

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

AG PROCESSING INC A COOPERATIVE,)	
Complainant,)	
)	
vs.)	HC-2010-0235
)	
KCP&L GREATER MISSOURI OPERATIONS)	
COMPANY,)	
Respondent.)	

MOTION TO STRIKE

COMES NOW Complainant Ag Processing Inc a Cooperative (AGP), pursuant to Section 536.070, RSMo 2000, and Commission Rules 4 CSR 240-2.080, 2.090, 2.130, and 2,135, and for its Motion to Strike Portions of the Prefiled Testimony of GMO witness Gary L. Clemens, respectfully states as follows:

1. The Commission should strike the identified portions of the Testimony of Gary L. Clemens:

a. The question and answer beginning on page 2, line 13 and concluding with the phrase " . . . gas hedging" on line 20 following;

b. The portion of the answer beginning on page 3, line 10 with the phrase "The parties to the case discussed . . ." and continuing through the end of the sentence on line 14;

c. The portion of the answer beginning on page 4, line 18 with the phrase ". . . as well as . . ." and continuing through the phrase " . . . especially AGP . . ." on the same line;

- d. The portion of the answer beginning on page 5, line 3 with the phrase "The program . . ." and continuing through the phrase ". . . summer of 2004" on line 4 of the same page;
- e. The portion of the answer beginning on page 5, line 16 and continuing through the end of line 20 on the same page.
- f. The question and answer beginning on page 5, line 21 and continuing through the end of page 6, line 14;
- g. The portion of the answer beginning on page 7, line 7 and continuing through the phrase ". . . QCA mechanism" on line 9;
- h. The portion of the answer beginning on page 7, line 17 with the phrase "Mr." and continuing through the phrase ". . . of the Stipulation" on line 20;
- i. The portion of the answer beginning on page 8, line 19 with the phrase "Beginning in . . ." and continuing through the phrase ". . . some discussion," on line 21;
- j. The portion of the answer beginning at page 9, line 7 with the phrase "We discussed . . ." and continuing through the end of that answer at line 19;
- k. The entirety of Schedule GLC-3 which is plainly marked as "Privileged and Confidential Settlement Document."

2. There is no question that settlement negotiations are privileged and confidential. Both Missouri statutes and Commission rules protect the confidentiality of settlement discussions and negotiations. Indeed, the Commission rule is

explicit. Commission Rule 4 CSR 240-2.090(7) states that "settlement offers are privileged and, except by agreement, shall not be used against participating parties unless fully substantiated by other evidence."

3. Section 536.070, RSMo 2000, which is part of the Administrative Procedure statute, provides, in part, as follows:

(7) Evidence to which an objection is sustained shall, at the request of the party seeking to introduce the same, or at the instance of the agency, nevertheless be heard and preserved in the record, together with any cross-examination with respect thereto and any rebuttal thereof, **unless it is** wholly irrelevant, repetitious, **privileged**, or unduly long.

(8) Any evidence received without objection which has probative value shall be considered by the agency along with the other evidence in the case. **The rules of privilege shall be effective to the same extent that they are now or may hereafter be in civil actions.** Irrelevant and unduly repetitious evidence shall be excluded. (Emphasis supplied).

4. Commission Rules adopt and embrace this basic precept of protecting privileged and confidential settlement discussions.

4 CSR 240-2.090 Discovery and Prehearing (referenced earlier:

(7) **Facts disclosed in the course of a prehearing conference and settlement offers are privileged and, except by agreement, shall not be used against participating parties unless substantiated by other evidence.** (Emphasis added)

4 CSR 240-2.130 Evidence:

(1) In any hearing, these rules supplement section 536.070, RSMo.

(3) The presiding officer shall rule on the admissibility of all evidence. Evidence to which an objection is sustained, at the request of the party seeking to introduce the same or at the instance of the commission, nevertheless may be heard and preserved in the record, together with any cross-examination with respect to the evidence and any rebuttal of the evidence, **unless it is** wholly irrelevant, repetitious, **privileged**, or unduly long. When objections are made to the admission or exclusion of evidence, the grounds relied upon shall be stated briefly.

Formal exceptions to rulings shall be unnecessary and need not be taken. (Emphasis added).

(5) The rules of privilege are effective to the same extent that they are in civil actions.

4 CSR 240-2.135 Confidential Information:

(2)(C) This rule does not require the disclosure of any information that would be protected from disclosure by any privilege, rule of the commission, or the Missouri Rules of Civil Procedure.

5. In each of the instances listed in Paragraph 1, *supra*, to which this motion to strike is directed, the objectionable disclosure concerns the **content** of settlement discussions, either discussions leading up to and concluding in and with the QCA Stipulation in Case No. HR-2005-0450, or discussions in subsequent meetings between Aquila, AGP and, in some instances, Staff, after the dispute arose in an effort to reach a compromise short of more formal proceedings. The fact that these meetings occurred is not privileged; the content of these meetings and the discussions comprehended therein is privileged, confidential and should be protected by granting this motion.

6. None of the parties appear to have waived privilege with respect to the settlement negotiations that Mr. Clemens discloses in his testimony. Certainly AGP never did.

