

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

<b>Staff of the Missouri Public Service</b>	)	
<b>Commission,</b>	)	
	)	
<b>Complainant,</b>	)	
<b>v.</b>	)	
	)	
<b>Missouri Pipeline Company, LLC,</b>	)	<b>Case No. GC-2006-0378</b>
<b>Missouri Gas Company, LLC, Omega</b>	)	
<b>Pipeline, LLC, Mogas Energy, LLC,</b>	)	
<b>United Pipeline Systems, Inc., and</b>	)	
<b>Gateway Pipeline Company, LLC</b>	)	
	)	
<b>Respondents.</b>	)	

**REPLY TO RESPONDENTS MPC, MGC, MOGAS, UPSI, AND GATEWAY’S  
MOTION TO QUASH SUBPOENA DUCES TECUM**

COMES NOW Staff of the Public Service Commission of Missouri, and in Reply to Respondent Missouri Pipeline Company, LLC (MPC), Missouri Gas Company, LLC (MGC), Mogas Energy, LLC (Mogas), United Pipeline Systems, Inc., LLC (UPSI); and Gateway Pipeline Company, LLC’s (Gateway) (jointly, the Respondents) Motion to Quash the Subpoenas, states:

1. The Staff, at the direction of the Commission, began an investigation of Missouri Pipeline Company, LLC (MPC) and Missouri Gas Company, LLC (MGC) in November, 2005. On March 31, 2006, the Staff filed a complaint against MPC; MGC; Omega Pipeline, LLC (Omega); and their affiliates, United Pipeline Systems Inc, LLC (UPSI); Gateway Pipeline Company, LLC (Gateway); and Mogas Energy LLC (Mogas). The complaint alleged, among other things, that MPC’s and MGC’s rates were too high (Count I), and that Respondents conducted business in such a manner as to subject them

all to regulation as gas corporations, as that term is used in Chapters 386 and 393, RSMo, 2000 (Count II). Staff further alleged that Respondents violated the Commission's affiliate transactions rules (Count III), and that MGC charged, or permitted to be charged, rates to customers in excess of its tariffed rates (Count IV).

2. Prior to the filing of this complaint, the Commission issued, at Staff's behest, a number of subpoenas *duces tecum* for each of the Respondents, for Respondent Omega, and for David (BJ) Lodholz, an officer of MPC and MGC. At the request of Respondents, Staff agreed to postpone the scheduled depositions and noticed the depositions of Mr. Lodholz and MPC for May 3 and 4, respectively, and Respondents refused to appear for the deposition. Staff has subsequently noticed the depositions of MGC and Gateway for May 10 and 11, respectively. Staff intends to notice the depositions of the other Respondents to occur in the next few weeks.

3. On May 2, 2006, the Respondents filed a Motion to Quash Subpoena Duces Tecum (the Motion). The Respondents allege that Gateway, UPSI and Mogas's business dealings, including transactions between the Respondents and MPC and MGC, are not subject to Commission supervision or jurisdiction (Motion, para. 10; Respondents' Suggestions in Support of Motion to Quash Subpoena Duces Tecum (Suggestions), Argument I, p. 2); that the Complaint does not allege facts showing Gateway, UPSI and Mogas are gas corporations subject to the Commission's jurisdiction (Motion, para. 9; Suggestions, Argument I, pp. 1-3); and that the subpoenas are deficient, burdensome, irrelevant, and fail to comply with the requirements of applicable laws and rules (Motion, para. 7, 11-16; Suggestions, Argument II-IV, pp. 3-5).

4. “A complaint under the Public Service Commission Law is not to be tested by the technical rules of pleading; if it fairly presents for determination some matter which falls within the jurisdiction of the Commission, it is sufficient.” *State ex rel. Kansas City Terminal Railway Co. v. Public Service Commission*, 308 Mo. 359, 372, 272 S.W. 957, 960 (banc 1925). When reviewing the dismissal of a petition, the pleading is granted its broadest intendment, all facts alleged are treated as true, and it is construed favorably to the plaintiff to determine whether the averments invoke substantive principles of law which entitles plaintiff to relief. *Welch v. McReynolds*, 928 S.W.2d 433, 435 (Mo. App. 1996). Appellate review of the grant of a motion to dismiss is also de novo, but is based on an examination of the pleadings to determine whether the plaintiff’s petition invokes principles of substantive law. The pleadings are liberally construed and all alleged facts are accepted as true and construed in a light most favorable to the pleader. *Koger v. Hartford Life Ins. Co.*, 28 S.W.3d 405, 409 (Mo. App. 2000).

