

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

Staff of the Missouri Public Service Commission,)	
)	
)	
Complainant,)	
)	
v.)	Case No. GC-2006-0491
)	
Missouri Pipeline Company, LLC;)	
Missouri Gas Company, LLC;)	
)	
Respondents.)	

**RESPONDENTS' MOTION FOR CONTINUANCE
AND EXPEDITED TREATMENT**

COME NOW Respondents Missouri Pipeline Company and Missouri Gas Company (hereafter "MPC" and "MGC") and move to continue this matter and for expedited treatment. Respondents' request is due to Staff's surprise additions of at least seven new witnesses and one new felony criminal count to this proceeding. Staff plans to use four of its new witnesses to testify on the issue of destruction of documents to prove felony criminal liability. None of Staff's surprise witnesses have prefiled testimony in this matter, and therefore no opportunity for discovery has been afforded Respondents.. Staff's surprise tactics grossly violate Respondents' due process and constitutional rights and totally ignore all individual witnesses' constitutional rights to protect themselves from self-incrimination, the right to an attorney, and the right to due process to reasonably defend themselves from Staff's criminal allegations. In support of its Motion, Respondents state as follows:

1. The evidentiary hearing in the matter is scheduled for December 13-15, 2006.

2. On December 4, 2006, Staff filed its Issues List and Order of Cross-Examination (hereafter "Staff's Issues List"). In requesting and receiving its extension to its Issues List, Staff did not mention adding live witnesses who had not provided prefiled testimony, nor its intention to add a count to its complaint.

3. In its Issues List, Staff lists three additional witnesses who have been deposed but have not filed pre-filed testimony: Mr. Allen Simpson, Mr. David (B.J.) Lodholz, and Mr. Dave Wallen.

4. On December 5, 2006, the Commission issued an Order Regarding Staff's Motion for Sanctions suggesting that the Motion for Sanctions may be heard at the evidentiary hearing. The fact that Staff has added a new count, potentially criminal in nature, to its complaint, comes as a complete surprise to Respondents.

5. On December 6, 2006, a Prehearing Conference was held to discuss the three new witnesses and how this manner would proceed.

6. During this on-the-record pre-hearing conference, Staff indicated its intent to raise the issue of potential felony criminal liability for destruction of public utility documents, thus raising the specter that any testimony in the evidentiary hearing may be used in a later criminal proceeding against Respondents and/or their employees in their individual capacities. Staff also announced its intent to call as many as five additional witnesses not identified in its prior filing to present live direct testimony addressing alleged criminal conduct and additional rebuttal testimony to evidence that may come to light as a result of cross examination of Respondents' witnesses.

7. In light of Staff's felony claim of criminal liability, the evidentiary hearing should not proceed on December 13th. Respondents' counsel must now advise Respondents, its employees, and witnesses that they should seek separate counsel to evaluate the implications of Staff's assertion of criminal activity.

8. Respondents' employees cannot possibly obtain criminal counsel on this short notice, nor should they. Moreover, there is not enough time for any newly retained counsel to read and understand the case and the facts because there is not enough time to do so.

9. Respondents have no control or knowledge of the course of action their witnesses will take after evaluating the implications of Staff's new allegations. However, Respondents are aware that the threat of criminal liability could lead them to invoke their Fifth Amendment rights against self-incrimination afforded by the United States Constitution during the evidentiary hearing. Respondents will be materially prejudiced in their ability to defend themselves on the five remaining counts contained in Staff's original complaint if its witnesses are forced to invoke their Fifth Amendment rights.

10. Respondents have had no cause to evaluate the issue of criminal liability until Staff's recent threat. The relationship between civil and criminal liability is complex, and preserving the rights of Respondents and their employees deserves thorough consideration when such issues are raised. Although Respondents vehemently deny any criminal liability, they and their witnesses will understandably need time to analyze the implications of Staff's potential criminal claims. In fact Respondents need to see Staff's allegations of criminal conduct with specificity, which to date, has not been forthcoming. Staff has utterly failed to provide notice or any prefiled evidence

explaining the factual basis of its claims despite having more than adequate opportunity to include the new allegations in its surrebuttal testimony. In the alternative, Staff could have requested modification of the procedural schedule to allow the opportunity to present additional prepared testimony on new issues. Moving forward with the evidentiary hearing before Respondents and its witnesses have been given an opportunity review the full factual basis for Staff's criminal allegations and how of its testimony in the hearing will be used in furtherance of such potential claims is futile.

11. Therefore, an evidentiary hearing should not commence until Staff has laid out the factual basis supporting its claims and Respondents have had time to consider its implications on the evidentiary hearing and respond accordingly. Respondents and their witnesses must have time to obtain individual counsel and determine the appropriate path to protect their rights. In the event that any witness does intend to invoke the Fifth Amendment, Respondents will also need time to substitute other witnesses who do not intend to invoke the privilege.

