

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

<b>AG PROCESSING INC., A COOPERATIVE,</b>	)	
<b>Complainant,</b>	)	
	)	
<b>v.</b>	)	<b>Case No. HC-2010-0235</b>
	)	
<b>KCP&amp;L GREATER MISSOURI OPERATIONS</b>	)	
<b>COMPANY,</b>	)	
<b>Respondent.</b>	)	

**RESPONDENT’S MEMORANDUM IN OPPOSITION TO COMPLAINANT’S  
REQUEST TO CALL STAFF WITNESSES**

COMES NOW Respondent KCP&L Greater Missouri Operations Company, formerly Aquila, Inc., (“GMO”) and submits to the Commission the following memorandum in opposition to the request of Complainant Ag Processing Inc. (“AgP”) to call Staff witnesses Cary Featherstone, Charles Hyneman, and David Sommerer at this hearing.

**1. Ag Processing Cannot Call Staff Witnesses as it did not List any Members of Staff on its Witness List.**

In its Order adopting the jointly-filed procedural schedules of Ag Processing Inc. (“AgP”), GMO, and Staff, the Commission ordered that the parties file a list of issues, witnesses, order of witnesses, and order of cross-examination. See Order Adopting Procedural Schedule and Waiving Certain Procedural Rules, Case No. HC-2010-0235 (July 16, 2010). Pursuant to this Order, AgP filed its List of Issues, Witnesses and Order of Cross, designating Donald E. Johnstone as its sole witness in this case. See List of Issues, Witnesses and Order of Cross at 3 (Nov. 5, 2010).

AgP did not list any members of Staff on its witness list, and should not now be permitted to introduce any witness not designated on its list. Allowing AgP to call a witness not listed on

its mandatory witness list would render meaningless the provisions of the Commission's Order Adopting Procedural Schedule requiring such a witness list.

PSC regulations require fair and full disclosure of the testimony and exhibits each party expects to offer at the hearing. See 4 CSR 240-2.130(8) (no supplementation of prefiled prepared testimony absent order of presiding officer or Commission or unless a previously undisclosed matter arises); see also Order Adopting Procedural Schedule and Waiving Certain Procedural Rules, Case No. HC-2010-0235 (July 16, 2010). Therefore, the Commission should, as would a court, exclude all witnesses, evidence, or testimony that have not been properly disclosed. See Hancock v. Shook, 100 S.W.3d 786, 798 (Mo. 2003) (warning of the threat of “[t]rial by ambush”). Such exclusions are necessary to ensure fundamental fairness and to avoid unfair surprise. See Ratcliff v. Sprint Mo., Inc., 261 S.W.3d 534, 546 (Mo. App. W.D. 2008); Hertz Corp. v. RAKS Hospitality, Inc., 196 S.W.3d 536, 545 (Mo. App. E.D. 2006). Permitting AgP now to call a witness not listed on its mandatory witness list would unfairly surprise GMO.

Furthermore, AgP's request that members of Staff testify is not timely as counsel for GMO were only advised of the request by a Staff attorney on Wednesday morning, November 17. This is not adequate notice. The comparable rule for subpoenas states: “Except for a showing of good cause, a subpoena . . . shall not be issued fewer than twenty (20) days before a hearing.” 4 CSR 240-2.100(2). AgP deposed these three Staff members in August (Mr. Featherstone on August 23, Mr. Hyneman on August 26, and Mr. Sommerer on August 31). Consequently, AgP has had nearly three months since it took the depositions of these Staff members in which to advise GMO of its intent to bring them to the hearing, to list the witnesses on its required List of Issues, Witnesses and Order of Cross (filed November 5), or otherwise subpoena them to appear at the hearing. Given the significant amount of time within which AgP

had an opportunity to advise of its plans or to subpoena these deponents, there is no good cause that would excuse AgP's eleventh hour request.

