

FILED³

SEP 13 2000

STATE OF MISSOURI
MISSOURI PUBLIC SERVICE COMMISSION

Missouri Public
Service Commission

In the Matter of Missouri-American)	
Water Company's Tariff Sheets De-)	
signed to Implement General Rate)	
Increases for Water and Sewer Ser-)	WR-2000-281
vice provided to Customers in the)	SR-2000-282
Missouri Service Area of the Compa-)	(Consolidated)
ny)	

APPLICATION FOR REHEARING OF
AG PROCESSING INC, A COOPERATIVE,
FRISKIES PETCARE, A DIVISION OF NESTLE USA AND
WIRE ROPE CORPORATION OF AMERICA INC. AND
CITY OF RIVERSIDE, MISSOURI

COME NOW AG PROCESSING INC, A COOPERATIVE ("AGP"),
FRISKIES PETCARE, A DIVISION OF NESTLE USA ("Friskies") and WIRE
ROPE CORPORATION OF AMERICA INC. ("Wire Rope") and City of
Riverside, Missouri ("Riverside") and pursuant to Section 386.500
RSMo. 1994 apply for rehearing of the Commission's August 31,
2000 Report and Order, the September 1, 2000 Notice of Correction
of said Order, and the September 12, 2000 Order of Clarification
all concerning Missouri-American Water Company (hereinafter
"MAWC").

In addition, for the reasons stated hereinafter,
Intervenors request that pending the decision on such application
and the decision on rehearing, if such application is granted,
that any rate increases contained in MAWC tariff sheets purport-
edly authorized by this filing with respect to the St. Joseph,
Missouri district and the Parkville district from which Riverside
receives service be stayed or in the alternative that any such

increases be ordered approved on an interim basis subject to refund until the Commission renders a decision on rehearing; and that the Commission give expedited consideration to this motion.

I.

The Order is unlawful, unjust and unreasonable in that the Commission has failed to provide adequate findings of fact related to the record as required by law thereby making it impossible for these intervenors to specify with particularity the factual errors that are contained in such Order. Accordingly, the Order violates these Intervenor's rights to due process as guaranteed by the United State and Missouri Constitutions by attempting to deny them access to the courts and should be set aside as unlawful and unconstitutional forthwith.

II.

Without prejudice to the foregoing specification of error, the aforesaid Order is arbitrary, capricious, unlawful, unjust, unreasonable and unconstitutional on the following grounds:

1. The Commission has placed upon these intervenors the burden of proof in this proceeding and has failed and refused to place such burden on the applicant utility in clear violation of Section 393.150.2 RSMo 1994.

a. The Commission has invented an additional burden of a "showing of inefficiency or improvidence" and has imposed such burden upon these intervenors' evidence and in so

doing has violated Section 393.150.2. There is in fact no such burden imposed by law or precedent and to impose such is arbitrary, capricious, unjust, unlawful and unreasonable.

b. The Commission has wholly invented a presumption of prudence on the part of the applicant utility which presumption is neither supported by any law or precedent and is in outright violation of Section 393.150.2 and thereby has unlawfully and unconstitutionally shifted the burden of proof to these intervenors in this proceeding which renders the resulting Order arbitrary, capricious, unjust, unreasonable and unlawful.

2. The Commission has rejected certain evidence as "lacking in credibility" and has specifically found the "testimony of Biddy and Morris to lack credibility" when none of the Commissioners observed the testimony of such witnesses or attended the portions of the hearing during which these witnesses testified. Such absent Commissioners were physically unable to observe the demeanor and manner of such witnesses during cross-examination and are therefore unable to make determinations regarding the credibility of witnesses whose testimony they did not observe. Their attempt to reject this testimony on such grounds is arbitrary, capricious, unjust, unreasonable and unlawful and the decision, accordingly, is not based on competent and substantial evidence on the whole record because the Commissioners have ignored or refused to consider competent evidence.

3. The Order is unjust, unlawful, unreasonable and unconstitutional in that the Commission did not hear and failed

to consider the evidence put forward against the prudence of the applicant utility by failing and refusing to attend the portion of the hearing during which such evidence was offered, then rejecting the testimony of witnesses whose testimony they did not see or observe as lacking in credibility. In so doing the Commission violated the provisions of Section 393.150.2 and Section 536.080 and the Order is accordingly unlawful, arbitrary and capricious in its rejection of such evidence.

4. The Order is unlawful, unjust, unreasonable and unconstitutional in that it purports to rely upon a figure of \$63.3 million in comparison to \$63.72 million for a new plant without identifying such figure in the record of the proceeding because such figure exists nowhere in the record of this proceeding. Accordingly, the Order is not supported by competent and substantial evidence on the whole record and is contrary to the competent and substantial evidence that is of record.

