

**STATE OF MISSOURI
PUBLIC SERVICE COMMISSION**

At a session of the Public Service
Commission held at its office in
Jefferson City on the 16th day
of March, 2011.

In the Matter of Rex Deffenderfer Enterprises, Inc.)
Request for a Increase in Annual Water System) **File No. WR-2011-0056**
Operating Revenues)

ORDER REGARDING STAFF'S REQUEST FOR CLARIFICATION

Issue Date: March 16, 2011

Effective Date: March 16, 2011

Background

On August 26, 2010, Rex Deffenderfer Enterprises, Inc. ("Corporation"), a Missouri corporation¹ providing water service to approximately 1,120 customers within its certificated service area,² filed a letter initiating a "Small Utility Rate Case Procedure" pursuant to Commission Rule 4 CSR 240-3.050. On January 28, 2011, the Commission's Staff filed a *Notice of Amended Company/Staff Partial Agreement Regarding Disposition of Small Water Company Revenue Increase Request* ("Agreement"). In that Agreement, Staff and the Corporation listed several issues that they could not resolve and requested that the Commission resolve the disputed issues by arbitration.

On February 8, 2011, the Office of the Public Counsel filed a response to the request for arbitration. Public Counsel agreed to the arbitration if it could include two

¹ Rex Deffenderfer Enterprises, Inc. is a Missouri Corporation, in good standing, that was created on August 30, 1976, Charter No. 00185826. LaVada F. Cottrill is president and Jimmy Joe Deffenderfer is secretary. The company's office address is 1770 N. Deffer Drive, Ste. 4, Nixa, Missouri 65714.

² Rex Deffenderfer Enterprises, Inc. was granted a certificate of public convenience and necessity effective on August 15, 1977, by the Missouri Public Service Commission to provide water service to customers living in and around Nixa, Missouri, in Christian County.

additional issues to those listed by Staff and the Corporation. On February 14, 2011, Staff agreed to include Public Counsel's issues in the arbitration. The Corporation did not file a separate pleading indicating its agreement to include Public Counsel's issues. But, on February 14, 2011, the Corporation did join in filing a request to establish a procedural schedule for arbitration. This is the first small utility rate case where the parties have attempted to use the arbitration process as described in Commission Rule 4 CSR 240-3.050.

A procedural conference was held on February 28, 2011 to be sure the parties were in agreement as to the procedure that would be followed at the arbitration. After the conference, Jim Deffenderfer, an officer of the Corporation, called the Regulatory Law Judge ("RLJ") and expressed some concerns over his understanding of the arbitration procedure and how the option of arbitration was presented to him. Although the Commission's rule contemplates "final offer" arbitration, Staff and Public Counsel requested a "mini hearing" to present evidence.

Mr. Deffenderfer indicated that he believes the Corporation would be at a disadvantage if it proceeds to a "mini hearing" without legal counsel and stated that the Corporation may be unable to afford legal counsel. Mr. Deffenderfer further stated that he believed Staff had misled him about what the arbitration entailed and that a "mini hearing" was not what he viewed as being arbitration. Since it appeared there was not a meeting of minds with regard to how the arbitration should proceed, the RLJ convened a second procedural conference on March 7, 2011.

At the second procedural conference the RLJ explained that while the parties could agree to have a "mini hearing" for the arbitration that the Corporation's employees would be

limited in the manner in which they could appear if the Corporation were not represented by a licensed attorney authorized to practice law in Missouri. Rex Deffenderfer Enterprises, Inc. is a corporation. Adducing evidence through testimony by direct questioning, cross-examination, filing legal pleadings, making legal arguments, etc. is the practice of law, and a corporation cannot be legally represented except through counsel authorized to practice law. In any context, the Corporation could provide witnesses on the day of arbitration, the RLJ could adduce testimony from those witnesses, and the other parties could cross examine them. However, neither those witnesses nor other employees of the Corporation could engage in the unauthorized practice of law. The RLJ discussed the various options the Corporation could pursue with this matter, including final offer arbitration, mediation, settlement, dismissal of the case, or the hiring an attorney to participate in the arbitration method desired by Staff and Public Counsel or for representation at an evidentiary hearing. The RLJ instructed the parties to confer about how they wished to proceed and to file a proposed procedural schedule

