

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

FILED⁴

MAY 11 2006

Staff of the Missouri Public Service
Commission,)

Complainant,)

v.)

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

Respondents.)

Missouri Public
Service Commission

Case No. GC-2006-0378

**REPLY TO STAFF'S OPPOSITION TO OMEGA PIPELINE COMPANY, LLC'S
MOTION TO DISMISS COMPLAINT AND QUASH THE SUBPOENAS**

COMES NOW Omega Pipeline Company, LLC ("Omega"), by and through the undersigned counsel, and for its reply to Staff's Opposition to Omega's Motion to Dismiss and to Quash, states as follows:

**Commission Jurisdiction Over Omega's Business with
Fort Leonard Wood is Barred by Federal Law.**

Count II of the Staff Complaint, the only count addressed to Omega, asks the Commission to determine that Omega, and all Respondents, are "gas corporations and thus public utilities subject to the Commission's regulatory authority...."

Omega has moved to dismiss Count II, as it relates to Omega, because it does not state a claim upon which relief may be granted. As explained in the first two points of the motion to dismiss, Count II is barred by federal law because: (1) pursuant to Art. I, Sec. 8, Cl. 17 of the United States Constitution, and R.S.Mo. §§ 12.030 and 12.040, the Commission lacks subject matter jurisdiction over the Omega's provision of utility service within the federal enclave of

Fort Leonard Wood because the State of Missouri has ceded exclusive jurisdiction to the federal government; and (2) pursuant to Art. VI, Cl. 2 of the United States Constitution, the Commission may not attempt to regulate Omega's contract for utility service at Fort Leonard Wood because such activities are governed exclusively by federal procurement statutes and regulations. See *Blackhills Power & Light Co. v. Weinberger*, 808 F.2d 665 (8th Cir.) cert. denied 484 U.S. 818 (1987) ("*Black Hills I*"); *West River Electric Assoc., Inc. v. Blackhills Power & Light Co.*, 918 F.2d 713 (8th Cir. 1990) ("*Black Hills II*"). The Staff does not dispute either point.

In an effort to appear reasonable, the Staff's Opposition acknowledges what it must: the Commission does not have subject matter jurisdiction over Omega's contract with the federal government to provide gas service to Fort Leonard Wood. (Opposition, ¶ 5). The Staff points to no other business of Omega which would qualify it as a public utility subject to regulation. Certainly, it has not in the past claimed that any non-federal activity of Omega is subject to Commission jurisdiction. If the Staff no longer asserts what it pleaded, it has a legal duty to dismiss Omega as a party, and not to ask the Commission to declare Omega to be a public utility which is subject to its jurisdiction.

The Staff, although acknowledging the federal bar to jurisdiction over Omega's business at Fort Leonard Wood, does not offer to dismiss Omega or offer any alternative basis for jurisdiction. Instead, the Staff claims that, despite the acknowledged bar to jurisdiction over utility service at Fort Leonard Wood, it should be allowed to exercise its full inquisitory powers over Omega and is free to contact its customers. As explained in point III of the motion to dismiss, under Missouri law, Staff's argument does not support the prayer in Count II of the Complaint. Omega does not become a "gas corporation" subject to Commission control simply because Staff has a desire to demand information from it.

Even so, Staff's fall back position does not remove the barriers between state and federal jurisdiction. The assertion of power over the contractor as a back-door strategy to the regulation of a federal contract have been ruled illegal by the federal courts. As explained in *Black Hills I*, **"the [South Dakota] Commission cannot avoid a clear constitutional barrier to state regulation of the enclave by claiming that it is only exercising jurisdiction over the supplier."** 808 F.2d at 669. The Staff is acting outside of its jurisdiction and authority in intruding upon the relationship between Omega and the Department of Defense.

There is no dispute from the Staff that Fort Leonard Wood is a federal enclave governed exclusively by federal law. There is no dispute from the Staff that the utility service contract between Omega and the Department of Defense for utility service at Fort Leonard Wood is governed exclusively by federal procurement law to the exclusion of state law. Accordingly, there is no dispute that the relief requested in Count II of the Complaint cannot be granted as to Omega. No other relief is sought from Omega in this Complaint.

