

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

In the Matter of Rex Deffenderfer)	
Enterprises, Inc. Request for a Increase in)	
Annual Water System Operating Revenues)	<u>Case No. WR-2011-0056</u>

STAFF’S REQUEST FOR CLARIFICATION

COMES NOW the Staff of the Missouri Public Service Commission (Staff) and respectfully requests the Missouri Public Service Commission (Commission) enter a five-person ruling, or in the alternative, provide additional guidance regarding the arbitration process found in Commission Rule 4 CSR 240-3.050 (3). In support of this request, Staff states the following:

1. In the *Notice of Amended Company/Staff Partial Agreement Regarding Disposition of Small Water Company Revenue Increase Request* (Amended Company/Staff Partial Agreement) filed on January 28, 2011, Rex Deffenderfer Enterprises, Inc. (RDE or the Company) and Staff listed several issues that could not be resolved, including payroll, payroll taxes, employee benefits and the effect of these items on income tax, and requested that the Commission resolve the disputed issues in arbitration.

2. On February 8, 2011, the Office of the Public Counsel (OPC) filed its *Response to Amended Company/Staff Partial Agreement and Request for Local Public Hearing* wherein OPC agreed to participate in arbitration if the issues of depreciation expense and reallocation of depreciation reserve would be included as unresolved issues in the case.

3. On February 14, 2011, Staff filed its *Response to the Office of the Public Counsel* stating it did not object to the additional issues being submitted to arbitration.

4. On February 28, 2011, a procedural hearing took place wherein it was established that the arbitration would be conducted as a “mini-hearing” wherein each party would present

witnesses to the arbitrator and opposing parties would have the opportunity for cross-examination of witnesses. The parties were further instructed to provide a final offer on each issue in a detailed position statement, including reference to legal authority.

5. On February 28, 2011, the Commission filed an *Order Setting Procedural Conference and Notice of Communication* indicating that there had not been a “meeting of minds with regard to the arbitration” and that conducting the arbitration as a “mini-hearing” could “create an issue in terms of the company’s representation.” The Order also established a second procedural conference that was held on March 7, 2011 with all parties participating.

6. During this second procedural conference, the arbitrator explained that because RDE is a corporation, it would be limited in the conduct allowed during the arbitration. Specifically, the Company was informed that the arbitrator would call each company witness and ask questions of the company witness before the company witness would be subject to cross-examination by both OPC and Staff. The Company was informed that it would be prohibited from examining any of the witnesses and therefore at a disadvantage in the arbitration unless it hired counsel to represent it during the arbitration.

7. This description of the arbitration process appears contrary to the plain language of Commission Rule 4 CSR 240-3.050 (3) (Commission Rule), which became effective May 30, 2008. The Commission Rule provides, in pertinent part, “[i]f the [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 would 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....” (emphasis added).

8. The plain language of the Commission Rule, duly promulgated, expressly provides that arbitration may occur without the company hiring legal counsel. Such language is consistent with the intent of the Commission Rule, which included providing small water and sewer companies several alternatives to resolve disputes outside an evidentiary hearing. Thereby, the company could avoid the additional cost of hiring counsel to represent it at hearing. Staff counsel does not dispute that the Missouri Supreme Court has found that corporations or associations must be represented by an attorney. *Reed v. Labor and Indus. Relations Comm’n*, 789 S.W.2d 19 (1990). However, Staff argues that the Court’s ruling in *Reed* was contemplated during the rulemaking process because the rule went into effect long after the *Reed* decision. Therefore, the requirement of representation by counsel was contemplated when the rule was drafted, submitted for public comment and ultimately approved by the Commission. Staff does not support the position that the Commission Rule automatically puts a small water or sewer company at a distinct disadvantage in the arbitration simply because it does not wish to incur the expense of legal counsel.

9. To allow an arbitration to proceed in a manner described during the March 7, 2011, procedural conference appears to be in direct contradiction to the specific language of the Rule as well as the spirit, intent and reasoning for the creation of Rule 4 CSR 240-3.050. Further, the intent of providing an alternative to an evidentiary hearing for small water and sewer companies was to allow these small companies the opportunity to resolve any issues without adding the expense of an attorney.

10. Staff has referred numerous small water and sewer companies to this Commission Rule and adopted the plain language in any explanation regarding the option to arbitrate unresolved issues. RDE is the first to elect to proceed to arbitration and is now being told an alternative interpretation.

11. If arbitration is to occur as described in the March 7, 2011 prehearing conference, then Staff must alter its reference and information it provides to all small water and sewer companies. In effect, these small companies are left with the option to settle, mediate, or hire an attorney and take it to arbitration or evidentiary hearing.

12. To Staff's knowledge, no Court has determined that this rule is unlawful or that such arbitration without counsel is prohibited by law.

13. Allowing an equitable arbitration without the Company having to hire counsel benefits both the Company and the ratepayers that receive water or sewer service from a small company. If these small companies are forced to hire counsel in order to have an equitable arbitration, the additional issue of rate case expense arises and it is almost certain that such an issue would be forced to go to an evidentiary hearing. This additional expense would force any small water or sewer company to spend money upfront and then be placed into rates as a rate case expense on an amortization schedule. This would impact the Company and the ratepayers who would see their rates increase due to the added expense that was not contemplated by the Commission Rule.

14. An alternative form of arbitration is to have each party submit its position and supporting evidence and then allow the assigned arbitrator to decide the issues without the opportunity of cross-examination by any party. The Commission Rule seems to contemplate this form of arbitration and under the rule an arbitrator may determine the process on a case-by-case

analysis. This form of arbitration is consistent with the “final offer” method as specifically described in the Commission Rule to be that “which the position of one of the parties shall be adopted based upon the evidence presented and commission precedent.”

15. Specific to this case, if the Company is unable to settle this matter unanimously with OPC and Staff, it will be forced to hire legal counsel at this late date and the Company will be disadvantaged due to the little amount of time left for these issues to be brought before the Commission. The Company has less than eight weeks to hire counsel, and to have its new counsel understand the procedures required to bring an arbitration or case to hearing before the Commission.

16. Therefore, Staff requests a ruling or, in the alternative, additional guidance on a method of arbitration that is consistent with 4 CSR 240-3.050 (3) and that may be applicable to any small water or sewer company that elects arbitration.

WHEREFORE, Staff respectfully request the Commission enter a five-person ruling on the procedure for arbitration or, in the alternative, to provide additional guidance on any such arbitration, pursuant to Commission Rule 4 CSR 240-3.050 (3).

Respectfully submitted,

/s/ RACHEL M. LEWIS

Rachel M. Lewis

Deputy Counsel

Missouri Bar No. 56073

Attorney for the Staff of the
Missouri Public Service Commission
P. O. Box 360

Jefferson City, MO 65102

(573) 526.6715 (Telephone)

(573) 751-9285 (Fax)

rachel.lewis@psc.mo.gov

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been mailed, hand-delivered, transmitted by facsimile or electronically mailed to all counsel of record this 10th day of March, 2011.

/S/ RACHEL M. LEWIS