BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

CHARLES HARTER,	)
COMPLAINANT	)
V.	)CASE NO.WC2013-0468
	)SMALL FORMAL COMPLAINT
MISSOURI AMERICAN WATER COMPANY,	)
RESPONDENT	)

COMPLAINANT'S APPLICATION FOR REHEARING
FROM REPORT AND ORDER OF NOVEMBER 26, 2013

COMES NOW Complainant, and for his Application for Rehearing prays that the Commission rehear his cause for the following reasons:

As set out in Complainant's brief, the Report and Order fails to give the proper weight to the testimony, as respondent failed in its burden of proof due to its lack of credibility and its reliance on its proven false, chart exhibit. Complainant identifies bias as the reason for this Failure of the Commission to recognize the failure of credibility of the respondent.

Bias was clearly demonstrated throughout the proceedings, including Commission Chairman Kenney's in persona violation of the Commission's own "Order of Presentation"; the interruptions Judge Kennard Jones made to complainant's testimony; Chairman Kenney's blocking complainant from introducing an exhibit; and the error when Chairman failed and refused to recuse himself from the Report and Order despite his bias shown at hearing.

On September 25, 2013 the Commission issued its "Order Setting Evidentiary Hearing" which, according to paragraph one of the Staff "Order of Presentation," directed Staff to "facilitate .. the order of presentation and cross. This Filing complies with the Commission's Order". In paragraph four the Staff Order stated "Complainant will call himself to testify ... the parties agree that the complainant will present his case first, followed with cross-examination if any by OPC, Staff and then MAWC." Judge Jones approved this Order (transcript page 36) and

then immediately proceeded to violate it (transcript page 37) when he said " I'm going to let you make a statement, and then we'll go into Cross, but first I want to ask you a question." He then launched into a critical attack on complainant which did not allow the promised statement.

Some examples of Judge Jones' interruptions, "So what you're telling me is what you're about to say is irrelevant?" (transcript p. 41), "So are you saying that your testimony could be wholly unreliable?" (transcript page 57) "Mr. Harter, you're rambling, so we're going to stop.:" (page 71, line 24) "Just listen to what I'm saying." (page 66 line 20) "than speaking, just focus on the task." (page 62, line 10) "You have to figure out a way to be quiet and look –" (page 62, line 17) Rather than speaking -- rather than speaking, just focus on the task." (line 4, 10, page 62)

Even though the Chairman is in charge of the Commission, the hearing officer Judge Jones, is in charge of the hearing. The Chairman, like any other participant, is not allowed to directly speak to a witness. He must direct all his speech to the judge, and request from the judge, the opportunity to Voir Dire the witness. Otherwise, he must wait his turn, for his opportunity to question, which according to the order of presentation, would come after the staff and utility complete their cross, and not during direct testimony.

A witness should be allowed to complete his answer. The Chairman asked questions and, before the witness could answer, interrupted such that he could not answer. This questioning was not a reaction to the witness, but rather because it occurred at the outset, it was an action, for whatever reason, of the questioner. The Chairman cautioned in his interruptions, complete with finger wagging, to "pay attention", but the witness was trying to pay attention to answer the first question asked. The witness could not pay attention to the admonition to pay attention, as this admonition was an interruption of the answer to the question still on the floor. This type of harassment is usually called "badgering the witness" and is usually not allowed.

Chairman Kenney, a lawyer and thus chargeably cognizant of courtroom procedure, nevertheless refused to obey courtroom decorum to confine all comments to the judge, and instead of asking Judge Jones if he can question the witness, began a double team, with Judge Jones, (transcript beginning page 51) which beset complainant at every turn, and since this was not the time reserved for cross by the "Order of Presentation", out of turn. Chairman Kenney interrupted the witness constantly, and berated and bullied the witness. More than half a dozen times he yelled at the attorney/witness on the stand to "pay attention" at the same time that his yelling so interrupted the testimony that it was impossible to pay attention. (transcript p. 52 line 5 and 10, p. 54 lines 4, 6 and 22), p. 55 lines 1 and 16)

