

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

The Staff of the Missouri Public Service Commission,)
)
)
Complainant,)
)
v.)
)
Missouri Pipeline Company, LLC, and)
Missouri Gas Company, LLC,)
)
Respondents.)

Case No. GC-2006-0491

**MOTION TO VACATE ORDER DENYING
RESPONDENTS' MOTION FOR STAY
AND TO CONVENE EVIDENTIARY HEARING**

COMES NOW the Staff of the Missouri Public Service Commission ("Staff"), by and through counsel, pursuant to Section 386.390, RSMo 2000, and for its Motion to Vacate Order Denying Motion for Stay and to Set Evidentiary Hearing, states as follows:

1. On October 11, 2007, this Commission issued its Revised Report and Order herein, having withdrawn its original Report and Order, issued on August 28, 2007, in its Order Denying Respondents' Application For Rehearing, Modifying Report and Order in Response to Applications For Rehearing Filed By the Municipal Gas Association and AmerenUE, and Granting Clarification of October 4, 2007.
2. On October 19, 2007, Respondents timely filed their Application for Rehearing and their Motion for Stay and Suggestions in Support.
3. The Revised Report and Order became effective on October 21, 2007.

4. On October 23, 2007, the Commission denied both Respondents' Application for Rehearing and Respondents' Motion for Stay. That Order was designated as becoming effective on the very date of its issue.

5. While there is no difficulty with making an order denying an application for rehearing effective on the day of issue, the same may not be true of an order denying a motion for stay. Given that the writ of review procedure at § 386.510, RSMo, is the exclusive mechanism by which judicial review of a Commission order can be obtained, and that the mandatory prerequisite for such a writ is a timely application for rehearing, and that an application for rehearing is only timely if filed *prior* to the effective date of the Commission's order whose rehearing is sought, it follows that the Commission may be required to allow a reasonable interval between the issue date and effective date of an order denying a motion for stay so that the movant can seek rehearing as the first step in seeking judicial review. The Missouri Supreme Court drew the Commission's attention to this very principle as recently as October 30, 2007, in *State ex rel. Office of the Public Counsel v. Public Service Commission of the State of Missouri*, 2007 WL 3147289 (Mo. banc 2007).

6. For this reason, the Commission should – at the very least – vacate the portion of its order of October 23 that denied Respondents' motion for a stay and issue a new order denying Respondents' motion for a stay, but this time effective ten days after issue. The Commission should not, however, vacate the portion of its order of October 23 that denied Respondents' application for

rehearing. The Commission's authority to do this is found at § 386.490.3, RSMo 2000, which provides:

Every order or decision of the commission shall of its own force take effect and become operative thirty days after the service thereof, except as otherwise provided, **and shall continue in force either for a period which may be designated therein or until changed or abrogated by the commission**, unless such order be unauthorized by this law or any other law or be in violation of a provision of the constitution of the state or of the United States.

(Emphasis added.) The cited language expressly and unmistakably authorizes the Commission to change or abrogate a previously-issued order, even after it has become effective.

7. Staff believes that the Commission should, however, go further. In support of its Motion for Stay and Supporting Suggestions, Respondents stated that "If this Commission fails to stay the effect of its Report and Order, it is likely that the Respondents will be irreparably harmed." This is a serious allegation and, if true, one worthy of careful consideration. In further support of its motion, Respondents filed the affidavit of David J. Ries, who on his oath stated that the economic effect of the Revised Report and Order "will ultimately render Respondents insolvent." Mr. Ries made other statements under oath, as follows:

- a. The Adjusted Rates are not economically viable for Respondents.
- b. The Adjusted Rates provide a negative return on capital.
- c. The Adjusted Rates will not allow for reservations out of income for surplus and contingencies.
- d. The Adjusted Rates will deplete and immediately exhaust

Respondents' reserves.

e. The Adjusted Rates will not allow Respondent to pay interest on its senior secured debt.

f. The Adjusted Rates will not allow Respondent to pay the minimum principle [*sic*] repayment on its senior secured debt.

g. The Adjusted Rates will not allow Respondents to pay currently assessed property taxes due December 31, 2007.

h. The Adjusted Rates will not allow Respondents to continue operations as they will not be able to pay employees which are required to comply with minimum operating standards established by the Department of Transportation.

8. Although Staff believes that the factual allegations set out in Mr. Ries' Affidavit are not actually true, Staff nonetheless urges the Commission to convene an evidentiary hearing on Respondents' Motion for Stay to allow Respondents an opportunity to adduce evidence showing why the public interest would best be served by granting the requested stay. In particular, Staff looks forward to an opportunity to examine Mr. Ries, under oath, on his Affidavit.

9. The evidentiary hearing should be convened on an expedited basis, as is appropriate given the serious nature of Mr. Ries' allegations.

10. Staff further suggests that the Commission's order on Respondents' Motion for Stay, whatever that order may be, would be more defensible if based upon findings of fact and conclusions of law made upon a record developed at an evidentiary hearing.

11. The Commission's order should include these Ordered Paragraphs:

That the Commission's Order of October 23, 2007, is hereby vacated to the extent that it denied Respondents' Motion for Stay.

That the Commission shall convene an evidentiary hearing on Respondents' Motion for Stay at its offices in Jefferson City, Missouri, on [DATE] at [TIME], Room [LOCATION], where Respondents' shall have the opportunity, and the burden, of adducing evidence showing why the Commission should stay its Revised Report and Order.

WHEREFORE, Staff prays that the Commission will issue its Order vacating the portion of its order of October 23 that denied Respondents' Motion for a Stay and setting an evidentiary hearing, on an expedited basis, on Respondents' Motion for a Stay, or, alternatively, issue a new order denying Respondents' Motion for a Stay, but this time effective ten days after issue; and grant such other and further relief as is just in the circumstances.

Respectfully Submitted,

/s/ Kevin A. Thompson

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Certificate of Service

I hereby certify that copies of this Motion have been mailed with first-class postage, hand-delivered, transmitted by facsimile, or transmitted via e-mail to all counsel and/or parties of record this **5th day of November, 2007**.

/s/ Kevin A. Thompson