BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

Staff of the Missouri Public Service Commission,	)	
	)	
Complainant,	)	
	)	
v.	)	Case No. GC-2006-0491
	)	
Missouri Pipeline Company, LLC; Missouri Gas Company, LLC;	)	
	)	
Respondents.	)	

INITIAL POST-HEARING BRIEF OF MISSOURI PIPELINE COMPANY AND MISSOURI GAS COMPANY

COMES NOW Respondents Missouri Pipeline Company (hereafter "MPC") and Missouri Gas Company (hereafter "MGC") (collectively referred to as the "Pipelines") and file their initial post-hearing brief.

Introduction

On March 31, 2006, Staff filed a Complaint alleging that the Pipelines and several named affiliates have excessive earnings, have violated the Affiliate Transactions Rules, have charged rates not authorized by tariff, as well as alleging that the Commission should assert jurisdiction over certain named affiliates.[1] On June 1, 2006, Omega Pipeline Company LLC ("Omega") was sold to an entity not affiliated with the Pipelines. On June 21, 2006, Staff filed this Complaint against the Pipelines alleging certain tariff violations.[2] On October 30, 2006, Staff filed a motion to suspend the GC-2006-0378

[1] *See* Staff Complaint Concerning Excessive Earnings; Violations of Affiliate Transactions Rule; Charging Rates Not Authorized By Tariff; And Asserting Jurisdiction Over Gateway Pipeline Company LLC, Omega Pipeline Company LLC, Mogas Energy LLC, AND United Pipeline Systems, Inc LLC, Case No. GC-2006-0378 (hereafter "GC-2006-0378").

[2] *See* Staff Complaint Concerning Tariff Violations and Motion for Expedited Treatment, Case No. GC-2006-0491 (hereafter "GC-2006-0491").

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complaint case and on November 9, 2006, the Commission granted the motion and suspended the procedural schedule in that case. Consequently, the evidentiary hearing in this matter only was held December 13-15, 2006. No pre-hearing briefs have been filed.

Executive Summary

The foundation of Staff's position in this case has been that prior to opening its investigation in November 2005, it was not aware that Omega, now a former affiliate of the Pipelines, was acting as a gas marketer, or that Omega was a company that bought and sold gas. Staff also claims it was not aware that other third parties were acting as agents for Shippers on the Pipelines' systems. Staff contends that these revelations lead to the "discovery" of the alleged violations of the Pipelines' tariff provisions relating to affiliate transactions and discriminatory pricing. Not only is Staff's position incorrect, Staff has previously acknowledged facts that clearly establish the fallacy of the foundation of its case. Staff was specifically advised by the Pipelines and therefore knew that: (i) Omega was a gas marketer and an affiliate of the Pipelines; and (ii) the Pipelines were approached for assistance with gas purchasing by small town customers and they wanted to help their small town customers by either getting tariff authority to allow the regulated Pipelines to buy and sell gas or by using Omega or some other marketing affiliate, doing so through agency contracts. Being fully informed, Staff advised the Pipelines that it preferred the Pipelines use a marketing affiliate and not amend the tariffs to allow the Pipelines to buy and sell gas. The small towns and small users were subsequently assisted, by their free choice, with their gas purchasing through agency contracts between them and Omega, just as Staff recommended.

A. The uncontroverted evidence presented in the form of: (i) data request responses submitted to Staff[3]; (ii) emails from Staff[4]; and (iii) FERC pleadings[5] to which this Commission was a party, establish that:

(i) Staff was told that certain small towns had approached the Pipelines looking for assistance to more effectively buy their gas[6];

(ii) the Pipelines requested Staff's support for tariff changes to allow the Pipelines to buy and sell small quantities of gas on behalf of small towns which had approached the Pipelines looking for assistance in more efficiently handling their purchasing needs[7];

(iii) the Pipelines indicated to Staff in writing that Omega was a buyer and seller of gas and had bought and sold gas for delivery to Fort Leonard Wood for the ten (10) previous years[8];

(iv) the Pipelines submitted proposed offers to buy gas for several small customers that would be put into effect if Staff supported, and the Commission approved, the tariff change[9];

(v) Staff was given three specific options by the Pipelines to consider in how best to assist these small towns. Specifically, an August 23, 2002,

[3] *See* Appendix AA to Exhibit 304, Ries Rebuttal, Appendix LL to Exhibit 301, John Surrebuttal (attached hereto as Attachment A).

[4] *See* Exhibit 306, e-mail from Warren Wood to David Ries dated November 20, 2002 with Data Requests 4101, 4102, 4103, and 4104 (attached hereto as Attachment B); Exhibit 308, letter to Mr. Dave Ries from Mr. Warren Wood, January 2, 2003 (attached hereto as Attachment C); Exhibit 310, e-mails (attached hereto as Attachment D).

[5] *See* Exhibit 304, Ries Rebuttal, Appendices B, C, D and E.

[6] *See* Exhibit 301, John Surrebuttal, Appendix LL; Exhibit 310, e-mails.

[7] *See* Exhibit 301, John Surrebuttal, Appendix LL; Exhibit 310, e-mails.

[8] *See* Exhibit 301, John Surrebuttal, Appendix LL; Exhibit 310, e-mails.