This is the CHAIRMAN of the entire commission, putting in a personal appearance in a SMALL Formal Complaint where the amount in controversy at the outset was a $30 disconnection penalty. A review of the PSC records reveals no equal circumstance. Given this authority, the intimidation was overwhelming. The questions of the Chairman prevented the witness from marking an exhibit (page 54, line 4 to page 62, line 25 to page 63, line 10). Under the Order of Presentation, the complainant had a right to introduce exhibits at a time of his own choosing, since cross examination had not yet begun (page 65, line 6). The court of appeals has reversed an administrative law judge who interfered with a litigant's attempt to introduce exhibits Scrivener Oil Co. v. Crider 304 S.W. 3d 261 (Mo So 2010), and this decision applies to the PSC, State ex rel. AG Processing Inc. v. Thompson 100 S.W.3d 915 (Mo App WD 2003).

It appears from all of these actions that both Judge Jones and Chairman Kenney were, at the least, combining functions of judge and inquisitor. This is a very dangerous path, and is not recommended in American law. In The United States v. Marzano, 149 F 2d. 923 (1945) Judge Learned Hand warned at page 926 that there is a danger when such judicial conduct occurs.

> The judge was exhibiting a prosecutor's zeal, inconsistent with that detachment and aloofness which courts have again and again demanded, particularly in criminal trials. Despite every allowance he must not take on the role of a partisan; he must not enter the lists; he must not by his ardor induce the jury to join in a hue and cry against the accused. Prosecution and judgment are two quite separate functions in the administration of justice; they must not merge. Adler v. United States, 5 Cir., 182 F. 464, 472-474; Connley v. United States, 9 Cir., 46 F.2d 53, 55-56; Frantz v. United States, 6 Cir., 62 F.2d 737, 739; Williams v. United States, 9 Cir., 93 F.2d 685, 690, 691; United States v. Minuse, 2 Cir., 114 F.2d 36, 39.

Nearly one hundred years ago, in a case still cited as precedence, in State v. Jones 197 SW 156 (Mo 1917) a judge also took on the role of partisan,

> However, at one point in the cross-examination, the trial judge himself took it up in a manner to indicate that the prosecutor was not developing facts against defendant as fast as he ought to do, and carried on the examination with great vigor and to such length that four typewritten pages were necessary to transcribe his questions and the answers to them.

The Missouri Supreme Court disapproved, finding at page 158, that

> the principal harm of the proceeding was the fact that the judge himself cross-examined, not tactfully, in a manner to bring out some forgotten fact, but in a way to indicate there was no innocent reason why defendant should employ Dr. Bowline.... The law so jealously guards the rights of a defendant, on trial for his liberty, that a trial judge should avoid any indication of feeling against the prisoner ... Such indiscretion on the part of the trial judge requires a reversal of the judgment. State v. Helton, 255 Mo. loc. cit. 182, 164 S. W. 457; State v. Hyde, 234 Mo. loc. cit. 256, 136 S. W. 316, Ann. Cas. 1912D, 191; State v. Fischer, 124 Mo. 460, loc. cit. 464, 27 S. W. 1109.

These principals definitely apply to the Judge Jones and Chairman Kenney in this case, as the Western District held in State ex rel. AG Processing Inc. v. Thompson 100 S.W.3d 915 (Mo App WD 2003) at page 919 that a PSC hearing in Missouri requires an impartial judge, such that

> The procedural due process requirement of fair trials by fair tribunals applies to an administrative agency acting in an adjudicative capacity. *Fitzgerald v. City of Maryland Heights,* 796 S.W.2d 52, 59 (Mo. App. E.D. 1990) (citing *Withrow v. Larkin,* 421 U.S. 35, 46, 95 S. Ct. 1456, 1464, 43 L.Ed.2d 712, 723 (1975)). Thus, administrative decision-makers must be impartial. *Id.* Officials occupying quasi-judicial positions are held to the same high standard as apply to judicial officers....

Further, an Application for Reconsideration before the PSC is an appropriate way to challenge the impartiality and bias of the judge and chairman, as in AG Processing, at page 920

> Although designated an "Application for Rehearing," Respondents/Relators' motion was effectively a motion to disqualify Appellant. A pleading is judged by its subject matter not its caption. *Worley v. Worley,* 19 S.W.3d 127, 129 (Mo. banc 2000). The motion presented the issue of Appellant's continued qualifications to preside over the case, and the PSC considered the issue.

