

At a session of the Public Service Commission held at its office in Jefferson City on the 5th day of December, 2006.

Respondents.

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The Commission struck Lissik's testimony in response to a motion filed by the Respondents, Missouri Pipeline Company, LLC, and Missouri Gas Company, LLC. That motion alleged that Lissik had been given access to highly confidential information in violation of the Commission's protective order. After considering the written arguments of the parties, the Commission agreed that Lissik should not be allowed to view highly

confidential information, and since her testimony was based on highly confidential information, that testimony was struck.

The Municipal Gas Commission asks for rehearing of the Commission's Order Granting Respondents' Motion to Strike Testimony pursuant to Section 386.500, RSMo 2000 and Commission Rule 4 CSR 240-2.160. The statutory provision that allows for rehearing before the Commission is closely tied to subsequent provisions that set out the procedures for judicial review of Commission orders. The order that the Municipal Gas Commission asks the Commission to rehear is an interlocutory order, not a final administrative decision. As such, it is not subject to judicial review.¹ Therefore, rehearing of the Commission's order under Section 386.500 is not appropriate.

However, Commission Rule 4 CSR 240-2.160(2) allows for the filing of a motion for reconsideration of procedural and interlocutory orders. The Commission will treat the Municipal Gas Commission's application for rehearing as a motion for reconsideration.

The Municipal Gas Commission contends that the Commission should reconsider its order striking Lissik's testimony because it is unreasonable, arbitrary and capricious, and in violation of Sections 536.070 and 536.090 of the Missouri statutes. The Municipal Gas Commission argues that the Commission's order is unreasonable because in making its decision, the Commission has made findings of fact that are not supported by substantial and competent evidence on the whole record, allegedly violating the requirements of Article V, Section 18 of the Missouri Constitution. The Municipal Gas Commission contends that before ruling on the motion to strike Lissik's testimony, the Commission should have

¹ See. City of Park Hills v. Public Service Commission, 26 S.W.3d 401 (Mo. App. W.D. 2000); State ex rel. Riverside Pipeline v. Public Service Commission, 26 S.W.3d 396 (Mo. App. W.D. 2000).

promptly scheduled an evidentiary hearing for the purpose of collecting competent and substantial evidence upon which to base its decision.

Article V, Section 18 of the Missouri Constitution establishes the scope of judicial review of “final decisions, findings, rules and orders” of administrative agencies. That section requires that such administrative decisions be supported by competent and substantial evidence. However, as previously indicated, the order that the Municipal Gas Commission asks the Commission to reconsider is not subject to judicial review. The Municipal Gas Commission does not cite any provision of law that would require every interlocutory decision of the Commission to be supported by competent and substantial evidence on the whole record. As a practical matter, it is not possible for the Commission to schedule an evidentiary hearing every time it needs to rule upon a motion filed by a party. That is particularly true in this case, where the Staff’s complaint is rapidly moving toward a hearing.

The Municipal Gas Commission argues that the Commission’s order is arbitrary and capricious in that its witness, Eve Lissik, is an employee of the Missouri Joint Municipal Electric Utility Commission, and is not an employee of the Municipal Gas Commission. As a non-employee, the Municipal Gas Commission argues that she should have been allowed to review highly confidential information by the terms of the Commission’s protective order. In its order, the Commission concluded that the Missouri Joint Municipal Electric Utility Commission and the Municipal Gas Commission are affiliated entities and on that basis found that Lissik should not be allowed to review highly confidential information. The Municipal Gas Commission argues that it is not affiliated with the Missouri Joint Municipal Electric Utility Commission; rather the two entities merely undertake some

activities under the common trade name of the Missouri Public Utility Alliance. The Municipal Gas Commission suggests that if the Commission's definition of affiliated entities were applied in other contexts, it would create affiliated relationships among persons and companies merely because they happened to join the same trade organization, or even the same chamber of commerce.

The Commission explained its conclusion that Lissik was an employee of an affiliated organization in its order striking her testimony, and will not repeat that explanation in this order. The Commission will emphasize, however, that its conclusion about the existence of an affiliate relationship in this situation applies only to this particular situation and should not be taken to establish a new standard for the determination of affiliate status.

The Missouri Gas Commission argues that the Commission's order violates Section 536.070(2), RSMo, which provides that a party in a contested administrative proceeding has a right to call and examine witnesses. The Missouri Gas Commission contends that by striking Lissik's testimony, the Commission has denied it the right to call its witness at the upcoming evidentiary hearing.

The Commission has not denied the Missouri Gas Commission the right to call a witness at the hearing, rather the Commission has ruled that a particular witness is not entitled to review highly confidential information and has struck her testimony that relied on such information. The Commission's decision to enforce the terms of its protective order by striking the testimony of a particular witness does not violate Section 536.070(2).

After considering the motion for reconsideration, the Commission finds that the Missouri Gas Commission has not provided a sufficient reason to reconsider the Commission's order. The motion for reconsideration will be denied.

IT IS ORDERED THAT:

1. The Municipal Gas Commission of Missouri's Application for Rehearing is rejected.
2. The Municipal Gas Commission of Missouri's motion for reconsideration is denied.
3. This order shall become effective on December 5, 2006.

BY THE COMMISSION



Colleen M. Dale
Secretary

(S E A L)

Davis, Chm., Clayton and Appling, CC., concur
Gaw, C., dissents
Murray, C., absent

Woodruff, Deputy Chief Regulatory Law Judge