

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

In the Matter of Missouri-American Water	)	
Company's Request for Authority to	)	
Implement a General Rate Increase for	)	<b>Case Nos. WR-2011-0337</b>
Water and Sewer Services Provided in	)	<b>SR-2011-0338</b>
Missouri Service Areas.	)	

**STAFF'S MOTION TO QUASH DEPOSITIONS AND SUBPOENAS  
DUCES TECUM AND MOTION FOR EXPEDITED TREATMENT**

**COMES NOW** the Staff of the Missouri Public Service Commission, by and through counsel, and for its Motion to Quash Depositions and Subpoena Duces Tecum, and Motion for Expedited Treatment, states as follows:

***Introduction***

1. These actions were commenced on June 30, 2011, when Missouri American Water Company ("MAWC") filed tariffs, testimony and other minimum filing requirements seeking a general rate increase.
2. Pursuant to order of the Commission issued on August 3, 2011, these cases are set for evidentiary hearing starting on February 21, 2012.

***Subpoenas Duces Tecum and Notice of Deposition***

3. On February 6, 2012, counsel for AG Processing, a cooperative ("AGP"), served Subpoenas Duces Tecum ("Subpoenas") upon Ms. Rachel Lewis, counsel for Staff in these proceedings, revealing his intention to depose five Staff members at his offices in Kansas City, Missouri, starting on February 13, 2012, and continuing through February 15, 2012, to-wit: James A. Busch, Keith D. Foster, Paul R. Harrison, Kim K. Bolin, and Cherlyn Voss. Contrary to established practice, AGP did not provide to counsel or file in EFIS a pleading-style notice of deposition.

4. The Subpoenas referred to in Paragraph 3, above, were issued on February 6, 2012, and signed by Regulatory Law Judge Harold Stearley, commanding each of the Staff members referred to in Paragraph 3, above, to appear for deposition at counsel's offices in Kansas City, Missouri, and to bring all of an extensive list of items. True and correct copies of the Subpoenas Duces Tecum are attached hereto as Exhibits A-E and incorporated herein by reference.

***The Commission Should Quash the  
Notice of Depositions and the Subpoenas Duces Tecum Served Herein***

5. As Staff shall make clear in the following paragraphs of this Motion, the Commission should quash the aforescribed Subpoenas Duces Tecum and the depositions they purportedly give notice of because they were improperly served, under improper and invalid notice, are overbroad, burdensome, harassing, and issued for an improper purpose, and, in part, violate the attorney-client and work-product privileges. Additionally, these last-minute depositions have come as a complete surprise to Staff, despite the regular discovery conferences convened herein.

***Discovery Depositions in PSC Proceedings***

6. Depositions may be taken in actions pending before the Commission on the same basis, and used for the same purposes, as in civil actions in the circuit courts. Commission Rule 4 CSR 240-2.090(1). Section 386.420.2, RSMo, provides in pertinent part:

The commission or any commissioner or any party may, in any investigation or hearing before the commission, cause the deposition of witnesses residing within or without the state to be taken in the manner prescribed by law for like depositions in civil actions in the circuit courts of this state and to that end may compel the attendance of witnesses and the production of books, waybills, documents, papers, memoranda and accounts. Witnesses whose depositions are taken as provided in this

section and the officer taking the same shall severally be entitled to the same fees as are paid for like services in the circuit courts of this state.

7. Supreme Court Rule 57.03(b)(1) provides for depositions upon oral examination and specifies the timing and contents of the notice thereof:

A party desiring to take the deposition of any person upon oral examination shall give not less than seven days notice in writing to every other party to the action and to a non-party deponent.

The notice shall state the time and place for taking the deposition and the name and address of each person to be examined, if known. If the name is not known, a general description sufficient to identify the person or the particular class or group to which the person belongs shall be stated.

If a subpoena duces tecum is to be served on the person to be examined, the designation of the materials to be produced as set forth in the subpoena shall be attached to or included in the notice.

8. Supreme Court Rule 57.09(d), in turn, governs the service of subpoenas for depositions, ***State ex rel. Ellis v. Schroeder***, 663 S.W.2d 766, 769 (Mo. App., E.D. 1983), and provides:

Service of a subpoena upon a person named therein shall be made by delivering a copy thereof to such person and by tendering the fees and mileage the witness would have been entitled to receive for attending court pursuant to subpoena.

### ***Invalid Notice***

9. The Commission should quash the proposed depositions because AGP has not provided valid notice. Supreme Court Rule 57.03(b)(1), set out above, prescribes the notice requirements. The notice given by AGP consisted solely of the five subpoenas and was fatally defective in three respects:

A. AGP failed to serve on each party and file with the Commission a written notice in pleading form containing each item of information specified in

Supreme Court Rule 57.03(b)(1).

B. AGP failed to serve on each party and file with the Commission a written notice in pleading form including a list of the items that each deponent was commanded to produce at the deposition, in violation of Supreme Court Rule 57.03(b)(1).

