

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

In the Matter of Missouri – American	)	
Water Company’s Request for Authority	)	
to Implement a General Rate Increase	)	<b><u>Case No. WR-2007-0216, et al.</u></b>
for Water Service Provided in Missouri	)	
Service Areas	)	

**NOTICE REGARDING PURPORTED ORDER SCHEDULING  
EXPEDITED ON-THE-RECORD DISCOVERY CONFERENCE**

COMES NOW AG Processing, Inc. (“AGP”) and for its Notice Regarding Purported Order Scheduling Expedited On-The-Record Discovery Conference respectfully states as follows:

1. On August 1, 2007, Regulatory Law Judge Harold Stearley, in response to a Staff email to the presiding officer in this proceeding, purported to schedule an expedited on-the-record discovery conference. As this pleading will further detail, the purported order scheduling the on-the-record discovery conference is littered with legal and procedural deficiencies. Recognizing that: (1) the order was issued by an individual that is not the presiding officer in this proceeding; (2) the order does not provide for the proper notice as required under Section 536.067(4); and (3) counsel for AGP is not available at the scheduled time of the discovery conference, AGP hereby informs Regulatory Law Judge Stearley that it **will not** be present for his purported discovery conference.

2. In the recent past Staff counsel has been heard to tout his past experience as a Regulatory Law Judge in an effort to convince the Commission of the

appropriateness of his position.<sup>1</sup> Given this experience, as well as his willingness to tout his experience, Staff counsel's apparent lack of familiarity in this matter with the Commission's rules of practice and procedure is puzzling.

4 CSR 240-2.090(8) provides that counsel shall not file a discovery motion or arrange a conference with the presiding officer until conferring by telephone or in person with opposing counsel. The Commission's rule continues on to note that "merely writing a demand letter is not sufficient." In fact, counsel is required to "certify compliance with this rule in any discovery motion."

In the case at hand, counsel sent an email to AGP counsel regarding the data request in question. Staff counsel was immediately informed by another attorney from the engaged firm that, as a result of pending travel, he should expect a response from lead counsel the next day. Not only did Staff counsel not attempt to comply with the Commission's rule by communicating with counsel by telephone or in person, he also did not even provide lead counsel an opportunity to communicate with him. Again, demonstrating his blatant disregard for the rules of practice and procedure for which he openly proclaims familiarity, Staff counsel instead opted to engage the assistance of the presiding officer. The Commission should not countenance such blatant disregard of its rules of practice and procedure from that individual responsible for advising the Commission on all such matters.

3. The legal and procedural deficiencies in this matter do not end with the purported "motion" that was "filed" by Staff counsel. Indeed, deficiencies are also contained in the alleged "order" issued by a regulatory law judge. Section 386.240

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<sup>1</sup> See, Motion for Reconsideration, filed July 10, 2007, at page 3. "When the undersigned was a Regulatory Law Judge, not so very long ago, contested procedural motions were required to be brought into Agenda for ruling by the Commission."

provides that the Commission may authorize certain individuals to perform certain functions otherwise authorized to the Commission. In its rules of practice and procedure, the Commission, under the authority contained in Section 386.240, has delegated certain powers to the presiding officer. Included in this delegated authority is the authority to conduct a telephone conference regarding a discovery dispute after the attorneys have conferred by telephone or in person.<sup>2</sup> As indicated in the Commission's rule, this authority has been delegated solely to the presiding officer.

In the case at hand, a regulatory law judge other than the presiding officer has purported to schedule a discovery conference on this matter. Since this individual is not the presiding officer in this matter, he has no authority to schedule a discovery conference or consider the merits of such a dispute. Furthermore, repeating the error of Staff counsel, this regulatory law judge has not followed the express requirements of 4 CSR 240-2.090(8)(B) by ensuring that "the attorneys have conferred in person or by telephone" prior to arranging such a conference.

4. In addition, the purported order scheduling the discovery conference ignores the express requirements of Section 536.067(4).

No hearing in a contested case shall be had, except by consent, until a notice of hearing shall have been given substantially as provided in this section, and such notice shall in every case be given a reasonable time before the hearing. Such reasonable time shall be at least ten days except in cases where the public morals, health, safety or interest may make a shorter time reasonable.

Although there is some question whether the scheduled discovery conference constitutes a hearing, the same notice requirements should still apply. In the case at hand, no finding

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<sup>2</sup> 4 CSR 240-2.090(8)(B).

regarding public morals, health, safety or interest has been made to justify providing only 20 hours notice of the discovery conference.

5. As indicated in previous emails to Staff and the presiding officer, counsel is not available for the scheduled discovery conference. As such, AGP will not be in attendance at the discovery conference. Counsel does not wish to appear as if it is blatantly defying the requests of the Commission or its presiding officer. In this case, however, procedures designed to ensure the fairness of the Commission's process have been blatantly ignored. Counsel is left with the impossible task of choosing which commitments it will meet. Given the procedural infirmities contained in Staff's "motion" and the RLJ's order, counsel is left to choose its previously scheduled commitments.

6. Finally, counsel notes that it is not averse to responding to Staff's discovery. In this case, counsel has responded to certain Staff data requests. In addition, Staff has repeatedly made its expert witness available to Staff members for discussion regarding the details of his rate design testimony. Counsel was under the belief that these discussions as well as the responses to other data requests had obviated the need for further response. Had opposing counsel availed himself of the opportunity to converse "in person or by telephone," counsel may have been able to more accurately deduce the information that Staff is currently seeking. It is this possibility of misunderstandings that undoubtedly forms the basis of the Commission's rule requiring parties to communicate prior to bringing its discovery disputes.

7. Counsel notes that, while the evidentiary hearing is scheduled to commence on August 6, the rate design issue is not scheduled to be heard in this matter until the week of August 13. Counsel will obviously be in attendance starting on August

6 and suggests that the presiding officer can hear argument and make a ruling from the bench at that time. AGP will make every effort to accommodate such a ruling. In the meantime, counsel suggests that Staff may take advantage of the available time to acquaint himself with the Commission's discovery rule and attempt to resolve this matter either by telephone or in person.

WHEREFORE, counsel for AGP respectfully informs the Regulatory Law Judge that they will not be in attendance at the scheduled discovery conference.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "David L. Woodsmall", is positioned above a horizontal line. To the right of the signature, a vertical red line extends downwards from the top of the signature area.

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ATTORNEYS FOR AG PROCESSING,  
INC.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served the foregoing pleading by email, facsimile or First Class United States Mail to all parties by their attorneys of record as provided by the Secretary of the Commission.

A handwritten signature in black ink, appearing to read "David L. Woodsmall", is written over a horizontal line. A vertical red line is positioned to the right of the signature.

David L. Woodsmall

Dated: August 1, 2007