

At a session of the Public Service Commission held at its office in Jefferson City on the 3rd day of November, 2006.

Respondents.

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On October 12, 2006, Missouri Pipeline Company and Missouri Gas Company filed a motion asking the Commission to strike the direct testimony of Eve A. Lissik, the witness for the Municipal Gas Commission of Missouri. That motion alleged that Ms. Lissik was given access to highly confidential information in violation of the Commission's protective order. In a separate allegation, the motion asserts that members of the Commission's Staff may have improperly disclosed highly confidential information to Ms. Lissik in 2002 and 2003, and asks the Commission to further investigate that assertion. At the direction of the Commission, the Municipal Gas Commission and Staff filed responses to the motion to strike on October 27. Missouri Pipeline and Missouri Gas filed a reply on November 1.

The protective order that the Commission issued in this case on June 22, 2006, provides:

materials or information designated as highly confidential ... may be reviewed only by attorneys or outside experts who have been retained for the purpose of this case.... Outside expert witnesses shall not be employees, officers or directors of any of the parties in this proceeding.

In other words, employees, officers, and directors of a party are not allowed to view highly confidential information.

Eve Lissik offered expert rebuttal testimony on behalf of the Municipal Gas Commission of Missouri. Lissik testified that she is the Director of Energy Services and Assistant to the General Manager with the Missouri Joint Municipal Electric Utility Commission, an organization that she indicates is part of the Missouri Public Utility Alliance.<sup>1</sup> Lissik is not a direct employee of the Municipal Gas Commission of Missouri and on that basis, the Municipal Gas Commission argues that she is an outside expert who may view highly confidential information under the terms of the protective order. However, later in her testimony, Lissik explains that the Municipal Gas Commission of Missouri is also a part of the Missouri Public Utility Alliance.<sup>2</sup> In other words, both the Missouri Joint Municipal Electric Utility Commission and the Municipal Gas Commission of Missouri are a part of the Missouri Public Utility Alliance. That means that Lissik is an employee of an organization that is affiliated with a party. The question becomes, does her employment with an affiliated organization preclude her from being treated as an outside expert entitled to view highly confidential information?

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<sup>1</sup> Lissik Rebuttal, page 1, lines 16-19.

<sup>2</sup> Lissik Rebuttal, page 3, line 8.

The protective order's restriction on the disclosure of highly confidential information to employees of a party is designed to protect a utility's trade secrets from disclosure to its competitors, who could use that information against the utility in the competitive market. Based on the testimony that has been filed in this case, the Missouri Public Utility Alliance competes with Omega Pipeline as a gas marketer, seeking to offer agency and sales agreements to various municipalities that transport gas through the pipelines operated by Missouri Pipeline and Missouri Gas. Therefore, Omega Pipeline has an interest in ensuring that its trade secrets are not revealed to the employees of its competitors.

Omega Pipeline is not a party to this case, but until it was sold to new owners effective June 1, 2006, it was an affiliate of Missouri Pipeline and Missouri Gas. Furthermore, since Staff continues to seek information from Omega Pipeline and its new owners,<sup>3</sup> Omega Pipeline continues to have an interest in protecting its trade secrets from improper disclosure to its competitors.

As a basis for its concern about the disclosure of its trade secrets to Eve Lissik, an employee of an organization with which they compete, Missouri Pipeline and Missouri Gas point to an exchange of e-mails in 2002 between Lissik and a member of Staff in which they discuss competition for gas marketing contracts with cities served by Missouri Pipeline or Missouri Gas. Although those e-mail exchanges do not indicate any wrongdoing by either Ms. Lissik or members of Staff, they clearly do indicate that Lissik is acting as an employee of a competitor, and not an outside expert. As such, she is not entitled to view highly confidential information. Having decided that Eve Lissik may not view highly

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<sup>3</sup> A motion to quash Staff's subpoena, filed by Terry Matlack and Tortoise Capital Advisors, LLC, acting on behalf of the new owners of Omega Pipeline, is pending before the Commission in Case No. GC-2006-0378.

confidential information, the Commission must now decide what to do with her prefiled testimony.

In her testimony, Lissik uses highly confidential information, apparently obtained from the highly confidential direct testimony of Staff's witness Robert E. Schallenberg, to calculate the amount by which the cities of St. James, St. Robert and Waynesville were overcharged for transportation of natural gas if Staff's allegations against Missouri Pipeline and Missouri Gas are correct. Missouri Pipeline and Missouri Gas contend that Lissik's rebuttal testimony should be struck and that she should be precluded from further participation in this case.

In arguing against the motion to strike, the Municipal Gas Commission states that Ms. Lissik signed a nondisclosure agreement that was filed in this case on August 14. The Municipal Gas Commission argues that the signing and filing of the nondisclosure agreement should have put Missouri Pipeline and Missouri Gas on notice that highly confidential information would be disclosed to Ms. Lissik. The Municipal Gas Commission then asserts that Missouri Pipeline and Missouri Gas acted in bad faith by waiting until Lissik's testimony was filed before raising an objection.