12. The introduction of the deposition testimony of Staff's three new witnesses and at least four new live witnesses presents significant due process issues. Due process and fundamental fairness require that parties have notice and fair opportunity to prepare a response. *See Moore v. Board of Education*, 836 S.W.2d 943, 947 (Mo. banc. 1992). Respondents were never informed that any additional witnesses would be called or other issues would be raised until the December 6, 2006, prehearing conference. Staff has further not requested leave of the Commission to amend its complaint. As a result, Respondents could not prepare for the new witnesses or conduct discovery or determine the necessity to subpoena the deponents to enable Respondents to rebut any of the

potentially newly offered testimony. Due process requires that Respondents have additional time to analyze the relevance and materiality of the newly raised issues and to propound appropriate discovery to prepare Respondents' rebuttal to the new testimony.

13. The announcement that Staff will present live direct testimony comes as a complete surprise to Respondents because it is contrary to the Commission's orders governing procedure and the norms of practice before this Commission. Per the Commission Procedural Schedule in this and every similar matter, the appropriate time to disclose issues and present testimony is through prepared Direct, Rebuttal, and Surrebuttal Testimony. Respondents must receive the same opportunity to conduct discovery and respond to Staff's disclosure of the intent to submit new additional testimony as it would have if the testimony was disclosed pursuant to proper practice before this Commission.

14. Staff is circumventing the Commission's Procedural Order and established practice. If Staff is allowed to inject testimony after all prefiled testimony is submitted and the opportunity for discovery is closed, the purpose of the Commission's Procedural Order and any prefiled testimony, which are intended to provide structure and fairness in the proceeding, will be defeated. If this practice is sanctioned, other parties can use this technique to ambush, surprise, and otherwise deprive parties of the benefit having prefiled testimony and preparing sufficient responses.

15. In this matter, if the hearing proceeds before Respondents have been allowed a fair opportunity to prepare a response and conduct the discovery to which parties are entitled, Respondents will have been denied due process. Notice at this late

date alone does not constitute due process and will not afford Respondents a fair opportunity to prepare and be heard at the evidentiary hearing.

16. If Staff's testimony relating to the new witnesses had been properly filed on its deadline to file Direct or even Surrebuttal Testimony according to the procedural schedule, Respondents would have had over a month to conduct discovery and carefully prepare and file additional responsive surrebuttal testimony. Staff is aware of the requirement to disclose evidence relied upon, as Staff properly attached other deposition excerpts to its Direct Testimony. *See* Staff Direct Testimony filed by Robert Schallenburg, September 6, 2006.

17. Staff should not be allowed to treat the deposition testimony of its new witnesses different from its prefiled testimony. As reflected by Staff's previous practice in this matter and Staff's consistent historical practice, Staff is aware of how to properly proceed. Regardless of how Staff characterizes it, the deposition testimony it is attempting to introduce should properly be filed as pre-filed testimony. Allowing Staff to proceed without prefiling this testimony would be a gross denial of due process and reversible error on appeal.

18. This Motion deserves expedited treatment since the evidentiary hearing begins in four business days. The hearing should not be held on December 13, 2006, in light of the fundamental procedural flaws injected by Staff's threat of criminal liability and new witnesses. Respondents intend to issue a round of data requests as expeditiously as possible to the four witnesses Staff has indicated it will call to testify regarding the destruction of documents issue. However, Respondents must know as soon as possible if the Commission intends to proceed with the evidentiary hearing so that Respondents

know how to direct their efforts within the next few days. Accordingly, Respondents request that the Commission rule on this Motion by December 8, 2006.

19. This matter has been extremely contentious throughout this proceeding. Respondents know that the evidentiary hearing will be no exception to this fact. Respondents request that the Commission refrain from adding fundamental due process flaws to the already contentious proceeding when such defects could be corrected by directing Staff to proceed with the fair process of pre-filing testimony as required by the Commission's Procedural Order.

WHEREFORE, Respondents respectfully request that the Commission continue the hearing dates in this matter and expedite its ruling on this Motion to allow Respondents to:

A. Conduct discovery in response to the new allegations and testimony, including production of documents, depositions, and data requests, particularly with respect to the new witnesses; and

B. Notify Respondents' employees and allow them to determine whether to seek independent counsel and determine whether to invoke their Fifth Amendment right against self-incrimination.

Respectfully submitted,

LATHROP & GAGE, L.C.

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Attorneys for Respondents

Dated: December 7, 2006

CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the foregoing Respondents' Motion for Continuance and For Expedited Treatment has been transmitted by e-mail or mailed, First Class, postage prepaid, this 7th day of December, 2006, to:

*** Case No. GC-2006-0491**

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