

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

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

**RESPONDENT GORDON BURNAM'S MOTION TO DISMISS OR
ALTERNATIVE MOTION FOR MORE DEFINITE STATEMENT**

COMES NOW Respondent Gordon Burnam, by and through undersigned counsel, and for his Motion to Dismiss or Alternative Motion for More Definite Statement states as follows:

Background

1. Respondent Gordon Burnam ("Burnam") has entered his appearance specially for the purpose of contesting this tribunal's jurisdiction over him. Nothing contained herein is a waiver of those rights to object or a submission to this tribunal's jurisdiction.

2. The Missouri Public Service Commission ("Commission") is a state administrative agency established by the Missouri General Assembly to regulate public utilities operated within the State of Missouri, pursuant to the Public Service Commission Law, Chapters 386, 392, and 393 of the Missouri Revised Statutes.

3. On or about June 8, 2007, the general counsel for the Commission filed a First Amended Complaint ("Complaint"), together with a Motion to Expedite, against both Respondent Suburban Water and Sewer Company ("Suburban") and Burnam.

4. The Complaint generally requests relief pursuant to Sections 386.570 and 386.580 RSMo. for each of the various counts, all of which are based upon and relate to alleged

violations of an Order Approving Small Company Rate Increase and Approving Tariff (Case No. WR-2005-0455), issued June 16, 2005 and effective June 30, 2005, including the Unanimous Agreement Regarding Disposition of Small Water Company Rate Increase Request dated May 31, 2005 and incorporated therein (collectively, 'Order'). The Commission claims in each case that the Order was authorized pursuant to Section 393.140(2). Suburban, and not Burnam, was party to the Order.

5. Suburban possesses a certificate of convenience and necessity granted by the Commission and is a water corporation and public utility, each as defined in Chapter 386 RSMo.

6. Suburban is a general business corporation incorporated and validly existing in the State of Missouri under and by virtue of Chapter 351 RSMo.

7. Burnam is an individual who is a shareholder and the President of Suburban.

Motion to Dismiss

For his Motion to Dismiss, Burnam states the following:

8. Burnam hereby restates and incorporates by reference all of the statements contained in paragraphs 1 through 7 above.

9. For the reasons enumerated below, 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 Burnam, in his individual capacity, including to make any findings or impose any penalties, pursuant to either of Sections 386.570 or 386.580, and accordingly the Complaint should be dismissed as against Burnam.

10. Sections 386.020(42) and (58) and 386.250(3), which establish the scope of the Commission's jurisdiction and authority over public utilities in general (and water utilities in particular) read, in pertinent part, as follows:

"Public 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 "Water corporation" includes 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

and

The jurisdiction, supervision, powers and duties of the public service commission herein created and established shall extend under this chapter: ... To all water corporations, and to the land, property, dams, water supplies, or power stations thereof and the operation of same within this state

11. Section 386.570 reads, in pertinent part, as follows:

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 ... 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.

12. Section 386.580 reads, in pertinent part, as follows:

Every officer, agent or employee of any corporation or public utility, who violates or fails to comply with, or who procures, aids or abets any violation by any corporation, person or public utility of any provision of the constitution of this state or of this or any other law, or who fails to obey, observe or comply with any order, decision, decree, rule, direction, demand or requirement, or any part or provision thereof, of the commission, or who procures, aids or abets any corporation, person or public utility in their or its failure to obey, observe and comply with any such order, decision, decree, rule, direction, demand or requirement, or any part or provision thereof, in a case in which a penalty has not herein been provided for such officer, agent or employee, is guilty of a misdemeanor and is punishable by a fine not exceeding one thousand dollars, or by imprisonment in a county jail not exceeding one year, or by both such fine and imprisonment.

13. The Commission has jurisdiction, power, and authority only over public utilities, and more specifically in the case of a water utility, to "water corporations," which are defined as persons or entities who own, operate, control, or manage any plant or property and distributing, selling, or supplying for gain any water. Further, Section 386.570 expressly provides that any act, omission, or failure of an individual acting on behalf of a public utility "shall in every case be and be deemed to be the act, omission or failure of such" public utility. Suburban is a public utility, but Burnam is not and never has been a public utility and was not subject to or otherwise bound by the Order. Suburban owns and operates the facilities and sells the water. The Complaint contains no allegations that Burnam is or ever has been a public utility. The Commission cannot make any findings or impose any penalties on or with respect to Burnam in his individual capacity. Without limiting the generality of the foregoing, see Wired Music, Inc. of the Great Midwest v. Great River Steamboat Co., 554 S.W.2d 466, 468 (Mo. App. 1977) (stating that "an individual who signs an instrument on behalf of another party ... e.g., president ... the liability is the principal's and not the individual signing for the principal."); Osage Water Co. v. Miller County Water Authority, 950 S.W.2d 569, 574 (Mo. App. S.D. 1997) (requiring an "explicit professing of public service or undertaking to provide service to the general public" in order to be deemed to be a public utility under the statute and subject to Commission regulation); Dir., State Department of Public Safety v. Murr, 11 S.W.3d 91, 96 (Mo. App. W.D. 2000) (noting that an "administrative agency enjoys no more authority than that which is granted to it by statute"); State v. Davis, 830 S.W.2d 27, 29 (Mo. App. S.D. 1992) (addressing Section 386.570 and stating that "[p]enal provisions of a statute, or of a statute penal in nature are always strictly construed...."); United Pharmacal Co. of Mo. v. Mo. Bd. Of Pharmacy, 208 S.W.3d 907,

912 (Mo. banc 2006) (holding that "when a party could possibly face a criminal penalty for violating a civil statute, ... [any] ambiguity ... must be resolved against the government").

