

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

The Staff of the Missouri Public)	
Service Commission,)	
)	
Complainant,)	
)	
v.)	Case No. GC-2006-0491
)	
Missouri Pipeline Company, LLC; and)	
Missouri Gas Company, LLC,)	
)	
Respondents.)	

**PROPOSED FINDINGS OF FACT /
CONCLUSIONS OF LAW**

OF

**THE MUNICIPAL GAS COMMISSION
OF MISSOURI**

Stuart W. Conrad (MBE #23966)
David L. Woodsmall (MBE #40747)
3100 Broadway, Suite 1209
Kansas City, MO 64111
(816) 753-1122 voice
(816) 756-0373 facsimile
E-mail: stucon@fcplaw.com

**Attorneys for the Municipal Gas
Commission of Missouri**

February 26, 2007

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Missouri Gas Company, LLC,)	
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Respondents.)	

COMES NOW the Municipal Gas Commission of Missouri (“MGCM”), pursuant to 4 CSR 240-2.140(4) and the Commission’s January 31, 2007 Order Modifying Briefing Schedule, and respectfully submits its Proposed Findings of Fact / Conclusions of Law.

I. INTRODUCTION

As indicate in its Statement of Position as well as in its Initial Brief, MGCM only takes a position on Issue 3 and its various subparts. That is:

3. Did MPC and MGC provide transportation service to its affiliate, Omega, at a discounted rate and if so, should this rate become the maximum rate that MPC and MGC could charge for any of its non-affiliated customers for similar service?

Subissue (a): If the above issue is answered in the affirmative, should MPC and MGC issue refunds for overcharges?

Subissue (b): If the above issues are answered in the affirmative, should MPC / MGC’s current charges be reduced so that the rates charged to non-affiliated shippers are equal to the lowest rates charged to Omega.

While MGCM focused solely on this single issue, it continues to maintain that the Commission’s decision on the other issues presented by Staff in this case will have a positive or negative effect on the reliability and quality of service provided to shippers on

this pipeline as well as on the equality of treatment of both affiliate and non-affiliate shippers. As such, MGCM urges careful consideration of the issues presented by the Staff.

Given its affirmative position only on Issue 3, MGCM proposes the attached findings of fact / conclusions of law on that single issue and its various subparts. Obviously, the Commission will have to supplement this document with findings of fact / conclusions of law on the other issues that were litigated and presented to the Commission for decision.

Furthermore, MGCM notes that it continues, in the current document, to maintain the highly confidential designation of certain information related to affiliate discount rates. As such, this document will have a highly confidential as well as a public version. Needless to say, if these findings of fact / conclusions of law are adopted by the Commission, these rates will no longer be limited to the pipelines' affiliate, but will be made applicable to all shippers. Therefore, these discount rates will no longer be held as highly confidential. In this situation, the Commission will need to vote to disclose this information, under authority provided in Section 386.480 RSMo., and include such rates in the public version of its Report and Order.

WHEREFORE, MGCM respectfully requests that the Commission issue its Report and Order fully adopting the findings of fact / conclusions of law contained herein.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "D. Woodsmall", enclosed within a rectangular red border.

Stuart W. Conrad, MBE #23966
David L. Woodsmall, MBE #40747
428 E. Capitol Avenue, Suite 300
Jefferson City, MO 65101
(573) 635-2700
Facsimile: (573) 635-6998
Internet: dwoodsmall@fcplaw.com

**Attorneys for the Municipal Gas
Commission of Missouri**

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served the foregoing pleading by email, facsimile or First Class United States Mail to all parties by their attorneys of record as provided by the Secretary of the Commission.

A handwritten signature in black ink, appearing to read "David L. Woodsmall", is positioned above a horizontal line. A vertical red line is located to the right of the signature.

David L. Woodsmall

Dated: February 26, 2007

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Missouri Gas Company, LLC,)	
)	
Respondents.)	

REPORT AND ORDER

APPEARANCES

Lera Shemwell, Esq., Deputy General Counsel, and **Steven Reed, Esq.**, Litigation Counsel, Missouri Public Service Commission, Post Office Box 360, Jefferson City, Missouri 65102, for the Staff of the Missouri Public Service Commission.

Marc D. Poston, Esq., Senior Public Counsel, Office of the Public Counsel, 200 Madison Street, Suite 650, Jefferson City, Missouri 65102, for the Office of the Public Counsel and the public.

Paul S. DeFord, Esq. and Aimee D.G. Davenport, Esq., Lathrop & Gage, L.C., Suite 2800, 2345 Grant Boulevard, Kansas City, Missouri 64108, for Missouri Pipeline Company, LLC and Missouri Gas Company, LLC.

Stuart W. Conrad, Esq. and David L. Woodsmall, Esq., Finnegan, Conrad & Peterson, L.C. 428 East Capitol Avenue, Suite 300, Jefferson City, Missouri 65101 for the Municipal Gas Commission of Missouri.

Duncan E. Kincheloe, Esq., Missouri Public Utility Alliance, 2407 West Ash Street, Columbia, Missouri 65203 for the Municipal Gas Commission of Missouri.

Thomas M. Byrne, Esq., AmerenUE, 1901 Chouteau Avenue, St. Louis, Missouri 63166 for Union Electric Company d/b/a AmerenUE.

James B. Lowery, Esq. and Colly J. Durley, Esq., Smith Lewis, LLP., 111 South Ninth Street, Suite 200, Post Office Box 918, Columbia, Missouri 65205 for Union Electric Company d/b/a AmerenUE.

