

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

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 Respondents' Motion for Reconsideration of the Commission's recent denial of Respondents' continuance request. In further opposition to Respondents' Motion, Staff states:

2. Respondents' Motion for Reconsideration raises nothing new. In

Paragraph 3, Respondents state that the purpose of the continuance is not delay, but “to allow the Commission to correct several Constitutional issues[.]” In Paragraph 4, Respondents again complain that Staff may seek to use depositions in a manner not anticipated by them: “Staff will use the depositions of its three new witnesses in a manner that undermines Staff’s obligations to prefile direct and surrebuttal testimony consistent with the Commission Procedural Order.” Respondents’ go on to complain that they “will be deprived of [their] fundamental right of confrontation under the Sixth Amendment of the United States Constitution.” Moreover, Respondents lament, “[t]his practice is not only inconsistent with every historical proceeding before this Commission, but violates Respondents’ fundamental right to cross-examine its accusers.”

3. Staff is dumbfounded that Respondents would suggest that the reliance by this Commission on procedures that are commonly used in the courts of this state would somehow deprive them of their fundamental rights. The law is that 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 the use of depositions in circuit court has recently changed; it is now 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.

Note that this is not a matter of the discretion of this Commission; it is the unalloyed and unmistakable command of the legislature. Exclusion by the presiding officer of

properly admissible evidence may well constitute reversible error. While Staff may not appeal, the Intervenors certainly can and there is no reason to suppose that they will not. Respondents were present at the depositions in question.

4. Respondents raise in their Motion for Reconsideration a formal objection to any use by Staff of depositions that have not been prefiled. The absurdity of Respondents' position reveals their desperation. Respondents were *present* at the depositions in question. Prefiling is thus not necessary because Respondents already have copies of those depositions – the contents of the depositions are well known to them and have been for months. Licensed attorneys are presumed to know the procedural rules and, consequently, Mr. DeFord's failure to cross-examine at those depositions was presumably his tactical choice. It is certainly not now cause to either grant a continuance or to exclude the depositions. In any event, the Commission's Procedural Schedule does not require the prefiling of depositions; neither does any Commission rule.

5. Respondents also repeat their concerns in view of the fact that the willful destruction of records, as Staff has charged in its Motion for Sanctions, may expose them to criminal sanctions. Staff responds that the law is what it is – the willful destruction of the records of a public utility has been a crime for many years; it is nothing new. Staff cannot prosecute it – that is within the discretion of a separate public official. Certainly, it cannot be grounds for a continuance that Respondents belatedly realize that the consequences of their conduct may be more serious than they previously believed. There is no criminal action pending. The Commission would have to find that willful destruction in fact occurred and then by majority vote, refer the matter

to the prosecuting attorney. None of those things has happened. Contrary to Respondents' unfounded fears, Staff cannot contact a law enforcement agency without specific prior authorization and direction from the Commission. As the Commission well knows, no such direction has been given.

6. Respondents complain that allowing the spoliation motion to be heard on December 13 is a denial of due process. They state, "Respondents have had not [sic] opportunity to conduct discovery or depose any of Staff's surprise witnesses." But Staff plans no surprise – every item of proof that Staff relies upon is already in the hands of Respondents and their lawyer. These items include: subpoenas duces tecum issued to Lodholz (January, 2006), Omega (March, 2006) and MPC (March, 2006); the deposition of David Ries taken on October 17 and 18, 2006; Exhibit 50 to Ries' deposition, which is a batch of invoices provided by Ries; the deposition of BJ Lodholz taken on July 17, 2006; Exhibit 4 to Lodholz' deposition, which is a batch of invoices obtained from customers of Omega; the affidavits of Wallen, Mertz, Hawkins, and Ries, provided by Respondents' counsel; documents provided by Mr. DeFord on December 6, 2006; documents obtained from Tortoise at the recent deposition of Terry Matlack; and admissions against interest by employees of Respondents to Staff members Schallenberg, Fischer, Branum, and Oligschlaeger. All of these items are already well-known to Respondents.

7. Finally, Respondents complain that hearing the spoliation motion together with the case-in-chief "will be highly prejudicial to Respondents." Prejudicial how? Respondents do not explain just what the source of this prejudice will be. Staff has already explained that Respondents are in possession of all of the proofs on which Staff

intends to rely.

WHEREFORE, Staff prays that the Commission will deny Respondents' Motion for Reconsideration 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 **11th day of December, 2006**.

/s/ Kevin A. Thompson