The Municipal Gas Commission's argument is without merit. The signing and filing of a nondisclosure agreement emphatically does not mean that highly confidential information may be disclosed to the signatory of that document. The nondisclosure agreement that Ms. Lissik signed merely indicates that she has "requested review of the confidential information produced in Case No. GC-2006-0491." She also certifies that she has "read the above mentioned Protective Order and agree[s] to abide by its terms and conditions." That nondisclosure agreement does not indicate that Ms. Lissik is entitled to

view highly confidential information or that counsel for a party intends to provide that information to her. On the contrary, as an employee of a party who is working as a consultant to an attorney, or who intends to file testimony, Ms. Lissik is entitled to view confidential information that has been designated as proprietary, even though she cannot view highly confidential material.<sup>4</sup> Therefore, the fact that Ms. Lissik signed a nondisclosure agreement would not put anyone on notice that the attorney for the Municipal Gas Commission intended to give her access to highly confidential information.

The Municipal Gas Commission, in its response to the motion to strike, also asserts that perhaps the information that was disclosed to Ms. Lissik should not have been designated as highly confidential in the first place. If the Municipal Gas Commission believes that information has been improperly designated as highly confidential, the protective order allows it to file an appropriate motion challenging that designation.<sup>5</sup> That issue is not before the Commission at this time. But it is clear that the possibility of a future challenge to the appropriateness of the highly confidential designation does not justify the inappropriate disclosure of that information to Ms. Lissik.

Ms. Lissik has been given inappropriate access to highly confidential information, which she incorporated into her rebuttal testimony. That testimony must therefore be struck. The Commission will not, however, preclude Ms. Lissik from further participation in this case, provided that she may not be given access to highly confidential information.

The Respondents' Motion to Strike also asks the Commission to conduct an investigation into what it contends are improper communications between representatives of the Missouri Public Utility Alliance, including Eve Lissik, and members of the Staff. As

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<sup>4</sup> Protective Order paragraph D.

<sup>5</sup> Protective Order paragraph B.

support for its request for further investigation, the Respondents point to certain e-mail exchanges that occurred in 2002 and 2003. In reply to the Respondent's motion, Staff and the Municipal Gas Commission offered affidavits from Eve Lissik and Carmen Morrissey – one of the Staff members involved in the e-mail exchange – in which they explain the context of the e-mail exchange and deny that any improper disclosure of confidential information occurred.

Eve Lissik was an employee of the Commission for eleven years before she went to work for her present employer. All Commission employees must always be aware that such a relationship may lead suspicious observers to ascribe improper motives to what may be an entirely appropriate contact between the former employee and the Commission. That said, there is nothing in the referenced e-mail exchange that would indicate that anyone did anything wrong. There is no basis for any further investigation.

Late in the day on November 2, the Municipal Gas Commission of Missouri and the Staff of the Commission filed further responses to the motion to strike. The Municipal Gas Commission, using rather intemperate language, accuses Missouri Pipeline and Missouri Gas of raising a “red herring” argument to distract the Commission from the pipelines’ “blatant” violation of their tariffs. The Municipal Gas Commission then again claims that the Municipal Gas Commission of Missouri, the Missouri Joint Municipal Electric Utility Commission and the Missouri Public Utility Alliance are separate legal entities and that an employee of one can be an “outside” expert for the other.

As previously discussed, the Municipal Gas Commission's argument is refuted by Ms. Lissik's own testimony indicating that the three public bodies are related. If the Municipal Gas Commission's argument were accepted, it would eliminate the requirement

that companies employ an outside expert to view highly confidential information. Nearly all major utilities have at least one affiliated company that is a separate legal entity. To allow the attorney for those companies to share highly confidential information with an employee of the affiliate would gut the protections against disclosure of highly confidential information to competitors that is afforded by the protective order.

Staff's response accuses the Respondents of committing a "twisted abuse of the Commission's standard protective order" and warns the Commission against setting its "stamp of approval on Respondents' conduct." As the Commission has found in this order, the only violation of the standard protective order that has been demonstrated in this case was committed by the Municipal Gas Commission. It is that conduct that the Commission does not wish to approve.

Staff also contends that "the protective order is not intended to immunize wrongdoers from the consequences of their actions." Staff indicates that Lissik's testimony is the only testimony filed in this case that establishes the actual damage inflicted by what it describes as Missouri Pipeline's and Missouri Gas' misconduct in favoring an affiliate over other shippers. Staff is reminded that it, not an intervening party, is responsible for proving all elements of its complaint. In any event, if Staff is able to prove its allegations of tariff violations and that refunds are appropriate, the Commission presumes that such refunds would be paid to all shippers on the pipeline, not just to the three municipalities represented by the Municipal Gas Commission, whose alleged damages were calculated by Ms. Lissik. Such refunds can be calculated with or without the testimony of Ms. Lissik.

Finally, Staff asserts that the information that was disclosed to Ms. Lissik should not be protected as highly confidential. As previously indicated, if any party believes that

information has been mislabeled as highly confidential, they may bring that matter to the Commission's attention by filing an appropriate motion.<sup>6</sup> They may not, however, simply decide for themselves to give that information to a witness who is not entitled to see that information by the terms of the Commission's protective order.

**IT IS ORDERED THAT:**

1. The rebuttal testimony filed by Eve A. Lissik on behalf of the Municipal Gas Commission of Missouri is struck.
2. Eve A. Lissik shall not be allowed access to information designated as highly confidential pursuant to the protective order previously entered in this case.
3. This order shall become effective on November 3, 2006.

**BY THE COMMISSION**



Colleen M. Dale  
Secretary

( S E A L )

Davis, Chm., Murray, Clayton and Appling, CC., concur  
Gaw, C., dissents, dissent to follow

Woodruff, Deputy Chief Regulatory Law Judge

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<sup>6</sup> Staff has recently filed a motion regarding the possible reclassification of some of the information in this case. That motion is pending before the Commission.