5. The Order is unlawful, unjust, unreasonable and unconstitutional in that it fails to consider all relevant factors in violation of *State ex rel. Utility Consumers' Council of Missouri, Inc. v. Public Service Commission*, 585 S.W.2d 41 (Mo. en banc 1979) and other controlling law regarding the requirements for such decisions because the Order rejects and fails to consider competent and substantial evidence of imprudent planning on the part of the applicant utility. Accordingly, the Order is not supported by competent and substantial evidence on

the whole record and is contrary to the competent and substantial evidence that is of record.

6. Furthermore, in its Order of February 2, 2000, the Commission failed and refused to apply and enforce its own rules permitting discovery against the applicant utility and against its own Staff by these intervenors thereby arbitrarily and capriciously denying the access to tools to permit them to properly prepare their case for the following reasons:

a. By denying full discovery rights on relevant information to these intervenors, the Commission acts unlawfully, capriciously, arbitrarily and issues an order that denies these intervening parties equal protection of the law and due process.

b. The Order extended to Commission Staff the authority of the Commission and/or the Public Counsel to seek discovery in non-contested case situations and then bootstraps that authorization as a means of denying discovery of undisputedly relevant materials to these intervenors. In so doing the Commission acts unlawfully, capriciously, arbitrarily and issues an order that denies these intervening parties equal protection of the law and due process. Staff is a party to the proceeding, like any other party. Staff is not the Commission and in a contested case in which the Commission sits as the trier of fact, Staff cannot act for or on behalf of the Commission. This case is a contested case initiated by the utility filing a request to increase its rates.

c. The Commission failed to ascribe a proper definition of relevancy, and thereby acted arbitrarily, in a discriminatory manner and capriciously so as to deny equal protection of the laws to these intervenors and to deny them due process.

d. The Commission statement in the February 2, 2000 Order that "Staff of the Commission and the Public Counsel enjoy broader discovery powers than other litigants" is incorrect in the context of a contested case. Due process requires that administrative hearings be fair and consistent with rudimentary elements of fair play. The Fourteenth Amendment of the United States' Constitution and Sections 2 and 10 of the Missouri Constitution guarantee that parties to a rate proceeding must be accorded a fair and meaningful opportunity to be heard. *State ex rel. Fischer v. Public Service Commission*, 645 S.W.2d 39 (Mo.App. 1982), cert. denied, 464 U.S. 819, 104 S.Ct. 81, 78 L.Ed.2d 91 (1983). No meaningful opportunity is provided when the Commission discriminatorily denies access to the established tools of discovery with all parties on an equal basis. These intervenors expect that the Staff of the Commission will take positions that are adverse to their interests, to the interests of large users, and to the interest of ratepayers in other districts. Denying them equal access to discovery devices and tools and promoting Staff to a "super party" is unlawful, capricious, arbitrary and denies these intervenors due process and equal protection of the law.

e. The Commission unlawfully confused itself with the role and position of its Staff and as a result has unlawfully failed to recognize the difference between a contested case that was initiated by the applicant utility seeking a rate increase and an investigation initiated by the Commission's own motion. In so doing the Commission has acted unlawfully, arbitrarily, capriciously, has denied these intervenors due process of law and the equal protection of the law.

f. The Commission unlawfully applied a standard that it wrongly asserted was applicable to its own Staff as a means of shielding the applicant utility from discovery sought by ratepayers in a contested case brought by that utility. In so doing the Commission has acted unlawfully, arbitrarily, capriciously, has denied these intervenors due process of law and the equal protection of the law.

g. The Commission unlawfully, capriciously and arbitrarily failed to recognize the significance of its own protective order and, while appearing to assert that discovery may not be had because of some unspecified "inadequacy" of such order, nevertheless issued such order upon the sole application of the applicant utility and in an **ex parte** manner long before these intervenors affected thereby were even permitted to intervene in the case and have input on such order. In so doing the Commission has acted unlawfully, arbitrarily, capriciously, has denied these intervenors due process of law and the equal protection of the law.

h. The Commission unlawfully, capriciously and arbitrarily in failing to specify in its February 2, 2000 Order what aspect of its own earlier protective order it considers to be "inadequate" denies these intervenors sufficient findings of fact and conclusions of law on which they may obtain review of such decision. In so acting, the Commission has acted unlawfully, arbitrarily, capriciously, and has denied these intervenors due process of law and the equal protection of the law.

i. The Commission misinterpreted the question of relevancy and misapplied a restrictive standard so as to preclude lawful discovery by these intervenors. In so doing the Commission acted unlawfully, arbitrarily, capriciously, and denied these intervenors due process of law and the equal protection of the law.