7. In two recent cases, the Commission has acted to protect settlement negotiations when parties have tried to disclose them. In a recent Suburban Water case^{1/} the Commission stated:

While the Commission certainly encourages compromise and settlement of contested claims in general, the Commission finds that both objections are well taken. As correctly noted by Public Counsel and Staff, at present there is no completed, multilaterally-negotiated "stipulation" or "agreement" for the Commission to approve -- instead, there is only an offer from Suburban. Furthermore, while portions of Exhibit A have evidently been used by the parties in an attempt to settle Case No. WC-2008-0030, it clearly does not constitute a completed negotiated settlement involving two or more parties; the confidential settlement negotiation information it contains was not intended to be revealed to the Commission or to the public; neither Public Counsel nor Staff agreed to the disclosure of any such information to either the Commission or the public; and Suburban's pleadings contain certain factual assertions that are vigorously contested by Public Counsel and Staff. Instead, Suburban filed the documents with the Commission as if they had been mutually agreed on without first obtaining permission from or even notifying Public Counsel or Staff.^{2/}

^{1/} *The Staff of the Missouri Public Service Commission, Complainant, v. Suburban Water and Sewer Company, Inc., and Gordon Burnam, Respondents, Case No. WC-2008-0030, "Order Sustaining Objections And Granting Motions to Strike" issued September 6, 2006.*

^{2/} *Id.*, pages 3-4.

In a recent Missouri-American Water rate case^{3/} the Commission struck an attachment to a pleading filed by intervenor City of Joplin because it improperly revealed privileged settlement negotiations:

Section 536.070(8), RSMo 2000, and Commission Rule 4 CSR 240-2.130 provide that the rules of privilege are effective to the same extent that they are in civil actions. Commission Rule 4 CSR 240-2.090(7) notes that settlement offers are privileged, except by agreement, and shall not be used against participating parties unless fully substantiated by other evidence. "Because settlements are encouraged under the law, the general rule is that evidence procured from settlement is to be excluded at trial."^{4/}

8. In both of these cases, the Commission granted motions to strike the portions of the filings that revealed settlement negotiations. The Commission should do so here. There is no exception to the rules of privilege that allow a party to unilaterally reveal settlement negotiations simply because that party disagrees with another party's position or interpretation of a public, filed agreement. Were this a case before a civil court, sanctions against GMO might well be sought and obtained.

9. Given the extended period over which these parties (by various names) initially negotiated the QCA Stipulation and

^{3/} *In the Matter of Missouri-American Water Company's request for Authority to Implement a General Rate Increase for Water Service provided in Missouri Service Areas, Case No WR-2007-0216, "Order Extending Time For Responses to Late-Filed Exhibits and Striking Amendment to Late-Filed Exhibit" issued August 27, 2007.*

^{4/} *Id.*, p. 3 (footnote omitted).

the subsequent negotiations exploring a resolution short of formal proceedings, it is astounding that GMO would unilaterally seek to disclose the content of those settlement discussions.

10. It is even more ironic that this inappropriate disclosure would be sponsored by GMO given that, in Case No. ER-2007-0291, KCP&L moved to strike the testimony of Staff witness Janice Pyatte who, as alleged by KCP&L, "discuss[ed] **privileged** and confidential settlement communications that previously occurred between the parties." (Emphasis by KCP&L). KCP&L's Motion to Strike then asserted that ". . . as Missouri law and this Commission's Rules clearly provide, **such privileged testimony should be struck and may not be heard or preserved in the record.**"^{5/} (Emphasis by KCP&L)

11. KCP&L's Motion further argued:^{6/}

Setting aside the particular merits of the rate design controversy in this case, the unilateral disclosure of privileged information by Staff, from KCPL's perspective, is unfortunate and **establishes a horrible precedent for parties' conduct in the future.** The unilateral disclosure of such privileged information by any party, if countenanced by the Commission, will **undoubtedly have a chilling effect** upon frank and candid exchanges of information and compromise positions in the settlement process. (Emphasis added)

^{5/} *In re the Application of Kansas City Power & Light, etc.*, Case No. ER-2007-0291, "Motion to Strike Portions of Prefiled Surrebuttal Testimony of Staff Witness Janice Pyatte," page 2, filed October 4, 2007.

^{6/} *Id.*, page 4.

12. AGP cannot help but agree with KCP&L's argument that confidential settlement negotiations and discussions should be shielded to avoid a "horrible precedent" and because they would have a "chilling effect upon frank and candid exchanges of information" in the settlement process. Settlements should be encouraged. The identified material should be struck from the record.

WHEREFORE AGP prays that the material identified above in the Prepared Testimony of Gary L. Clemens as referenced in Paragraph 1 of this Motion, should be struck from the record of this proceeding and not referred to in any manner herein.

Respectfully submitted,

FINNEGAN, CONRAD & PETERSON, L.C.

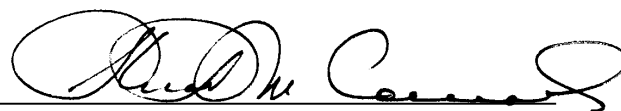


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ATTORNEYS FOR AG PROCESSING INC.

SERVICE CERTIFICATE

I certify that I have served a copy of the foregoing pleading upon identified representatives of KCP&L Greater Missouri Operations Company, and upon representatives of the Staff of the Missouri Public Service Commission by electronic means as an attachment to e-mail, all on the date shown below.

A handwritten signature in black ink, appearing to read "Stuart W. Conrad", written over a horizontal line.

Stuart W. Conrad, an attorney for
Ag Processing Inc a Cooperative

Dated: October 27, 2010