In Scrivener Oil Co. v. Crider 304 S.W. 3d 261 (Mo So 2010), where a party "claims the referee "hassled" Employer's counsel and its primary witness regarding a procedure the referee used for the re-marking and identifying of various exhibits", the court found at page 272:

> "However, it is elementary that a referee must observe the strictest impartiality and show no favor to either of the parties by her conduct, demeanor or statements." *Lusher,* 993 S.W.2d at 543. "'Fair hearing' is defined in 35 C.J.S., page 598, as `one in which authority is fairly exercised, that is, consistently with the fundamental principles of justice embraced within the conception of due process of law.'" *Jones v. State Dep't of Pub. Health & Welfare,* 354 S.W.2d 37, 39 (Mo. App.K.C.D.1962). An administrative proceeding is considered a `fair hearing' unless it "lacks the rudimentary elements of `fair play' embraced within the requirements of due process." *Id.* at 39-40. For an administrative proceeding to be conducted "in accordance with fundamental principles of justice and fairness," that proceeding must be "conducted by `an impartial officer, — free of bias, hostility and prejudgment.'" *Id.* at 40, (quoting 16A C.J.S., Constitutional Law, Section 628, p. 862).

The conduct of the Chairman is doubly pernicious, since the Commission votes on the decision, he acts both as the judge and as a member of the jury. In fact, the Commission is more clubby than a jury, where members may never see each other again. The members of the Commission will see each other, and be required to work together, and cooperate together, every day. Each member will know, if another commissioner makes known that something is important to them, that they must respect that Commissioner's opinion if they wish to receive back respect and institutional empathy. The Supreme Court illustrated the pitfalls faced by a judge who questions a witness where he must control and instruct the jury in US v. Quercia 289 US 466 (1933) the court said at p. 468

> This privilege of the judge to comment on the facts has its inherent limitations. His discretion is not arbitrary and uncontrolled, but judicial, to be exercised in conformity with the standards governing the judicial office. In commenting upon testimony he may not assume the role of a witness. He may analyze and dissect the evidence, but he may not either distort it or add to it. His privilege of comment in order to give appropriate assistance to the jury is too important to be left without safeguards against abuses. The influence of the trial judge on the jury 'is necessarily and properly of great weight' and 'his lightest word or intimation is received with deference, and may prove controlling.' This court has accordingly emphasized the duty of the trial judge to use great care that an expression of opinion upon the evidence 'should be so given as not to mislead, and especially that it should not be one-sided'; that 'deductions and theories not warranted by the evidence should be studiously avoided.' Starr v. United States, 153 U.S. 614, 626, 14 S. Ct. 919, 923, 38 L. Ed. 841; Hickory v. United States, 160 U.S. 408, 421 423,

Similarly in McPherson v. US Physician's Mutual 99 S.W. 3d 462 (Mo App WD 2003) the court discussed at page 490 the situation where even though the evidence of actual bias may not be sufficient, the judge still had a duty to recuse.

> The question, though, is whether the judge's impartiality *might* reasonably be questioned, not whether the judge was, in fact, biased. *Robin Farms,* 989 S.W.2d at 247 (appearance of impropriety if there is "a shade of doubt or a *lesser* degree of possibility" that judge appears biased) (emphasis added); *Molasky v. State,* 710 S.W.2d 875, 878 (Mo.App.1986). *See also In re Mason,* 916 F.2d 384, 386 (7th Cir.1990) ("[D]rawing all inferences favorable to the honesty and care of the judge whose conduct has been questioned could collapse the appearance of impropriety standard ... into a demand for proof of actual impropriety.") As Justice Frankfurter observed, "When there is ground for believing that ... unconscious feelings may operate in the ultimate judgment, or may not unfairly lead others to believe they are operating, judges recuse themselves.... [T]he administration of justice should reasonably appear to be disinterested as well as be so in fact." *Public Utils. Com'n of D.C. v. Pollak,* 343 U.S. 451, 466-67, 72 S. Ct. 813, 96 L.Ed. 1068 (1952). To maintain public confidence in the integrity of the judicial system, the courts adopt a liberal construction that favors the right to disqualify. *Robin Farms,* 989 S.W.2d at 247 (citing *State ex ret Wesolich v. Goeke,* 794 S.W.2d 692, 695 (Mo.App.1990)). Judges must "err on the side of caution by favoring recusal to remove any reasonable doubt [of] impartiality." *Id.* Such is the situation here. Even though the court was justifiably frustrated with the SDR, the court should have recused.

