

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.

**Case No. GC-2006-0491**

**MOTION FOR SANCTIONS FOR DESTRUCTION OF DOCUMENTS**

COMES NOW the Staff of the Missouri Public Service Commission, and requests the Commission impose sanctions upon MPC, MGC and David Ries, and authorize the General Counsel to seek penalties in Circuit Court against MPC, MGC and Mr. David Ries for destruction (spoliation) of documents necessary for Staff's investigation of Missouri Pipeline Company and Missouri Gas Company. In support of its request Staff states:

1. MPC and MGC are gas corporations, as defined by §386.020(18),<sup>1</sup> that provide natural gas transportation service to customers in Missouri under tariffs approved by the Missouri Public Service Commission (Commission). MPC and MGC are, therefore, public utilities as defined by §386.020 and are subject to the jurisdiction of the Commission, pursuant to §386.250 and §393.140.

<sup>1</sup> All statutory references are to RSMo (2000) and the Cumulative Supplement (2005), unless otherwise indicated.

2. Mr. David J. Ries is the President of MPC and MGC and was President of their affiliate local distribution and marketing entity, Omega Pipeline Company, from January 2002 through at least June 1, 2006. Mr. Ries was in control of relevant business documents regarding the operations of these entities through at least this time frame.

3. In November, 2005, Staff was instructed by the Commission to investigate the reasonableness of the rates charged by MPC and MGC. Staff initially conducted its investigation on an informal basis until discovery of information became problematic and information was inadequate to determine that existing rates were just and reasonable.

4. Initially, Staff filed a cost-of-service complaint in late March early April 2006. Further investigation and examination revealed the possibility that MPC and MGC were not operating in a manner consistent with their tariffs and were not charging customers the rates required by their tariffs. Specifically the MPC and MGC tariffs generally require that the “The lowest transportation rate charged to an affiliate shall be the maximum rate that can be charged to non-affiliates.” In order to determine compliance with this tariff requirement Staff sought copies of MPC’s and MGC’s invoices to their customers, both affiliated and non-affiliated, that show what was charged during the time period under investigation.

5. On January 26, 2006, Staff served Mr. David (BJ) Lodholz, MPC and MGC Vice President of Finance, with a Subpoena Duces Tecum. The items listed for production on this subpoena included:

“14. Please provide copies of the MPC/MGC bills to Omega Pipeline Company since 1/1/02 with any supporting documentation justifying any discounts provided to Omega during this period.

15. Provide copies of the MPC or MGC bills to their customers paying maximum tariff rates in 2004. Please identify the amount for each customers that was recorded as revenue in 2004 that differs from amounts shown on these bills.”

6. On March 23, 2006, Staff served Mr. David Ries with a Subpoena Duces Tecum.

The items listed for production on this subpoena included:

“20. Please provide copies of all MPC bills to Omega Pipeline Company since 1/1/02 with any supporting documentation justifying any discounts provided to Omega during this period.

21. Provide copies of all MPC bills, invoices, or statements to customers that received transportation service through MPC/MGC.”

The subpoena noted that, “For all documents listed below provide for calendar years 2003, 2004, and 2005, unless requested otherwise.”

7. Pursuant to Commission Rule 4 CSR 240-2.090 and Civil Rule 57.03, Staff gave notice to all parties to this case that it would take the deposition of Mr. David (BJ) Lodholz, on April 24, 2006, beginning at 9:00 a.m., and continuing daily thereafter until completed.

8. In April of this year, upon learning of Mr. Paul DeFord’s representation of MPC and MGC, Staff counsel reminded Mr. DeFord, attorney for the Respondents, of the Companies’ obligation not to destroy documents.

9. Mr. Lodholz actually gave his deposition in this case on July 17 and 18, 2006. Mr. Lodholz had resigned his position with MPC and MGC on May 12, 2006.

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11. Staff immediately insisted MPC and MGC produce copies of these records in response to prior subpoenas. In its subpoena duces tecum to Mr. David Ries, Staff instructed Mr. Ries to bring certain documents, including these invoices, with him to his deposition.

12. Mr. Ries failed to produce these documents at his deposition on July 21, 2006. The deposition reconvened on August 29, 2006, but Mr. Ries requested to postpone his deposition asserting a family emergency.