DEPUTY CHIEF REGULATORY LAW JUDGE: Morris L. Woodruff

LIST OF ISSUES

On or about December 1, 2006, the parties submitted a list of issues and statements of position for determination by the Commission. No parties have objected to that list of issues. In fact, the parties have utilized the same list of issues. Therefore, the Commission will articulate the list of issues as presented. The issues that the parties presented to the Commission are as follows:

1. Did MPC and MGC violate the terms of their tariffs and Commission affiliate transactions rules (4 CSR 240-40.016) by permitting Omega Pipeline Company to use confidential customer information in a discriminatory manner for each of Omega's contracts with customers served by MPC and MGC?

2. Did MGC and MPC violate their tariffs by transporting natural gas to Omega customers ** _____ ** without an executed transportation agreement?

3. Did MPC and MGC provide transportation service to its affiliate, Omega, at a discounted rate and if so, should this rate become the maximum rate that MPC and MGC could charge for any of its non-affiliated customers for similar services?

Subissue (a): If the above issues are answered in the affirmative, should MPC and MGC issue refunds for overcharges?

Subissue (b): If the above issues are answered in the affirmative, should MPC / MGC's current charges be reduced so that the rates charged to non-affiliated shippers are equal to the lowest rates charged to Omega.

4. Did MPC and MGC violate their tariffs by failing to report their offer of discounted transportation service to its affiliate, Omega, in its second quarter and third quarter 2003 reports to the Commission's Energy Staff?

5. Did MGC construct a lateral line for ** _____ ** to benefit its affiliate, Omega, without demanding reimbursement from either Omega or ** _____ ** in violation of its tariff?

6. Did MPC and MGC violate their respective tariffs by providing preferential terms of payment to their affiliate, Omega?

Furthermore, the Commission notes that Staff has raised an issue related to the Respondents alleged destruction of documents and the legal implications of that destruction under the spoliation doctrine. The documents alleged destroyed are MPC and MGC invoices to its affiliate, Omega Pipeline Company, from 2003. Recognizing that these documents relate to the issue of discounted affiliate rates, Issue 3 and its various subparts, the issue of spoliation and its legal consequences will be addressed therein.

FINDINGS OF FACT

Issue 3: Did MPC and MGC provide transportation service to its affiliate, Omega, at a discounted rate and if so, should this rate become the maximum rate that MPC and MGC could charge for any of its non-affiliated customers for similar services?

Subissue (a): If the above issues are answered in the affirmative, should MPC and MGC issue refunds for overcharges?

Subissue (b): If the above issues are answered in the affirmative, should MPC / MGC's current charges be reduced so that the rates charged to non-affiliated shippers are equal to the lowest rates charged to Omega?

1. The approved tariffs for MPC and MGC are largely identical.¹ Except for difference in rates and certain other items that are unique to each tariff, the terms and conditions of both tariffs appear to be identical. With regards to that section relevant to the immediate issue (Section 3.2(b)), that section is identical in both tariffs. Furthermore, that section is identical whether the service in question is firm transportation service or interruptible service.²

2. Section 3.2(b) contains certain provisions to ensure that the pipelines do not engage in discriminatory treatment in favor of its affiliate. Specifically, Section 3.2(b) provides:

¹ Exhibit 70 (Missouri Gas Company) and Exhibit 71 (Missouri Pipeline Company).

² Exhibit 70, Sheet No. 6 (Firm Provisional Transportation Service) and Sheet No. 16 (Interruptible Provisional Transportation Services).

(b) For all Transportation Agreements entered into by Transporter with any affiliate of Transporter after the effective date of tariff sheets having a Date of Issue of January 18, 1995, in those instances in which the term of the Agreement is greater than three (3) months:

(1) **The lowest transportation rate charged to an affiliate shall be the maximum rate that can be charged to non-affiliates.** Any renegotiation or other type of modification to the rates of any then-effective Transportation Agreement is to be considered an applicable Transportation Agreement for the purpose of setting this maximum rate for non-affiliates.³

3. It is undisputed and the Commission finds that, at all times relevant to this proceeding, Omega Pipeline Company was a marketing affiliate of Missouri Gas Company and Missouri Pipeline Company.⁴

4. The Commission finds, as more thoroughly set forth herein, that, commencing on July 1, 2003, the pipelines began providing transportation services to its affiliate, Omega Pipeline Company, at rates that were lower than those charged to other non-affiliated shippers. The Commission further finds that such affiliate discounts are in direct contravention of the provisions of Section 3.2(b) as set forth, *supra*.

**JULY 1, 2003 DISCOUNT ON COMMODITY RATE FOR
FIRM TRANSPORTATION SERVICE FROM MGC**

5. The evidence indicates and the Commission finds that on July 1, 2003, MGC began providing discounted firm transportation service to its affiliate in order for the affiliate to provide the City of Cuba with a bundled natural gas / transportation service.⁵ Recognizing that the tariff provides that “[t]he lowest transportation rate charged to an affiliate shall be the maximum rate that can be charged to non-affiliates”, the

³ Exhibit 70, Sheet No. 6; Exhibit 70, Sheet Nos. 16 and 17; Exhibit 71, Sheet No. 6; Exhibit 71, Sheet No. 16. (emphasis added).

⁴ See, Respondents’ Answer to Complaint, filed July 21, 2006, at ¶¶ 1, 2, and 3.

⁵ Exhibit 19, page 24.

Commission determines that the recreated invoices sent to Omega for MGC's transportation service are the best evidence of the "rate charged."

6. Invoices in the record indicate that Omega was provided a discount in the commodity rate from that reflected in the tariff. Specifically, Exhibit 67, Appendix E-1 reflects a recreated invoice, although labeled Omega Pipeline Company, from Missouri Gas Company to its affiliate. The contract number reflected on that invoice, MG-1009-TAF, indicates that billings are associated with the firm transportation of gas on the MGC pipeline to the City of Cuba.⁶ That invoice indicates that, while Omega was charged the full reservation charge of \$13.1767 / Dth, it was provided a discount from the tariffed commodity rate of \$0.9433 / Dth to a rate of ** _____ **.

