

STATE OF MISSOURI  
MISSOURI PUBLIC SERVICE COMMISSION

In the Matter of The Application of	)	WT-2004-0192
Missouri-American Water Company for	)	Tariff Nos.
Approval of an Agreement with Pre-	)	YW-2004-0555
mium Pork, L. L. C., for the Retail	)	YW-2004-0556
Sale and Delivery of Water	)	

**REPLY OF AG PROCESSING INC A COOPERATIVE  
TO MISSOURI-AMERICAN'S OBJECTION TO APPLICATION TO INTERVENE**

COMES NOW AG PROCESSING INC A COOPERATIVE ("AGP") and replies to Missouri-American Water Company's ("MAWC") October 29, 2003 Objection to AGP's Application to Intervene as follows:

1. MAWC's arguments against AGP's intervention in this proceeding have no merit. MAWC first argues that "[t]he Premium Pork contract is proposed for approval under the 'Alternative Incentive Provisions'" and faults AGP's expressions of concern regarding the alleged insufficiency of the EDR discounts and what customer or customer group will be expected to make up the difference. Careful examination of MAWC's Application will not reveal any reference to "Alternative Incentive Provisions," and will, instead reveal at least two references to the "General Incentive Provisions" referenced by AGP. These appear at p. 5 of MAWC's Application as follows:

These terms are necessary for the project to proceed because the **General Incentive Provisions** of the Economic Development Rider Tariff currently approved by this Commission are not sufficient. The **General Incentive rates** are not competitive with rates for water service offered by other communities in which

Premium Pork has considered constructing its new facility. . . .

*Id.*, (emphasis added).

Later referencing an affiant from Premium Pork, MAWC's Application again states:

Mr. Krause further states that the rates negotiated with MAWC, as set forth in the Agreement, are competitive with rates being offered by other communities, **unlike the rates set forth in the General Incentive Provisions.**

*Id.*, (emphasis added).

If MAWC intended to submit its Application under the "Alternative Incentive Provisions" to which it now makes reference, one would not discern that from its Application. If MAWC wishes to amend its Application it is free to do so, but it is MAWC's Application to which AGP addressed, and continues to address, its concerns about who will have to "absorb" this "discount." AGP does not wish to interfere with the decision by a new business to locate in St. Joseph. As expressed in our Application to Intervene, however, AGP already pays excessive rates and is not in a competitive position to subsidize water service for the beneficiary of a discount contract.

Moreover, it does not appear, based on Staff's Recommendation filed in this docket that MAWC met even the requirements of the tariff under which it now seeks to hide.

2. MAWC argues that Staff and Public Counsel are "fully capable" of assessing compliance with the tariffs MAWC claims are pertinent. This argument misses the point. The

nature of AGP's interest in this proceeding is that of an industrial customer in a special category that will be assigned any underrecovery of costs from the proposed service and discount. Neither Staff nor Public Counsel is capable of "assessing" AGP's interest nor does either pretend to represent AGP's pecuniary and proprietary interest in this proceeding.

3. MAWC then makes the somewhat astounding contention that AGP has no interest in this proceeding. The Commission will recall that its own order of October 21, 2003 stated:

The Commission finds that **proper persons** should be allowed an opportunity to seek to intervene or to oppose the proposed tariff sheets and agreement. The Commission finds that notice of this application should be sent to all parties in Missouri-American's currently pending rate case, Case No. WR-2003-0500.<sup>1/</sup>

Setting aside the legally intriguing question of what MAWC would agree would be a "proper person" to intervene in this case, it should be apparent that AGP meets both the interest requirements of the Commission's rules and Missouri law.

*First*, MAWC does not appear to dispute that AGP is provided service in the St. Joseph service district, the same district that will be directly affected by the proposed discount agreement. Indeed, the Commission may arguably have presumptively decided that any party to the WR-2003-0500 case was a "proper party" to intervene in this proceeding. The question of whether

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<sup>1/</sup> *Order Directing Notice, Directing Filing, and Adopting Protective Order*, WT-2004-0192, October 21, 2003, p. 3 (emphasis added).

a customer in a rate district other than the St. Joseph district could support an intervention need not be resolved, but certainly an industrial customer ***in*** the subject district has a sufficient interest.

