

BEFORE THE ARKANSAS POLLUTION CONTROL & ECOLOGY COMMISSION

IN THE MATTER OF:

RIVER VALLEY REGIONAL WATER DISTRICT
2806 BRYAN ROAD, VAN BUREN, AR 72956
REQUEST TO INITIATE RULEMAKING
TO AMEND APCEC REGULATION NO. 2
SECTION 2.304

NO. 05-013-R

**RIVER VALLEY REGIONAL WATER DISTRICT'S
REQUEST TO WITHDRAW
THIRD PARTY PETITION FOR RULEMAKING
AND TO TERMINATE RULEMAKING PROCEEDING**

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& ECOLOGY COMMISSION
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On December 9, 2005 the Commission voted to initiate a Third Party Rulemaking that was requested by River Valley Regional Water District. Commission Minute Order 05-29. On January 9, 2006, the Department filed suit against the Commission. Arkansas Department of Environmental Quality v. Arkansas Pollution Control & Ecology Commission, No. CIV 2006-173 (Pulaski Cir. Ct, 3rd Div.). The Department's lawsuit alleges that the Commission's vote to initiate the rulemaking was void for lack of a quorum. The sole basis for the Department's claim regarding the quorum is the fact that one of the nine Commissioners involved in the vote participated by speaker phone.

River Valley Regional Water District believes that the Department's lawsuit against the Commission is without merit for at least four distinct reasons:

1. The Department has no authority to sue the Commission.¹

¹ The Department attempted to sue the Commission on one prior occasion. In that case the Department's suit was dismissed on the ground that the Department did not have legal authority to sue the Commission because the Commission is a supervisory and appellate arm of the same agency. In the Matter of Arkansas Medical Services Corp., No. CIV 94-7974 (Pulaski Cir. Ct., decided Jan. 71995), *appeal dismissed sub nom. Arkansas Department of Pollution Control &*

2. The Department is wrong on the quorum issue because Commissioners may validly participate and vote in Commission meetings by speaker phone.²
3. The Commission's decision to initiate rulemaking is not the final Commission action in the rulemaking proceeding and therefore the matter is not yet appealable.³
4. The Department did not raise the question of the quorum before the Commission, either at the December 9th meeting or at any time thereafter. As a consequence the Department waived any right it might have had to object to the Commission's action on that ground.

The fact that the Department's suit is groundless and will ultimately be dismissed, however, cannot erase the confusion and delay that the Department's actions will inevitably inject into this rulemaking. River Valley's proposed rule raises serious questions of important public policy. Regardless of one's views on the merits of the proposed rule, everyone should be able to agree that the public and the Commission deserve to have these serious questions addressed honestly on the merits without the distraction of groundless lawsuits or other procedural obfuscation.

To avoid having consideration of the merits of the rulemaking diverted or confused by the Department's lawsuit, River Valley Regional Water District hereby requests permission to withdraw its Petition and terminate the Third Party rulemaking proceeding. Withdrawal of the

Ecology v. Arkansas Pollution Control & Ecology Commission, No. 96-492 (Ark. Supreme Court, decided July 8, 1996).

² Participation by speaker phone is a common practice in almost all Arkansas state boards and commissions. The validity of this practice was expressly upheld in Attorney General's Opinion 2000-102. That opinion concluded that participation by speaker phone was permissible:

"It is my opinion that the use of a speaker phone to allow a member to participate in a meeting is permissible, provided that the speaker phone is used in such a way as to allow the public and press to hear what is being said on the phone."

But see Attorney Genral's Opinion 90-034 (March 27, 1990).

³ Judicial review is available only to challenge final actions of the Commission. Ark. Code Ann. § 8-4-223(a)(1). When the Commission's rulemaking proceeding is not yet complete, no judicial review is available. McLane Southern, Inc. v. Davis, 80 Ark. App. 30; 90 S.W.3d 16 (2002). Needless to say, the Commission's decision to initiate the rulemaking proceeding requested by River Valley is just the beginning of a rulemaking proceeding, not the conclusion of it.

Petition and termination of the rulemaking proceeding will clearly render the Department's lawsuit moot.

Simultaneous with this request to withdraw its Petition and terminate the original rulemaking proceeding, River Valley has filed a new Petition for Third Party Rulemaking. The new Petition is identical to the one that was considered by the Commission on December 9th, and the proposed Minute Order is identical to the one adopted by the Commission in December except for four changes:

- (i) the dates of the public hearings have been moved back to account for the delay caused by the Department's lawsuit;
- (ii) the number of public hearings has been increased from two to four to accommodate a change requested by the Department;
- (iii) the period of time for preparing the response to public comments has been increased from 15 days to 45 days to accommodate a request for additional time made by the Department; and
- (iv) the date for this matter to come back to the Commission for final action has been moved from May 25, 2006 to October 27, 2006 to accommodate a suggestion that Commissioner Young received from another Commissioner.

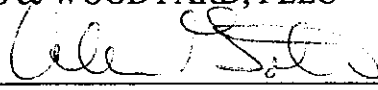
River Valley regrets that almost two months has been lost due to the Department's actions, but River Valley is convinced that the public interest will be best served by keeping the discussion focused as much as possible on the serious questions of public policy raised by its proposed rule, rather than on distracting procedural maneuvers.

WHEREFORE, River Valley Regional Water District respectfully requests leave to withdraw its Petition for Third Party Rulemaking and to terminate the rulemaking proceeding. As noted above, this request is accompanied by a request that the Commission approve an identical Petition that is being filed simultaneously herewith. River Valley respectfully requests

that this Request to Withdraw be considered at the same time as its newly filed Petition to Initiate Third Party Rulemaking.

Respectfully submitted,

MITCHELL, WILLIAMS, SELIG,
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By 
Allan Gates, Ark. Bar I.D. # 72040


ATTORNEYS FOR RIVER VALLEY REGIONAL
WATER DISTRICT

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of January, 2006 I served the foregoing Petitioner's Request to Withdraw Third Party Petition For Rulemaking and to Terminate Rulemaking Proceeding by depositing a true copy in the United States mail, First Class postage prepaid, addressed to each of the following:

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