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15. Staff has not received a copy of any actual invoices MPC and MGC sent to their customers. Staff has not received any 2003 invoice materials which are needed to calculate the damages to MPC's and MGC's customers and the extent of the violations of MPC's and MGC's tariffs by charging higher transportation service rates to its non-affiliated shippers than it charged Omega.

16. Staff has only been provided re-created invoices for the period January 1, 2004 through March 2006.

17. The Commission may impose the same sanctions as a circuit court under the Missouri Rules of Civil Procedure. The Commission's authority to impose discovery sanctions derives in part from Section 536.073, RSMo, which provides in pertinent part (emphasis supplied):

1. In any contested case before an agency created by the constitution or state statute, any party may take and use depositions in the same manner, upon and under the same conditions, and upon the same notice, as is or may hereafter be provided for with respect to the taking and using of depositions in civil actions in the circuit court . . .

2. In addition to the powers granted in subsection 1 of this section, any agency authorized to hear a contested case may make rules to provide that the parties may obtain all or any designated part of the same discovery that any Missouri Supreme Court rule provides for civil actions in circuit court. **The agency may enforce discovery by the same methods, terms and conditions as provided by Supreme Court rule in civil actions in the circuit court.**

18. As authorized by the cited statute, the Commission's rules of procedure, at 4 CSR 240-2.090(1) & (2), provide for depositions, interrogatories, requests for production, requests for admissions, and data requests. The rule specifically provides that: "Sanctions for abuse of the

discovery process or failure to comply with commission orders regarding discovery will be the same as those provided for in the rules of civil procedure.”

19. The Commission’s authority to impose discovery sanctions has been specifically approved by the Missouri Court of Appeals for the Western District: “This court holds the PSC may impose sanctions pursuant to Rule 61.01.” *State ex rel. Arkansas Power & Light Co. v. Missouri Public Service Com'n*, 736 S.W.2d 457, 460 (Mo. App., W.D. 1987). Like a circuit court, the Commission’s imposition of sanctions in a given case may be reversed if the sanction imposed is inappropriate. *Id.*

20. Rule 61.01, Mo. R. Civ. Pro., provides for discovery sanctions. The sanctions vary depending on the discovery device. For a failure to timely answer interrogatories, the Commission may issue “An order striking pleadings or parts thereof, or dismissing the action or proceeding or any part thereof, or render a judgment by default against the disobedient party.” Rule 61.01(b)(1), Mo. R. Civ. Pro.

21. If a party fails to timely respond to a request for admissions, the sanction is that the matter is deemed admitted. An unwarranted refusal to make admissions may result in more stern sanction:

“If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 59.01, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, the party requesting the admissions may apply to the court for an order requiring the other party to pay the reasonable expenses incurred in making that proof, including reasonable attorney's fees.”

Rule 61.01(c), Mo. R. Civ. Pro.

22. The Commission has great flexibility in designing a sanction for a failure to respond to a production request under Rule 61.01(d):

If a party fails to . . . produce documents and tangible things as requested under Rule 58.01, or timely files objections thereto that are thereafter overruled and the documents and things are not timely produced or inspection thereafter is not timely permitted, the court may, upon motion and reasonable notice to other parties, make such orders in regard to the failure as are just and among others the following:

(1) An order refusing to allow the disobedient party to support or oppose designated claims or defenses or prohibit the disobedient party from introducing designated matters in evidence.

(2) An order striking pleadings or parts thereof or staying further proceedings until the order is obeyed or dismissing the action or proceeding or any part thereof or, rendering a judgment by default against the disobedient party.

(3) An order treating as a contempt of court the failure to obey.

(4) An order requiring the party failing to obey the order or the attorney advising the party or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

Rule 61.01(d), Mo. R. Civ. Pro.

23. MPC and MGC are required by Commissions rules to maintain records such as customer invoices and face sheets under 4 CSR 240-10.010 and section 393.140 RSMo. The destruction of such records is a violation of Commission rules and Sections 386.460, 386.560, and 386.570 RSMo. MPC, MGC and Mr. Ries are subject to penalties and potential criminal sanction. Every day that the requested records are not produced is a separate and distinct offense allowing a penalty up to \$2,000 per day.