On March 10, 2011, Staff filed a request for clarification. Staff claims that the RLJ's description of the limitations the Corporation would face at a "mini hearing" appear to be contrary to the plain language of Commission Rule 4 CSR 240-3.050(3). Apparently Staff has interpreted the rule as granting a lay person affiliated with a corporation the ability to act as an attorney. Staff reasons that no court has determined the Commission's rule is unlawful or that such arbitration without counsel is prohibited by law. Staff opines that requiring the Corporation to hire an attorney will interject the issues of rate case expense and would almost certainly lead to the convening of an evidentiary hearing creating expenses that would burden the ratepayers. Staff seeks guidance, "a five-person ruling"

regarding the proper method of arbitration consistent with the Commission's rule.

The Controlling Law

Staff cites to Commission Rule 4 CSR 240-3.050(3) provides in pertinent part:

If the commission staff (staff) and the utility do not reach agreement on a full resolution of the utility's revenue increase request, they may elect to arbitrate unresolved issues. Such arbitration shall allow the utility, the staff and the public counsel to present their positions on the unresolved issues to the regulatory law judge, who shall establish, on a case-by-case basis, procedures for identification and submission of issues and the presentation of the parties' positions. **Parties need not be represented by counsel during arbitration**, and each issue shall be determined using the "final offer" method, under which the position of one of the parties shall be adopted based upon the evidence presented and commission precedent. The regulatory law judge shall issue a written opinion resolving all issues presented for arbitration within twenty (20) days of the close of the arbitration proceeding. The arbitration decision and any partial, unanimous or non-unanimous disposition agreement shall be submitted to the commission for its consideration in issuing its decision regarding the resolution of the utility's revenue increase request. (Emphasis Added).

However, Commission Rule 4 CSR 240-2.040(5), specifically addressing practice before the Commission, states:

A natural person may represent himself or herself. Such practice is strictly limited to the appearance of a natural person on his or her own behalf and shall not be made for any other person or entity.

The basis for 4 CSR 240-2.040(5) is found in Sections 484.010 and 484.020.³

Section 484.010 provides:

1. The "practice of the law" is hereby defined to be and is the appearance as an advocate in a representative capacity or the drawing of papers, pleadings or documents or the performance of any act in such capacity in connection with proceedings pending or prospective before any court of record, commissioner, referee or any body, board, committee or commission constituted by law or having authority to settle controversies.

³ All statutory citations refer to RSMo 2000 unless otherwise noted.

2. The "law business" is hereby defined to be and is the advising or counseling for a valuable consideration of any person, firm, association, or corporation as to any secular law or the drawing or the procuring of or assisting in the drawing for a valuable consideration of any paper, document or instrument affecting or relating to secular rights or the doing of any act for a valuable consideration in a representative capacity, obtaining or tending to obtain or securing or tending to secure for any person, firm, association or corporation any property or property rights whatsoever.

Section 484.020 provides:

1. No person shall engage in the practice of law or do law business, as defined in section 484.010, or both, unless he shall have been duly licensed therefor and while his license therefor is in full force and effect, nor shall any association, partnership, limited liability company or corporation, except a professional corporation organized pursuant to the provisions of chapter 356, a limited liability company organized and registered pursuant to the provisions of chapter 347, or a limited liability partnership organized or registered pursuant to the provisions of chapter 358, engage in the practice of the law or do law business as defined in section 484.010, or both.

