

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

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

APPLICATION FOR REHEARING

COMES NOW, the Municipal Gas Commission of Missouri (“MGCM”), pursuant to Section 386.500 RSMo and 4 CSR 240-2.160 of the Commission’s Rules of Practice and Procedure, and for its Application for Rehearing, respectfully states as follows:

I. INTRODUCTION

1. On October 6, 2006, MGCM filed the Rebuttal Testimony of Dr. Eve Lissik. The testimony was designed to provide the Commission with a quantification of damages suffered as a result of Respondents’ offering discriminatory rates to their marketing affiliate. In essence, MGCM’s testimony provided validation that Staff’s Complaint was not merely an academic undertaking, but resulted in real damages to pipeline shippers.

2. On November 3, 2006, the Commission issued its Order Granting Respondent’s Motion to Strike Testimony. In that Order, pursuant to a Motion by Respondents in this proceeding, the Commission struck the rebuttal testimony filed by

Dr. Lissik on behalf of MGCM. As a result of the Commission's Order, MGCM harbors concerns regarding two suggestions that necessarily derive from the Commission's Order. First, MGCM is concerned that the Commission has found that MGCM has violated the protective order by disclosing highly confidential information to its outside expert witness. Second, MGCM is concerned with any Commission finding, explicit or implicit, that MGCM and the Missouri Joint Municipal Electric Utility Commission ("MJMEUC") are affiliated entities. As a result of these two errors MGCM finds itself compelled to seek rehearing of the Commission's Order.¹

3. By way of background, the Commission's Protective Order permits Highly Confidential information to be viewed by "outside experts who have been retained for the purpose of this case".² The Protective Order notes that outside expert witnesses "shall not be employees, officers or directors of any of the parties in this proceeding."³ In the case at hand, MGCM retained the services of Dr. Lissik, an employee of MJMEUC, a separate entity created under statutory authority. As an employee of a separate legal entity, Dr. Lissik is not an "employee, officer or director" of MGCM and therefore falls within the Commission's definition of "outside expert witness". Therefore, MGCM believed, and continues to believe, that Dr. Lissik was permitted to review highly confidential testimony. Consistent with this belief, MGCM had Dr. Lissik review the protective order and file a nondisclosure agreement requesting review of highly confidential information. As will be shown in this pleading, the

¹ MGCM is also mindful of Section 536.083 which may require a change in regulatory law judge in the event that the Commission grants rehearing immediately.

² Standard Protective Order at §C

³ *Id.*

Commission's Order applies a new and arbitrary standard for the disclosure of confidential information to MGCM's outside expert witness.

II. STANDARD

4. Article V, Section 18 of the Missouri Constitution provides that:

All final decisions, findings, rules and orders on any administrative officer or body existing under the constitution or by law, which are judicial or quasi-judicial and affect private rights, shall be subject to direct review by the courts as provided by law; and such review shall include the determination whether the same are authorized by law, and in cases in which a hearing is required by law, whether the same are supported by competent and substantial evidence upon the whole record. (emphasis added).

5. In addition, the Missouri Courts have reviewed Commission decisions to determine whether such decisions are arbitrary and capricious. "[I]f this Court finds that the order is lawful, then it determines whether the order is reasonable. In so doing, this Court determines whether the order was supported by substantial and competent evidence on the whole record, whether the decision was arbitrary, capricious, or unreasonable, or whether the PSC abused its discretion."⁴

6. As will be shown in this Application, the Commission's Order is: (1) is unreasonable in that it is not based upon competent and substantial evidence; (2) is arbitrary and capricious in that it applies a different standard for the dissemination of highly confidential information to MGCM outside experts than is stated in the Commission's June 22, 2006 Protective Order and relies upon a definition of affiliate that is contrary to Commission rules and regulations; (3) is unlawful in that it denies MGCM of rights guaranteed under Section 536.070 RSMo; and (4) is unlawful in that it violates

⁴ *State ex rel. Sprint Mo. Inc. v. Pub. Serv. Comm'n*, 160 S.W.3d 160, 164 (Mo. 2005) (citing to *State ex rel. AG Processing, Inc. v. Pub. Serv. Comm'n*, 120 S.W.3d 732, 734 (Mo. Banc 2003); *State ex rel. Mobile Home Estates, Inc. v. Pub. Serv. Comm'n*, 921 S.W.2d 5, 9 (Mo. App. W.D. 1996)). (emphasis added).