7. The Commission finds that, pursuant to the terms of Section 3.2(b) of the MGC tariff, the ** _____ ** commodity rate, once charged to its affiliate, became the maximum rate that could be charged to all non-affiliates. Any action by MGC to charge a higher commodity rate would violate the terms of its approved tariff.

8. The Commission further finds that, while invoices for this transaction (the firm transportation of natural gas on the MGC pipeline to the City of Cuba on behalf of Omega) are only available commencing on January 1, 2004, this affiliate discount was initiated on July 1, 2003.

9. The Staff alleges that MGC destroyed all invoices for 2003. As a result of this destruction, MGC refused to provide even recreated invoices for the latter half of 2003. As a result, Staff asserts that, while it was unable to provide the only document (i.e., invoices) that could prove the actual commencement date of the affiliate discount, it is entitled to an evidentiary inference that such affiliate discount began on July 1, 2003.

⁶ Exhibit 24 clearly reflects that contract number MG-1009-TAF is for the provision of firm transportation service on the MGC pipeline to the City of Cuba.

10. The Commission finds that, under the doctrine of spoliation, Staff is entitled to an evidentiary inference in proving its case that the affiliate discount provided by MGC to Omega preceded the January 1, 2004 invoice. Given: (1) the requirement contained in 4 CSR 240-10.010 to maintain such records; (2) the apparent existence, following the commencement of this action, of these records (Lodholz deposition); (3) the failure of MGC to produce such records; and (4) the admission by its President that MGC has not typically retained copies of invoices, the Commission finds that these invoices were intentionally destroyed or not retained. Furthermore, the Commission finds that MGC has failed to provide a satisfactory explanation for the destruction of these invoices. Therefore, the Commission finds that the doctrine of spoliation is applicable. Given the applicability of the spoliation doctrine and MGC's failure to provide the invoices for the latter half of 2003, the Commission finds that the affiliate discount provided by MGC to Omega commenced simultaneous with the term of the Natural Gas Sales and Agency Agreement entered into between Omega Pipeline and the City of Cuba (Exhibit 22). As such, the Commission finds that the affiliate discount provided by MGC to Omega started on July 1, 2003.

11. In response to Staff's position on this issue, MGC argues that the **_____** commodity rate was not provided to its affiliate, but instead was provided to the City of Cuba. In support of this assertion, MGC directs the Commission to Exhibit 26, an alleged letter from the President of MGC to the mayor of the City of Cuba which allegedly implemented the **_____** commodity rate. The Commission finds that Exhibit 26 is of no probative value in that it was never executed and was likely created after the fact. In support of this finding the Commission notes that, unlike the other letter

agreements executed between MGC and various municipalities:⁷ (1) the agreement allegedly contained in Exhibit 26 was never signed by the mayor of Cuba; (2) the agreement allegedly contained in Exhibit 26 was not formatted to include the signature of the mayor of Cuba; and (3) the agreement was on the wrong letterhead.⁸ As indicated, given these numerous unexplained inconsistencies and MGC's obvious motivation to have the Commission believe that the discount was provided to Cuba and not to its affiliate, the Commission finds that Exhibit 26 is not authentic and is entitled to no probative value.

12. MGC also asserts that Omega was acting through an agency arrangement with the City of Cuba.⁹ Under MGC's argument, Omega merely acquires natural gas for the City of Cuba and then transports that gas using the transportation arrangements between the City of Cuba and the pipelines.¹⁰ At the time that Omega commenced service to the City of Cuba, Cuba did have transportation contracts with both MGC and MPC.¹¹

It is apparent, however, that the transportation agreements between the pipelines and the City of Cuba are not the actual agreements underlying the transportation of gas to the City of Cuba. Where the MGC / Cuba transportation agreement calls for Cuba to pay full tariff rates, the invoices sent to Omega under the alleged "host" agreement and on behalf of the City of Cuba reflect the commodity discount discussed, *supra*.¹² Therefore, MGC was clearly not charging Omega the rates provided for in the Cuba agreement, as would be appropriate in an agency relationship; rather, MGC was charging Omega the

⁷ Exhibits 25, 27 and 28.

⁸ See the Initial Brief of MGCM, pages 8-9, for a thorough discussion regarding the inconsistencies between Exhibit 26 and those agreements properly executed and reflected in Exhibits 25, 27 and 28.

⁹ MGC / MPC Initial Brief at page 23

¹⁰ *Id.* In its testimony and brief, MGC advances the theory that, while Omega provided Cuba a bundled service (natural gas and transportation), the transportation was provided under rates, terms and conditions contained in the "host" agreement between MGC and Cuba.

¹¹ Exhibit 23 (MPC / Cuba transportation agreement) and Exhibit 24 (MGC / Cuba transportation agreement).

¹² Exhibit 67, Appendix E.

commodity discount discussed, *supra*, under an unexecuted transportation arrangement between MGC and Omega. Recognizing that Omega was not charged the rates provided for in the MGC / Cuba transportation agreement, MGC's agency assertion is misplaced.

13. In a typical agency arrangement, the agent is a fiduciary to the principal.¹³ As a fiduciary, the agent's "obligation is to act only in the interest of their beneficiaries and to forego personal advantage".¹⁴ "In all matters connected with the agency, he is under a duty to act solely for the benefit of the principal."¹⁵ "The agent is under duty to act solely and entirely for the benefit of his principal in every matter connected with his agency."¹⁶ Consistent with the duty to act solely for the benefit of the principal, an agent who profits through the misuse or misappropriation of the principal's property is liable for the full profits obtained whether or not the property or the principal was harmed.¹⁷

14. In the case at hand, Omega was not acting as an agent for the City of Cuba. As mentioned, *supra*, Omega was not passing its transportation discount through to the City of Cuba. Rather, Omega was billing the City of Cuba a higher transportation rate and keeping the difference as earnings. This action is not consistent with that of a fiduciary relationship.