[9] *See* Exhibit 301, John Surrebuttal, Appendix LL.

email from Mr. Ries to Mr. Wood of the Staff in which Mr. Ries describes the three options the Pipelines proposed: *(1) "We could completely change the current tariff of MGC to allow it to buy and sell commodity; (2) "Since Omega currently performs all of the necessary functions, selling gas to other customers along the transportation path would be a natural fit"; or (3) "Alternatively the small cities currently hold their own capacity on MPC and MGC and assign various parties to be their agent under those agreements. Omega could continue to serve the FORT and act as their agent for the cities the same way as the other parties are doing today."*[10]*;*

(vi) the Pipelines indicated to Staff that, absent appropriate tariff changes, Omega or another marketing affiliate would market gas to small customers along the Pipelines' transmission path[11];

(vii) Omega was specifically identified as an affiliate of the Pipelines and fully disclosed that it was sharing employees with the Pipelines[12];

(viii) in a January 3, 2003 letter from Mr. Wood to Mr. Ries, Staff acknowledged that it had received the aforementioned data request response from the Pipelines and made clear its preference that the Pipelines not be used to market gas, and that instead a marketing affiliate of the Pipelines be used to market gas[13]; and

[10] *See* Exhibit 301, John Surrebuttal, Appendix LL; Exhibit 310, e-mails.

[11] *See* Exhibit 301, John Surrebuttal, Appendix LL.

[12] *See* Exhibit 301, John Surrebuttal, Appendix LL.

[13] *See* Exhibit 308, letter to Mr. Dave Ries from Mr. Warren Wood, January 2, 2003.

(ix) in an August 23, 2002 e-mail from Mr. Wood to Staff members Sommerer, Morrissey, Schwarz and Imhoff, many of whom have worked on this case, Mr. Wood accurately and succinctly details the three options Mr. Ries indicated the Pipelines intended to pursue.

For Staff to claim it did not know these facts or that the Pipelines have attempted to disguise or conceal their activities is at best disingenuous. If Staff were to acknowledge the relevance of data request responses and the e-mails it produced, then Staff could not concoct its "story" that the Pipelines were secretly using Omega to transport gas to customers as their agent or marketer. In fact, what transpired with the small towns and small users was exactly what the Pipelines told Staff they would do, which was to use Omega as an agent to buy and sell gas for the small towns and small customers. It may sound more interesting to call them "secret customers," as Staff did during the hearing, seeking to imply some evil intent to hide them.

As it turns out, Staff's attempt to create a clever phrase cannot cover up the truth. In fact, everything the Pipelines did was precisely and fully disclosed to Staff as early as August of 2002. There is no intrigue involved with these transactions and there was no impropriety on the part of the Pipelines. The Pipelines reasonably relied on Staff's expressed preference so that instead of amending MGC's tariff, Omega acted as the marketing agent, just as was happening in 2002 between the small towns and other agents they had been using.

B. The only credible evidence in the record demonstrates that Omega consistently paid the highest rates of any Shipper on the Pipelines' systems. Staff reaches its incorrect conclusions on this issue by ignoring the fact that Omega acts in two capacities in dealing with the Pipelines. First, Omega has a contract with the Pipelines that enable it to ship gas on the system.[14] Second, Omega has a contract with the City of Cuba to act as its agent to acquire and manage the delivery of gas.[15] In the latter circumstance, the City of Cuba has the contract with the Pipelines, allowing it to be a Shipper of gas on the system.[16] This agency relationship is commonly utilized for the benefit of small customers[17] and Staff knew other marketing entities were using agency contracts[18].

The City of Cuba, unlike Omega, does have a discounted rate for shipping gas.[19] Staff wrongly attributes the City of Cuba's discount to Omega, claiming that all Shippers on the system should have the same discount as Cuba, even though Staff admits the City of Cuba was not an affiliate of the Pipelines. In its comparison, Staff incorrectly compares rates for service under transportation service agreements between the Pipelines and Shippers with payment provisions from gas sales and agency agreements between Omega and Omega's customers.[20] Staff admits in its testimony that Omega's charges included charges for performing a gas supply function (buying and selling gas, nominations, scheduling, etc.), transportation charges upstream on interstate pipelines, as well as charges for the transportation service provided by the Pipelines. Agency agreements are non-jurisdictional agreements under which services are not required to be

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[14] *See* Exhibit 303, Smith, Rebuttal; Appendices F-1 and V.

[15] *See* Exhibit 303, Smith Rebuttal; Appendix I.

[16] *See* Exhibits 23-24; Transportation Agreement (Firm Provisional Transportation Service) between MPC and Cuba, MP-1025-TAF; Transportation Agreement (Firm Provisional Transportation Service) between MGC and Cuba, MG-1009-TAF.

[17] *See* Exhibit 303, Smith Rebuttal at 10.

[18] *See* Exhibit 301, John Surrebuttal, Appendix LL.

[19] *See* Exhibit 26; Letter Agreement from Mr. Ries to Mayor John Koch, July 7, 2003.

[20] *See* Exhibit 300, John Rebuttal at 23.

offered on a cost-basis, while transportation agreements are jurisdictional and services are required to be provided pursuant to tariff rates. Accordingly, it is not appropriate to compare the rates and charges from the gas sales and agency agreements from a non-regulated marketer to its customers to those charges of the Pipelines for only transportation to its Shippers when the functions and services are so obviously not equivalent. The comparison is so ludicrous that Staff does not even attempt to cite any Commission rule or case law that supports this "apples to oranges" comparison.