Section 536.090 RSMo. For all the reasons stated herein, the Commission should grant rehearing.

III. UNREASONABLE

7. In its Order, the Commission makes several findings that are not supported by “substantial and competent evidence on the whole record.” First, the Commission finds that “Lissik is an employee of an organization that is affiliated with a party.”⁵ Second, relying upon emails from 2002 that were attached to Respondents’ pleadings, the Commission finds that “Lissik is acting as an employee of a competitor, and not an outside expert.”⁶ Third, the Commission finds that “Ms. Lissik has been given inappropriate access to highly confidential information, which she incorporated into her rebuttal testimony.”⁷ Fourth, the Commission notes that “the only violation of the standard protective order that has been demonstrated in this case was committed by the Municipal Gas Commission.”⁸

8. It is important to note that, in making each of these findings of fact, *the Commission did not have any competent and substantial evidence on the whole of the record on which to base its findings of fact.* In the event that the Commission believed that it was necessary to make the findings contained in its Order prior to the evidentiary hearing scheduled to be convened on December 13, 2006, then the Commission should have promptly scheduled a hearing in order to allow the parties an opportunity to present competent and substantial evidence upon which the Commission could base its findings. Absent such a hearing and such evidence, the Commission’s Order is in direct violation

⁵ Order Granting Respondents’ Motion to Strike Testimony, issued November 3, 2006, at page 2.

⁶ Id. at page 3.

⁷ Id. at page 5 (emphasis added).

⁸ Id. at page 7.

of Article V, Section 18 of the Missouri Constitution. As such, the Commission should immediately grant rehearing in order to properly address the matters contained in Respondents' Motion to Strike.

IV. ARBITRARY AND CAPRICIOUS

9. On June 22, 2006, the Commission issued its Protective Order in this proceeding. That protective order provides that "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."⁹ The Commission's Protective Order continues on to note that "[o]utside expert witness shall not be employees, officers or directors of any of the parties in this proceeding."¹⁰

10. In striking the testimony of MGCM's expert witness, however, the Commission utilized a different standard from that expressed in its Protective Order and applied to the other parties to this proceeding. Specifically, while recognizing that Dr. Lissik is an employee of MJMEUC and therefore not an employee, officer or director of MGCM, the Commission appears to find that her employment with an "affiliated" organization "precludes her from being treated as an outside expert entitled to view highly confidential information."¹¹ The Commission's decision to limit the definition of "outside expert witness" as it applies to MGCM is clearly arbitrary and capricious.

11. As demonstrated in its November 2, 2006 pleading on this matter, MGCM and MJMEUC are distinct entities created under legislative authority codified in Section 386.700 et seq. Along with the Missouri Association of Municipal Utilities ("MAMU"), these entities undertake certain activities under a common trade name of MPUA. Again,

⁹ Order Establishing Protective Order, issued June 22, 2006, at §C.

¹⁰ Id. (emphasis added).

¹¹ Order Granting Respondents' Motion To Strike Testimony, issued November 3, 2006, at page 2.

it is important to understand that MPUA: (1) is not a legal entity, but merely a trade name; (2) does not exercise any common control over any entities, and, therefore, (3) can not cause the creation of an affiliated relationship between MJMEUC and MGCM.¹²

12. The practical effect of the Commission's determination would be to create an affiliation where one does not legally exist, based merely on the fact that separate entities have joined a common group. For instance, the Commission's new definition would prevent an outside expert from testifying on behalf of a party merely because they both belong to Touchstone Energy, Mid-American Regulatory Council, Missouri Professional Engineers, or even the same Chamber of Commerce. The Commission's Order drains the concept of "affiliate organization" of any useful meaning. While noting that "[n]early all major utilities have at least one affiliated company that is a separate legal entity", the Order fails to acknowledge that common ownership is the feature fundamental to their affiliate status, a factor clearly not present with the trade name MPUA.