*Second*, MAWC also does not appear to dispute that AGP as a customer is different from the general public. AGP is one of the larger water users in the St. Joseph District, surely an interest that is "different from that of the general public." We are not aware of any residential customers that use anything close to AGP's usage, nor are these customers served from distribution mains anywhere near the size of those serving AGP. AGP's service certainly differs from that provided to the general public and its interests are not those of the general public.

*Third*, MAWC does not deny that AGP is an intervenor (to whose intervention MAWC did not object) in the WR-2003-0500 case, and also was an intervenor (without objection) in numerous prior MAWC rate cases and AAO applications. Accordingly, AGP has already established an interest that is sufficient to support intervention in the overarching rate case because of its size, usage characteristics and, indeed, the same criteria as pertinent here. This proceeding specifically concerns discounts, the treatment of those discounts in calculating the rates of the other large customers in the specific district involved and what customers are expected to subsidize these "discount rates." That is the focus of AGP's concerns.

*Fourth*, MAWC cannot not deny that AGP, as an industrial customer in the St. Joseph district will not be adversely affected by a final order arising from this case. AGP's usage levels make clear that even minimal additional charges per gallon of water will have an adverse impact on AGP. Both MAWC's Application and its Objection stop short of disclaiming any intent on the part of MAWC to recover these apparently significant discounts over the proposed ten-year life of the proposed agreement from other customers.<sup>2/</sup> And indeed the experience in this jurisdiction of "economic development rates" has clearly been that the utility eagerly seeks to "share" these "economic development discounts" with its other customers.

*Fifth*, MAWC seems to question whether AGP's intervention serves the "public interest." The public interest is always served by permitting actual business customers to intervene and act to protect their own interest so that the issues presented in the filing may be more fully explored and the Commission more completely informed.

AGP is also an employer in the St. Joseph area with roughly 185 employees. Like the proposed beneficiary here, AGP makes a substantial (roughly \$8 million) payroll in the St.

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<sup>2/</sup> Given our knowledge of the competitive marketplace for industrial water, it would not be surprising to discover that the amount of the discount was greater than 80% from the existing rates, more than twice the discount amount allowed under the "general" discount provisions. This raises serious questions about whether the utility intends to "eat" these unrecovered "costs" and also raises serious questions regarding the variable costs and thus the support for the existing rates that are currently being charged to these customers.

Joseph economy and makes substantial payments to the local taxing authorities to support public services. There is simply no valid reason to discriminate against **existing** business operations in favor of new business operations. More to the point, the public interest is certainly as well served by preserving **existing** businesses as it is by facilitating new businesses to locate in an area. The proposed intervention amply serves the public interest.

4. MAWC also seems to assert that this question was somehow decided in Case No. WT-2004-0156 where MAWC's EDR tariff was "approved." We have examined the docket of that proceeding and find therein that MAWC's filing was made on a Wednesday, September 24, 2003, at 3:58 p.m. Again MAWC requested "expedited treatment." The following Friday (September 26) the Commission issued an order directing **Staff and Public Counsel** to comment on the filing. No public notice of the filing was made, no intervention schedule was ordered and, even though Case No. WR-2003-0500 was then pending before the Commission, no order directing that notice be given even to the parties already active in that case. Both Staff and Public Counsel responded on the following Monday, September 29, at 3:46 and 4:06 p.m. respectively and on October 2, five working days after MAWC's "expedited" filing was made, the Commission issued an order approving the tariff.

Moreover, MAWC's Motion for Expedited Treatment belies its argument. At page. 2, MAWC's Motion states:

The subject tariffs DO NOT by themselves do not [sic] give MAWC the ability to provide

service to Premium Pork under a contract rate. The tariffs merely establish the process by which MAWC must then make application to the Commission for approval of its agreement with Premium Pork. Thus, the Commission will subsequently be presented with an application presenting the agreement to the Commission for its review and possible approval. (Upper case emphasis in original).