C. Staff's unilateral pronouncement that a "Shipper" is any party that owns gas moving through the Pipelines' systems is unsupported by any law, rule or tariff provision. Staff literally makes this definition up and has failed to produce one cite to case law or Commission rules or industry treatise to support its creation out of thin air. It is only through this made up definition of "Shipper" that Staff can then allege that the Pipelines shipped gas to a party with which it did not have a contract. Moreover, Staff tries to retroactively and selectively apply that definition of "Shipper" to the Pipelines and to no others. Staff completely ignores the fact that for years other cities have been receiving gas without a contract by using capacity other parties already held on the Pipelines. Staff cannot, after the fact, retroactively and unilaterally create definitions and rules. To now impose a new definition of "Shipper" would have a devastating effect on the industry and the Pipelines.

I. Issue One

Did the Pipelines violate the terms of their tariffs and Commission affiliate transactions rules (4 CSR 240-40.016) by permitting Omega to use confidential customer information in a discriminatory manner for each of Omega's contracts with customers served by the Pipelines.

The Pipelines did not violate the terms of their tariffs or the Commission affiliate transaction rules and did not permit Omega to use confidential customer information in a discriminatory manner. The Commission's rules provide, "A regulated gas corporation shall not provide a financial advantage to its affiliate."[21] The Pipelines never provided such an advantage. When Staff's tortured assumptions and innuendo about affiliate relationships are peeled away, one is left with only one affiliate transportation agreement, that is with Omega. Omega, the Pipelines' then marketing affiliate, was consistently charged the highest transportation rate under the Pipelines' tariffs and therefore, Omega did not improperly use confidential customer information to its benefit.

Staff was Aware of Omega's Dual Role and Shared Personnel

Staff bases its argument on the fact that the Pipelines have shared personnel with their then affiliate, Omega. The evidence clearly establishes that Staff and the Commission have been fully aware of the relationships between the Pipelines and their former affiliate, Omega, in both of its capacities since 2002. In fact, in August 2002, Mr. Ries informed the Commission's Staff that the Pipelines were considering using its then affiliate, Omega, to provide marketing services to other customers along the Pipelines' transportation paths.[22] In a subsequent letter from Mr. Wood to Mr. Ries, Staff indicated its preference for the Pipelines to use Omega as a marketer by stating, **"Staff has expressed concern over the structure of these transactions and Staff's preference that an affiliate should make any 'bundling' arrangements."**[23] In this same letter Staff further stated, "While the Commission's affiliate rules do not specifically require

[21] 4 CSR 240-40.016(3).

[22] *See* Exhibit 301, John Surrebuttal , Appendix LL; s*ee* Exhibit 310, e-mail from Mr. Dave Ries to Mr. Warren Wood, August 23, 2002.

[23] See Exhibit 308, letter to Mr. Dave Ries from Mr. Warren Wood, January 2, 2003.

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separate employees, there are requirements that would apply to any affiliate transactions between the interstate Pipeline and a marketing affiliate. The Commission affiliate rules also allow waivers to be granted if the Commission approves."[24] Until the filing of Case No. GC-2006-0491, Staff sent no follow-up correspondence to Mr. Ries indicating its change of position that the Pipelines not use Omega as a marketer or that it objected to the sharing of personnel.

Staff's awareness of the fact that the Pipelines were sharing employees and office space with Omega is further evidenced by its support of FERC's waiver allowing this sharing of employees and space to continue. Due to the Pipelines' small size, the Pipelines' affiliate Missouri Interstate Gas (hereafter "MIG") filed in FERC Docket No. TS04-259-000, seeking a waiver of the FERC regulation section 358.4(a) requiring that the transmission function employees of the Pipelines function independently of the Pipelines' marketing or energy affiliates.[25] The Commission, through its Staff, intervened in the FERC proceeding on April 12, 2004.[26] In its intervention, Staff and the Commission were again made aware of the nature of the Pipelines and Omega's shared personnel and supported the request for waiver of the FERC rules requiring the independent functioning of such personnel.[27] FERC granted MIG's request for waiver on July 7, 2004.[28] Staff and the Commission made no objection to the ruling at that time. Staff, through Mr. Wood[29] responded that Staff preferred a marketing affiliate be used to buy and sell gas for the small towns and that MGC not change its tariff. Staff was

[24] *Id.*

[25] *See* Exhibit 300, John Rebuttal, Appendix B.

[26] *See* Exhibit 300, John Rebuttal, Appendix C.

[27] *Id* at 10.

[28] *See* Exhibit 300, John Rebuttal, Appendix D.

[29] *See* Exhibit 308, letter to Mr. Dave Ries from Mr. Warren Wood, January 2, 2003.

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advised and acknowledged it knew Omega was a marketer of gas as early as August 2002. (Imhoff confirmed he knew as of August of 2002 through Staff member Sommerrer's e-mail.[30]). To now indicate that the Pipelines' use of its then affiliate, Omega, as a marketer was somehow a surprise to Staff and improper, is blatantly against the evidence presented.

Staff's witnesses in this proceeding maintain that they had little or no knowledge of the affiliate relationship. This is despite the fact that some of the documentation cited above was requested by one of the Staff witnesses in this proceeding. However, Mr. Wood and others on Staff were made aware of the potential use of an affiliate, Omega, to provide bundled services needed by small cities and end-users.

The fact that Mr. Ries served as an officer of both Omega and the Pipelines is not unlawful or in any way improper. Courts generally presume that officers holding positions with affiliated entities can and do change roles to represent each entity separately.[31] It is further recognized that "It is entirely appropriate for directors of a parent corporation to serve as directors of its subsidiary..."[32]

<u>Staff Misunderstands Omega's Role in Managing Imbalances on the System</u>

The contracts negotiated between Omega and MPC resulted in Omega paying the highest rate for transportation service on both systems. The Pipelines have provided a copy of the agreement between the Pipelines and Omega and demonstrated that Omega has paid the highest rates of any Shipper.[33] Even in light of this fact, Staff's lack of understanding of Omega's role in assisting the Pipelines to manage imbalances free of

[30] *See* Transcript page 233, lines 1-4.

