

**STATE OF MISSOURI
MISSOURI PUBLIC SERVICE COMMISSION**

In the Matter of Missouri-American)	
Water Company's Request for Author-)	
ity to Implement a General Rate)	WR-2011-0337
Increase for Water Service Provided)	
in Missouri Service Areas)	

RESPONSE TO MOTION TO QUASH

COMES NOW Ag Processing Inc a Cooperative ("AGP") and responds to the Motion to Quash that was filed herein by Staff on February 8, 2012 as follows:

1. On Friday, February 3, 2012, AGP counsel sought to call Rachel Lewis, Staff Counsel, to inquire about the scheduling of depositions. A recorded message was left on her voice mail that identified the persons to be involved and also inquired if she was the correct Staff attorney to whom those requests should be directed. Later that afternoon, AGP counsel received a call back from Ms. Lewis who confirmed that she was the person that should be involved.

2. Undersigned counsel then sought to implement the proposed depositions by notice and agreement of counsel (which is the more common method and allows counsel to discuss locations and times). Indeed, undersigned counsel reviewed dates and times in the next week with Ms. Lewis as to when the depositions might occur, (including that of Ms. Voss) and Ms. Lewis advised undersigned counsel that she "would get back to him" with availability

and schedule. AGP counsel provided Ms. Lewis not only with his office phone number in Kansas City, but provided his cellular telephone number where he could be reached later that day or even into the evening. However, no call to either number appears to have been received, nor was any voice mail message left. Accordingly, given the advance of time, counsel for AGP was constrained to move forward on Monday morning, February 6.

3. When service was effected on Ms. Lewis, she again confirmed her identity as staff attorney but, again, made no indication that she was in any manner lacking in authority, nor did she raise any of the concerns that are now being raised, any of which could have easily been addressed at that time or immediately thereafter.

4. By way of summary, Staff's complaints appear to be the following:

a. AGP did not provide or file a "pleading-style" notice of deposition. Certainly had Ms. Lewis "gotten back to me" as she indicated she would (but did not) such a "pleading-style" notice would have been forthcoming. Staff should not be heard to complain about the absence of a document that they frustrated. Moreover, AGP counsel did file in EFIS (in "pleading style") a copy of the return of service which included the subpoenas. This provided all parties with notice of content. That filing included a certificate of service to all parties.

That return of and service certificate was filed on February 6, 2012.^{1/}

b. AGP counsel was not entitled to serve the subpoenas. The rule Staff cites permits this service. AGP counsel is not a party and is (slightly) over 18 years old. Staff cites no authority for its statement that AGP counsel is "disqualified" from serving a subpoena. As to the tender of fees, Staff is correct. Past procedure regarding service of subpoenas on Staff witnesses was, however, followed.

c. Service was on Ms. Lewis and not on the individuals. The details of the service have been recounted above. At no time did Ms. Lewis disclaim authority as Staff attorney, to accept service for members of the Staff she claimed to represent. Moreover, the judge can confirm that each subpoena was directed to the specific witness and not to "trial counsel." *Meher* is not in point. This will be confirmed by examination of the subpoenas that are on file in EFIS. Moreover, each subpoena was hand-delivered and not faxed to Ms. Lewis.

d. Staff is a party to this matter. Its witnesses act pursuant to that authorization and in that capacity and not on their own. Rules dealing with non-party service have no application here. If they are "non-parties," how can they simultaneously claim to represent Commission Staff?

^{1/} There was a typographical error on one of the subpoenas that appeared to call for the deposition to commence at 10:00 p.m. This was called to the attention of all counsel by email to the same service listing on February 7, 2012. A copy of that email can be provided if needed.

e. Compliance would cause "undue burden and hardship." Any appearance would apparently cause "undue burden and hardship." However, AGP limited its deposition requests to specific Staff witnesses who have provided testimony or sponsored portions of a Staff report dealing the district specific rates and whether subsidies are to be permitted. *First*, AGP is willing to shift the timing of the proposed depositions to avoid the "holiday." This "holiday" appears to be recognized only in state offices and was not known to AGP counsel. *Second*, it is an easy matter to adjust dates, a matter that could have been handled with far less kerfuffle by a telephone call. This also addresses Staff's claim of "improper purpose."

f. Ten day notice. As these persons are representatives of a party, they cannot simultaneously claim a non-party non-employee status. This rule does not apply here.

g. Undue Scope. Again an issue that could have readily been addressed in a telephone call. We do not seek duplicates of what has already been produced. If all workpapers have been produced, fine. To our knowledge, however, the "district cost studies" may not be part of any witnesses' workpapers, but should be available and can be produced for identification. Whether district cost studies have already been provided to the parties is not clear, they have not been identified to the witness or person that produced them. Part of this process is to avoid a finger-pointing exercise at the hearing or necessitate recall of a witness.

h. Given that we do not know what materials exist, any request must of necessity be broad. The scope is that it is reasonably calculated to lead to the disclosure of admissible evidence. If certain materials are privileged, they can be dealt with appropriately. AGP intends to respect legitimate attorney-client privilege. However, comments, markups and the like that are on materials that are not privileged are reasonable things to disclose and it is not burdensome or harassment to ask that they be provided. Preliminary testimony drafts may or may not be privileged; it depends on the markings and who made them. Circulated drafts and comments thereon from other staff members we do not believe are privileged.