15. MGC also argues that "Omega has consistently paid the highest rates of any Shipper on the Pipelines' systems."¹⁸ In support of this claim, MGC presents the testimony of Christopher John.¹⁹ Mr. John undertakes a calculation that, based on the 25% load factor specified in the tariff, combines the reservation and commodity rates into

¹³ *State ex rel. Ford Motor Co. v. Bacon*, 63 S.W.3d 641 (Mo. 2002).

¹⁴ *The Law of Agency and Partnership*, Reuschlein, Harold Gill and Gregory, William A., 1990 (2d edition) at page 11.

¹⁵ *Id. State ex rel. Ford Motor Co. v. Westbrooke*, 12 S.W.3d 386 (Mo.App. 2000).

¹⁶ *The Law of Agency and Partnership*, Reuschlein, Harold Gill and Gregory, William A., 1990 (2d edition) at pages 125-126.

¹⁷ *Id.* at pages 131-132.

¹⁸ *Id.* at page 21; Exhibit 300, pages 25 – 27.

¹⁹ Exhibit 300.

a single volumetric transportation rate. Based upon his calculation, Mr. John claims that Omega is charged a combined transportation rate of **_____**. ²⁰ Accepting his calculation, it does appear on first blush that Omega is charged the “highest rates of any Shipper on the Pipelines’ system.” The record evidence and the thorough arguments presented by Staff detail two problems that clearly undermine Mr. John’s assertion. ²¹

16. First, Mr. John’s calculation reflecting the transportation rate for Omega is based upon the reservation and commodity rates reflected in the contract between MGC and Omega for transportation of gas only to Fort Leonard Wood. ²² It does not reflect the rates associated with the transportation of gas to customers other than Fort Leonard Wood. Given that Fort Leonard Wood is on the terminal end of the MGC pipeline, it is logical that Omega should be charged the highest rates of any Shipper for transportation of gas to Fort Leonard Wood. The rates reflected in the MGC / Omega contract are not, however, the rates used for billing Omega for transportation of gas to the City of Cuba. As indicated previously, the best evidence of the rates charged to Omega for transportation of gas to the City of Cuba is contained in the recreated invoices to Omega for MGC transportation service. ²³ As reflected in Exhibit 67, Appendix E, Omega is charged a combined volumetric transportation rate of **_____** for shipping gas to the City of Cuba. ²⁴ This affiliate rate is admitted by the pipelines to be the lowest rates on the system. ²⁵

²⁰ *Id.* at page 26.

²¹ Staff Reply Brief at pages 22-24.

²² Exhibit 41.

²³ Exhibit 67, Appendix E.

²⁴ $(\$13.1766 / \text{Dth}) * (12 \text{ months}) \div (365 \text{ days}) \div (.25 \text{ load factor}) = \$1.7328 / \text{Dth}$ reservation charge + ** _____ ** commodity rate = ** _____ ** total transportation charge.

²⁵ Exhibit 300, page 26. Mr. John admitted, under cross examination, that inclusion of the rates charged to the University of Missouri – Rolla (“UMR”) were not relevant to this comparison because UMR was charged for interruptible service. The gas transported to the City of Cuba was firm capacity.

17. Second, the rates upon which Mr. John relies, those contained in the MGC / Omega contract are clearly not applicable to transportation of gas to the City of Cuba because that MGC / Omega contract was not executed until February 1, 2005.²⁶ As mentioned previously, Omega commenced service to the City of Cuba on July 1, 2003. The transportation rates charged to Omega by MGC were clearly not those rates in the MGC / Omega contract that was still approximately two years from being executed. Rather, the rates charged to Omega for service to Cuba are those rates reflected in the invoices.²⁷

18. The Commission finds that the assertions made by MGC that “Omega has consistently paid the highest rates of any Shipper on the Pipelines’ systems” is inaccurate. Instead, the Commission finds that the rates charged to Omega for MGC transportation of gas to the City of Cuba was the lowest rate charged to any shipper on the MGC pipeline. Given the applicability of Section 3.2(b) of MGC’s tariff, the Commission finds that MGC should have charged all firm nonaffiliate shippers no more than a ** _____ ** commodity rate for service on or after July 1, 2003.

**SEPTEMBER 1, 2003 DISCOUNT ON COMMODITY RATE FOR
INTERRUPTIBLE TRANSPORTATION SERVICE FROM MGC AND MPC**

19. The evidence indicates and the Commission finds that on September 1, 2003, MGC and MPC began providing discounted interruptible transportation service to its affiliate in order for Omega to provide a bundled natural gas service to ** _____²⁸ Recognizing that both MGC and MPC’s interruptible tariff provides that “[t]he lowest transportation rate charged to an affiliate shall be the maximum rate that can

²⁶ Exhibit 41.

²⁷ Exhibit 67, Appendix E.

²⁸ Exhibit 32. The Commission notes that Exhibit 32 states that the term on this contract commenced on August 1, 2003. That said, by the signatures on the contract, it was not executed until August 19, 2003. Because of the unavailability of the 2003 invoices from MGC to Omega, it is impossible to know the exact date that transportation of gas for Omega to ** _____ ** actually began. That said, the Commission accepts Staff’s conservative date of September 1, 2003 as contained in Exhibit 19, page 24.

be charged to non-affiliates”,²⁹ the Commission determines that the invoices sent by to Omega for MGC and MPC interruptible transportation service is the best evidence of the “rate charged.”