[31] *See* <u>United States v. Best Foods</u>, 118 S.Ct. 1876, 1888 (U.S. 1998).

[32] *Id.*

[33] *See* Exhibit 303; Smith Rebuttal; Appendices F-1 and V.

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charge has led it to conclude that Omega has somehow received preferential treatment due to the sharing of personnel. Again, Staff is incorrect.

Staff's focus on the cause of imbalances is misguided. The important issue is in fact how the Pipelines manage imbalances. In the case at hand, no customer has ever been penalized for not being in balance. By utilizing Omega to balance the systems, the Pipelines (until Omega was sold) have assumed all risk of remaining in balance with PEPL and MRT, all to the economic benefit of Shippers.

To clarify, imbalances result from the difference in the amount of gas that a Shipper or its agent nominate from the delivering pipeline from the volume of gas actually used by the Shipper. Since the Pipelines do not have the authority to buy or sell any quantity of gas off their systems to correct imbalancing problems, the Pipelines are totally dependant upon Shippers' nominations and actual usage to balance the Pipelines' systems.[34] However, the Pipelines have never penalized a Shipper for being out of balance.

Because the Pipelines do not have the authority to sell gas for operational purposes or to cure imbalances, the Pipelines have had to rely on Omega to balance the Pipelines' systems and maintain balance with PEPL and MRT.[35] To the extent that the Pipelines had too much gas in their systems to be able to receive all Shipper nominations, Omega was asked to reduce its nominations. Conversely, to the extent that the Pipelines did not have enough gas in their systems to accommodate Shipper nominations, Omega was asked to increase its nomination to keep the Pipelines in balance.

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[34] *See* Exhibit 304, Ries Rebuttal at 9.

[35] *Id* at 12.

Omega has performed this service this without compensation from the Pipelines. Generally, a marketing company would provide this type of service for a fee or a regulated local distribution company would obtain this service, subject to prudence review and would do so at a risk of incurring a cost disallowance.[36] As explained to Staff in detail, the Pipelines continue to manage the imbalances between the Pipelines with the same tariff provisions that existed previously, but has required Omega to assist with carrying any extra imbalance for the Pipelines.[37] While Staff alleges that Omega is being given preferential treatment, just the opposite is true. Since the sale of Omega on June 1, 2006, Omega has indicated that it was no longer willing to provide this service free of charge. As a result, the Pipelines entered into an agreement to sell the positive imbalance to Omega once these companies have approval to do so.[38]

Staff has failed to present any law or factual basis to show that there was any violation of the affiliate transaction rules simply because Mr. Ries served as an officer of both entities. The evidence shows that the one affiliate contract entered into between affiliates while Mr. Ries served as an officer of both entities was the firm transportation agreement between Omega and the Pipelines; Omega was paying the highest rates on the system under this agreement. Clearly, this one affiliate transaction cannot be viewed as preferential. Staff's misunderstanding of Omega's role in managing imbalances free of charge, even in light of the transportation agreements reflecting that Omega paid the highest rate, has led it to this erroneous claim and the wrong conclusion. Staff has failed

[36] *Id*. at 13.

[37] *Id*. at 11.

[38] *See* Exhibit 304, Ries Rebuttal, Appendix Z.

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to provide any competent and substantial evidence to support the allegations raised by this issue.

II. Issue Two

Did the Pipelines violate their tariffs by transporting natural gas to Omega customers **____________________________________ without an executed transportation agreement.**

No. The Pipelines did not violate their tariffs by transporting natural gas to Omega customers **__________________________** without separate executed transportation agreements between **_____________________________** because none were needed because the gas was being transported pursuant to other existing transportation agreements between the Pipelines and Cuba. In fact, the Pipelines have had written transportation agreements in accordance with the Commission's rules with all Shippers on their systems, including long standing preexisting transportation contracts between the Pipelines and Cuba since 1999.[39] Since gas was delivered to **__________ ____________________________** on capacity held by Cuba on the Pipelines' systems, they were not Shippers on the Pipelines' systems, and therefore were not required to have written transportation agreements. The Pipelines provided Staff with invoices that included all volume transported on the Pipelines' systems for 2004, 2005, and three months of 2006. All volumes shipped were subject to a valid and binding transportation agreement as required by the Pipelines' tariffs.

<u>Transportation Agreements</u>

Staff alleges that Omega was allowed to transport gas over the Pipelines without an executed transportation agreement while non-affiliates were not permitted to do so.

[39] *See* Exhibits 23-24; Transportation Agreement (Firm Provisional Transportation Service) between MPC and Cuba, MP-1025-TAF; Transportation Agreement (Firm Provisional Transportation Service) between MGC and Cuba, MG-1009-TAF.

