

Staff of the Missouri Public Service Commission,
Complainant,
v.
Missouri Pipeline Company, LLC,
Missouri Gas Company, LLC, et. al.
Respondents.

Missouri Pipeline Company, LLC,)
Missouri Gas Company, LLC, et. al.)
)
Respondents.)

Staff's position: Yes. In its tariffs, Aquila had adopted strict affiliate transactions language that provided significant protection for non-affiliates from affiliate transaction abuses. The current operator,, Mr. David J. Ries, as President of MPC filed an Adoption Notice that MPC "hereby adopts, ratifies, and makes its own, in every respect as if the same had originally been filed by it, all schedules rules, notices . . . filed with the Missouri Public Service Commission by Missouri pipeline Company prior to the effective date hereof." Mr. Ries filed the same adoption notice for MGC. The notices were effective January 1, 2003.

NP

Part of the tariff adopted and ratified by Mr. Ries on behalf of MPC and MGC, are affiliate transactions rules that only became of real significance when Gateway acquired MPC, MGC and Omega.

The tariffs contain a section 12 under the General Terms and Conditions that specify the Operation of the Rate Schedule in Conjunction with Marketing Affiliates. These tariffs became significant after the sale for the following reasons:

MPC, MGC and Omega shared facilities and personnel

On or around July 1, 2003, Omega began to expanded its activities beyond its traditional local distribution company service to Fort Leonard Wood to provide marketing functions to other entities served by its affiliates, MPC and MGC. Before this happened ** _____

_____. **

Staff's recent audit determined that MPC and MGC did not maintain separate operational facilities and personnel from its now marketing affiliate, Omega. Operational and accounting information, including shipper information, was not kept confidential from Omega. MPC and MGC data were provided to Omega upon the request of their common president, David J. Ries. The use of MPC and MGC personnel performing functions for Omega during the time period Omega was performing marketing activities was fairly widespread and included the following individuals David Ries, David Wallen, David Lodholz, Patti Hawkins, and John Mittlehauser. The sharing of these employees resulted in violations of the Company tariffs.

In Case No. GM-2001-585 noted that David. Ries would have day-to-day charge of the business affairs, management and contracting for MPC and MGC. Mr. Ries would also performs a similar role for Omega. It was Staff's understanding that when Ries assumed control of its

operation, Omega only provided the natural gas functions of a local distribution company to Fort Leonard Wood. Mr. Ries was an Omega employee and President of Omega and at the same time was President of MPC and MGC. While President of MPC and MGC and during the period Omega engaged in marketing activities, Mr. Ries also: a) would negotiate contracts with customers on behalf of Omega; b) would be involved in the structure and rates of the transportation arrangements under which MPC and MGC would serve these customers; c) was responsible for the monthly billing of Omega customers; d) would determine the rates MPC and MGC would charge Omega for related transportation service; e) contracted for Omega's customers capacity on the MPC and MGC pipelines; f) would negotiate the discounts granted or reduced to any non-affiliated party on the MPC and MGC pipelines; g) would nominate the natural gas deliveries into MPC and MGC on behalf of Omega customers; h) was aware of the nominations of other non-affiliated shippers, and i). would review and approve gas purchase invoices for Omega.

The City of Cuba transaction that will be discussed later will provide an actual example of Ries, as President of all three entities, negotiating transactions between Omega and its customers in transactions with MPC and MGC. Fort Leonard Wood provides another example of the dual role performed by Mr. Ries.

MPC and MGC violated the general operating provisions of their tariffs requiring non-discriminatory treatment of affiliates and non-affiliates. In addition, MPC and MGC failed to operate in compliance with Sheet No. 39, paragraph 12 of their Commission approved tariffs:

Operation of Rate Schedule in Conjunction with Marketing Affiliates.

- a. All terms and conditions contained herein shall be applied in a uniform and nondiscriminatory manner without regard to affiliation of any entity to Transporter.

By failing to provide uniform and nondiscriminatory service, under section 12.a, MPC and MGC provided its marketing affiliate Omega advantages over other shippers. MPC/MGC applied the rate authority contained in their tariffs on more favorable terms to their affiliate, Omega, than was applied to non-affiliate shippers. ** _____

_____. **

As President of affiliate Omega, which became a competing marketer on the system, Mr. Ries had access to information about all natural gas customers on the MPC and MGC lines that should have been maintained as confidential information from Omega as a marketing affiliate. This information was certainly not made uniformly available to any other marketers or shippers.

** _____

_____. ** In violation of their tariffs, MPC and MGC charged non-affiliated customers higher rates than the lowest rate charged to an affiliate, Omega, without express Commission approval. P.S.C. MO. No. 3, Sheet No. 5, Paragraph 3.2.