2. Any person, association, partnership, limited liability company or corporation who shall violate the foregoing prohibition of this section shall be guilty of a misdemeanor and upon conviction therefor shall be punished by a fine not exceeding one hundred dollars and costs of prosecution and shall be subject to be sued for treble the amount which shall have been paid him or it for any service rendered in violation hereof by the person, firm, association, partnership, limited liability company or corporation paying the same within two years from the date the same shall have been paid and if within said time such person, firm, association, partnership, limited liability company or corporation shall neglect and fail to sue for or recover such treble amount, then the state of Missouri shall have the right to and shall sue for such treble amount and recover the same and upon the recovery thereof such treble amount shall be paid into the treasury of the state of Missouri.

3. It is hereby made the duty of the attorney general of the state of Missouri or the prosecuting attorney of any county or city in which service of process may be had upon the person, firm, association, partnership, limited liability company or corporation liable hereunder, to institute all suits necessary for the recovery by the state of Missouri of such amounts in the name and on behalf of the state.

The Missouri Supreme Court has made clear that it regulates the practice of law, although the legislature has provided penalties for acts determined to be the unauthorized practice of

law in Section 484.020.⁴ As the Court stated:

The unauthorized practice of law is prohibited so that the public is protected for provision of services deemed to require special fitness and training by those not having needed legal qualifications. **One cannot consent to the unauthorized practice of law, such that there can be no waiver of protections of section 484.010.** (Internal citations omitted and emphasis added).⁵

The only exception is carved out in Missouri Supreme Court Rule 5.29, and that exception pertains to representation in employment security proceedings.⁶ There is no exception for practice before this tribunal, and as the Missouri Supreme Court made absolutely clear:

“The law does not treat individuals and corporations equally. The law allows an individual to bear the risk that representation without an attorney may entail. Natural persons may represent themselves in situations which, if done for someone else, would constitute the practice of law. Unlike individuals, corporations are not natural persons, but are creatures of statute. Businesses operating in corporate form are entitled to certain benefits that are denied to others. In addition to benefits, however, corporations also have certain restrictions placed upon them. One such restriction in Missouri is that a corporation may not represent itself in legal matters, but must act solely through licensed attorneys.” (Internal citations omitted).⁷

Analysis

Commission Rule 4 CSR 240-3.050 does indeed state a small company need not be represented for purposes of engaging in final offer arbitration. This is not contrary to law. Final offer arbitration does not require the practice of law. And, the Commission could not, does not and will not sanction the unauthorized practice of law. The Corporation may consent to participation in a “mini-hearing”, but only to the extent allowed by law. If the Corporation sends witnesses to an arbitration conducted by way of a “mini hearing” without

⁴ *Haggard v. Division of Employment Sec.*, 238 S.W.3d 151, 153 -154 (Mo. banc 2007).

⁵ *Id.*

⁶ *Id.*

⁷ *Reed v. Labor and Indus. Relations Com'n*, 789 S.W.2d 19, 21 (Mo. banc 1990).

retaining legal representation, it will also be consenting to a waiver of offering an opening statement, a waiver of cross-examination, a waiver of making closing arguments, and a waiver of taking any action or filing any legal pleading as an advocate in a representative capacity as defined in Section 484.010 and as defined by the Missouri Supreme Court.⁸ If the Corporation wishes to consent to that procedure, it may, as long as it has a full understanding of the extent to which it can lawfully appear.

THE COMMISSION ORDERS THAT:

1. To the extent the explanation from the Regulatory Law Judge to the parties regarding arbitration required clarification, it is so clarified by this order.
2. This order shall become effective immediately upon issuance.

BY THE COMMISSION



Steven C. Reed
Secretary

(S E A L)

Gunn, Chm., Clayton, Davis, Jarrett,
and Kenney, CC., concur.

Stearley, Senior Regulatory Law Judge

⁸ In fact, not only are filings by a lay person on behalf of a corporation considered untimely filed, null and void, any judgment rendered in such a proceeding where a corporation is unlawfully represented is void. *Stamatiou v. El Greco Studios, Inc.*, 935 S.W.2d 701, 702 (Mo. App. 1996).