

At a session of the Public Service Commission held at its office in Jefferson City on the 11th day of January, 2007.

Respondents.

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On December 13, 2006, during the course of an evidentiary hearing in this matter, the Presiding Officer admitted an affidavit of David (B.J.) Lodholz into evidence over the objections of the Commission's Staff and those of the Municipal Gas Commission of Missouri. The affidavit had been offered into evidence by the Respondents, Missouri Pipeline Company, LLC, and Missouri Gas Company, LLC. On December 20, Staff filed a motion asking the Commission to reconsider that evidentiary ruling. Missouri Pipeline and Missouri Gas filed a written reply to Staff's motion on January 2, 2007. This order denies Staff's motion for reconsideration.

The Commission's Staff filed a complaint against Missouri Pipeline Company, LLC, and Missouri Gas Company, LLC., on June 21, alleging that the companies have violated their tariffs in several respects. The Commission held an evidentiary hearing regarding that complaint on December 13, 14, and 15. Prior to that hearing, on November 14, Staff filed a motion asking the Commission to impose sanctions against Missouri Pipeline, Missouri Gas, and their President, David Ries, for the alleged destruction of documents important to the proof of Staff's complaint against Missouri Pipeline and Missouri Gas. After considering the written contentions of the parties, the Commission issued an order on December 5, one week before the start of the hearing, advising the parties that it would consider Staff's Motion for Sanctions for Destruction of Documents as part of the upcoming hearing. That order specifically ordered that the parties would be allowed to present additional live direct testimony on that question.

The Commission took up Staff's motion for sanctions at the start of the evidentiary hearing. Staff alleged that during his deposition, David (B.J.) Lodholz, a former officer of Missouri Pipeline and Missouri Gas, revealed that while he was employed by the companies, he kept paper copies of certain billing documents. Missouri Pipeline and Missouri Gas deny the existence of those paper documents and contend that the billing information that Staff seeks is available only in electronic form. Staff doubts the veracity of the recreated documents offered by Missouri Pipeline and Missouri Gas and contends that the Respondents have destroyed the documents referenced by Lodholz rather than turn them over in response to Staff's discovery requests.

David Ries testified at the hearing in opposition to Staff's motion for sanctions. During the course of his testimony, he referred to an affidavit allegedly signed by David

Lodholz, in which Lodholz confirms the Respondents' contention that the paper documents he kept in his office are not the documents that Staff seeks. Missouri Pipeline and Missouri Gas offered that affidavit into evidence as Exhibit 311. In opposing the admission of that exhibit, Staff pointed out that the affidavit does not contain a date indicating when it was signed. Staff and the Municipal Gas Commission of Missouri also objected that the affidavit was hearsay. The presiding officer overruled the objections and admitted Exhibit 311 into evidence, but limited that admission to the question of the destruction of documents motion.¹

In considering Staff's motion for reconsideration of the admission of Lodholz's affidavit, it is important to note that the affidavit is indeed hearsay evidence. It is an out-of-court statement, offered to prove the truth of the matter asserted. It does not fall into any recognized exception to the hearsay rule. The fact that Lodholz's out-of-court statement is in the form of an affidavit does not change its status as hearsay. This particular affidavit is not in proper form because it does not indicate the date when it was signed, but even if it were in perfect form, it would still be hearsay evidence.

Section 536.070(12), RSMo 2000 creates a procedure whereby affidavits may be introduced as evidence in an administrative contested case. That statute provides that affidavits may be admitted into evidence if no party makes a timely objection to their use as evidence. However, if a party makes a timely objection, as Staff did in this case, the affidavit may not be used, "except in ways that would have been permissible in the absence of this subdivision." Thus, the statute does not support the admission of the affidavit into evidence, but it does not preclude its admission in ways that would otherwise be

¹ Transcript Page 165.

permissible. The question then becomes, is the admission of the affidavit into evidence otherwise permissible?

There is no law that would preclude an administrative agency from admitting a hearsay document into evidence. Missouri courts have clearly indicated that “reception of hearsay or other inadmissible evidence [in an administrative hearing] does not dictate a reversal unless there is not sufficient competent evidence to sustain the decision.”² It is, however, equally clear that hearsay evidence, to which an objection has been made, cannot be utilized as competent and substantial evidence to support an administrative agency’s finding of fact.³ What then is the purpose of admitting the affidavit into evidence if it cannot be relied upon as competent and substantial evidence?

The key rationale for admitting the affidavit into evidence is that it was accepted into evidence for the limited purpose of permitting Missouri Pipeline and Missouri Gas to respond to Staff’s Motion for Sanctions for Destruction of Documents. Staff’s motion argued that Lodholz’s deposition testimony revealed that he had retained written documents that have not been turned over to Staff and which the Respondents indicate were destroyed in the normal course of business. The Respondents submitted written arguments, supported by unchallenged affidavits from some of their employees, to counter Staff’s argument. The Commission perhaps could have decided to grant or deny Staff’s motion for sanctions without hearing any further evidence. Instead, just a week before the start of the hearing, the Commission chose to allow the parties an opportunity to present additional direct testimony on that question at the evidentiary hearing. Unfortunately,

² Giessow v. Litz, 558 S.W.2d 742, 750 (Mo. App. 1977)

³ State ex rel. GS Technologies Operating Co. Inc. v. Pub. Serv. Comm’n, 116 S.W.3d 680, 690, (Mo App. 2003)

Lodholz was not called to testify at the hearing and his affidavit is the only evidence that has been presented to the Commission that could indicate Lodholz's views on Staff's interpretation of his testimony. The Commission would like to have that evidence, however flawed, available when it decides whether to grant Staff's Motion for Sanctions.

However, just because the affidavit will be in evidence before the Commission does not mean that the Commission will find the affidavit to be persuasive evidence. It will be up to the parties to argue, in their post-hearing briefs, the extent to which the Commission can or should rely on Lodholz's affidavit in deciding whether to grant Staff's Motion for Sanctions.

After considering the motion for reconsideration, the Commission finds that Staff has not provided sufficient reason to reconsider the Commission's order admitting the affidavit of David (B.J.) Lodholz into evidence as Exhibit 311. The motion for reconsideration will be denied.

IT IS ORDERED THAT:

1. Staff's Motion for Reconsideration is denied.
2. This order shall become effective on January 11, 2007.

BY THE COMMISSION

A handwritten signature in black ink, appearing to read 'Colleen M. Dale', written over a horizontal line.

Colleen M. Dale
Secretary

(S E A L)

Davis, Chm., Murray, Gaw, Clayton and Appling, CC., concur

Woodruff, Deputy Chief Regulatory Law Judge