**Respondents’ Argument I –**

**The Complaint does not allege sufficient facts showing Gateway, UPSI and Mogas’ businesses are so commingled with MPC and MGC that Respondents business dealings become subject to Commission jurisdiction and supervision**

5. Staff replies that Respondents Mogas, UPSI, and Gateway so intermingle their operations with that of MPC and MGC, that by statute, all of these entities are subject to regulation by the Commission as gas corporations. See §393.140(12). For example, source documents including, but not limited to, balance sheet accounts related to plant, depreciation reserve, other paid-in-capital, long-term debt and retained earnings, probably in the possession of Gateway or Mogas, were not provided. Further, several

inappropriate postings and charges have been recorded on MPC and MGC's books that Staff reviewed, indicating further need for inquiry (Audit Report, p.19).

6. Even if the businesses were not so integrated as to all be "gas corporations" the Commission may still inquire into the affiliate transactions because §393.140(12)

shall not restrict or limit the powers of the commission in respect to the owning, operating, managing or controlling by such corporation of such gas plant, . . . and said powers shall include also the right to inquire as to, and prescribe the apportionment of, capitalization, earnings, debts and expenses fairly and justly to be awarded to or borne by the ownership, operation, management or control of such gas plant, electric plant . . . .

See also *State ex rel. General Telephone Co. of the Midwest v. Public Service Commission*, 537 SW2d 655, 659-661 (Mo. App. 1976).

7. When businesses are as integrated as Respondents, the Commission will need to consider all Respondents' operations to prescribe the apportionment of capitalization, earnings, debts and expenses fairly and justly to be awarded to or borne by each of the entities.

8. Respondents' assertion that Staff has not alleged sufficient facts to support its Complaint ignores the abundant facts set out in the Staff Report incorporated into the complaint. Specifically:

- a. Finding 6, p. 2 (Mogas and Gateway activities costs charged to the pipelines);
- b. Pages 16 – 17, 23 (Gateway and Mogas lenders control the MPC/MGC cash flow);
- c. Page 23 (MPC/MGC cost of capital information, held by Mogas, refused to Staff);
- d. Pages 26 – 27 (MPC operating bank account from which checks are drawn for invoices received for services provided by third parties to Gateway and others. However, Respondents refuse to provide documentation to support charges between affiliates);
- e. Pages 28 – 29 (MPC has paid for services provided to Mogas and Gateway);

- f. Page 39 (MPC employees do not maintain time sheets to support job duties performed for MPC/MGC, Gateway, and other Respondents);

These facts alone are more than adequate to support the Complaint and for the Commission to deny Respondents' Motions to Quash the subpoenas.

9. Respondents' Suggestion (p. 3) that Staff's inquiry into affiliate transactions between Gateway, UPSI, and Mogas and MPC and MGC is premature and invalid is simply wrong. Specifically, Respondents cite *State ex. Rel. Atmos Energy Corp. v. Public Service Comm'n*, 103 S.W.3d 753 (Mo. 2003) [where the Commission promulgated its affiliate transactions rules for regulated utilities, which many regulated and non-regulated entities appealed, but which the Supreme Court upheld] to support this proposition. However, *Atmos* supports Staff's assertions that the allegations are proper. Specifically, *Atmos* states "where the affiliate is not one 'substantially kept separate' from the utility, the PSC is authorized to 'inquire' into certain aspects of the affiliates' operations as they relate to the capitalization, debts, expenses, etc., of the utility." *Id.* at 764. Staff's Complaint sets out several points within Count III that support this assertion. Furthermore, Respondents' own Motion asserts that "Mogas owns the limited liability interests in Gateway, Gateway owns the limited liability interests in United [UPSI], and United owns the limited liability interests in MPC and MGC..." (at p.2), further supporting the alleged relationship Staff made in its' Complaint, and also supporting the subpoenas.

10. Respondents' Motion contains factual misrepresentations. Specifically, Respondents assert they "voluntarily provided" specific documents and that "virtually all of the documents allegedly subpoenaed have already been provided but Staff has not

taken the time or made the effort to inventory what it has been provided” (Motion, p. 2-3, and 5). This is simply false.

11. For example, Respondents’ Motion states that 2004-2005 payroll records for MPC and MGC were provided to Staff (p.3). In actuality, only a summary sheet, with no source documents, was provided to Staff (Audit Report, p 38). Another example of Respondents’ misrepresentation is their reference (Motion, p.3) to the electronic files replicating 2004-2005 billing data. Staff determined that this documentation does **not** reflect actual generated revenues for all actual gas volumes transported for 2004-2005 (Audit Report, p 20). Staff has been unable to obtain from the Respondents this and other information necessary for a complete review of MPC and MGC transportation volumes and revenues.

12. One final example of Respondents’ inaccurate assertions is that already regulated utilities, MPC and MGC, have provided audited financial statements to the Staff. MPC and MGC, in fact, have only provided an audit report of the consolidated financial statements of Gateway. That report expressly denies that the audit covers the financial statements on MPC and MGC (Audit Report, p. 10). To demonstrate the integrated nature of these businesses, Staff has attached the Audit Report for the 2004/2005 consolidated Gateway financial statements as Attachment A - HC.