j. The Commission wholly misapplied the law regarding an attorney work product exception to discovery such that material that is and must be disclosed to purportedly adverse parties in the form of data requests is still ruled to be confidential and protected attorney work product when the same material is sought by other adverse parties. In doing so the Commission wholly misinterpreted, misstated and misunderstood the law of this state regarding discovery, relevancy and privileges and in so doing the Commission acted unlawfully, arbitrarily, capriciously, and denied these intervenors due process of law and the equal protection of the law.

k. In its February 2, 2000 Order the Commission stated that "broader discovery available to Staff and the Public Counsel under Section 386.450, RSMo, cannot result in any denial of due process to other litigants." (Order, p. 9). The Commission failed to consider that what was requested by these intervenors was not data requests propounded by any party under Section 386.450, but data responses provided by the applicant utility to requesting parties and data requests propounded by the applicant utility itself. Moreover, Section 386.450 does not refer in any aspect to the Staff of the Commission, but rather to the Commission itself. The Order fails to refer to any designation or direction by the Commission to its Staff to act in this case, for there has been none. Accordingly, Staff in this contested case proceeding was not seeking data pursuant to direction of the Commission, for if such were so it would be acting as the Commission itself and would be disqualified from acting as a litigant in the rate case proceeding. The Order issued thus compromises the position of the Commission's own Staff in this proceeding and in so doing the Commission has acted unlawfully, arbitrarily, capriciously, has denied these intervenors due process of law and the equal protection of the law.

1. The Commission's determination in the Order that providing a copy of applicant utility's data request responses to these intervenors is "unduly burdensome" is absurd and ridiculous. Undue burden relates to the assembly of the information necessary to prepare a response, not the clerical task of

making an additional copy of information already assembled. The Commission's own rules require, not one additional copy, but currently eight (8) and formerly (14) fourteen additional copies, of pleadings, testimony, voluminous exhibits and other materials that are filed. If one additional copy is unduly burdensome, then the Commission's own filing requirements are indubitably so. Moreover, the Commission ignores the provisions of its own **ex parte** protective order issued in this proceeding well in advance of any involvement by these intervenors, that provides a clear and explicit procedure to make available materials that are truly too voluminous to copy. The Commission's failure to enforce its own protective order is prima facie arbitrary, capricious and unlawful and in issuing the February 2, 2000 Order the Commission has acted unlawfully, arbitrarily, capriciously, and has denied these intervenors due process of law and the equal protection of the law.

m. In denying these Intervenor's Motion to Compel as to the asserted claim of **attorney** work product immunity, the Commission substantially garbled and confused a legitimate principle and permitted it to be used as an illegitimate shield to protect the application utility who purportedly has the burden of proof in this proceeding under Section 393.150.2. The cases cited by the Commission including *O'Malley*^{1/} did not even remotely suggest that interrogatories themselves are to be

^{1/}*State ex rel. Atchison, Topeka and Santa Fe Ry. Co. v. O'Malley*, 898 S.W.2d 550 (Mo. 1995).

shielded, but rather responses to interrogatories calling for disclosure of privileged material. Indeed, inspection of the O'Malley decision reveals that the **content of the interrogatories themselves**, which is what was sought by these intervenors, was not only reported but even reproduced in the opinion of the O'Malley court. The Commission unlawfully confused data requests themselves with the substantive content of the interrogatories.

n. In failing and refusing to enforce its own discovery rules and protective orders, the Commission also misapplied and misinterpreted Missouri Rule of Civil Procedure 56.01 and other related rules. The February 2, 2000 Order is, therefore, arbitrary, capricious, unjust, unlawful and unconstitutional

7. The Order is unjust, unlawful, unreasonable and unconstitutional in that the Commission failed to find that the proper rate of return for the applicant utility's common equity was 9.30 percent which figure was fully supported by competent and substantial evidence on the whole record. Accordingly, the Order is not supported by competent and substantial evidence on the whole record and is contrary to the competent and substantial evidence that is of record.

8. The Order is unjust, unlawful, unreasonable and unconstitutional in that the actions employed and taken by the Commission and by individual Commissioners during the post-submittal public deliberation of this case denied these interve-

nors due process of law and failed to constitute a fair or impartial procedure in that

a. Despite purporting to reject **ex parte** filings by their Staff and by other parties by sustaining objections thereto of these intervenors, the interlocutory interim orders issued by the Commission during the conduct of the post-briefing processes nevertheless revealed that the Commission reviewed said filings and in fact considered them in their deliberations. Evidence of such consideration is found in the interim orders themselves as well as at page 13 of the Order.