**2. Staff took no Position in this Case and AgP cannot Project a Position upon Staff.**

Staff, a party to this proceeding, has taken no position whatsoever in this case. Staff filed a proposed procedural schedule with AgP and GMO that did not call for any Staff testimony to be filed. See Proposed Procedural Schedule and Other Conditions, Case No. HC-2010-0235 (June 30, 2010). Staff filed no testimony pursuant to the Commission's Procedural Order. See Order Adopting Procedural Schedule and Waiving Certain Procedural Rules, Case No. HC-2010-0235 (July 16, 2010). Neither has Staff filed any rebuttal testimony in this case.

In its Statement of Position, Staff states: "Staff has taken no position in this litigation." See Staff's Statement of Position, Case No. HC-2010-0235 (Nov. 12, 2010). Staff goes on to state that it "has had only limited involvement in this dispute." Id.

By calling Staff witnesses to give live testimony, AgP is attempting to masquerade Staff as having a position when it clearly does not, or, worse yet, to project a position in this dispute between a customer and a utility onto the Staff. It is, therefore, unfair to allow AgP to call Staff witnesses to attempt to create a Staff position when there is none. Staff witnesses merely would testify to personal opinions that are irrelevant to this dispute between two parties. Considerations of fundamental fairness to avoid unfair surprise should control here. See Ratcliff, 261 S.W.3d at 546; Hertz Corp., 196 S.W.3d at 545.

**3. As an Alternative, the Commission could Admit Designated Portions of the Deposition Transcripts of Staff Deponents Into Evidence.**

Missouri Rule of Civil Procedure 57.07(a) provides: "Depositions may be used in court for any purpose." The Commission, like a trial court, has broad discretion in determining

whether to admit deposition testimony. See Hemeyer v. Wilson, 59 S.W.3d 574, 580 (Mo. App. W.D. 2001). Thus, the Commission could admit into evidence the deposition transcripts of Staff members Featherstone, Hyneman, or Sommerer, rendering live testimony by these Staff deponents unnecessarily duplicative.

Once admitted, “depositions of witnesses are used as evidence in all respects as though the witnesses orally testified in open court.” Robertson v. Cameron Mut. Ins. Co., 855 S.W.2d 442, 448 (Mo. App. W.D. 1993). Because deposition testimony is given the same credibility as live testimony at trial, where a deposition transcript is available and admitted into evidence, the party deposed need not be subpoenaed to testify at trial.

If the Commission is inclined to admit the depositions of the Staff deponents into evidence, AgP should designate by page and line the portions of the transcript it is offering into evidence. GMO should then be allowed to submit any objections for the Commission’s consideration, and to counter-designate any additional passages of the depositions, with AgP given the right to object to any such counter-designations.

This would be similar to the process often used in judicial proceedings where portions of the deposition transcripts are offered into evidence, and the non-offering party is then permitted to rebut the offered testimony by reading into the record additional portions of the deposition. After selections from a deposition are proffered to the jury, the opposing party's remedy is to utilize the deposition to clarify, rebut the inferences to be drawn from the selections, or explain its side of the controversy. Saddleridge Estates, Inc. v. Ruiz, 2010 WL 3743761 \*3 (Mo. App. W.D. 2010). “As a general rule, once one party reads a portion of a deposition, the opposition may read some or all of the remainder in explanation.” Bowls v. Scarborough, 950 S.W.2d 691, 703 (Mo. App. W.D. 1997).

Given the constraints upon the Commission's time and resources, and the fact that Commissioners consider pre-filed written testimony in the majority of cases pending before them, the process of designating and counter-designating deposition testimony would be the most efficient means of presenting deposition testimony to the Commission.

WHEREFORE, GMO requests that the Commission deny AgP's request to call Staff witnesses at the hearing of this case.

Respectfully submitted,

/s/Lisa A. Gilbreath

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**Certificate of Service**

A copy of the foregoing has been emailed this 17th day of November 2010 upon counsel of record in this proceeding.

/s/Lisa A. Gilbreath  
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