C. AGP failed to serve on each party and file with the Commission a written notice in pleading form including a certificate of service stating the list of parties upon whom the notice had been served and the date and manner by which service was accomplished. Commission Rule 4 CSR 240-2.080(17) states, "Every pleading or brief shall include a certificate of service." Commission Rule 4 CSR 240-2.080(15) requires service on all the parties of every document tendered for filing with the PSC.

### ***Invalid Service***

10. The Subpoenas in question herein were not properly served and, consequently, are ineffective and unenforceable. Staff requests that the Commission recognize the fact and consequences of improper service by quashing the Subpoenas and corresponding depositions. Service was ineffective in four respects, each of which is fatal to the effectiveness of the Subpoenas:

A. The Subpoenas were served by counsel for AGP. Supreme Court Rule 57.09(d), "Service," specifies:

A subpoena may be served by:

(1) The sheriff or a sheriff's deputy, or

(2) Any other person who is not a party and is not less than 18 years of age.

Service of a subpoena upon a person named therein shall be made by delivering a copy thereof to such person and by tendering to that person the fees and mileage the witness would have been entitled to receive for attending court pursuant to subpoena.

While Mr. Conrad, AGP's counsel, is not a party and is over the age of eighteen, he is not qualified to be a witness in the case and, therefore, he is disqualified from serving subpoenas.

B. The Subpoenas herein at issue were served on Rachel Lewis, counsel for Staff, and not personally on the deponents. None of the proposed deponents have authorized Ms. Lewis to receive service of process on their behalf. In a similar situation, the Western District held:

We . . . conclude that transmitting a subpoena via facsimile to a nonparty is insufficient to constitute "delivery" under Missouri Rule 57.09(d), when there has been, as here, a challenge to the adequacy of service. \* \* \* The subpoena was not served properly not only because it was transmitted via facsimile, **but also because it was not directed to the witness but instead to Diagnostic's trial counsel. *Mehrer v. Diagnostic Imaging Center, P.C.*, 157 S.W.3d 315, 321 (Mo. App., W.D. 2005) (emphasis added).**

A subpoena must be *personally* served on the summoned individual and the fact of service attested by affidavit. Rule 57.09(d) provides:

Service of a subpoena upon a person named therein shall be made by delivering a copy thereof to such person and by tendering the fees and mileage the witness would have been entitled to receive for attending court pursuant to subpoena.

AGP may not summon Staff's employees by serving counsel for Staff, but must serve process on each employee individually. ***Russ v. Russ***, 39 S.W.3d 895, 897 (Mo. App., E.D. 2001). Where service is improper, the tribunal does not

acquire jurisdiction over the individual in question. **Shapiro v. Brown**, 979 S.W.2d 526, 528 (Mo. App., E.D. 1998).

C. Fees and mileage were not tendered with the service of the Subpoenas. Rule 57.09(d) specifically and expressly requires that fees and mileage be tendered with the subpoena.

D. The Subpoenas Duces Tecum were not served on Staff's employees at least ten days prior to the time specified for compliance. Staff's employees are not themselves parties to this case any more than the employees of the Company are parties. Rule 57.09(c), "Subpoena to a Non-Party," provides: "A subpoena to a non-party pursuant to Rule 57.09 for the production of documents and things **shall be served not fewer than 10 days before the time specified for compliance**" (emphasis added).

11. Staff's employees herein have neither consented to appear nor waived service of process.

12. Staff's counsel did not consent to accept service of any subpoena on behalf of any witness.

### ***Improper Purpose***

13. The right of a party litigant to depose witnesses is absolute. **State ex rel. Pein v. Clark**, 526 S.W.2d 383, 385-6 (Mo. App., K.C.D. 1975). "But the 'absolute right' to take depositions must be equitably measured with the adverse consequences and hardships upon the party sought to be deposed as the facts may show." *Id.*, at 386. In the present case, Mr. Conrad and AGP are under an affirmative duty to avoid causing undue burden and hardship to the non-party deponents. Supreme Court Rule 57.09(c)

provides, "A party or attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a non-party subject to the subpoena." AGP has not complied with that duty in this case and the subpoenas and related depositions should therefore be quashed.

A. Staff's employees have been ordered to appear on less than the required ten days' notice, at a city far distant from their places of residence and work,<sup>1</sup> two of them on a state holiday (February 13) when they would otherwise be spending time with family and friends and not working, and one of whom is not a scheduled witness in this case.

B. This matter is set for hearing beginning February 21, 2012, which is Tuesday of the week following the proposed depositions. Given that Mr. Conrad never raised his desire to depose these Staff members at any of the several discovery conferences held in this case, Staff inevitably suspects the timing of these depositions to be a tactic intended to prevent Staff from having adequate time to prepare for hearing. If the depositions are held as proposed by Mr. Conrad, Staff counsel will be required to attend five depositions over the three days of February 13 through February 15 in Kansas City. This circumstance is extremely burdensome for Staff and will make adequate final hearing preparation impossible.