The public and other affected customers, even in the St. Joseph district, were given no notice, no opportunity to intervene or protest, and no opportunity for a hearing in the WT-2004-0156 proceeding even though a number of these parties had already established their interest, had been granted intervention and were participating actively in the pending general rate proceeding;<sup>3/</sup> now that the actual contract is filed, even customers who are affected and in the **same** district as the proposed beneficiary are (under MAWC's view) not "proper parties" to be involved. The Commission's procedures must be fair and afford parties a full and fair hearing at a meaningful time and in a meaningful manner.

This court has authority to examine acts of the Public Service Commission for due process violations. *State ex rel. Chicago Rock Island & Pacific Railroad Company v. Public Service Commission*, 312 S.W. 2d 791, 796[2] (Mo. banc 1958).

Due process requires that administrative hearings be fair and consistent with rudimentary elements of fair play. *Tonkin v. Jackson County Merit System Commission*, 599 S.W. 2d 25, 32-33[7] (Mo. App. 1980) and *Jones v. State Department of Public Health and Welfare*, 354 S.W. 2d 37, 39-40[2] (Mo. App.

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<sup>3/</sup> See, *Mullane v. Central Hanover Trust*, 339 U.S. 306 (1950).

1962). **One component of this due process requirement is that parties be afforded a full and fair hearing at a meaningful time and in a meaningful manner.** *Merry Heart Nursing and Convalescent Home, Inc. v. Dougherty*, 131 N.J. Super. 412, 330 A. 2d 370, 373-374[7] (Ct. App. Div. 1974).<sup>4/</sup>

5. MAWC finally appears to assert that the Commission can confirm that the existing customer base "will not be harmed." Then MAWC argues that if the tariff is allowed to go into effect it will be "because the Commission has determined that there will be no impact on AGP . . ." and that if there is harm the Commission will not approve. This question-begging logic essentially assumes that the Commission can make these decisions in a vacuum, and does not have to issue an order that is supported by competent and substantial evidence, a test only recently held to apply even to even non-contested cases under 386.510 RSMo.<sup>5/</sup> As MAWC admits in its Objection, either result would require a "determination" by the Commission that would require support. How that support would be developed without participation by customers to be affected by the relief granted defies logic. Moreover, MAWC's statements fail to distinguish between the interest that the PSC Staff and Public Counsel have as "general and not partisan"

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<sup>4/</sup> *State ex rel. Fischer v. Pub. Serv. Comm'n.*, 645 S.W.2d 39, 43 (Mo. App. 1982) (emphasis added).

<sup>5/</sup> *State ex rel. Coffman v. Pub. Serv. Comm'n.*, \_\_\_S.W.3d \_\_\_, WD62016, 10/28/2003 (Mo. App. 2003).



representatives,<sup>6/</sup> and the interest of affected customers as **partisan** representatives.<sup>7/</sup>

6. MAWC is also wrong on the law. The leading case is *State ex rel. Consumers Public Service Co. v. Pub. Serv.*

*Comm'n.*<sup>8/</sup> There the court tellingly said:

Considering the Public Service Commission Act as a whole, it seems apparent that parties to cases before the Commission, whether as complainants or intervenors **are not required to have a pecuniary interest, or property or other rights, which will be directly or immediately affected by the order sought or even its enforcement. . . . Any local partisan interest in the situation involved, such as a customer,** representative of the public in the locality or territory affected [ *State ex rel. City of St. Louis v. Public Service Comm.*, 317 Mo. 815, 296 S.W. 790]; or as a competitor for the same territory or privilege **is surely sufficient to show an interest similar to that of complainants described in Section 5686** [ *State ex rel. Kansas City Power & Light Co. v. Public Service Comm.*, 335 Mo. 1248, 76 S.W. (2d) 343]; **and, therefore, is likewise a sufficient basis for intervention.** So also it should certainly be sufficient to authorize intervention if the ultimate enforcement of the order sought would directly affect property rights as in *American Petroleum Co. v. Public Service Commission*, *supra*, and the ruling to the contrary therein is overruled.<sup>9/</sup>

An interest sufficient to support intervention is not required to be a pecuniary interest, a property interest or even

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<sup>6/</sup> *State ex rel. McKittrick v. Pub. Serv. Comm'n.*, 175 S.W.2d 857 (Mo. en banc 1943).