This allegation is completely false. Staff is imposing an inconsistent standard, apparently only against Omega. Staff's unilateral pronouncement that a "Shipper" is any party that owns gas moving through the Pipelines' systems is unsupported by any law, rule or tariff provision. Staff literally makes up this interpretation for the convenience of pursuing the Pipelines in this case. Staff fails to cite any law or industry treatise to support its creation out of thin air. It is only through this inconsistent treatment that Staff can then allege that the Pipelines shipped gas to a party with which they did not have a contract. Moreover, Staff tries to retroactively and selectively apply its change in interpretation to the definition of "Shipper" to the Pipelines and no others. Staff completely ignores the fact that for years other cities have been receiving gas without a contract, but use other parties contracted for capacity. Staff cannot, after the fact, retroactively and unilaterally create definitions. To now impose a new definition of "Shipper" would have a devastating effect on the industry and the Pipelines. There are numerous examples of Staff's acceptance of the transportation of gas by non-affiliates across the Pipelines' systems without separate transportation agreements.[40] The **____________ ** is one example. The Municipal Gas Commission of Missouri (hereafter "MGCM") has stated that it represents the **____________**. The **______________ ** has never been a Shipper on the Pipelines' systems, yet, the entire City has received all of its gas transported on the Pipelines' systems without ever having a transportation agreement.[41] Other examples include end-use customers behind the City Gate stations at **____** and **__________**. These customers receive transported volumes but are not considered Shippers on the Pipelines' systems. Staff has been fully aware of similar arrangements

[40] *See* Exhibit 304, Ries Rebuttal at 18.

[41] *Id*. at 18.

with **______________________________ ** and has deemed such arrangements prudent and thus presumably lawful.[42]

Moreover, the Pipelines' witness Mr. Ries explained that the Cuba transportation agreements with the Pipelines do not limit with whom Cuba can conduct the business of managing its capacity and that Cuba still holds the capacity on the Pipelines' systems. Mr. Ries also notes that there are other cities with a similar agency relationship with **_________________**In all of these instances, Staff has done nothing to indicate that these arrangements are improper.

<u>Agency Agreements</u>

Staff points to Omega's Agency Sales Agreement with the City of Cuba to somehow support its claim that Omega has ownership of the pre-existing contracts to transport gas held by City of Cuba on the Pipelines' systems. The contracts for transportation held by Cuba on the Pipelines' systems have been continuous and existed many years before Omega became Cuba's agent. The Pipelines themselves are not privy to these contracts between Cuba and Omega. The transportation rights on the Pipelines' systems are held by Cuba, and Cuba, like other towns, exercised its choice to designate Omega as the agent to administer that capacity. The transportation agreements between Cuba and the Pipelines do not limit which entity(ies) Cuba can conduct business with in managing its own transportation capacity on the Pipelines' capacity.[43]

There are literally hundreds of marketing companies across North America that provide the type of sales/agency services that Omega is providing to Cuba, i.e. selling natural gas and acting as agent for administering the ancillary services such as

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[42] *Id*. at 19.

[43] *Id*. at 20.

transportation to the point of delivery. Cuba is a municipally owned LDC capable and free to select the marketer of its choice based on a variety of factors including price, quantity and quality of services. **_______________ **, the marketing arms of **_________________________,** among many others, were all choices available at the time Omega and Cuba entered into the Sales Agreement. Cuba independently chose Omega.

In fact, Cuba has exercised its right of choice. In the four years prior to the Omega contract, Cuba had used **______________________,** an affiliate of **____________________ **, to do what Omega does for Cuba now, namely sell gas to Cuba using Cuba's transportation capacity on the Pipelines' systems to deliver gas to the Cuba City Gate.[44] During that period **__________,** as sales agent, had the obligation to sell gas to Cuba, delivered to Cuba's City Gate just like Omega, and like Omega also had to nominate the volumes, pay the Pipelines on behalf of Cuba for Cuba's use of transportation capacity on the Pipelines' systems and other administrative functions. Although Staff knew these facts, nowhere in the testimony of Staff witnesses Imhoff or Shallenberg does Staff acknowledge the existence of any agency and sales agreement between Cuba and **_____________ **. The fact remains there is nothing extraordinary about the sales agreement between Cuba and Omega, any more than there was anything extraordinary in the similar contract between **_________** and Cuba during the years preceding the Cuba/Omega Sales Agreement or as in effect today between **__________________** and the cities of **_____________________________**.[45]

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[44] *See* Exhibit 304, Ries Rebuttal, Appendix M.

[45] *See* Exhibit 303, Smith Rebuttal at 13.

The Agency Sales Agreement between Omega and Cuba clearly states that Omega is Cuba's agent and that Cuba still holds capacity on the Pipelines' system.[46] Cuba allows Omega, as its agent, to use the Cuba transportation capacity held by Cuba. Cuba is not an affiliate of the Pipelines. These types of agency sales agreements are typical in the industry, particularly when smaller LDC's are involved.[47] In fact, as previously indicated, **____________ ** provided Cuba with the same agency and sales services in the four years prior to Cuba selecting Omega to perform those same services. **____________________** also provides similar bundled services to the towns of **_____________________________ **.[48] These types of agreements are common to the industry and greatly benefit small LDC's with little gas transportation expertise.

Likewise, Omega's Sales Agreements with **_______________ ** and **_________________** are standard across the industry. Most small industry customers buy their gas supply in the form of a "bundled" service, i.e. the supply is delivered to their plant and the supplier manages the upstream transportation.[49] Omega's transportation agreement with Cuba allows Omega to complete the sale to **_________________** delivered at its plant in order to provide a bundled gas supply service. By this transportation contract, Omega has a rate on Cuba's LDC system. Again, this bundled service is common to the industry. This arrangement benefited Cuba as well as **________________ **. If these entities were unhappy with the arrangement, they had the flexibility to select alternative suppliers; thus ensuring that Omega stayed

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[46] *Id.* at Appendix I.

[47] *See* Exhibit 303, Smith Rebuttal at 10.

[48] *See* Exhibit 303, Smith Rebuttal at Appendix X.

