reconsideration of its Order, dismiss this matter for lack of jurisdiction, or, in the alternative, stay this matter pending the outcome of the Writ of Review case.¹

Respectfully submitted,

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¹ It should be apparent that continued litigation before the Commission will only result in further challenges to the Commission's jurisdiction and Circuit Court enforcement actions that will only result in further challenges to the Commission's jurisdiction, all of which will amount to naught until the Circuit Court of Cole County has determined the Writ of Review case, after which all parties will have clear direction and a clean slate upon which to proceed. Respondent recognizes that the present case is an attempt by the Commission to create such a clean slate by the filing of a new case and the use of a statutory procedure to attempt to compel document production. Due to the pendency of the Writ of Review case, however, such new action is not ripe. The Commission has chosen a horse to ride, and may not now switch horses in the middle of the stream, while respondents have a pending Writ of Review.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been hand-delivered, transmitted by e-mail or mailed, First Class, postage prepaid, this 25th day of July, 2008, to:

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