

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

Staff of the Missouri Public Service Commission,)	
)	
)	
Complainant,)	
)	
v.)	Case Nos. GC-2006-0378
)	and GC-2006-0491
Missouri Pipeline Company, LLC;)	
Missouri Gas Company, LLC;)	
)	
Respondents.)	

RESPONSE TO AMENDED MOTION TO DECLASSIFY

The Missouri Public Service Commission Staff has filed an amended a motion seeking to declassify highly confidential information disclosed by respondents in the above-styled cases. Staff requests the declassification in order to provide respondents' highly confidential information to "in-house" employees of AmerenUE and Laclede and, possibly, to include the information in filings made before the Federal Energy Regulatory Commission ("FERC"). The requested declassification should be denied because (A) the Commission has lost jurisdiction over the cases in which Staff seeks the declassification and (B) the asserted purposes for the declassification are unauthorized by statute or rule.

I. Staff's Pleading Is Deficient

A. Staff Cites No Authority for the Relief It Seeks

By rule, all pleadings filed before the Commission shall include "specific reference to the statutory provision or other authority under which relief is requested."¹ In the present motion, Staff fails to provide any such reference. This leaves respondents in the unfair position of

¹ 4 CSR 240-2.080(3).

speculating as to the Commission's authority to declassify respondents' highly confidential information, to disclose it to employees of AmerenUE and Laclede, and to include it in filings made before the Federal Energy Regulatory Commission. Staff's failure to comply with the Commission's rules warrants denial of Staff's motion.

B. The Scope of the Requested Declassification Is Unclear and Unauthorized by Commission Rules

It is unclear exactly what Staff is requesting. In its prayer for relief, Staff requests a "limited declassification" of respondents' highly confidential information, but the relevant Commission rule does not provide for "limited declassification," and the phrase is an oxymoron. Pursuant to the rules, information is either classified (as proprietary or highly confidential), or else it is not classified. Staff appears to be attempting to create a new classification, different than proprietary or highly confidential, which has not been provided for in the Commission's rules.

Respondents know of no lawful procedure by which the Commission may grant a "limited declassification," and respondents know of no Commission rule that would govern the use or misuse of information after a "limited declassification." Consequently, any attempt to execute a "limited declassification" is unauthorized.

II. The Commission Has Lost Jurisdiction in GC-2006-0378 and GC-2006-491

The procedural schedule in GC-2006-0378 was suspended on November 9, 2006, and the case was later dismissed. A tribunal lacks jurisdiction to issue orders in a case that has previously been dismissed. *See, e.g., State ex rel. Blake & Davis, LLC v. Thornhill*, 247 S.W.3d 590 (Mo.App. E.D. 2008). Because GC-2006-0378 has been dismissed, the Commission lacks jurisdiction to order the declassification sought by Staff in GC-2006-0378.

GC-2006-491 was fully and finally litigated at the Commission level, culminating in the issuance of a Revised Report and Order on October 11, 2007. That case is now subject to a Writ of Review issued on November 27, 2007 in Cole County Case No. 07AC-CC01081. The Writ of Review is currently pending. It is settled law that while review of a Commission order is pending before a circuit court, the Commission loses jurisdiction to enter modified, extended, or new orders in the case until such time as the judgment of the circuit court becomes final and the Commission regains its jurisdiction to act in a manner not inconsistent with the decision of the circuit court. *State ex rel. Missouri Cable Telecommunications Ass'n v. Missouri*, 929 S.W.2d 768, 772 (Mo.App. W.D. 1996). Because review of GC-2006-491 is pending in Cole County, the Commission lacks jurisdiction to order the declassification sought by Staff in GC-2006-491.

III. The Purpose for the Declassification is Unauthorized by Law

A. Staff Does Not Seek Declassification for the Purpose of Any Missouri PSC Case

Although Staff filed the present motion in PSC cases GC-2006-0378 and GC-2006-491, Staff makes clear in its motion that the purpose of the requested declassification is to assist its “investigation” in FERC Docket No. CP07-450, *MoGas Request for Authorization under Blanket Certificate* (the “FERC case”),² a federal administrative case concerning issues of interstate commerce, in which the Commission is merely an intervenor. Staff does not assert that the declassification is necessary, or even helpful, for the purposes of the cases in which it has been filed (GC-2006-0378 or GC-2006-491) and, as described above, neither case is currently active. Because there is no present activity or litigation in GC-2006-0378 or GC-2006-491, declassifying the information can serve no purpose in either case. The only apparent relationship