20. By way of illustration, the Commission notes that Exhibit 35 is a recreated invoice sent by the pipelines to their marketing affiliate, Omega. Rather than send a separate bill to its affiliate for each of the affiliate’s customers, the pipeline charges are reflected on a single consolidated bill with detail which allowed the affiliate to determine the volumes delivered to each of the affiliate’s customers.³⁰ Specifically, while reflecting a total delivery of 11,077 Dth, Exhibit 35 reflects deliveries to three different customers of Omega. First, Exhibit 35, page 3 indicates that 2,003 Dth were delivered to the Willard Asphalt interconnect. Second, Exhibit 36, page 1 indicates that 5,565 Dth were delivered to the Cuba city gate on behalf of **_____. Finally, the remainder of 3,509 Dth was delivered for use by the City of Cuba.

21. On the invoice to Omega for pipeline transportation charges, all volumes were charged the same commodity rates: (1) a MGC commodity rate of **_____** and (2) a MPC commodity rate of **_____**. That said, while the gas to the City of Cuba was under firm transportation, the gas to both the Willard Asphalt interconnect and for **_____** was actually interruptible in nature. As indicated in the testimony of Staff witness Schallenberg, the transportation of gas to **_____** was clearly interruptible in nature. As Mr. Schallenberg indicates, **_____** has previously been directed by Mr. Ries to switch to propane when gas deliveries could not be assured. Thus, while the gas deliveries were piggy-backed on to the capacity reflected in the firm

²⁹ Exhibit 70, Sheet No. 16; Exhibit 71, Sheet No. 16.

³⁰ As Staff notes, “[b]y claiming the service was for the City of Cuba, Mr. Ries was able to conceal the discounted interruptible service being charged to Omega while certain other non-affiliated shipped paid full maximum tariff rates for interruptible service before any adjustment for transportation service provided to affiliates.” (Exhibit 67, page 9) (emphasis added)

transportation contract between the pipelines and the City of Cuba, the transportation service provided to **_____** was actually interruptible.³¹ Furthermore, as noted earlier, since interruptible service does not provide for the guaranteed capacity on the pipeline, there is no reservation charge. Therefore, the only charges reflected on the invoice for pipeline transportation charges to Omega related to transportation of gas to **_____** and Willard Asphalt is the MGC commodity rate of **_____** and the MPC commodity rate of **_____**.

22. As mentioned previously, the pipelines assert that gas was delivered to the City of Cuba using the transportation arrangements in place between the City of Cuba and the pipelines. This is the pipelines' alleged "host" theory. As the Commission has found, this theory breaks down because Omega was not charged the rate contained in the alleged "host" agreement, but instead was provided a significant discount. The flaws in the pipelines' "host" theory are further revealed when one recognizes that **_____** and Willard Asphalt did not have transportation arrangements with the pipelines that would serve as the "host" agreement for deliveries of gas by Omega to those customers. Rather, Omega attempted to piggyback those customers on to the capacity contained in the Cuba "host" agreement. The pipelines' logic is faulty because the Cuba arrangement did not allow for deliveries to other customers.³² Nor, did the Cuba arrangement or pipeline tariffs allow for the release of capacity by one customer to another customer, let alone by that customer's alleged agent.

23. The Commission finds that, Omega was charged a **_____** commodity rate by MGC and **_____** by MPC for interruptible transportation service to **_____**. Pursuant to the terms of Section 3.2(b) of the MGC and MPC tariffs,

³¹ Exhibit 67, page 9.

³² *Id.*

these interruptible rates, once charged to its affiliate, became the maximum rate that could be charged to all non-affiliates. Therefore, the Commission finds that, starting on September 1, 2003, the maximum interruptible that could be charged by MGC was ** _____ ** and the maximum interruptible rate that could be charged by MPC was ** _____ **. Any action by MGC or MPC to charge a higher commodity rate for interruptible service would violate the express terms of their approved tariffs.

FEBRUARY 1, 2005 DISCOUNT OF COMMODITY RATE
FOR FIRM TRANSPORTATION SERVICE FROM MGC
TO FORT LEONARD WOOD

24. The evidence indicates and the Commission finds that on February 1, 2005, MGC began providing discounted firm transportation service to its affiliate in order for Omega to provide natural gas service to Fort Leonard Wood.³³ Recognizing that MGC's firm transportation tariff provides that "[t]he lowest transportation rate charged to an affiliate shall be the maximum rate that can be charged to non-affiliates",³⁴ the Commission determines that the recreated invoices sent by MGC to Omega for this firm transportation service is the best evidence of the "rate charged."

25. Invoices indicate that Omega was provided a discount in the firm transportation commodity rate from that reflected in the MGC tariff for service to Fort Leonard Wood. Specifically, the MGC tariff provides for a \$0.55 / Dth commodity rate for firm transportation service to Fort Leonard Wood.³⁵ Invoices provided in the record, and expert testimony submitted by Staff, indicate, however, that Omega was provided a significant discount from the MGC commodity rate for firm transportation service to Fort Leonard Wood.

³³ Exhibit 19, pages 25-26.

³⁴ Exhibit 70, Sheet No. 6.

³⁵ Exhibit 70, Sheet No. 5.

26. Invoices contained in Exhibit 67, Appendix D show the rates charged to Omega by the pipelines for service to Fort Leonard Wood.³⁶ Those invoices clearly indicate that MGC charged Omega a commodity rate of **_____** for firm transportation service to Fort Leonard Wood. Of this discount, Omega passed **_____** on to Fort Leonard Wood in order to wrest that business from ONEOK.

