STATE OF MISSOURI
PUBLIC SERVICE COMMISSION

At a session of the Public Service Commission held at its office in Jefferson City on the 6th day of June, 2006.

The Staff of the Missouri Public Service Commission, Complainant, v. Missouri Pipeline Company, LLC; Missouri Gas Company, LLC; Mogas Energy, LLC; United Pipeline Systems, Inc.; and Gateway Pipeline Company, LLC. Respondents.	)	**Case No. GC-2006-0378**

ORDER REGARDING MOTION TO DISMISS

Issue Date: June 6, 2006 Effective Date: June 6, 2006

This order denies the motion to dismiss filed by Missouri Pipeline Company, LLC; Missouri Gas Company, LLC; Mogas Energy, LLC; United Pipeline Systems, Inc.; and Gateway Pipeline Company, LLC.

On March 31, 2006, the Commission's Staff filed a complaint against Missouri Pipeline Company, LLC; Missouri Gas Company, LLC; Omega Pipeline Company, LLC; Mogas Energy, LLC; United Pipeline Systems, Inc.; and Gateway Pipeline Company, LLC. Staff's complaint alleges that the first two Respondents – Missouri Pipeline and Missouri Gas – are public utilities subject to the Commission's regulation. Staff's complaint alleges

that those two utilities are over-earning and asks that the Commission reduce the rates they are allowed to charge their customers.

Staff's complaint also alleges that the other named respondent companies – Omega, Mogas Energy, United Pipeline Systems, and Gateway Pipeline – are affiliated with Missouri Pipeline and Missouri Gas. Staff contends that the books, records, and operations of those affiliated companies are so intermingled as to make all of the companies gas corporations, and thus, public utilities, subject to the Commission's regulatory authority.

On May 16, the Commission dismissed Omega as a party. On that same date, the remaining respondents, Missouri Pipeline, Missouri Gas, Mogas Energy, United Pipeline Systems, and Gateway Pipeline, for convenience referred to as the Pipeline Companies, filed a motion asking the Commission to dismiss Staff's complaint against them.

The Pipeline Companies make several arguments for the dismissal of Staff's complaint. The first concerns some troublesome language in the statute that sets out who may bring a complaint before the Commission concerning the rates charged by a utility.

Standing to Bring a Complaint

Section 386.390.1, RSMo 2000, after identifying a long list of persons, organizations, corporations, and other entities that may file a complaint with the Commission, states as follows:

> Provided that no complaint shall be entertained by the commission, *except upon its own motion*, as to the reasonableness of any rates or charges of any gas, electrical, water, sewer, or telephone corporation, unless the same be signed by the public counsel or the mayor or president or chairman of the board of aldermen or a majority of the council, commission or other legislative body of any city, town, village or county, within which the alleged violation occurred, or not less than twenty-five consumers or purchasers, or prospective consumers or purchasers of such gas, electricity, water, sewer or telephone service. (emphasis added)

The Pipeline Companies point out that this provision makes no mention of the Staff of the Commission, and argue that Staff may bring a rate complaint before the Commission only if it has received prior authorization from the Commission. They contend that Staff did not receive prior authority from the Commission before filing this complaint. From that fact, they argue that Staff does not have standing to bring this complaint and that the complaint should be dismissed.

In its reply to the motion to dismiss, Staff contends that it began its investigation into the rates charged by the Pipeline Companies at the direction of the Commission. Staff does not, however, point to any specific order of the Commission that would authorize the filing of the complaint. Staff also points out that Commission regulation 4 CSR 240-2.070(1) specifically authorizes the "commission staff through the general counsel" to file a complaint. Neither Staff nor the Pipeline Companies have cited any court cases or decisions of the Commission relating to the question of whether Staff may bring a rate complaint without prior authorization.

Careful consideration of Section 386.390.1, RSMo 2000, indicates that Staff has standing to bring this complaint. The key phrase in the statute is "except upon its own motion." In the full context of the statute, that phrase must mean that Staff has the authority to bring a complaint to the attention of the Commission. Any other interpretation would be inconsistent with a reasonable interpretation of how the legislature intended the Commission to function.

