

IN THE CIRCUIT COURT OF BUTLER COUNTY  
STATE OF MISSOURI  
CIVIL DIVISION

POPLAR BLUFF INTERNET, INC., )  
 )  
 PLAINTIFF, )  
 )  
 v. ) CASE NO. 11BT-CV00566  
 )  
 THE CITY OF POPLAR BLUFF, ET AL. )  
 )  
 DEFENDANTS. )

**RESPONSE TO MOTION FOR SUMMARY JUDGMENT  
ON PLAINTIFF’S REMAINING AFFIRMATIVE DEFENSES**

COMES NOW, Plaintiff Poplar Bluff Internet, Inc., by and through its counsel, and submits the following Response to Defendants’ Motion for Summary Judgment on Plaintiff’s Remaining Affirmative Defenses:

The Defendants have moved for summary judgment with respect to their counterclaim against Plaintiff. As set forth herein, Defendants have failed to comply with the Missouri Administrative Procedure Act, which nullifies any decision the City of Poplar Bluff has rendered with respect to Plaintiff’s account and renders Defendants’ motion for summary judgment moot. Moreover, the City of Poplar Bluff failed to follow its own procedures with respect to all the protested bills except December 2010, which, again, renders Defendants’ motion for summary judgment inappropriate. Finally, the Defendants’ motion is predicated, at least in part, on this Court’s previous interlocutory ruling with respect to the applicability of §392.410.7 RSMo. New evidence has come-to-light since the Court’s previous interlocutory ruling, which should be considered. If the Court finds that the new evidence relevant to whether §392.410.7 is applicable, then Defendants are not entitled to summary judgment as a dispute exists with respect to whether the alleged rates set by the City of Poplar Bluff were illegal.

**A. The City of Poplar Bluff failed to follow the applicable provisions of the Missouri Administrative Procedures Act and, therefore, its decision must be reversed.**

In their motion for summary judgment, Defendants argue that the City Council's decision on August 10, 2012 to deny Plaintiff's protest(s) "shall be considered a final administrative action by the City." (Defendants' motion, paragraph 10) The City, however, failed to provide Plaintiff with findings of fact and conclusions of law with respect to its "decision" on August 10, 2012. Accordingly, either the City's "decision" is not ripe for judicial review or the City violated the applicable provisions of the Missouri Administrative Procedure Act and, therefore, its "decision" must be reversed as it is void as a matter of law.

First, "enforcement of an ordinance by a municipality is administrative and should be reviewed under the Missouri Administrative Procedure Act." Begshaw v. City of Independence, 41 S.W.3d 500, 503 (Mo.App.W.D. 2000) Importantly, decisions made by a municipality after a hearing are "contested cases" for purposes of the Missouri Administrative Procedure Act. *Id.* (citing Reynolds v. City of Independence, 693 S.W.2d 129 (Mo.App.W.D. 1985))

§536.090 RSMo. requires all decisions in "contested cases" to include findings of fact and conclusions of law. Failure to include findings of fact and conclusions of law cannot be waived and requires reversal of the municipality's decision. Complete Auto Body & Repair, Inc. v. St. Louis County, 232 S.W.3d 722, 724 and 726 (Mo.App.E.D. 2007)("it is well-established that the failure to file findings and conclusions under 536.090 cannot be waived by failing to object in the circuit court . . . The Council's failure to accompany its decision with findings of fact and conclusions of law as required by section 536.090 was error requiring reversal.")

Accordingly, either the City's alleged decision is not ripe for judicial review because no findings of fact and conclusions of law have been submitted or the City's alleged decision must

be reversed for failing to comply with the mandatory provisions of §536.090 RSMo. In either instance, the City is not entitled to summary judgment.

**B. The City of Poplar Bluff failed to follow its own procedures when rendering its alleged decision and, thus, any such decision is void and cannot be relied upon for summary judgment.**

As set forth in Plaintiff's Statement of Additional Facts, Plaintiff contested every bill it received from the Defendants from January of 2011 until Open Access was terminated in May of 2011. Defendants failed to follow their policies as to all such disputes except for the first one. Defendants' policies clearly state that each disputed bill will receive an individual response within five days, and that each dispute will be subject to subsequent hearings.

In June of 2012—well after the Plaintiff's request to reinstate the dispute process and well after this action was filed—the parties agreed to resume the dispute process in an effort to expedite litigation and narrow the issues. However, the only process initiated was as to the December 2010 dispute. Defendants took no action whatsoever as to the remaining disputed bills. Moreover, the clear intent was to have the dispute hearings or Plaintiff would not be able to assert its affirmative defenses. An agreement would preserve Plaintiff's ability to present evidence to the Court regarding those defenses. As a result, pursuant to its own policies, the amounts due on those remaining bills are not due and owing and summary judgment is not appropriate as a genuine issue of material fact exists as to whether any money is owed.

**C. New Evidence exists with respect to whether Defendants are subject to the provisions of §392.410.7 RSMo.**

Defendants' motion is predicated, at least in part, on the Court's previous interlocutory ruling regarding Plaintiff's Petition against Defendants and certain affirmative defenses Plaintiff

submitted to Defendants' Counterclaim. The Court's previous interlocutory ruling seemingly provides that the provisions of §392.410.7 RSMo. do not apply to Defendants because the Court determined that the services provided by Defendants did not constitute a "telecommunication network."

Since the Court entered its interlocutory ruling, new evidence has come-to-light with respect to Defendants' representations of its broadband network. Specifically, as set forth in Plaintiff's Statement of Additional Material Facts, the City of Poplar Bluff described the system at issue in this case as a "telecommunication network" prior to and after the bond was passed in February 2000, which was used to build the network. Moreover, the State of Missouri classified the system as a "telecommunication network" and required the City of Poplar Bluff to submit to annual surveys from 2002-2007, in which the City of Poplar Bluff continued to represent that the broadband network was, in fact, a "telecommunication network."

The fact that the City of Poplar Bluff and the State of Missouri described and classified the network at issue as a "telecommunication network" for several years leading up to the events that are the basis of the claims in Plaintiff's Petition and some of Plaintiff's affirmative defenses to Defendants' Counterclaim, the Court should reexamine its earlier interlocutory ruling. It is certainly relevant that the City of Poplar made numerous representations that its network was a "telecommunication network" since it has taken the exact opposite position in this case. Whether it is on estoppel grounds or considered admissions of a material element of fact, this evidence undermines Defendants' motion for summary judgment.

Respectfully submitted,

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