5. Certainly these persons are not "parties" having not intervened in the rate case, but they are certainly part of the panoply of Commission Staff, which **is** a party and is represented, apparently, by Ms. Lewis -- according to her explicit statement -- and not by Ms. Voss.

6. As far as the claim that Ms. Voss is a Staff attorney and not subject to subpoena,^{2/} it is difficult for us to determine what role Ms. Voss plays. There are many attorneys serving in capacities other than giving legal advice and counsel. Certainly at one time she served as a regulatory law judge, then as a staff advisor to one of the Commissioners, Now, her status

^{2/} Staff has also filed a "Motion in Limine" with respect to Ms. Voss' inclusion on a witness list. Setting aside the assumption that Ms. Voss would be a "hostile witness," which is itself revelatory, most of these comments also would apply to that separate Motion.

appears to be that of the Director of the Regulatory Review Division. That division appears to be separate from the Staff Counsel department. According to the Commission's own letter-head, telephone and staff directory, Ms. Voss is not serving as an attorney but, rather, is in charge of a major section of the Commission Staff. If she is serving as a "supervising attorney," that status is not clear from external indications, and one thing that gives us pause is an "on again, off again" status.

7. As to a request for workpapers, if Ms. Voss has none, that is a perfectly acceptable response. If certain communications between Ms. Voss and other staff members are claimed to be privileged, they may be appropriately identified and withheld for further review under such claim. Based on our information, however, Ms. Voss is not serving under the General Counsel department and has not replaced Mr. Thompson as Chief Staff Counsel. Hence she does not appear to be serving as an attorney in this matter. To the contrary, our information is that Ms. Voss (while doubtless a licensed attorney), is not serving as an attorney in her present position and, instead, is serving as an upper-level member of the Commission Staff and only as that. Any communications between her and other members of the Commission Staff would not be privileged under any known principle of law.

8. Finally, as to an alternative resolution to this needless controversy, i.e., location for and timing of depositions, a simple telephone call would have accomplished the same effect. We would have no difficulty with either (1) rescheduling

depositions away from a state holiday (which was not known to be such to AGP or its counsel), and (2) an alternative location in Jefferson City. However, as earlier disclosed, AGP counsel had sought initially to explore with Staff counsel alternatives but had been met with no response to his requests. We have control over scheduling our facilities in our office in Kansas City; we do not have control over scheduling appropriate facilities in the Governor Office Building. An additional possible location that could have been discussed was (and remains) is our office in Jefferson City. Either would require some degree of coordination with Staff counsel, which has not been forthcoming. This, by the way, also addresses issues of fees and mileage.

9. Additionally, as regards Staff's claims of "surprise," "harassment," "burden," etc., it is not to AGP's advantage to deflect Staff from its (apparently) continuing analysis of the numerous issues in this rate case. It is even possible that many of the matters that would be addressed in a deposition could be addressed through a stipulation of facts., but that doesn't yet exist. Again, however, these and other matters could have been easily addressed in a cooperative manner with Staff counsel had the latter been willing to address them. That said, we are under no obligation known to us to give Staff, or indeed any other party, some sort of advance notice as to trial strategy. As far as that goes, a series of data requests had earlier been tendered to Commission Staff generally, and the discovery rules that are known to us do not require that interrogatories or

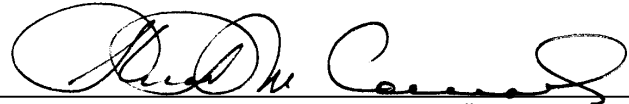
other methods of discovery be used to the exclusion of others. Occasionally a transcribed interview, such as a deposition, is the most efficient (while not the least expensive) means to obtain information or pin down a person's information. These depositions are intended to identify particular staff materials and the associated person's views of that case. Ms. Voss' deposition is intended to identify her role, whether it involves the determination of "policy," and the identification of what has become apparent as a Commission Staff policy, seemingly to depart from the "cost causer, cost payer" policy that has long been a Commission policy, to one, the outlines of which are presently uncertain.

10. We will readily confess that we are not privy to and do not know precisely how Commission Staff has recently "re-shuffled" itself into a new organizational structure. We can only evaluate the information that we are provided from the Commission's website, its staff listings, its telephone listings and its letterhead. These items appear to identify Ms. Voss as "Director of Regulatory Review." Our information is that Ms. Voss has been given the responsibility that at one time was assigned to Wess Henderson (who is not an attorney) and her responsibility is that of a Staff supervisor of sorts. If, in fact, she is serving as an attorney, and is supervising Staff, then her relationship to the Commission, General Counsel and Staff Counsel is certainly not clear. That relationship may raise additional issues that transcend this response.

11. Even at this late date, AGP is willing to move the depositions that are currently proposed for Monday to a later day, possibly Thursday, and to conduct those depositions at this firm's Jefferson City office or at the Commission's offices as Ms. Lewis now proposes as a form of alternative relief. This seems to be Staff's alternative approach, which would be satisfactory. Again, these matters could have been easily dealt with by simple discussion with counsel or a telephone call.

Respectfully submitted,

FINNEGAN, CONRAD & PETERSON, L.C.



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 pleading on the designated attorneys or representatives of each party in accord with Commission Orders and the service list maintained in this proceeding by the Secretary of the Commission on EFIS.

Dated: February 9, 2012



Stuart W. Conrad, an attorney for
AGP