**Respondents’ Arguments II-IV –  
Subpoenas exceed Commission’s jurisdiction and are void**

13. Respondents’ objections to the subpoenas are misplaced. The subpoenas are regular on their face, and the information sought is clearly material and relevant to resolution of the issues alleged in the complaint. Further, the information designated for production is specifically set out in each subpoena’s attachment. The subpoenas, ordering

production of documents and appearance for deposition, with attachment lists are attached hereto as Attachment B.

14. Respondents' are mistaken that representatives for each entity needed to be specified in the subpoena (Motion, para. 5-6). All subpoenas served on the Respondents' designated the entity or company name by which the organization does business, as Missouri Supreme Court Rule of Civil Procedure 57.03(b) Notice of Examination, (4) proscribes:

A party may in the notice and in a subpoena name as the deponent a public or private corporation or a partnership or association or governmental agency and describe with reasonable particularity the matters on which examination is requested. In that event, **the organization so named shall designate** one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf and may set forth, for each person designated, the matters on which the person will testify. [Emphasis added.]

15. Respondents' motion declares that the subpoenas are invalid under Missouri Supreme Court Rule 57.02 because of service prior to the date Staff filed this complaint (Motion, para. 11). This assertion is misleading and false. First, the underlying authorization to issue the subpoena arises from §386.420.2. This statute states:

The commission or **any commissioner** or any party **may, in any investigation** or hearing before the commission, **cause the deposition of witnesses** residing within or without the state to be taken in the manner prescribed by law **for like depositions in civil actions in the circuit courts** of this state and to that end may compel the attendance of witnesses and the production of books, waybills, documents, papers, memoranda and accounts. [Emphasis added.]

Chairman Davis signed the subpoenas at issue in this case in compliance with §386.420.2. Secondly, the subpoenas were issued in compliance with the provisions of 4 CSR 240-2.100, which states that its' purpose is "prescrib[ing] the procedures for requesting and issuing subpoenas." Further, §386.410.1 states "in all investigations,

inquiries or hearings the commission or commissioner shall not be bound by the technical rules of evidence.” Therefore, the subpoenas were issued in compliance with the applicable laws and regulations, and are valid. Missouri Supreme Court Rule 57.02 does not invalidate the subpoenas issued in this matter.

16. Respondents also appear to claim that the Commission can examine only the parties to a case, and their employees. Witnesses other than parties are routinely subpoenaed and examined in Commission proceedings, and Staff recalls no objection on the grounds that the witness is not a party. Indeed, §393.140(10) provides:

[The commission shall h]ave power in all parts of the state, either as a commission or through its members, to subpoena witnesses, take testimony and administer oaths to witnesses in any proceeding or examination instituted before it, or conducted by it, in reference to any matter under sections 393.110 to 393.285.

It appears from the statutory provisions that the legislature has provided the Commission broad investigatory power, and these subpoenas fall well within the ambit of that legislative grant.

17. Respondents’ assertions about the failure to tender witness and mileage fees are also unavailing. First, Staff need not tender witness or mileage fees at the time of service of a subpoena pursuant to §386.440.2. That section provides:

Whenever a subpoena is issued at the instance of a complainant, respondent, or other party, except the public counsel to any proceeding before the commission, the cost of service thereof and the fee of the witness shall be borne by the party at whose instance the witness is summoned. Any witness subpoenaed **except one whose fees and mileage may be paid from the funds of the commission** may, at the time of service, demand the fee to which he is entitled for travel to and from the place at which he is required to appear, and one day’s attendance.... [Emphasis added.]



Because all witnesses subpoenaed by the Staff will be paid from Commission funds, Staff is not required to tender such fees at the time of service.

18. Finally, Respondents' Motion to Quash is not timely filed under Commission rules. MPC, MGC, Omega, Mogas, UPSI, and Gateway were served with the subpoena *duces tecum* on March 23, 2006, by service upon an authorized representative of each company. Respondents' Motion was filed May 2, 2006, more than ten days after service, as required by 4 CSR 240-2.100(3):

Objections to a subpoena or subpoena *duces tecum* or motions to quash a subpoena or subpoena *duces tecum* shall be made within ten (10) days from the date the subpoena or subpoena *duces tecum* is served.

Therefore, Respondents' Motion is not proper and should be dismissed.

WHEREFORE, having fully addressed the Respondent's contentions, Staff respectfully asks the Commission to overrule the Respondent's Motion to Quash Subpoena Duces Tecum.

Respectfully submitted,

/s/ Shelley E. Syler

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### **Certificate of Service**

I hereby certify that copies of the foregoing have been mailed, hand-delivered, or transmitted by facsimile or electronic mail to all counsel of record this 9<sup>th</sup> day of May, 2006.

/s/ Shelley E. Syler