### ***Improper Scope***

13. The Subpoenas Duces Tecum herein at issue should be quashed because the scope thereof is improper in that they are overbroad and unduly burdensome.

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<sup>1</sup> According to the official Missouri State Highways Map, Kansas City is 148 miles from Jefferson City.

Specifically, some of the items whose production is commanded are privileged and some others of the items whose production is commanded have already been provided to counsel for AGP. The list of items sought from Keith Foster, Paul Harrison and Kim Bolin is as follows:

1. All documents in your possession, whether in written or electronic form, that constitute your workpapers pertinent to any direct, rebuttal or surrebuttal testimony filed herein.

2. All documents in your possession constituting district cost studies for each and any of the 19 separate water districts that are served or proposed to be served by the utility that is the applicant in this proceeding.

3. All documents in your possession, whether in written or electronic form, that constitute direction you have received from persons on the public service commission staff or from elsewhere that pertain to the content of your testimony as filed including drafts, comments on drafts as well as final versions thereof.

4. All documents in your possession, whether in written or electronic form, that constitute communications from you to other persons on the public service commission staff or other persons that pertain to the content of your testimony as filed including drafts, comments on drafts as well as final versions thereof.

A. With respect to workpapers and district cost studies, those have *already* been provided to the parties, including AGP. A redundant production request is undeniably burdensome and supports Staff's contention that Mr. Conrad's real purpose is harassment.

B. With respect to testimony, the final version of each piece of testimony has *already* been provided to the parties, including AGP. A redundant production request is undeniably burdensome and supports Staff's contention that Mr. Conrad's real purpose is harassment. Preliminary testimony drafts, including



direction and communications relating to testimony, are privileged work-product and thus undiscoverable.

14. The requests from the other deponents are generally similar and the same objections apply. However, in the case of Cherlyn Voss, there are no workpapers. Ms. Voss is the supervising attorney on this case and not a witness. She has filed no prepared testimony. In addition to workpapers, the following requests were made of Ms. Voss:<sup>2</sup>

2. All documents in your possession, whether in written or electronic form, that constitute direction you have received from persons on the public service commission staff or from elsewhere that pertain to the content of your testimony as filed including drafts, comments on drafts as well as final versions thereof or regarding the performance of your responsibility for the public service commission in this matter.

3. All documents in your possession, whether in written or electronic form, that constitute communications from you to other persons on the public service commission staff or other persons that pertain to the content of your testimony as filed including drafts, comments on drafts as well as final versions thereof or regarding the performance of your responsibility for the public service commission in this matter.

A. Ms. Voss has not filed any testimony in this case and will not be a witness herein. The documents sought by AGP either do not exist or are privileged under the attorney-client and work-product privileges.

### ***Improper Deponent***

15. In addition to the other objections raised herein, Staff objects to the proposed deposition of Cherlyn Voss. Ms. Voss is the supervising attorney on this case and not a witness. She has filed no prepared testimony herein. The proposed deposition of Ms. Voss is no more appropriate than would be the deposition of any other of Staff's

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<sup>2</sup> Staff does not mention the typographical error on the subpoena directed to Ms. Voss that set her deposition for 10:00 P.M. Mr. Conrad did advise the parties by email that this was an error.

attorneys. Supreme Court Rule 56.01(b)(1) provides, "Parties may obtain discovery of any matter, **not privileged**, that is relevant to the subject matter involved in the pending action . . ." (emphasis added). The deposition of Ms. Voss is absolutely barred by the attorney-client and work-product privileges and the subpoena directed to her and the associated deposition should be quashed.

***Alternative Relief***

16. In the event that the Commission does not quash all of these subpoenas and depositions, Staff urges the Commission to require that they be conducted at the Commission's offices in Jefferson City, during normal state business hours and not on a state holiday, and that the deponents be relieved from any requirement that they produce documents already provided to AGP.

***Expedited Treatment***

17. Staff further requests that the Commission take up and determine this motion on an expedited basis in order to provide a ruling for the guidance of the parties prior to February 13, 2012.

**WHEREFORE**, Staff prays that the Commission will take up this matter on an expedited basis and will quash the Subpoenas Duces Tecum and associated proposed depositions described herein for the reasons set out above; and grant such other and further relief as may be just in the premises.

Respectfully submitted,

s/ Kevin A. Thompson  
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**Certificate of Service**

I hereby certify that a true and correct copy of the foregoing was served, either electronically or by hand delivery or by First Class United States Mail, postage prepaid, on this **8<sup>th</sup> day of February, 2012**, on the parties of record as set out on the official Service List maintained by the Data Center of the Missouri Public Service Commission for this case.

s/ Kevin A. Thompson