27. The rates reflected in the invoices for transportation service provided by MGC to Omega for service to Fort Leonard Wood are significantly lower than the rates charged to the Fort's previous supplier, ONEOK. Exhibit 67, Appendix A contains invoices for transportation service from the pipelines to ONEOK for service to Fort Leonard Wood. These invoices reflect the fact that ONEOK was charged full transportation (reservation and commodity) rates on both MPC and MGC. It is readily apparent that, as a result of the commodity rate discount provided by MGC, Omega was able to wrestle the natural gas business of Fort Leonard Wood away from ONEOK. Interestingly, ONEOK appeared to suspect that something was amiss when Fort Leonard Wood moved its natural gas business to Omega. When confronted with a request by ONEOK for the pipelines' contract with Omega to serve Fort Leonard Wood, Mr. Ries misleadingly informed ONEOK that the Omega arrangement includes **_____

³⁶ Recognizing that these invoices were recreated, there are certain inconsistencies between the recreated bills and the actual bills. For instance, the invoices contained in Exhibit 67, Appendix D claim to start with February of 2004. Staff claims that this is erroneous because the bills were "recreated" and that the initial invoice is actually for February of 2005. The pipelines never challenged the authenticity of these invoices as for the period starting February 1, 2005. The Commission notes that Omega did not start providing natural gas service to Fort Leonard Wood until February 1, 2005. (Exhibit 37). Prior to this date, since Omega was not serving Fort Leonard Wood, the pipelines would not have been submitted an invoice for service to Fort Leonard Wood. Furthermore, the transportation agreements that Omega executed with MGC and MPC to serve Fort Leonard Wood were not effective until February 1, 2005. (Exhibits 38-42). As such, the Commission finds that, despite the error in the dates on the recreated invoices, these invoices are for the period commencing on February 1, 2005.

_____³⁷ Noticeably, Mr. Ries failed to divulge any information related to the commodity rate discount.

28. The Commission finds that, pursuant to the terms of Section 3.2(b) of the MGC tariff, the ** _____ ** commodity rate for firm transportation service on MGC to Fort Leonard Wood, once charged to MGC's affiliate, became the maximum rate that could be charged to all non-affiliates for service to Fort Leonard Wood. Any action by MGC to charge a higher commodity rate would violate the express terms of MGC's approved tariff.

**MAY 1, 2005 DISCOUNT ON RESERVATION RATE
FOR FIRM TRANSPORTATION SERVICE FROM MGC AND MPC**

29. The evidence indicates and the Commission finds that starting on May 1, 2005, MGC and MPC began providing discounted firm transportation service to its affiliate in order for Omega to provide a bundled natural gas service to ** _____ **. ³⁸ Recognizing that both MGC and MPC's firm transportation tariff provides that "[t]he lowest transportation rate charged to an affiliate shall be the maximum rate that can be charged to non-affiliates", ³⁹ the Commission determines that the recreated invoices sent by MGC and MPC to Omega for this firm transportation service is the best evidence of the "rate charged."

30. Invoices in the record indicate that Omega was provided a discount in the firm transportation reservation rate from that reflected in the MGC and MPC tariffs. Specifically, the MGC and MPC tariffs provide for a \$13.1766 / Dth and \$4.1381 / Dth reservation rate respectively. Invoices provided in the record and expert testimony submitted by Staff indicate, however, that commencing on May 1, 2005, MPC and MGC

³⁷ Exhibit 85. (emphasis added).

³⁸ Exhibit 19, page 26.

³⁹ Exhibit 70, Sheet No. 6; Exhibit 71, Sheet No. 6.

both **_____** their reservation charge associated with firm transportation service.⁴⁰

The Commission notes that in conjunction with the **_____** of the reservation charge, MGC did charge its affiliate the full commodity rate. As will be shown in the next section, however, MGC's charge of a full commodity rate was short-lived.

31. The Commission finds that, pursuant to the terms of Section 3.2(b) of the MGC and MPC tariffs, the **_____** reservation charge for firm transportation service, once charged to its affiliate, became the maximum rate that could be charged to all non-affiliates. Any action by MGC or MPC to charge a higher reservation charge would violate the terms of its approved tariff.

**JUNE 1, 2005 DISCOUNT ON COMMODITY RATE FOR FIRM
TRANSPORTATION SERVICE FROM MGC AND MPC**

32. The evidence indicates and the Commission finds that starting on June 1, 2005, MGC began providing firm transportation service at a greater discount to its affiliate in order for Omega to provide a bundled natural gas service to **_____**.⁴¹ Recognizing that MGC's firm transportation tariff provides that "[t]he lowest transportation rate charged to an affiliate shall be the maximum rate that can be charged to non-affiliates",⁴² the Commission determines that the invoices sent by MGC to Omega for this firm transportation service is the best evidence of the "rate charged."

33. Invoices in the record indicate that, one month after **_____** its reservation charge so that its affiliate could provide service to **_____**, MGC provided Omega an additional discount in the form of a transportation commodity discount from the rate reflected in the MGC tariff. Specifically, Exhibit 67, Appendix D-17 reflects a recreated invoice from the pipelines to its affiliate. That invoice indicates that,

⁴⁰ Exhibit 67, Appendix D-12.

⁴¹ Exhibit 19, page 26.

⁴² Exhibit 70, Sheet No. 6; Exhibit 71, Sheet No. 6.

commencing on June 1, 2005, MGC reduced its commodity charge associated with firm transportation service to ** _____ **.

34. The Commission finds that, pursuant to the terms of Section 3.2(b) of the MGC tariff, the ** _____ ** commodity charge for firm transportation service, once charged to its affiliate, became the maximum rate that could be charged to all non-affiliates. Any action by MGC to charge a higher reservation charge would violate the terms of its approved tariff.