[49] *See* Exhibit 303, Smith Rebuttal at 12.

competitive to maintain their business.[50] These types of agreements in no way suggest wrongdoing or tariff violations.

Neither Cuba, **_______________** or **_____________** are required to have transportation agreements under the Commission's rules. The gas supply contracts between two non-regulated entities are beyond the jurisdiction of this Commission. Similarly, there is no lawful authority to arbitrarily determine who are the Pipelines' Shippers in contradiction to the Pipelines' written agreements. The Pipelines have valid agreements with all Shippers, including Omega.[51] Staff has failed to provide any competent and substantial evidence to support the allegations raised by this issue.

Staff's Expressed Preference that Small Towns be
Assisted by Marketing Affiliate of the Pipelines

Staff's continued denial of the receipt of the data request responses from the Pipelines[52] that were hand delivered to Ms. Shemwell on December 10, 2002, is completely disingenuous. Documents produced by Staff admit it received the data request responses, yet its denial persists. Staff witness Imhoff is asked a series of questions trying to elicit testimony that Staff members searched their files and could not find the data request responses.[53] Ironically, Mr. Imhoff is then asked questions about the January 3, 2002, e-mail letter from Staff member Mr. Wood to Mr. Ries[54], but one

[50] *Id*. at 13.

[51] *See* Exhibit 23, Transportation Agreement (Firm Provisional Transportation Service) between MPC and Cuba, MP-1025-TAF; Exhibit 24, Transportation Agreement (Firm Provisional Transportation Service) between MGC and Cuba, MG-1009-TAF; Exhibit 38, Transportation Agreement (Firm Transportation Service) between MPC and Omega, MP-1103-TAF; Exhibit 39, Exhibit A to Transportation Agreement between MPC and Omega, MP-1103-TAF; Exhibit 40, Transportation Agreement (Firm Transportation Service) between MGC and Omega, MG-1103-TAF; and Exhibit 42, Exhibit A to Transportation Agreement between MGC and Omega, MG-1103-TAF.

[52] S*ee* Exhibit 301, John Surrebuttal, Appendix LL.

[53] *See* Transcript page 227, lines 20-25; page 228, lines 1-25; and page 229, lines 1-21.

[54] *See* Exhibit 308, letter to Mr. Dave Ries from Mr. Warren Wood, January 2, 2003.

sentence he is not asked about is the second to the last sentence of the letter in which Mr. Wood says to Mr. Ries:

> "We are reviewing the data request responses and hope to complete this effort shortly."

There can be no doubt that Staff received the data request responses when in Mr. Wood's own letter he admits receiving the data request responses. Despite Staff's stubborn refusal to admit it received the data request responses in December 2002, its own e-mail produced from its own files in discovery, conclusively establishes that the data request responses had been received.

Why would Staff go though pages of live testimony trying to prove they did not receive what their own e-mails prove otherwise? The motive is clear. The e-mails of Staff amongst itself and to and from Mr. Ries, in conjunction with the information contained in the data request responses, totally dismembers Staff's complaint.

These e-mails and data request responses prove that between August 2002 and December 2002 Staff was openly and voluntarily told by Mr. Ries and the Pipelines that:

1. Small towns on the Pipelines' systems had approached the Pipelines looking for help in more effectively purchasing gas. (Imhoff admits there was a meeting he attended in 2002 to discuss the bundling of services to small towns[55]).

2. The Pipelines could not, under their tariff, buy and sell gas to help the small towns and asked Staff if it would support a change to the Pipelines' tariff to allow for the purchase and sale of gas to help these towns.[56]

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[55] Transcript page 233, lines 7-13; *see* also Exhibit 310, first paragraph; and Exhibit 301, John Surrebuttal, Appendix LL, Response to DR 4101.

[56] *See* Exhibit 70, MGC Tariff; Exhibit 71, MPC Tariff.

3. Staff was told and acknowledged it knew Omega was a marketer of gas as early as August 2002. (Imhoff confirmed he knew as of August of 2002 through Staff member Sommerrer's e-mail of August 27, 2002[57]).

4. Staff was told that Shippers holding capacity on the Pipelines' systems were then, in 2002, appointing third parties to be their agents to mange the capacity the Shippers had on the Pipelines' systems and to buy and sell gas as their agent.[58]

5. Staff was asked if it did not approve the tariff change for the Pipelines to buy and sell gas, if it preferred that Omega (or a new marketing affiliate of the Pipelines) market gas for the small towns acting as the agent for the capacity.[59]

6. Staff, through Mr. Wood, responded that it preferred a marketing affiliate be used to buy and sell gas for the small towns and that MGC not change its tariff.[60]

If Staff were to acknowledge the relevance of the data request responses and the e-mails it produced, then it could not support its theory that the Pipelines were secretly using Omega to buy and sell gas to customers as their agent or marketer. In fact, what transpired with the small towns and small users was exactly what the Pipelines told Staff it would do, that is, use Omega as an agent to buy and sell gas for the small towns and small customers. It may sound more interesting to call them secret customers, to imply

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[57] Transcript page 233, lines 1-4; *see* also Exhibit 310, John Surrebuttal, Appendix LL, Response to DR 4103.

[58] *See* Exhibit 310, third page, an e-mail dated August 23, 2002 from Mr. Ries to Mr. Wood.

[59] *See* Exhibit 308, second to last sentence of a January 2003 letter from Mr. Wood to Mr. Ries.