13. Finally, the Commission's reliance upon Dr. Lissik's past work on behalf of MGCM can not cause her to be an "employee" of MGCM. The practical effect of such a strict interpretation would be to limit a party to utilizing a new expert in every single proceeding. The Commission is obviously very familiar with certain experts appearing on behalf of certain parties in multiple different Commission proceedings. The Commission's strained logic would create an "affiliate employee" relationship as of the date the expert first provided services to a party. Once deemed an "affiliate employee", that expert witness could no longer be considered an "outside expert", so as to prevent

¹² 4 CSR 240-40.015 defines an affiliated entity based upon the existence of common control. Clearly, given that MPUA is not a legal entity, but a trademark, it can not exercise control over any entity.

that witness from seeing highly confidential information in any subsequent proceedings. Certainly, this is not the situation the Commission was attempting to address. When confronted with the need for particular regulatory services, it is commonplace for any party to call upon experts it has previously retained.

14. The Commission's reliance upon the existence of a past work relationship or the participation in / operation under a common trade name strains any rational interpretation of the term "affiliate". As pointed out previously, the Commission's own rules look to the existence of common control in determining whether an affiliate relationship exists.¹³ The Commission's broadened interpretation in the instant proceeding, is arbitrary and capricious in that it is in direct conflict with the Commission's rules and previously promulgated Protective Order.

V. VIOLATION OF SECTION 536.070

15. Section 536.070 RSMo provides parties to a contested case with certain guaranteed rights. The rights contained in this section reflect fundamental notions of procedural due process. Specifically, Section 536.070(2) RSMo provides that "[e]ach party shall have the **right to call** and examine witness".

16. By striking the testimony of its expert outside witness, the Commission has violated Section 536.070(2) by denying MGCM the right to call its witness to testify at the scheduled December 13, 2006 evidentiary hearing. As such, the Commission should immediately grant rehearing.

¹³ 4 CSR 240-40.015(1)(A).

VI. VIOLATION OF SECTION 536.090

17. Section 536.090 RSMo provides that:

Every decision and order in a contested case shall be in writing, and, except in default cases or cases disposed of by stipulation, consent order or agreed settlement, the decision, including orders refusing licenses, shall include or be accompanied by findings of fact and conclusions of law. The findings of fact shall be stated separately from the conclusions of law and shall include a concise statement of the findings on which the agency bases its order. (emphasis added).

18. In its Order, the Commission provides a lengthy discussion of the issues presented by the Respondents' Motion as well as the various responses provided by the parties. Nevertheless, the Commission's Order fails to separately state the findings of fact and conclusions of law.

19. In addressing this statutory requirement the Missouri Supreme Court notes that such findings of fact:

must constitute a factual resolution of the matters in contest before the commission; must advise the parties and the circuit court of the factual basis upon which the commission reached its conclusion and order; must provide a basis for the circuit court to perform its limited function in reviewing administrative agency decisions; must show how the controlling issues have been decided, and that a mere recital or statement in chronological order of the events which transpired giving rise to the controversy is not sufficient.¹⁴

20. The Commission's Order violates Section 536.090 by failing to provide a statement of the findings of fact that are separate from the conclusions of law. This failure precludes a reviewing court from performing its duty of reviewing the Commission's decision.

¹⁴ *St. Louis County v. State Tax Commission*, 515 S.W.2d 446, 447 (Mo. 1974) (citing to *Iron County v. State Tax Commission*, 480 S.W.2d 65 (Mo. 1972)).

WHEREFORE, the Municipal Gas Commission of Missouri respectfully requests that the Commission issue its Order Granting Rehearing of its November 3, 2006 Order Granting Respondents' Motion To Strike Testimony.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "David L. Woodsmall", is positioned above a horizontal line. A vertical red line is located to the right of the signature.

David L. Woodsmall (MBE #40747)
Stuart W. Conrad (MBE #23966)
FINNEGAN, CONRAD & PETERSON, L.C.
428 East Capitol Avenue, Suite 300
Jefferson City, MO 65102-0148
Voice: 573-635-2700
Fax: 573-635-6998
Email: dwoodsmall@fcplaw.com

AND

Duncan E. Kincheloe (MBE #25497)
Missouri Public Utility Alliance
2407 West Ash Street
Columbia, Missouri 65203
Voice: (573) 445-3279
Fax: (573) 445-0680
Email: dkincheloe@mpua.org

**Attorneys for the Municipal Gas
Commission of Missouri**

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served the forgoing pleading by email, facsimile or First Class United States Mail to all parties by their attorneys of record as provided by the Secretary of the Commission.

A handwritten signature in black ink, appearing to read "David L. Woodsmall", is positioned above a horizontal line. A vertical red line is located to the right of the signature.

David L. Woodsmall

Dated: November 8, 2006