² Amended Motion at ¶ 6.

between the present motion and the cases in which it has been filed is that it was in these cases that Staff obtained the information that it now seeks to declassify.³

B. Staff Seeks Declassification for the Purpose of a Pending FERC Case

Staff makes no pretense that the motion to declassify is related to any exercise of the Commission's powers and duties under the Missouri Public Service Commission Law. Instead, Staff candidly explains that the declassification is for the purpose of the FERC case:

This information is necessary for Staff to complete its investigation in the Federal Energy Regulatory Commission (FERC) Docket Number CP07-450. . . because information included in the documents provides support for the actual nominations and deliveries on MoGas during days that Laclede has indicated MoGas could not deliver the gas it had nominated.⁴

Staff may need to include the recreated⁵ invoices in future FERC filings to demonstrate what customer is responsible for costs associated with the purported need for compression.⁶

In FERC Docket Number CP07-450 MoGas and Laclede have suggested there may be reliability issues concerning pipeline pressures and deliverability of gas to certain customers based upon alleged Panhandle Eastern Pipe Line Company pressure decreases on eleven days over a four year period. Staff questions whether the problem was on Panhandle Eastern or was the result of MoGas under-nominating deliveries which may have resulted in MoGas not being able to deliver all of the gas Laclede has nominated.⁷

In order to decide whether or not to support MoGas' contention it needs compression to assure reliability, Staff needs to verify specific information related to nominations and delivery of natural gas to Missouri LDC's transporting such gas through MPC/MGC during 2004-2005.⁸

³ Notably, Staff already has obtained in discovery both (A) the original invoices from AmerenUE and Laclede and (B) the reprinted invoices from respondents. It is unclear from Staff's motion why Staff does not simply compare the invoices itself and why it is necessary for Staff to declassify the invoices and produce them to respondent's adversaries when Staff could simply make the comparison itself.

⁴ Amended Motion at ¶ 6.

⁵ Respondents note that the invoices at issue were reprinted and that Staff's characterization of the invoices as "recreated" is misleading to the extent that it suggests that the invoices were the product of some imprecise, error-prone, or potentially fraudulent process of "recreation," when in fact the invoices were simply reprinted.

⁶ Amended Motion at ¶ 7.

⁷ Amended Motion at ¶ 11.

⁸ Amended Motion at ¶ 12.

In other words, Staff requests the declassification in order to “investigate” MoGas’ federal request that FERC approve compression on an interstate pipeline. But FERC has its own professional staff that is capable and authorized to investigate these issues. Furthermore, FERC has subpoena power and rules of discovery available, not just for itself, but for all intervening parties, just as this Commission has for its cases. Staff states that it needs these documents declassified so that it can show them to Laclede Gas and AmerenUE and possibly use them in the FERC docket. But AmerenUE and Laclede Gas are large and sophisticated public utilities fully capable of fighting their own battles. It strains credulity to suggest that they need the Staff of the Missouri Public Service Commission to protect their interests in this FERC docket. Indeed, Laclede Gas and AmerenUE are already party intervenors in FERC Docket Number CP07-450, have ample FERC discovery procedures available to them in that docket.

C. The Commission Has No Authority to “Investigate” FERC Cases

(1) **The Commission has limited, statutory powers.** Because it is purely a creature of statute, the Public Service Commission's powers are limited to those conferred by its enabling statutes, either expressly, or by clear implication "as necessary to carry out the powers specifically granted." *State ex rel. Utility Consumers' Council of Missouri, Inc. v. Public Service Commission*, 585 S.W.2d 41, 49 (Mo. 1979); *see also State ex rel. GS Technologies Operating Co., Inc. v. Public Service Com'n of State of Mo.*, 116 S.W.3d 680 (Mo.App. W.D. 2003). Neither convenience, expediency, nor necessity are proper matters for consideration in determining the scope of the commission’s statutory authority. *State ex rel. Utility Consumers' Council*, 585 S.W.2d at 49, quoting *State ex rel. Kansas City v. Public Service Comm'n*, 301 Mo. 179, 257 S.W. 462 (Mo. banc 1923).