[60] *See* Exhibit 308, letter to Mr. Dave Ries from Mr. Warren Wood, January 2, 2003.

some evil intent to hide them, but everything the Pipelines did was precisely disclosed to Staff in 2003. The Pipelines reasonably relied on Staff's expressed preference that a marketing affiliate be used to assist the small towns.

Staff has failed to provide any competent and substantial evidence to support the allegations raised by this issue.

III. Issue Three

Did the Pipelines provide transportation service to their affiliate, Omega, at a discounted rate and if so, should this rate become the maximum rate that the Pipelines could charge for any of their non-affiliated customers for similar services.

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

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

Staff's entire case rests on the allegation that Omega, an affiliate of the Pipelines until June 1, 2006, was charged lower rates for transportation than other Shippers who were not affiliated with the Pipelines. The allegation is false, without support and appears to be based upon Staff's fundamentally flawed theories of contract law.

Omega has consistently paid the highest rates of any Shipper on the Pipelines' systems. Staff reaches its incorrect conclusions on this count by continuing to ignore the fact that Omega acts in two distinct legal capacities in dealing with the Pipelines. First, Omega has a contract with the Pipelines that enables it to be a Shipper of gas on the Pipelines' systems.[61] The following charts, prepared by the Pipelines' witnesses John and Ries, clearly demonstrate that Omega, in its capacity as a Shipper, has paid the highest rates of any charged to Shippers on the systems.

[61] *See* Exhibit 303, Smith Rebuttal; App. F-1 and V.

MPC Shipper	25% Load Factor Rate
Omega	**________**
Cuba	**________**
Waynesville	**________**
St. Robert	**________**
St. James	**________**
Laclede	**________**
AmerenUE	**________**
Fidelity	**________**
Royal Canin	**________**
Phelps	**________**
Busy Bee	**________**

MGC Shipper	25% Load Factor Rate
Omega	**________**
Royal Canin	**________**
Phelps	**________**
Busy Bee	**________**
AmerenUE	**________**
Waynesville	**________**
St. Robert	**________**
St. James	**________**
Cuba	**________**

**____

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Second, Omega has a contract with the City of Cuba to act as an agent to acquire and manage the delivery of gas.[62] In the latter circumstance, the City of Cuba has the transportation contract with the Pipelines, allowing it to be a Shipper of gas on the Pipelines' system.[63] While this agency relationship is commonly utilized for the benefit of small customers, it nonetheless appears to be at the heart of Staff's erroneous contention that Omega should be attributed the Cuba discounted rates.[64]

The City of Cuba does have a discounted rate for shipping gas.[65] However, Staff wrongly attributes the City of Cuba's discount to Omega, claiming that all Shippers on the Pipelines' system should have the same discount. In its analysis, Staff incorrectly compares rates for service under transportation service agreements between the Pipelines and Shippers with payment provisions from gas sales and agency agreements between Omega and its customers.[66]

Several of the rate adjustments made by Staff are based on a fundamental misunderstanding of agency agreements and a lack of recognition of the differences

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[62] *See* Exhibit 303, Smith Rebuttal; App. I.

[63] *See* Exhibits 23-24; Transportation Agreement (Firm Provisional Transportation Service) between MPC and Cuba, MP-1025-TAF; Transportation Agreement (Firm Provisional Transportation Service) between MGC and Cuba, MG-1009-TAF.

[64] *See* Exhibit 303, Smith Rebuttal at 10.

[65] *See* Exhibit 26; Letter Agreement from Mr. Ries to Mayor John Koch, July 7, 2003.

[66] *See* Exhibit 300, John Rebuttal at 23.

between: (1) rates charged under a MGC/MPC transportation agreement; and (2) the bundled charges contained in agency agreements entered into by Omega with several customers.[67] The first improper rate adjustment made by Staff is based on this assumption that "beginning July 1, 2003, MGC provided Omega firm transportation at a rate lower than the maximum tariff rates."[68]

What actually occurred on July 1, 2003, was that Omega entered into a *non-jurisdictional and non-regulated* Natural Gas Sales and Agency Agreement with the City of Cuba to provide a bundled transportation and sales service. The actual jurisdictional transportation contracts between the Pipelines and Cuba have been in effect since 1999.[69]

These are two distinct and separate contracts between different parties. The Natural Gas Sales and Agency Agreement is between Cuba and Omega, while the preexisting Transportation Agreement is between the Pipelines and Cuba.

Staff has incorrectly attributed affiliate status to this transaction between Omega and Cuba through a "host" transportation agreement concept. Using this "made up" concept, Staff incorrectly concludes that Omega, the agent[70], is now the Shipper under the Cuba transportation contract. No attempt is even made by Staff to support its "made up" theory with any cite to a Commission rule or state statute. Further, Staff assumes that the Cuba transportation rates with the Pipelines, as well as tariff provisions of the Pipelines, are now applicable to Omega and that the Cuba transportation rate transforms into an affiliate rate, which should dictate rates paid by other Shippers. Staff provides no

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[67] *See* Exhibit 301, John Surebuttal, page 9, lines 1-5.

[68] *See* Exhibit 301, John Surrebuttal, page 9, lines 8-10.

[69] *See* Exhibit 23, Transportation Agreement (Firm Provisional Transportation Service) between MPC and Cuba, MP-1025-TAF; Exhibit 24, Transportation Agreement (Firm Provisional Transportation Service) between MGC and Cuba, MG-1009-TAF.