24. Staff requests the Commission impose sanctions on Missouri Gas Company and Missouri Pipeline Company in the maximum amount of \$2,000 per day for destruction of the face sheets and invoices of its actual January 2003 through December, 2005 invoices. Staff also

requests that the Commission strike MPC and MGC's answer and pleadings under Rule 61.01 and apply the doctrine of spoliation to this case. The Staff is entitled to judgment as a matter of law under the "spoliation of evidence doctrine" fully described in *Degraffenreid v. R.L. Hannah Trucking*, 80 S.W.3d 866 (Mo.App. 2002). "Spoliation is the destruction or significant alteration of evidence. A party who intentionally spoliates evidence is subject to an adverse evidentiary inference." *Id.* at 873 (internal citations omitted).

25. The adverse inference that the Commission should draw against the Respondents is that the evidence destroyed by the Pipelines would support the Staff's case. "The law, in consequence of the fraud practiced, in consequence of the spoliation will presume that the evidence destroyed will establish the other party's demand to be just." *Id.* at 876. The Respondents cannot and will not produce the invoices that tend to prove violations of their tariffs and the amount of damages due to those violations. In fact, Respondent's President David Ries admits that the documents "don't exist," admitting that he failed to instruct his employees to keep and not destroy evidence of wrongdoing.

26. This is not simple negligence. The evidentiary spoliation doctrine applies when there is intentional destruction of evidence, indicating fraud and a desire to suppress the truth. *Moore v. General Motors*, 558 S.W.2d 720, 733 (Mo.App.1977). 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).

27. The spoliator's failure to satisfactorily explain the destruction of the evidence may give rise to an adverse inference against the spoliator. *Id.* Mr. Ries' explanation, if it can be considered an "explanation" that he simply did not tell employees to keep records necessary to



comply with statutes and rules gives rise to the adverse inference under the spoliation of evidence doctrine.

28. Moreover, not only did Mr. Ries permit destruction of evidence that would support Staff's complaint, Mr. Ries had a duty to preserve the evidence of what he charged affiliates and what he charged non-affiliates since the Staff's complaint had been filed, and Mr. Ries had been informed by his counsel of his duty to preserve evidence. Certainly the fact that the very documents that would demonstrate MPC's and MGC's tariff violations "no longer exist" is sufficient proof that the spoliation of evidence doctrine should apply in this case. *Morris v. J.C. Penney Life Ins. Co.*, 895 S.W.2d 73, 77-78 (Mo.App. W.D.1995) (emphasis omitted).

29. The Commission should determine that Mr. Ries intentionally, fraudulently, deceitfully and with bad faith destroyed evidence necessary to this case. The remedy under this doctrine is that Respondents in effect admit that the destroyed evidence would be unfavorable. "Not concerned with whether the opposing party suffers prejudice as a result of the destroyed evidence, the doctrine works only to punish the spoliator." *See Pomeroy v. Benton*, 77 Mo. 64, 86 (1882) ("It is because of the very fact that the evidence of the plaintiff, the proofs of his claim . . . have been destroyed, that the law, in hatred of the spoiler, baffles the destroyer, and thwarts his iniquitous purpose, by indulging a presumption which supplies the lost proof, and thus defeats the wrong-doer by the very means he had so confidently employed to perpetrate the wrong.").

30. "Specifically, the spoliation doctrine and the resulting adverse inference punish the spoliators by holding them to admit that the destroyed evidence would have been unfavorable

to their position.” *Furlong v. Stokes*, 427 S.W.2d 513, 519 (Mo.1968); and *Garrett v. Terminal R. Ass’n*, 259 S.W.2d 807, 812 (Mo.1953).

31. “Missouri has, for over a century, enforced an evidentiary spoliation inference, *omnia praesumuntur contra spoliatores* (all things are presumed against a wrongdoer). *Pomeroy v. Benton*, 77 Mo. 64, 86 (1882) (internal citations omitted).

32. 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.

WHEREFORE Staff prays that the Commission impose sanctions against MPC and MGC as are just and reasonable in light of their actions, including striking their pleadings and testimony, applying an inference adverse to MPC and MGC’s interests and in favor of the Staff, entering judgment against MPC and MGC on the Complaint brought by Staff, and authorizing the Staff to proceed to Circuit Court to seek penalties against MPC, MGC and David Ries under 386.560 and 386.570.

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 14th day of November, 2006.

/s/ Steven C. Reed

Steven C. Reed