APPLICABLE RATES

35. As indicated, *supra*, MPC and MGC are bound by the terms of its tariffs. Those tariffs provide explicit prohibitions against the pipelines charging non-affiliates rates that are greater than the rates charged to its affiliate shippers. In the previous sections, the Commission has made findings regarding the appropriate rates to be charged to non-affiliates based upon specific discounts to the pipelines' affiliate shipper. Based upon the evidence, the Commission is fully aware that certain non-affiliates were overcharged for transportation on both the MPC and MGC systems. The Commission is also aware that it is not authorized to order refunds from the pipelines to specific customers. In order to obtain such refunds, those non-affiliated shippers will have to seek redress in circuit court. Nevertheless, by this Order and based upon the evidence contained in the record, the Commission finds and determines that the following are the appropriate rates, for the applicable periods, for both MPC and MGC:

	Firm Reservation	Firm Commodity	Interruptible
MPC Delivery	▶ \$4.3181 / Dth until April 30, 2005. ▶ ** _____ ** after May 1, 2005.	▶ \$0.1699 / Dth.	▶ \$0.3036 / Dth until August 31, 2003. ▶ ** _____ ** after September 1, 2005.
MGC Delivery (non-Fort)	▶ \$13.1766 / Dth until April 30, 2005. ▶ ** _____ ** after May 1, 2005	▶ \$0.9433 / Dth until June 30, 2003. ▶ ** _____ ** after July 1, 2003.	▶ \$1.3765 / Dth until August 31, 2003. ▶ ** _____ ** after September 1, 2005.
MGC Delivery (to Fort)	▶ \$18.10 / Dth.	▶ \$0.55 / Dth until January 31, 2005. ▶ ** _____ ** after February 1, 2005.	▶ \$1.15 / Dth.

ALLEGATION OF IMPROPER RATEMAKING

36. In its Reply Brief, the pipelines claim that any change in the rates charged by the pipelines to non-affiliates would constitute improper ratemaking in that it fails to consider all relevant factors.⁴³ The pipelines argument is misplaced. Clearly, this docket is not ratemaking. Chapters 386 and 393 provide two methods for the Commission to engage in ratemaking: (1) through a complaint proceeding under Section 386.390 or (2) the file and suspend method in Section 393.140(11).

37. In contrast to these two ratemaking dockets, this docket was established to hear a complaint by the Staff to have the Commission enforce the pipelines' currently approved tariffs. These pipelines were purchased with full knowledge of the tariffs and their provisions. Upon acquisition, these tariffs were adopted. The ramifications of providing affiliate discounts as prohibited by these tariffs were clearly understood.⁴⁴ Later, in an effort to leverage its control of monopoly pipeline service into the competitive natural gas

⁴³ Initial Posthearing Brief of MPC and MGC, at pages 27 and 28.

⁴⁴ In fact, the record indicates that, following the acquisition of MPC and MGC, the new owners of the pipelines attempted to modify its tariff to remove the provision precluding affiliate discounts. (Exhibit 8). After not receiving the support of Staff, the pipelines dropped their request to remove the troublesome provision and moved forward with the affiliate discounts.

supply business, the officers of the pipelines elected to provide such affiliate discounts. The reduction in transportation rates to all nonaffiliate shippers is the relief mandated by its tariffs. The ramifications were known prior to the action and the pipelines moved forward of their own volition. The appropriate relief is not granted pursuant to the Commission's ratemaking authority, but via its authority to enforce its approved tariffs.

ABILITY TO RECOVER PRUDENTLY INCURRED COSTS

38. In its Initial Brief, the pipelines also claim that the relief sought by the Staff and mandated by the pipeline tariffs "would not allow the Pipelines to recover costs prudently incurred and would be detrimental to Shippers and end users in the long run."⁴⁵ Again, the pipelines' argument is misplaced. There is no evidence to support an assertion, let alone a finding of fact, that a reduction in non-affiliate rates would not allow the pipelines to recover prudently incurred costs. There has not been any evidence as to the level of pipeline expenses, the current receipt of revenues, the pipelines' capital structure, the pipelines' cost of debt or the appropriate return on equity. Without such evidence it is impossible for anyone to know whether the discounted rates will allow the pipeline to recover prudently incurred costs.

39. Given the pipelines' allegation, however, the Commission is concerned that the pipelines have violated the Commission's affiliate transaction rule. Commission rule 4 CSR 240-40.015 addresses affiliate transactions for gas utilities. Subsection (2)(A) of that rule provides:

A regulated gas corporation shall not provide a financial advantage to an affiliate entity. For the purposes of this rule, a regulated gas corporation shall be deemed to provide a financial advantage to an affiliate entity –

2. It transfers information, assets, goods or services of any kind to an affiliate entity below the greater of –

⁴⁵ Initial Posthearing Brief of MPC and MGC, at page 27.

- A. The fair market price; or
- B. The fully distributed cost to the regulated gas corporation.

By its brief, the pipelines admit that the discounted rates provided to its affiliate would not be sufficient to allow the pipeline to recover its prudently incurred costs. This is an explicit admission that the discounted rates were not above the “fully distributed cost to the regulated gas corporation.”

40. The Commission also notes that the pipelines have been fully aware of the implications of its affiliate abuses as well as Staff’s assertions that such discounted rates should be made applicable to all current shippers. On September 6, 2006, Staff filed the testimony of Robert Schallenberg in which he concludes that the pipelines “reduced the maximum tariff rates that can be charged to a non-affiliate for transportation service, by virtue of rates MPC and MGC charged their affiliate, Omega, for transportation service.”⁴⁶ As such, the pipelines have been on notice for almost six (6) months of the possibility that its current rates would be reduced. The pipelines could have filed a rate proceeding to ensure that rates would adequately recover prudently incurred costs. To date, the pipelines have not availed themselves of the protections offered by Section 393.140(11).