Omega respectfully requests that the Commission enter an Order dismissing Omega from the Complaint.

**The Complaint Fails to State a Claim Upon Which Relief
May be Granted under Missouri Law.**

The third point of Omega's motion to dismiss raised two issues: (1) that the pleading did not set forth facts providing a basis for the Commission to declare that Omega was a "gas corporation"; and (2) that there was no basis in Missouri law for the Staff's assertion that an affiliate can be deemed to be a "gas corporation" as pleaded by the Staff in Count II of the Complaint.

The Staff's opposition to the motion to dismiss claims the Audit Report pleaded sufficient facts regarding affiliate transactions to meet their burden. Omega believes that many

of the allegations stated in the Staff's Opposition are incorrect, but that is an issue which cannot be easily resolved on a motion to dismiss. But Staff still makes no attempt to show that the allegations are material rather than *de minimis* or that the pleaded facts show that Omega is operating as a "gas corporation" within the jurisdiction of the Commission and not merely an affiliate. That is the only claim against Omega pleaded in the Complaint.

The sufficiency of the fact pleading was only half of point III of the motion to dismiss. What clearly can be resolved by a motion to dismiss, and what the Staff does not even try to answer, is the fundamental flaw that the Complaint does not provide any statutory basis for extending the statutory definition of a "gas corporation" stated in R.S.Mo. § 386.020(18) to include "affiliates" of gas corporations.¹ The Staff is ducking the real issue: it is not rational for Staff to claim to have pleaded sufficient facts to justify deeming Omega to be a "gas corporation" when the Staff cannot articulate, much less cite authority for, the legal elements for transforming a non-regulated affiliate into a statutorily regulated entity as pleaded in Count II. Lacking a known legal basis for the prayer in Count II, the Count does not state a claim and should be dismissed.

As explained by the Commission in *In the Matter of an Investigation into a Pending Sale of Assets of Aquila, Inc.*, Case No. EO-2004-0224, Missouri Public Service Commission, (February 26, 2004) ("*Aquila*"), the Commission is not at liberty to open an investigation simply because the Staff thinks it would be a good idea. The Commission's foremost duty is loyalty to the Missouri Constitution and to conscientiously maintain itself within the boundaries set by the

¹ "(18) 'Gas corporation' includes every corporation, company, association, joint stock company or association, partnership and person, their lessees, trustees or receivers appointed by any court whatsoever, owning, operating, controlling or managing any gas plant operating for public use under privilege, license or franchise now or hereafter granted by the state or any political subdivision, county or municipality thereof;"

legislature. Staff's defense of the inclusion of Omega in this Complaint is simply a reprise of the Staff's claim to unrestricted authority which the Commission very properly rejected in *Aquila*.

What the Staff fails to acknowledge, and what Count II of the Complaint asks the Commission to ignore, are the fundamental differences between an unregulated affiliate and a regulated "gas corporation". In the Motion to Dismiss, Omega pointed to *State ex. rel. Atmos Energy Corp. v. Public Service Comm'n*, 103 S.W.3d 753 (Mo. 2003), which explained that R.S.Mo. §§ 393.130.2 and 393.140(12) provide the Commission with jurisdiction to *investigate* the regulated entity's dealings with its affiliates:

"Thus, where the affiliate is not one 'substantially kept separate' from the utility, the PSC is authorized to 'inquire' into certain aspects of the affiliate's operations as they relate to the capitalization, debts, expenses, etc., of the utility."

103 S.W.3d at 764.

That power to inquire of an affiliate which is not substantially separate from the regulated entity is embodied in, and limited by, 4 C.S.R. § 240-40.015. It appears that Count II is based solely upon the Staff's discontent with the legal limits on its power over affiliated entities and instead wants to expand its authority by treating the affiliate as a regulated entity, subject to the broad inquisitory powers of the Staff. R.S.Mo. § 393.140(12) cannot be read to confer the power to simply declare that the affiliate is itself a "gas corporation" subject to complete regulation by the Commission. As noted in *State ex rel. Utility Consumers Council of Missouri v. Public Service Commission*, 585 S.W.2d 41, 56 (Mo. 1979), although the Commission is vested with broad powers by the legislature, those powers do not extended to modifying the statutory scheme. That is very explicitly what the Staff asks the Commission to do under Count II of the

Staff Complaint, and it is manifestly improper, unlawful and outside the jurisdiction of the Commission. Omega should be dismissed from the Complaint.