The clear purpose of the statute's limitation on the filing of complaints about the rates charged by a utility is to restrict the ability of individual ratepayers to tie-up limited

Commission resources by filing frequent, unsupported, rate complaints.[1] There is no reason to believe that the legislature intended to impose a similar restriction on the Commission's Staff; the entity that the Commission most relies upon to monitor and evaluate the propriety of the rates charged by Missouri utilities.

Similarly, there is no support for the idea that the phrase "on its own motion" means that the Commission, or its Staff, must file some sort of motion for prior Commission approval before Staff can file a rate complaint. The idea that the Staff must file a motion with the Commission seeking prior permission to file a complaint would essentially require the Commission to conduct a preliminary hearing before allowing Staff to file a complaint. In other words, the Commission would have to hear and consider every Staff complaint twice. The statute does not require such burdensome procedure before the Commission can consider a complaint brought by anyone else, so there is no reason to read the statute to impose such a requirement on complaints brought by Staff.

It is also important to note that the first part of Section 386.390, the part of the statute that identifies the persons and entities that may bring a general, non-rate-related, complaint before the Commission, states "complaint may be made by the commission of its own motion." That part of the statute also makes no separate mention of Staff as a party that can bring a complaint. There is no reason to believe that the legislature intended to restrict the ability of Staff to bring complaints to the attention of the Commission. Therefore, the clear implication is that within the meaning of the statute, complaints made by Staff are complaints made by the Commission of its own motion.

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[1] For a discussion supporting the wisdom of the legislature's decision to impose such restrictions on the filing of complaints by individual ratepayers, *see* Dyer v. Public Service Commission, 341 S.W. 2d 795 (Mo. 1960).

Based upon its interpretation of the controlling statute, the Commission finds that Staff has standing to bring this complaint.

Failure to State a Claim Upon Which Relief Can Be Granted

The Pipeline Companies' second argument contends that Staff's complaint fails to state a claim upon which relief can be granted. Specifically, the Pipeline Companies contend that Staff fails to allege, or in any way demonstrate that Missouri Pipeline or Missouri Gas are earning in excess of the returns previously authorized by the Commission. Instead, they contend that they are under-earning.

The standard for review for consideration of a motion to dismiss for failure to state a claim has been clearly established by Missouri's courts as follows:

> A motion to dismiss for failure to state a cause of action is solely a test of the adequacy of the plaintiff's petition. It assumes that all of plaintiff's averments are true, and liberally grants to plaintiff all reasonable inferences therefrom. No attempt is made to weigh any facts alleged as to whether they are credible or persuasive. Instead, the petition is reviewed in an almost academic manner to determine if the facts alleged meet the elements of a recognized cause of action, or of a cause that might be adopted in that case.[2]

By that standard, the Commission must consider the motion to dismiss based on the facts alleged in Staff's complaint.

Staff's complaint alleges that it has audited the current revenues and expenses of Missouri Pipeline and Missouri Gas and has determined that their rates are not just and reasonable because the revenue generated by their current tariffs exceeds the reasonable cost of providing service, even with an allowance for a reasonable average return upon the capital actually expended. Obviously, Staff will have to present evidence to prove that Missouri Pipeline and Missouri Gas are over-earning before the Commission will grant the

[2] *Eastwood v. North Central Missouri Drug Task Force*, 15 S.W.3d 65, 67 (Mo. App. W.D. 2000).

relief it requests. But, if the Commission accepts Staff's allegation as true, as it must when considering a motion to dismiss for failure to state a claim, then Staff has stated a claim upon which the Commission can grant relief.