14. Sections 393.140(2) and 386.570 cannot be expanded to apply to Burnam, and Section 386.580 cannot be applied to Burnam for any failure to contribute his own funds or in any other respect relative to the alleged violations, because this would constitute a taking of private property without just compensation and due process in violation of the Fifth and Fourteenth Amendments to the U.S. Constitution and Article I, Sections 10 and 26 of the Missouri Constitution. Without limiting the generality of the foregoing, cf. State ex rel. Southwestern Bell Tel. Co. v. Public Service Comm'n, 416 S.W.2d 109, 114 (Mo. 1967) (stating that the Commission could not order a telephone company to make any investment in a particular area where the company never professed to offer service in that area, because such an order would constitute an unconstitutional taking).

15. Sections 386.570 and 386.580 are unconstitutional and void in that they violate Article I, Section 31 of the Missouri Constitution, which provides that "no law shall delegate to any ... administrative agency authority to make any rule fixing a fine or imprisonment as punishment for its violation." Both Sections 386.570 and 386.580 violate this provision in that both purport to delegate blanket authority to the Commission to adopt rules and issue orders and requirements, the violation of which automatically result in fines and/or imprisonment. Without limiting the generality of the foregoing, cf. Op. Atty. Gen., No. 19 (June 11, 1953) (stating that only violations of statutory requirements, and not mere agency rules or orders, may result in prosecutions).

16. To the extent the Commission is being requested to adjudicate any issues or make any findings relating to the Complaint or the allegations contained therein, the Commission is

without jurisdiction or authority to do so, because its exercise of any such function would constitute an invalid delegation of powers and a violation of due process and the Doctrine of Separation of Powers under the U.S. and Missouri Constitutions as well as constitutional and statutory rights enjoyed by an accused in criminal prosecutions, such as the right to trial by jury, which Burnam has not waived. The Commission cannot engage in any judicial or other fact-finding function for purposes of Section 386.570, which is penal in nature, or Section 386.580, which would result in a misdemeanor. Without limiting the generality of the foregoing, see Percy Kent Bag Co. v. Mo. Comm'n on Human Rights, 632 S.W.2d 480, 484 (Mo. banc 1982) (quoting favorably the statement that "Agencies may not be delegated power to administer what is deemed to be criminal law, and agencies may not serve when juries are required.").

17. Sections 393.140(2), 386.570, and 386.580 and the Order are unconstitutional and void as applied in this case, because they are vague and contrary to due process and do not convey to a person of ordinary intelligence a sufficiently definite warning that they may result in penalties in an individual capacity or for acts or omissions which are impossible due to financial inability or otherwise. Even the Complaint itself is unclear in that it does not identify any Commission order or other requirement applicable to Burnam, allege any knowledge or purpose by Burnam, or claim any other means by which responsibility may be imposed upon Burnam, in each case in his individual capacity. Without limiting the generality of the foregoing, see State v. Young, 695 S.W.2d 882, 884 (Mo. banc 1985) (requiring "guidance, through explicit standards, ... avoiding possible arbitrary and discriminatory application.").

18. The Order is unconstitutional and void because it does not afford an adequate rate of return and, thus, constitutes a taking of private property without just compensation and due process in violation of the Fifth and Fourteenth Amendments to the U.S. Constitution and Article

I, Sections 10 and 26 of the Missouri Constitution. Without limiting the generality of the foregoing, see Duquesne Light Co. v. Barasch, 488 U.S. 299, 308 (1989) (stating that a utility rate must afford sufficient compensation to the utility company, or it would constitute an unconstitutional taking by the regulatory commission).

19. All claims made and penalties sought for violations of the Order are barred by the applicable statute of limitations. Without limiting the generality of the foregoing, Section 556.036 provides for a one-year statute of limitations for all misdemeanors, and any alleged offenses by Burnam would pre-date this period of time.

20. The Complaint fails to state a claim upon which relief may be granted, because it fails to allege all necessary elements of each claimed violation. With respect to Section 386.570, the Complaint omits to state any cause of action (or elements thereof) or other allegations supporting the imposition of personal liability on Burnam. With respect to Section 386.580, the Complaint acknowledges that the Order was agreed to by (and applied to) Suburban only. It does not require any compliance by Burnam personally, so the only possible conduct that could give rise to a misdemeanor on his part would be aiding or abetting any failure to comply on the part of Suburban, yet the Complaint omits to state any elements of this cause of action.

Alternative Motion for More Definite Statement

For his Alternative Motion for More Definite Statement, in the event his Motion to Dismiss is denied, Burnam states the following:

21. Burnam hereby restates and incorporates by reference all of the statements contained in paragraphs 1 through 20 above.

22. The Complaint is general and vague and does not differentiate between which claims are against Suburban, as a corporation, as opposed to Burnam, as an individual, or the respective theories, bases, and requisite elements for such claims against Suburban or Burnam.

23. In order to prepare a responsive and appropriate answer to the Complaint and, specifically, any claims contained therein against Burnam personally, the general counsel for the Commission must amend the Complaint to clarify those claims.

WHEREFORE, Respondents request that the Commission dismiss Respondent Gordon Burnam from the Complaint and any and all other proceedings before the Commission, or in the alternative to order the general counsel for the Commission to provide a more definite statement relating to Mr. Burnam's personal and individual liability under the Complaint and for such other and further relief as the Commission deems just and proper.

/s/ Matthew S. Volkert
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The undersigned certifies that a complete and conformed copy of the foregoing document was filed electronically and mailed to each attorney who represents any party to the foregoing action, by U.S. Mail, postage prepaid in the proper amount, at said attorney's business address.

/s/ Matthew S. Volkert
Dated: June 15, 2007