(2) The Commission's limited powers do not extend to matters of interstate

commerce. The Commission's enabling statute expressly limits the Commission's powers to those that are "necessary or proper to enable it to carry out fully and effectually all the purposes of this chapter,"⁹ and the statute explicitly states that such purposes do not include matters of interstate commerce, such as the FERC case or MoGas' need for compression on an interstate pipeline regulated by FERC:

Neither this chapter, nor any provision of this chapter, except when specifically so stated, shall apply to or be construed to apply to commerce with foreign nations or commerce among the several states of this union, except insofar as the same may be permitted under the provisions of the Constitution of the United States and the acts of Congress.

§ 386.030, RSMo.

Finally, the investigatory power of the Commission with regard to public utilities is expressly limited to the investigation of violations of law:

[T]he commission shall make such inquiry in regard to any act or thing done or omitted to be done by any such public utility, person or corporation in violation of any provision of law or in violation of any order or decision of the commission.

§ 386.330.1, RSMo. This authority does not expressly or by clear implication extend to the investigation of allegations or issues in a regulatory filing lodged before FERC. Although it might be convenient or arguably necessary for the Commission to conduct an investigation in order to take an advocacy position in a FERC case, convenience, expediency, and necessity are not the standard.¹⁰ There is simply no statutory authority for the Commission to conduct the investigation proposed in Staff's motion.

⁹ RSMo. § 386.040.

¹⁰ See *State ex rel. Utility Consumers' Council*, *supra*.

Furthermore, there is no express statutory authority for the Commission to intervene in the FERC proceeding in the first instance, and such intervention into matters of interstate commerce—in addition to being expressly prohibited by § 386.030, RSMo.—is not by clear implication necessary to carry out any power specifically granted to the Commission. Once again, convenience, expediency, and even necessity are not relevant; the question is whether the legislature has specifically authorized the Commission to intervene and advocate before FERC on matters of interstate commerce. It has not.

(3) The Commission’s express authority to conduct joint federal investigations has not been invoked or triggered. The legislature has expressly authorized the Commission to conduct investigations in FERC cases, but under circumstances that do not exist in the present case. Such investigation is authorized only when conducted as a **joint investigation** with FERC and as an agent of FERC:

The commission may make joint investigations. . . in conjunction or concurrence with any. . . public utility or similar commission. . . [of] the United States of America. . . except that in the holding of such investigations. . . the commission shall function. . . as an agent of the United States of America. . . .

§ 386.210.7, RSMo.

Staff has not asserted that its investigation of the FERC case is a joint investigation conducted as an agent of the United State of America, and it appears from the pleadings in the FERC case that the Commission is an intervening party appearing *before* FERC in the case, not an agent acting jointly with FERC.

The inclusion of § 386.210.7 in the Commission’s enabling statute makes clear that the legislature considered and determined the circumstances under which the Commission is authorized to investigate a FERC case. Such circumstances are expressly described, and they do not exist in the present case. Accordingly, Staff’s proposed investigation is ultra vires.

Respondents challenge Staff to cite any provision of Missouri law by which the legislature conferred upon the Commission the power to conduct the FERC investigation proposed by Staff in its motion. Respondents submit that there is no such law.

IV. Conclusion

The Commission and its Staff have no express or implied statutory authority to conduct an investigation in an FERC docket other than as a **joint investigation**. The legislature has expressly empowered the Commission to participate in FERC investigations only as a joint investigator acting at the request of, and on behalf of, FERC. In the present case, FERC has made no such request, and thus the Commission is acting both unilaterally and unlawfully.

FERC and its Staff have the power to obtain any highly confidential information at issue if they deem the information to be relevant to the FERC case. Furthermore, intervenors AmerenUE and Laclede Gas have discovery rights as parties to the FERC docket. Under the circumstances, it is both presumptuous and in excess of the Commission's statutory jurisdiction for the Commission to conduct a separate and unilateral investigation into the substance of a pending FERC case. Rather than encourage and participate in an ultra vires investigation, the Commission should deny Staff's amended motion and allow the interested parties, AmerenUE and Laclede Gas to protect their interests as they see fit in the pending FERC docket

Respectfully submitted,

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ATTORNEYS FOR RESPONDENTS

CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the foregoing Response to Amended Motion to Declassify has been transmitted by e-mail this 1st day of August, 2008, to:

*** Case No. GC-2006-0491 and GC-2006-0378**

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