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

MPC and MGC have provided transportation service to Omega without the written transportation agreement required by tariff. P.S.C. MO. No. 2, Sheet No. 4, Paragraph 1.c. (firm transportation); P.S.C. No. 3, Sheet No. 15, Paragraph 1.b. (interruptible transportation). MPC

and MGC allowed Omega through their common control and shared personnel to operate outside the parameters of the conditions for natural gas receipts and deliveries specified in section 1.a of their tariffs regarding the provision of firm or interruptible transportation service, or section 2.b of the General Terms and Conditions of their tariffs. ** _____

_____. ** Ries needed to hide these arrangements to avoid detection that MPC and MGC were operating outside the parameters contained in their tariffs.

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.

Yes. There are two parts of Omega. The Omega that served the Fort paid the highest tariff rates on the system because it is the only provider to the highest rate area on the pipeline system, but Omega the marketer and agent for certain customers, did not pay the highest rates.

** _____

_____. ** The MPC and MGC tariffs specify that the “lowest transportation rate charged to an affiliate shall be the maximum rate that can be charged to non-affiliate.” MPC and MGC violated their tariffs by charging non-affiliate customers more than the rate that was being charged to Omega.

a) If the above issues are answered in the affirmative, should MPC and MGC issue refunds for overcharges.

Yes. MPC and MGC had no authority to charge non-affiliated customers more than the rate charged to Omega, and their tariffs provided for an immediate reduction in rates to the level charged to an affiliate. Such charges were a violation of their tariffs and MPC's and MGC's tariffs and were unlawful and refunds should be paid to customers that were overcharged.

b) If the above issues are answered in the affirmative, should MPC's and MGC's current charges be reduced so that the rates charged to non-affiliated shippers for transportation is the same as the rates charged to Omega.

Yes. The MPC and MGC tariffs state that the lowest rate charged to an affiliate is the maximum rate that can be charged to a non-affiliate. To state it another way, no non-affiliated customer shall be charged more than the lowest rate charged to Omega without express Commission approval.

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.

Yes. MPC and MGC failed to report to Staff the affiliation with Omega regarding discount offers provided for transportation service to the City of Cuba, ** _____
_____. **

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 or its certificate?

Yes. MGC has a line certificate only and lacks authority to build this lateral outside the boundaries of its certificated area. MGC was authorized under its tariffs to modify its facilities only in the event that MGC was reimbursed by ** _____ ** or the end-user ** _____

_____. ** On or around June 1, 2004, MPC and MGC provided interruptible transportation service to Omega at a new delivery point for Willard Asphalt. MPC paid for the line (MGC does not have a checking account) and did not seek nor receive reimbursement from ** _____
_____ ** for all costs and expenses in constructing, establishing or modifying the facilities required for receipt and/or delivery of gas to this location. MPC and MGC provided interruptible transportation service to satisfy Omega gas supply obligations to this customer at rates lower than the rates charged to other MPC and MGC customers.

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

Staff is not pursuing this issue at this time.

The issue of destruction of documents remains. Respondent's refusal to produce certain documents essential to Staff's case, remains an issue that must be addressed by the Commission. Staff has not received a copy of any actual invoices MPC and MGC sent to their customers which are necessary 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. Ries actually stated to Staff that we would never get these documents.

In his deposition, Mr. Lodholz testified that the documents existed but Staff has only been provided "re-created" invoices for the period January 1, 2004 through March 2006. The destruction of such records or the refusal to produce them 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. 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. The adverse inference that the Commission should draw against the Respondents is that the evidence hidden or 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. Respondents refuse to produce the invoices that would prove violations of their tariffs and the amount of damages due to those violations.

ORDER OF WITNESSES AND ORDER OF CROSS EXAMINATION

Staff agree with Respondent’s list of cross examination and submits the following additions to the list of witnesses:

Thomas Imhoff - MGCM, AmerenUE, Federal Executive Agencies, (FEA) OPC, MPC

Robert Schallenberg- Same

Allen Simpson- OPC, AmerenUE, MGCM, Staff, MPC

David (BJ) Lodholz - Same

David Wallen - Same

James Massman Same

Christopher John - AmerenUE FEA, OPC, MGCM, Staff

Clark Smith - Same

David Ries - Same

Since there are only three days scheduled for hearing Staff suggests that the Commission prepare to proceed into the evening and continue the hearing into the weekend if necessary to complete the hearing in a timely manner.

WHEREFORE Staff requests the Commission accept this list of issues in this case.

Respectfully submitted,

/s/ Lera L. Shemwell

Lera L. Shemwell
Deputy General Counsel
Missouri Bar No. 43792

Attorneys for the Staff of the
Missouri Public Service Commission
P. O. Box 360
Jefferson City, MO 65102
(573) 751-3015 (Telephone)
(573) 751-9285 (Fax)
steven.reed@psc.mo.gov
lera.shemwell@psc.mo.gov

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been mailed, hand-delivered, transmitted by facsimile or electronic mail to all counsel of record on this 4th day of December, 2006.

/s/ Lera Shemwell