

Staff of the Missouri Public Service Commission,

Complainant,

v.

Missouri Pipeline company, LLC,  
Missouri Gas Company, LLC, Omega Pipeline, LLC, Mogas Energy, LLC,  
United Pipeline Systems, Inc., and  
Gateway Pipeline Company, LLC

Respondents.

Q. Do you know if this document, labeled Exhibit 12, is something that is regularly produced by anyone in the company?

A. I don't know.

Q. Did you maintain the attachments to the invoices in hard copy in your office?

A. Yes

Q. And how long were they kept?

A. Forever. I had the ones from when I started.

...

A. .... I started in July of '02.

The Respondents now claim these things do not exist. Contradicting Lodholz' testimony through self-serving affidavits prepared by persons other than Lodholz does not establish, as the Respondents suggest, a lack of intentional or willful conduct. Rather, Lodholz' admission coupled with the documents' inexplicable disappearance should carry the day. The Commission should take up this matter with the case at hearing and include this issue as one for determination after receiving evidence into the record. Since the Staff investigating the case and Mr. Ries have filed testimony for the Pipelines, this matter can be explored further at hearing and a decision can be based on evidence in the record.

2. The Commission should inquire into the whereabouts of Lodholz' documents and keep in mind the Respondents' and Mr. Ries' behavior since this case and GC-2006-0378 were filed: A. In response to the Staff's Complaint and discovery requests, the Pipelines filed for FERC jurisdiction in order to escape their legal obligations and commitments to the Commission; B. Once the business activities of Omega Pipeline Company were discovered by the Staff, the Respondents sought to change the appearance of their relationship with their affiliate, Omega, by selling it to another entity. Mr. Ries actively sought to prevent that entity, Tortoise, from cooperating with the Staff's investigation. The Staff can present this information

at an evidentiary hearing; and C. The Pipelines have repeatedly failed and refused to comply with the Staff's discovery attempts. One need only consider the number and frequency of discovery disputes in this case to surmise at what the Pipelines are hiding.

3. The Respondents suggest that the Staff will be entitled to sanctions for destruction of documents only if the Staff proves that the Respondents' "intentional or willful behavior" in destroying documents. In other words, they urge proof of a smoking gun in the form of an admission such as "I destroyed the documents" or discovery of the documents in the trash bin. But the standard for proof of intent is not so high as the Respondents hope. Destruction of evidence without a satisfactory explanation gives rise to an inference unfavorable to the spoliator. *Brown v. Hamid*, 856 S.W.2d 51, 57 (Mo. 1993). The law is well settled that the destruction of written evidence without a satisfactory explanation gives rise to an inference unfavorable to the spoliator. *Weir v. Baker*, 357 Mo. 507, 209 S.W.2d 253; *Griffith v. Gardner*, 358 Mo. 859, 217 S.W.2d 519.

### **The Facts**

4. Electronic spreadsheets were provided in response to the Staff's request for customer billing information on January 26, 2006. The spreadsheets were a surrogate for actual customer bills since the Staff was told that copies of actual customer bills were not retained by MPC/MGC. Upon receipt of actual customer invoices from several customers it was determined by the Staff that the spreadsheets provided by Mr. Ries contained inaccurate information. These spreadsheets could not be relied upon.

5. The customer invoices that Mr. Ries has provided the Staff for 2004 through the first quarter of 2006 are re-creations. The Staff has no confidence that the information re-created is accurate. The request for the Lodholz invoice face sheets is to verify the actual customer

billings to which refunds will be calculated. The customer invoice consists of two pages. The first page includes the billing summary with gas usage volumes, applicable rates and charges. The second page includes daily usage information. The Staff needs the first page data to verify gas usage and charges. The Staff understood from BJ Lodholz' deposition that he maintained copies of the first page of the customer invoices since he began his employment with MPC/MGC in 2002. The Staff requested copies of whatever customer invoice information that had been maintained by Mr. Lodholz.

6. There are around thirty customers between MPC/MGC. Each customer receives a two page bill each month. This results in a total of approximately 750 pages each year, about one and a half reams of paper, hardly voluminous.

7. The affidavits of the Respondent's office staff indicate that MPC/MGC customer invoices have been retained for the current calendar year. If this were the case, then MPC/MGC should have been able to provide copies of actual customer invoices since January 2005 rather than re-create invoices. In addition, the affidavits continue to represent that what Mr. Lodholz kept were "not the invoices in individual form that were sent to customers." The Staff understands the difference but none-the-less wants copies of the customer information that was maintained by Mr. Lodholz. The Staff would note that Mr. Ries did not sign an affidavit attesting that he has not destroyed or removed any documents in the files previously kept by Mr. Lodholz.

8. The Staff's discussion resulting in the MPC/MGC re-creation of 2004 through first quarter of 2006 customer invoices was premised upon there not being any copies in existence. After Mr. Lodholz' deposition, Staff learned the invoice face-sheets existed in fact but have mysteriously gone missing.

9. The Staff has verbally and in writing requested customer billing information since January 2006. The use of surrogates for customer billing information is only acceptable if accurate and the original information does not exist. Upon the disclosure in Mr. Lodholz's deposition that copies of the first page of MPC/MGC customer invoices had been retained since 2002, the Staff has requested that these copies be provided to verify customer usage and billing information.

10. The fact that Mr. Ries has provided inaccurate information regarding the MPC/MGC customer billing information has lead the Staff to seek copies of actual customer billing information to verify the actual gas usage and billing charges in order to calculate refunds. From an auditing perspective, the re-created billing information is of little value if it can not be validated through review of actual customer invoices. Because of the inaccuracies included in the initial MPC/MGC spreadsheets provided by Mr. Ries, the Staff is reluctant to place any reliance on Ries' re-created customer invoices. The Staff has been able to attain some customer invoices by requests made to customers. The copies maintained by Mr. Lodholz since 2002 providing the first page customer billing information should be provided to the Staff. Mr. Ries' insistence that documents not be provided, which the Staff can prove at hearing, indicates that discrepancies still exist between the created invoices and the actual invoices.

11. The Staff's audit of MPC/MGC must rely on actual source documents. The bank statements provided of MPC do not identify the source of each deposit so that it can easily be determined which customer has paid their bill. The deposits from Omega contain multiple customer payments. The information provided by MPC/MGC is not conclusive for purposes of determining refunds due to customers. If MPC/MGC had provided information as initially

requested the Staff would not have needed to request repeatedly in subpoenas and data requests this same information.

12. The Respondents' representations that Mr. Lodholz' records prior to 2006 contain only billing summaries is contrary to what Mr. Lodholz stated in his sworn deposition. Respondents' affidavits are interesting only in what they don't say. How are these affiants more knowledgeable about Mr. Lodholz' records than he was? If none of the affiants threw out Mr. Lodholz' records, who did? When? Why? Did anyone collect Lodholz files and move them? Who? Before removing Lodholz' files, were copies made? And where is Mr. Ries' affidavit addressing the disappearing documents?

WHEREFORE Staff prays that the Commission grant its Motion for Sanctions, or alternatively grant its motion after hearing, and such relief as is just and mete.

Respectfully submitted,

**/s/ Steven C. Reed**

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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 28th day of November, 2006.

/s/ Steven C. Reed

Steven C. Reed