

**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 and)	
Missouri Gas Company, LLC)	
)	
Respondents.)	

**STAFF’S RESPONSE TO RESPONDENTS’ MOTION
FOR CONTINUANCE AND EXPEDITED TREATMENT**

COMES NOW the Staff of the Missouri Public Service Commission, by and through the Commission’s General Counsel, and hereby urges the Commission to deny the continuance now belatedly sought by Respondents in that the same is merely a delaying tactic and is intended only to frustrate this Commission in the discharge of its regulatory responsibility. In further opposition to Respondents’ Motion, Staff states:

1. On December 5, 2006, this Commission issued its Order Regarding Motion for Sanctions for Destruction of Documents and stated therein (at p. 3) that “Staff’s Motion for Sanctions for Destruction of Documents will be taken up at the evidentiary hearing, and the parties will be allowed to present additional live direct testimony on that question.” Thus, the Commission has already considered the matter and determined that additional witnesses will be heard.

2. Respondents raise several points in their Motion of December 7, 2006, none of which have any merit:

A. The Respondents claim (at pp. 1 and 2) unfair surprise. What surprise? Staff filed its Motion for Sanctions for Destruction of Documents on November 14, 2006. On the same day, the Commission ordered that any response to Staff's Motion be filed by November 20. Respondents timely filed their Response, stating (at p. 1) that Staff's Motion "is without merit, is prejudicial, and seeks a remedy for actions that did not occur." Respondents then described their efforts to provide the documents requested by Staff, finishing with the categorical statement (at p. 2), "There has been no intentional destruction of documents as Staff attempts to lead this Commission to believe." It is noteworthy that Respondents *never* state that additional time is necessary to investigate Staff's allegations. Instead, Respondents assert, without equivocation, that the conduct charged by Staff has simply not occurred. Therefore, it is difficult to understand why Respondents are now unable to go to hearing on Staff's allegations. Presumably, their categorical denials had a factual basis – why cannot those persons repeat those denials under oath, subject to confrontation and cross-examination?

B. Respondents claim (at pp. 1 and 5) a "gross" denial of due process. What denial? Staff has moved for relief on the basis of certain allegations and Respondents have denied the allegations. Motions and responses are filed all the time in Commission proceedings as well as in the courts. Now, at hearing, Staff will seek to prove its allegations, subject to Respondents' right to confront and cross-examine Staff's witnesses. This is the very essence of due process and cannot be a denial of it.

C. Respondents claim that Staff has added “one new criminal count to this proceeding.” How could that be? The Commission has no criminal law jurisdiction and Staff has not recently filed any pleading seeking leave to amend its Complaint. What Staff *has* done, as a matter of fairness, is to point out to counsel for Respondents that it is a felony, under Section 386.560, RSMo, to “willfully destroy” the records of any “corporation, person or public utility governed by the provisions of . . . chapter [386, RSMo.]” Given Mr. DeFord’s long-standing expertise as a practitioner before this Commission, it cannot seriously be suggested that the contents of Section 386.560, RSMo, were previously unknown to him. It is equally fatuous to suggest, as Respondents do (at p. 1), that holding a hearing on Staff’s Motion will somehow abridge their right to not incriminate themselves. Section 386.470, RSMo, provides immunity from prosecution to witnesses in Commission proceedings:

No person shall be excused from testifying or from producing any books or papers in any investigation or inquiry by or upon any hearing before the commission or any commissioner, when ordered to do so by the commission, upon the ground that the testimony or evidence, books or documents required of him may tend to incriminate him or subject him to penalty or forfeiture, but no person shall be prosecuted, punished or subjected to any penalty or forfeiture for or on account of any act, transaction, matter or thing concerning which he shall under oath have testified or produced documentary evidence; provided, however, that no person so testifying shall be exempt from prosecution or punishment for any perjury committed by him in his testimony. Nothing herein contained is intended to give, or shall be construed as in any manner giving unto any corporation immunity of any kind.

D. Respondents complain (at pp. 1 and 2) that Staff’s additional witnesses on the spoliation issue have not prefiled testimony. How could they? The spoliation issue only arose on November 14, long after the deadline for Staff’s

Direct Testimony. As for a discovery opportunity, Staff has already noted that Mr. DeFord's November 20th Response to Staff's Motion does not state that any additional interval for investigation or discovery is needed; instead, it categorically denies Staff's allegations. Obviously, Respondents already have all they need to defend against Staff's Motion.

E. Respondents claim (at p. 5) that the presentation of live direct testimony "is contrary to the Commission's orders governing procedure and the norms of practice before this Commission." How can that be, given the Commission's Order of December 5? That Order states (at p. 3), "Staff's Motion for Sanctions for Destruction of Documents will be taken up at the evidentiary hearing, and the parties will be allowed to present additional live direct testimony on that question." Not only is the contemplated procedure *not* a violation of any Commission order, it has been specified in a Commission order.

F. Respondents claim (at p. 6) that Staff may not use depositions that have not been prefiled like prefiled testimony. Depositions may be used in Commission proceedings in the same manner as in circuit court. Section 536.073(1), RSMo.; Rule 4 CSR 240-2.090(1). The rule governing their use in circuit court is as follows (Supreme Court Rule 57.07(a)):

Any part of a deposition that is admissible under the rules of evidence applied as though the deponent were testifying in court may be used against any party who was present or represented at the taking of the deposition or who had proper notice thereof. Depositions may be used in court for any purpose.

Respondents were present at the depositions in question. Mr. DeFord is a competent and qualified litigator and certainly knows the above-cited Supreme

Court Rule. Because Respondents were present at the depositions and already know what they contain, they need not be prefiled. Testimony is prefiled in Commission proceedings in order to provide notice to all interested parties. And, the Order Establishing Procedural Schedule, issued on September 5, 2006, sensibly does not require the prefiling of depositions. Any use of a deposition in Commission proceedings in the same manner that the deposition could be used in circuit court is hardly a due process violation and is certainly not reversible error.

3. Respondents seek only to avoid trial of this matter in the hope that delay will be beneficial to them. None of their arguments for a continuance are at all meritorious. However, should the Commission be persuaded by Respondents' Motion, Staff suggests that, rather than delay the hearing of Staff's Complaint next week as has long been scheduled, the spoliation issue could be bifurcated and set for hearing separately, at a later date. In this way, Respondents' concerns would be fully alleviated.

WHEREFORE, Staff prays that the Commission will deny Respondents' Motion for Continuance and grant such other and further relief as is just in the circumstances.

Respectfully submitted,

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Certificate of Service

I hereby certify that copies of the foregoing have been mailed, hand-delivered, transmitted by facsimile or emailed to all counsel of record on this **8th day of December, 2006.**

/s/ Kevin A. Thompson