b. During agenda sessions and public discussions of this case individual Commissioners produced and relied upon on extra-record material such as newspaper articles and potentially other materials that were never produced in the hearing room, were, in fact, produced after the hearing was concluded, were never provided to other parties, and those parties were never provided an opportunity to object to their use or consideration by the Commissioners. Such actions contaminate the decision herein, and make it unlawful, unjust, unreasonable and unconstitutional.

c. That the Commission even sought to obtain post-submittal materials from selected parties to the proceedings in the form of "late filed exhibits" and "scenarios" which as a result of the timing of such requests could not have been provided to the parties and could not be the subject of proper cross-examination demonstrating that rather than considering the evi-

dence that was of record and that constituted the record, the Commission was concerned with assessing supposed "impacts" and other extra-record matters in reaching their decision and in so doing the Commission denied these intervenors due process of law and equal protection of the laws, acted arbitrarily, capriciously, injudiciously, and resulting in an Order that is not supported by competent and substantial evidence on the whole record and is contrary to the competent and substantial evidence that is of record, is unlawful, unjust, unreasonable and unconstitutional.

9. The Commission failed to make findings of fact or conclusions of law regarding the proper method to use to allocate costs to customers and classes of customers using mains that are smaller than 10" and those that utilize mains that are 12" and larger. This issue was clearly tried and argued before the Commission, yet the Commission wholly failed to rule on this issue and on the implications thereof. The parties to a proceeding before the Commission are entitled to a Commission decision on matters that are presented to the Commission for decision. In the Commission's Brief in *Midwest Gas Users' Association v. Public Service Commission*, Cole County Circuit Court Case No. CV197-504CC, the Commission acknowledged that its failure to decide a contested issue in the Missouri Gas Energy GR-96-285 proceeding "likely" constituted error. (Commission Brief, p. 3). In that case, the Circuit of Cole County determined that the Report and Order in GR-96-285 was also unlawful and unreasonable in violation of Missouri law **insofar as the Commission failed to**

rule on such legitimate and identified issue. (Findings of Fact, Conclusions of Law and Judgment, pp.6-7). In this proceeding, the Commission cannot lawfully ignore issues that the parties have fully tried and must give decisions thereon, fully substantiated by appropriate findings of fact and conclusions of law that are supported by such findings. In failing to do so, the Commission has acted arbitrarily and unlawfully with respect to this issue.

10. The Order is unlawful, unjust and unreasonable in that it failed to recognize that Staff's rate design employed identical peak day and peak load data for each district when, in fact, such parameters vary from district to district. The Order fails to address this issue at all despite it having been raised by the parties as an issue. As a result, and for the same reasons as stated infra, the Order is not supported by competent and substantial evidence on the whole record and is contrary to the competent and substantial evidence that is of record and is further based on inadequate findings of fact and conclusions of law.

11. The Commission wholly failed and refused to employ a "phase-in" methodology as fully supported by the evidence herein and in fact fails to even refer to the controversy regarding the appropriateness of a phase-in. This results in an Order that is unjust, unreasonable and unlawful and in additional violation of Sections 393.130 and 393.270. As a result, the Order is not supported by competent and substantial evidence on

the whole record and is contrary to the competent and substantial evidence that is of record and is further based on inadequate findings of fact and conclusions of law.

12. The Order is unlawful, unjust and unreasonable in that it violates the Commission's own earlier order regarding the test year to be used in the case and the true up period in permitting a surcharge to be implemented on and after January 1, 2001 to purportedly recover property taxes that have neither been assessed nor paid by the applicant utility. In so doing the Commission violates the law in that it permits a rate increase to be implemented without consideration of all relevant factors and further violates its own orders regarding test year and true up periods in this case. As a result, the Order is not supported by competent and substantial evidence on the whole record and is contrary to the competent and substantial evidence that is of record and is further based on inadequate findings of fact and conclusions of law and is otherwise unlawful.

WHEREFORE for the foregoing reasons, these Intervenor
seek and request rehearing of the Order aforesaid.

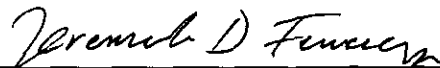
Respectfully submitted,

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.,
FRISKIES PETCARE, A DIVISION OF
NESTLE USA and WIRE ROPE CORPORA-
TION OF AMERICA, INC.



Jeremiah D. Finnegan Mo. Bar #18416
3100 Broadway, Suite 1209
Kansas City, Missouri 64111
(816) 753-1122
Facsimile (816) 756-0373
Internet: jfinnegan@fcplaw.com

ATTORNEYS FOR CITY OF RIVERSIDE,
MISSOURI

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served the
foregoing pleading by U.S. mail, postage prepaid addressed to the
parties of record or their representatives as disclosed by the
Commission's records in this proceeding.

Dated: September 13, 2000



Stuart W. Conrad