In Elam v. Alcoa, Inc. 765 S.W. 2d 42(Mo App WD 1988), the trial judge interrupted and said that the witness who had testified that something was "erroneous" had meant to say "bad". The judge immediately warned the jury to disregard his own comment, something the Chairman did not do on the record. The judge instructed the jury, at page 212

> Ladies and gentlemen of the jury, the last comment that I made concerning the word "bad" is not a personal observation of mine about the merits of the case. I wanted to get the shortest word possible to put on this chart over here, and since erroneous was too long, false gave the wrong picture, it might have indicated deceit, I just took the word bad, and that is what I meant by cutting it down. It is not to hurt anybody in the case. It is the Court's shorthand way of getting something on the board quickly, and you should not interpret that to mean that anybody has done a bad job or that the defendant is right, the plaintiff is wrong or any other It was my choice of words and the comments added gratuitously after that, which I am instructing you to disregard.

The appeals court ruled that this instruction, which the Chairman did not give, saved the judge.

> It is improper for a judge by act, conduct or remark to color the neutral status that role entails. State ex rel. State Highway Comm'n v. Thurman, 427 S.W.2d 777, 781[2, 3] (Mo.App.1968). The comment of the trial court, however hedged by proper purpose, was indecorous and was better left unsaid. In the usual course, counsel should be left to elicit their own testimony from the witnesses. In the circumstances presented, however, the jury could not have but understood from the explanation and instruction given them by the court immediately afterwards that the comment was not meant as an expression of belief or favor of either litigant. State ex rel. Mo. Highways & Transp. Comm'n. v. Legere, 706 S.W.2d 560, 569 (Mo.App.1986). The explanation and instruction cured whatever prejudice may have resulted from the error, and the mistrial was properly denied. St. Louis County v. Seibert, 634 S.W.2d 590, 592 (Mo.App.1982).

Because the Chairman failed to "cure" his "indecorous" statements by explanation, the jury, which in this case is the Commission, was left to consider the bias of their own Chairman to guide them.

Complainant suspects that the bias of the Chairman may spring from Complainant's appeal in which he questioned the tendency of the Commission to shorten the time for Rehearing from the 30 days granted by statute to 10 days, with the tenth day always falling on Saturday. The Commission could not have found comfortable that exposure, nor the admonition of the Western District, Harter v. PSC 361 S.W. 3d 52 (Mo App WD 2011) footnote four at page 59,

> Though we are compelled to affirm in this case, we are not favorably impressed by the decision of the PSC to shorten the statutory thirty-day time period (before the order becomes effective) to a ten-day time period. The PSC does not articulate any exigent circumstance that necessitated shortening the time for the effective date of its order—

creating an effective date for an order that occurs on a Saturday—and ordering that the file be closed on a Sunday. The fact that it took six months from the time the case was filed until it was heard, and then another four months from the date of hearing to the date of the order would appear to belie the existence of any such exigency. We hope that the PSC will give serious consideration to future decisions to shorten the section 386.490.3 thirty-day time frame when there does not appear to be any reason of exigency that requires such a time reduction nor any reason for declaring an effective date that falls on a weekend, particularly in cases filed by individual ratepayers involving billing disputes and service termination issues. (emphasis supplied)

The bias of the chairman, as displayed at the hearing, infected the Commission such that it was unable to determine that: respondent had reneged on its offer of a payment plan; violated rules by disconnecting complainant after it promised that it would not; refused to credit the pledge of CAASTL and wrongly determined it to be a late payment of complainant to deny him a payment plan; and wrongly charged a $30 disconnection fee.

WHEREUPON, complainant prays the Chairman RECUSE and Commission REHEAR.

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I certify this Application for Rehearing was mailed postage prepaid to the Public Service Commission, 200 Madison Street, PO Box 360, Jefferson City, Mo 65102-0360 and electronically filed and served on other parties by EFIS this 18th day of December, 2013.