The Subpoena Should be Quashed

In *Atmos* the Court expressed its concern that the power to investigate affiliates of regulated entities was subject to abuse. The Staff's opposition to the motion to quash certainly reinforces that concern. In the subpoenas, the Staff made no effort to justify the breadth of their demands or show that the matters sought from Omega were within their jurisdiction, or show that the properly requested materials were not available from the regulated entity. In the Staff's opposition to the motion to quash, the Staff takes great offense at the notion that they should have to legally justify their assertion of power over a citizen. The Commission's admonition in *Aquila, supra*, that the limits on its jurisdiction must be strictly observed has not been heeded by the Staff. Indeed, the Staff's Opposition fails to mention, much less distinguish, that decision.

It appears the Staff is seeking to avoid scrutiny of the breadth of the subpoenas, and the limitations imposed by law an investigation of affiliates, by claiming that Omega is itself a regulated entity in Count II of the Complaint. As explained above, that theory is absolutely bereft of legal foundation. But pursuant to its claim, the Staff has demanded information beyond that which relates to the affiliate's transactions with the regulated entities, and asks for disclosure about Omega's dealings with its own customer, which happens to be the federal government.

The Staff's opposition attempts to dispose of all objections by claiming that the objections were waived because the motion to quash was not filed within 10 days of issuance of the subpoenas. The argument is a complete fallacy because there was no proceeding open at that time. As admitted by the Staff's opposition, Counsel for Omega, with whom the Staff had been dealing without objection, lodged his objections with both the Staff and the General Counsel of

the Commission. The assertion of a procedural bar by the Staff is just a further indication that the Staff is behaving as a roving inquisition, and claiming authority which they do not possess. This time, unlike *Aquila* (or maybe because of it), the Staff has decided not to seek permission from the Commission before starting its investigation.

What makes the waiver argument even more galling, and even more offensive to due process, is that the Staff is apparently asserting that absent a timely objection, it has the right to exceed its statutory jurisdiction, and even transgress the United States Constitution. Subject matter jurisdiction cannot be created by consent or fabricated by a claim of waiver. *Garcia-Huerta v. Garcia*, 108 S.W.3d 684, 686 (Mo.App.W.D. 2003). Agency actions, including this subpoena, done in excess of the agency's subject matter jurisdiction are void *ab initio*. *Id.*

Omega, and the regulated entities, have cooperated in providing information regarding affiliate transactions with the regulated entities. But Staff goes too far, much too far, in demanding open ended discovery into Omega's own business, and in interfering with its relationship with its primary customer, the federal government. Apparently because Omega stood on its rights to refuse to comply with facially void subpoenas in excess of the Staff's powers, the Staff has tried to flex its muscle and is asking the Commission to declare, without legal or factual basis, that Omega itself is a regulated gas corporation. As explained in the motion to dismiss, and has not been disputed by the Staff, there was no legal basis for the Staff Complaint asking to have Omega re-classified as a regulated entity.

The breadth of the subpoenas, and the Staff's failure to offer any justification or good cause for their issuance, demonstrates that they were issued on the Staff's presumption that Omega could lawfully be treated as a regulated entity. Since Staff's presumption is baseless as a

matter of law, and the subpoenas rove far beyond the Commission's subject matter jurisdiction, the subpoenas much be quashed.

Wherefore, Omega Pipeline Company, LLC respectfully requests that the Staff Complaint filed March 31, 2006 be dismissed insofar as the Complaint is addressed to Omega Pipeline Company, LLC and further that the subpoenas issued by the Staff to David Ries and David (BJ) Ludholz, regarding Omega Pipeline Company, LLC be quashed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the foregoing Answer to Complaint has been hand-delivered, transmitted by e-mail or mailed, First Class, postage prepaid, this 11th day of May, 2006, to:

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