41. Despite the lack of evidence as to the pipelines’ ability to recover prudently incurred costs as well as the pipelines’ failure to file a rate proceeding to ensure that discounted rates, once applied to all shippers, would be sufficient to recover those prudently incurred costs, the Commission is cognizant of the fact that the rates contained in the MGC tariffs have **never** been reviewed. MGC continues to operate under a standing fifteen year old Commission order to file a rate case to determine the

⁴⁶ Exhibit 19, page 27.

appropriateness of current rates.⁴⁷ Clearly, there were sufficient revenues from non-affiliate shippers to cover the pipelines' expenses while still allowing it to offer significant discounts to its affiliates. Given that these non-affiliate revenues were sufficient to cover all pipeline costs, the question necessarily arises as to whether those rates are excessive. Furthermore, the Commission notes that current rates were set on the initial level of rate base prior to any depreciation. Recognizing that this rate base has now experienced 15 years of depreciation, that rate base has likely declined.

42. In order to address these fifteen year old rates and in an effort to ensure that the discounted rates are sufficient to cover prudently incurred expenses and, similarly, are not excessive, the Commission hereby orders the pipelines to file a permanent rate proceeding within thirty (30) days of the effective date of the Report and Order in this complaint proceeding to bring itself into compliance with the conditions of its certificate. Given the limited number of customers on the pipeline as well as the fact that the financial books for 2006 are likely already closed, it is not unreasonable to expect the company to prepare a rate proceeding in that period of time.

40.

CONCLUSIONS OF LAW

The Missouri Public Service Commission has reached the following conclusions of law:

1. Missouri Pipeline Company and Missouri Gas Company are gas corporations and public utilities as defined in Section 386.010(18) and (42), RSMo. 2000. As such, MPC

⁴⁷ On June 28, 1991, the Commission issued its Report and Order granting Missouri Gas Company a certificate of convenience and necessity to construct and operate a natural gas pipeline along the I-44 corridor. In that Order, the Commission approved the rates proposed by MGC "but only for a period of 18 months after its pipeline is operational and on-line." The Commission thereby ordered Missouri Gas Company "to file a permanent rate case within 18 months of the date said pipeline becomes operational." *In re: Intercon Gas, Inc. et al.*, Case No. GA-90-280 et al., Report and Order, issued June 28, 1991

and MGC are subject to the Commission's jurisdiction pursuant to Chapters 386 and 393, RSMo.

2. Section 393.140(11), RSMo. 2000, gives the Commission the authority to require gas corporations "to file with the commission and to print and keep open to public inspection schedules showing all rates and charges, establishing or enforced or to be charged or enforced, all forms of contract or agreement and *all rules and regulations relating to rates, charges or service used or to be used.*" (emphasis added).

3. The Missouri Courts have held that tariffs, once approved by the Commission, have the force and effect of law. State ex rel. Jackson County v. Public Service Commission, 532 S.W.2d 20 (Mo. 1975) (citing to May Department Stores v. Union Electric Company, 107 S.W.2d 41 (Mo. 1937)).

4. Section 393.140(11) RSMo. 2000 provides that "[n]o corporation shall charge, demand, collect or receive a greater or less or different compensation for any service rendered or to be rendered than the rates and charges applicable to such services as specified in its schedule filed and in effect at the time."

5. Section 386.570.1 RSMo. 2000 provides that:

Any corporation, person or public utility which violates or fails to comply with any provision of the constitution of this state or of this or any other law, or which fails, omits or neglects to obey, observe or comply with any order, decision, decree, rule, direction, demand or requirement, or any part or provision thereof, of the commission in a case in which a penalty has not herein been provided for such corporation, person or public utility, is subject to a penalty of not less than one hundred dollars nor more than two thousand dollars for each offense.

6. Section 386.570.2 RSMo. 2000 provides that:

Every violation of the provisions of this or any other law or of any order, decision, decree, rule, direction, demand or requirement of the commission, or any part or portion thereof, by any corporation or person or public utility is a separate and distinct offense, and in case of a continuing violation each day's continuance thereof shall be and be deemed to be a separate and distinct offense.

7. Section 386.580 RSMo. 2000 provides that:

Every officer, agent or employee of any corporation or public utility, who violates or fails to comply with, or who procures, aids or abets any violation by any corporation, person or public utility of any provision of the constitution of this state or of this or any other law, or who fails to obey, observe or comply with any order, decision, decree, rule, direction, demand or requirement, or any part or provision thereof, of the commission, or who procures, aids or abets any corporation, person or public utility in their or its failure to obey, observe and comply with any such order, decision, decree, rule, direction, demand or requirement, or any part or provision thereof, in a case in which a penalty has not herein been provided for such officer, agent or employee, is guilty of a misdemeanor and is punishable by a fine not exceeding one thousand dollars, or by imprisonment in a county jail not exceeding one year, or by both such fine and imprisonment.

8. Section 386.600 RSMo. 2000 provides that:

An action to recover a penalty or a forfeiture under this chapter or to enforce the powers of the commission under this or any other law may be brought in any circuit court in this state in the name of the state of Missouri and shall be commenced and prosecuted to final judgment by the general counsel to the commission.

IT IS ORDERED THAT:

1. All pending motions and requests for relief not otherwise granted are denied.
2. MGC and MPC shall file tariffs that comport with this Report and Order.
3. That the General Counsel, pursuant to Section 386.600 RSMo. 2000, is hereby authorized to seek recovery of all penalties or forfeitures under Chapter 386 and all other enforcement actions contemplated by Section 386.570, .580 and .600 RSMo.
4. MGC and MPC shall, within 30 days of the effective date of this Report and Order, file a rate proceeding to determine the reasonableness of the discounted rates.
5. This Report and Order shall become effective on _____, 2007
6. This case may be closed on _____, 2007.