

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

The Staff of the Missouri Public
Service Commission,

Complainant,

v.

Missouri Pipeline Company, LLC, and
Missouri Gas Company, LLC,

Respondents.

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Case No. GC-2006-0491

ORDER DENYING MOTION FOR CONTINUANCE

Issue Date: December 8, 2006

Effective Date: December 8, 2006

On December 7, 2006, at approximately 4:00 p.m., the Respondents, Missouri Pipeline Company, LLC, and Missouri Gas Company, LLC, filed a motion asking for a continuance of the hearing set to begin on December 13. The Respondents requested that the Commission act on their motion by December 8. In order to act on the motion in the time requested, the Commission ordered that any party wishing to respond to the motion for continuance do so by 1:00 p.m. on December 8. The Commission's Staff filed a timely response. No other party responded.

The motion for continuance argues that the hearing should be delayed to avoid violating the Respondents' due process rights. In particular, the Respondents allege that Staff has unfairly surprised them by recently disclosing that as many as seven new witnesses may offer live testimony at the hearing. In addition, the Respondents contend

that Staff has recently amended its complaint to add a count alleging that the Respondents have destroyed documents, resulting in the possibility of criminal liability for the persons responsible for that destruction.

The allegation of unfair surprise arises from Staff's filing of an Issues List and Order of Cross-Examination on December 4. In that document, Staff indicated its intention to add three witnesses who have not prefiled testimony to the list of witnesses who would provide testimony at the hearing. The three additional witnesses that Staff named are David (BJ) Lodholz, David Wallen, and Allen Simpson. Lodholz and Wallen are current or former employees of the Respondents. Simpson is the natural gas buyer for Fort Leonard Wood. When asked about these new witnesses at the prehearing conference held on December 6, Staff explained that all three have previously been deposed and that Staff intended to use their depositions at the hearing. When pressed by counsel for the Respondents to explain more precisely how it intended to use these depositions, Staff refused to provide such details, indicating that it would use the depositions in a manner that was consistent with accepted practice before the Commission.

The Respondents are concerned that Staff will attempt to use the depositions in a way that would undermine Staff's obligation to prefile its direct and surrebuttal testimony. If that occurs, Respondents claim that they would be unfairly surprised and denied their right to raise a defense to what they claim would be new testimony. However, the depositions that Staff has indicated an intention to use were taken in this case months ago. All parties, including the Respondents, either participated in the depositions, or had an opportunity to do so. Under those circumstances the Respondents cannot be surprised by anything that might be contained in those depositions. Furthermore, Staff has not yet indicated exactly

how it intends to use those depositions, and the Commission has not yet ruled on any objection that the Respondents may make to Staff's use of the depositions. Until those things happen, the Respondents' concerns are premature, and do not provide a basis for a continuance.

The Respondents also contend that Staff has recently amended its complaint to add a new count that raises the question of potential criminal liability for destruction of public utility documents. The Respondents indicate that because of these allegations, their witnesses may now invoke their Fifth Amendment rights against self-incrimination during their testimony. The Respondents contend that a continuance is needed so that those witnesses can seek separate legal counsel regarding the potential criminal charges.

Staff has not amended its complaint to add any new counts, but, on November 14, it filed a motion asking the Commission to impose sanctions against Missouri Pipeline, Missouri Gas, and the president of both companies, David Ries, for the alleged destruction of certain documents necessary for Staff's investigation. Staff asked the Commission to impose appropriate sanctions, including giving Staff the authority to seek monetary penalties in circuit court, for the alleged discovery violations. In addition, Staff asks the Commission to apply the spoliation of evidence doctrine to apply an adverse evidentiary inference against the Respondents regarding the documents that Staff claims were destroyed. Staff's motion does not mention possible criminal penalties.

The Respondents filed a reply to Staff's motion for sanctions on November 20. Affidavits from several employees of the Respondents that rebut Staff's allegations were attached to the reply. Staff responded to the reply on November 28, and the Respondents filed a further reply on December 5. The Respondents' December 5 reply incorporates an

affidavit from David Ries in which he denies Staff's allegations about the destruction of documents.

On December 5, the Commission issued an order regarding Staff's motion for sanctions. The Commission indicated that rather than make a decision based only on the written submissions, it would take up Staff's motion as part of the hearing to allow all parties an opportunity to present evidence regarding the dispute. The Commission specifically ordered that the parties would be "allowed to present additional live direct testimony on that question."

At the December 6 prehearing conference, Staff indicated that it might call four members of Staff as witnesses on the destruction of documents issue. The calling of those witnesses to present testimony limited to that narrow issue is consistent with the Commission's December 5 order and does not constitute a violation of any Commission procedure. Staff's stated intention to offer testimony from those witnesses is not a proper basis for a continuance.

There is, however, another aspect of the destruction of documents issue that causes the Respondents' concern. Staff's motion for sanctions does not ask the Commission to make any findings about possible criminal liability for the destruction of documents. However, during the course of the December 6 prehearing conference, the Commission's General Counsel, legal representative for Staff, mentioned that the willful destruction or falsification of utility records could be prosecuted as a felony. Indeed, Section 386.560, RSMo 2000, provides that such actions may constitute a felony punishable by a fine and imprisonment.

The offhand comment of Staff's legal counsel during a prehearing conference does not constitute an amendment of Staff's complaint to add a count seeking criminal prosecution. Obviously, this Commission does not have any authority to impose criminal penalties against anyone. The Respondents are, however, concerned that because of Staff's comment, their witnesses will now be in fear of criminal prosecution and as a result will be hesitant to testify in this proceeding.

The Commission, of course, has no way of knowing whether the Respondents' witnesses have any reason to fear criminal prosecution. It is clear, however, that the statute that criminalizes the willful destruction of documents has been in place for many years. Presumably the Respondents, or at least their legal counsel, have been aware of the existence of that statute since the beginning of this case. Staff's reference to the statute during a prehearing conference does not change anything and does not require the continuance of the hearing.

After considering the arguments of the parties, the Commission finds that the Respondents' Motion for Continuance should be denied.

IT IS ORDERED THAT:

1. Respondents' Motion for Continuance is denied.

2. This order shall become effective on December 8, 2006.

BY THE COMMISSION



Colleen M. Dale
Secretary

(S E A L)

Morris L. Woodruff, Deputy Chief Regulatory
Law Judge, by delegation of authority pursuant
to Section 386.240, RSMo 2000.

Dated at Jefferson City, Missouri,
on this 8th day of December, 2006.