<sup>7/</sup> See, *Consumers Public Service Co.*, *infra*.

<sup>8/</sup> 352 Mo. 905, 180 S.W.2d 40 (Mo. 1944).

<sup>9/</sup> *Consumers Public Service Co.*, *supra*, 352 Mo. 905, 921, 180 S.W.2d 40, 46 (Mo. 1944)

any interest that will be directly or immediately affected by the order sought. Per the court, "any partisan interest involved such as a customer" is sufficient to support intervention. AGP is, undeniably, a customer in the very district and class that will be affected by this discount.

*Consumers Public Service* remains good law and has been repetitively cited by Missouri courts.<sup>10/</sup> Insofar as concerns large industrial customers' interest, the language in *Dyer*, *supra*, note 8 is instructive:

The Commission was, of course, proceeding more or less "upon its own motion," (having acted to suspend the rates) and we feel that it had some discretion as to the parties whom it should admit. It had already permitted seventeen large industrial consumers (less than twenty-five) to intervene, **but we note that their interests were substantially different from those of the general public.**<sup>11/</sup>

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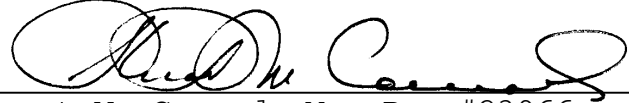
<sup>10/</sup> *State ex rel. Dyer v. Pub. Serv. Comm'n.*, 341 S.W.2d 795, 797 (Mo. 1960); *Smith v. Pub. Serv. Comm'n.*, 336 S.W.2d 491, 494 (Mo. 1960); *State ex rel. Brink's, Inc. v. Pub. Serv. Comm'n.*, 535 S.W.2d 582, 584 (Mo. App. 1976); *State ex rel. Summers v. Pub. Serv. Comm'n.*, 366 S.W.2d 738, 742 (Mo. App. 1963).

<sup>11/</sup> *Dyer*, *supra*, 341 S.W.2d 795, 797 (emphasis added).

WHEREFORE, AGP prays a Commission Order promptly sustaining its Application to Intervene thereby permitting it to have access to the confidential data for review and analysis.

Respectfully submitted,

FINNEGAN, CONRAD & PETERSON, L.C.

A handwritten signature in black ink, appearing to read "Stuart W. Conrad", is written over a horizontal line.

Stuart W. Conrad Mo. Bar #23966  
3100 Broadway, Suite 1209  
Kansas City, Missouri 64111  
(816) 753-1122  
Facsimile (816) 756-0373  
Internet: stucon@fcplaw.com

ATTORNEYS FOR AG PROCESSING INC A  
COOPERATIVE

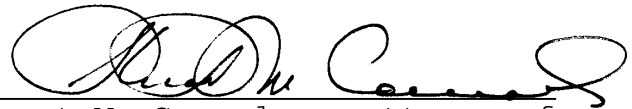
**CERTIFICATE OF SERVICE**

I certify that I have served a copy of the foregoing Response on each of the following persons either by postage-paid U.S. mail, by e-mail or by facsimile transmission.

Office of the Public Counsel  
P. O. Box 7800  
Jefferson City, MO 65102

Dean L. Cooper, Esq.  
Brydon, Swearengen & England,  
P.C.  
312 East Capitol Avenue  
P. O. Box 456  
Jefferson City, MO 65102-0456

Dated: October 30, 2003

A handwritten signature in black ink, appearing to read "Stuart W. Conrad", written over a horizontal line.

Stuart W. Conrad, an attorney for  
within respondent