Subject Matter Jurisdiction over Mogas Energy, United Pipeline Systems, and Gateway Pipeline

The third argument put forth by the Pipeline Companies is that the Commission lacks subject matter jurisdiction over Mogas Energy, United Pipeline Systems, and Gateway Pipeline. Those three companies are not currently regulated by the Commission. Instead, they are the holding companies that own Missouri Pipeline and Missouri Gas. Staff contends that the affairs and finances of the holding companies are so intermingled with those of the two regulated companies that the otherwise unregulated holding companies are subject to regulation as gas corporations.

Section 393.140(12), RSMo 2000, which is the statute dealing with transactions of affiliates of regulated utilities, supports Staff's assertion of the right to regulate Mogas Energy, United Pipeline Systems, and Gateway Pipeline. That statute provides, in relevant part, that the Commission does not have jurisdiction over the affairs of an affiliate of a regulated utility that is not engaged in regulated activities, if the operations of that affiliate are "so conducted that its operations are to be substantially kept apart and separate from the owning, operating, managing or controlling of such gas plant, electric plant, water system or sewer system." By implication, the Commission is not prohibited from claiming jurisdiction over the operation of affiliates that are not "substantially kept apart and separate" from the operations of the regulated utility. That is the basis for Staff's assertion of jurisdiction over the intermingled affairs of the holding companies.

Section 386.020(18), RSMo Cum. Supp. 2005, defines a "gas corporation" as an entity "owning, operating, controlling or managing any gas plant operating for public use." Staff's audit report, which was incorporated into its complaint, describes a tangled web of interrelated companies affiliated by common ownership. Staff describes Mogas Energy, Gateway Pipeline, and United Pipeline Systems as members of the chain that owns Missouri Pipeline and Missouri Gas. As owners of the regulated companies, Staff can reasonably assert that those companies are subject to regulation as a gas corporation when their affairs are intermingled with the regulated company.

Based on Staff's allegations regarding the intermingling of the affairs and finances of the chain of companies owning Missouri Pipeline and Missouri Gas, the Commission finds that it has subject matter jurisdiction to hear Staff's complaint against Mogas Energy, Gateway Pipeline, and United Pipeline Systems.

Federal Preemption

The fourth argument[3] presented by the Pipeline Companies claims that the Commission is preempted from asserting jurisdiction over Mogas Energy, Gateway Pipeline, and United Pipeline Systems by the federal Natural Gas Act. This argument is based on the fact that Missouri Interstate Gas, LLC, which is not a party in this case, is owned by United Pipeline Systems, which is owned by Gateway Pipeline, which in turn is owned by Mogas Energy. Missouri Interstate Gas is an interstate pipeline company that is exclusively regulated by the FERC under federal law. The Pipeline Companies argue that by asserting jurisdiction over the holding companies that own the interstate pipeline company, the Commission would also be asserting jurisdiction over the federally regulated

[3] This fourth argument appears only in the Respondents' Suggestions in Support of their Motion to Dismiss, not in the motion itself.

interstate pipeline company, contrary to the Supremacy Clause of the United States Constitution.

In response, Staff states that it is not asking the Commission to regulate Missouri Interstate Gas or the interstate transportation of gas. Staff denies that its proposal to regulate the companies that also happen to own a federally regulated interstate pipeline would be preempted by federal law.

The Commission finds that Staff's complaint does not seek to regulate the affairs of Missouri Interstate Gas. There is no federal preemption of Staff's proposed regulation of the holding companies that own the Missouri regulated companies, just because those companies also happen to own a federally regulated pipeline company.

After considering, and rejecting, all the arguments put forward by the Pipeline Companies, the Commission concludes that their motion to dismiss should be denied.

IT IS ORDERED THAT:

1. The Motion to Dismiss filed by Missouri Pipeline Company, LLC; Missouri Gas Company, LLC; Mogas Energy, LLC; United Pipeline Systems, Inc.; and Gateway Pipeline Company, LLC., is denied.

2. This order shall become effective on June 6, 2006.

BY THE COMMISSION

(S E A L)

Colleen M. Dale
Secretary

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

Woodruff, Deputy Chief Regulatory Law Judge