[70] *See* Exhibit 301, John Surrebuttal, page 9, lines 13-23.

explanation or analysis to justify the conclusion that the Cuba transportation rate should be assumed to be an affiliate transportation rate. Simply put, the City of Cuba is not an affiliate of the Pipelines.[71]

Staff admits in testimony that Omega's charges to its customers included charges for performing a gas supply function as well as charges for the transportation service provided by the Pipelines.[72] Accordingly, it is not appropriate to compare the rates and charges from the gas sales and agency agreements to those set forth in the transportation agreements of other Shippers when the functions and services are not equivalent.

Specifically, the charges from the transportation agreements are not comparable to the charges from the gas sales and agency agreements, because the agency agreements provide for charges for gas supply as well as charges for the transportation service provided by the Pipelines and perhaps other pipelines. Agency agreements, in general, are non-jurisdictional contracts, which are not subject to the cost-based limitations of agreements entered into by regulated entities. Conversely, transportation agreements entered into between pipelines and shippers are jurisdictional, cost-based agreements that are subject to Commission oversight with regard to rates and terms and conditions of service. The obligations, rights, and duties between Omega and Cuba under the Sales Agreement are entirely independent of the rights and obligations of Cuba under its transportation agreements with the Pipelines and should not be compared on an equal basis.

[71] *See* Exhibit 301, John Surrebuttal, page 10, lines 1-7.

[72] *See* Exhibit 19, Schallenberg Direct at 27; Transcript at 61; *see* also Exhibit 300, John Rebuttal at 23.

Again, an accurate comparison of rates charged by the Pipelines to Omega and other Shippers clearly shows that the rates Omega is paying on the Pipelines' system are the highest of any Shipper.[73] These comparisons are based on using the methodology required by Paragraph 3.2(b)(4) of the firm transportation rate schedule of both the MPC (P.S.C. Mo No. 2, Sheet No. 6) and MGC tariffs (P.S.C. Mo. No. 2, Sheet No. 6) which state, "Rate comparisons for compliance with these provisions will be calculated assuming a 25% load factor."[74] Using this methodology, the comparison shows that Omega is paying the highest MPC and MGC rates of any Shipper.[75]

In sum, Staff has made an invalid comparison between (1) rates for service under transportation service agreements between the Pipelines and the Shipper; and (2) gas sales and agency agreements between Omega and Omega customers. Yet, the charges from these agency agreements include charges for gas supply and transportation charges on other pipelines *in addition to the charges for transportation provided by the Pipelines* and can include a variety of other services from Omega to its customers. In contrast, the charges from these transportation agreements only reflect charges for transportation provided by the Pipelines to the contracting Shipper. Consequently, any comparison between these service agreements and these agency agreements would represent an "apples to oranges" comparison. Therefore, it is a meaningless comparison.[76]

Staff continues to ignore the legal distinction between Omega's activities as an agent for other Shippers and as a Shipper, despite the fact that the Natural Gas Sales and Agency Agreement between Omega and Cuba specifically states that Omega is an

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[73] *Id*.

[74] *Id.* at 21.

[75] *See* Exhibit 300, John Rebuttal at 23.

[76] *See* Exhibit 305, Ries Surrebuttal,. page 13, lines 5-15.

agent.[77] This Sales Agreement also explicitly discusses the transportation agreements that Cuba holds with the Pipelines, clearly indicating that the City, as buyer, is still responsible for transportation. Not only is Staff's claim based upon its misunderstanding of the legally distinct roles of Omega, but Staff's recommended adjustments to the Pipelines' firm reservation rates would effectively preclude the Pipelines from recovering prudently incurred fixed costs related to operation and maintenance of the systems.[78] Under Staff's recommendation, Staff witness Schallenberg recommends MGC's firm reservation charges be reduced from **____________________** and its firm commodity rate drop from **___________________**."[79] These rate levels proposed by Scallenberg's chart 27 would not allow the Pipelines to recover costs prudently incurred and would be detrimental to Shippers and end users in the long run.[80]

Finally, any rate adjustment request during this proceeding is impermissible by law. The Missouri Supreme Court has affirmed that in determining rate changes and suspensions, the Commission must consider all relevant factors, including operating expenses and the utility's rate of return.[81] The Commission has not heard all of the relevant evidence to determine rate reduction issues during the course of this Complaint. Without such evidence, this Commission will not be able to evaluate all of the facts necessary to determine whether to determine the appropriate rate and, therefore, is precluded by law from granting Staff's requested relief. In Staff's relentless pursuit to

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[77] *See* Exhibit 304, Ries Rebuttal, Appendix I.

[78] *See* Exhibit 300, John Rebuttal, at 28

[79] *See* Exhibit 300, John Rebuttal at 25.

[80] *See* Exhibit 300, John Rebuttal at 27.

[81] *See* State ex rel. Utility Consumers Council of Missouri, Inv. v. Public Service Commission, 585 S.W.2d 41, 49 (Mo banc. 1979); *see also* State ex. rel. Missouri Water Co. v. Public Service Commission, 308 S.W.2d 704, 718-19 (Mo. 1957).

penalize the Pipelines, Staff has proposed an improper, impermissible avenue for the Commission to determine rate issues.

In choosing to ignore the clear roles in the separate agreements, Staff reaches its forgone conclusion that all Shippers on the system are entitled to the same discount as the City of Cuba. Staff's conclusion is clearly wrong and if accepted as correct, would result in the financial ruin of the Pipelines. Staff has failed to provide any competent and substantial evidence to support the allegations raised by this issue. Accordingly, the Commission should not consider the issue of refunds or reduced rates prospectively.[82]

IV. Issue Four

Did the Pipelines violate their tariffs by failing to report their offer of discounted transportation service to their affiliate, Omega, in their second quarter and third quarter 2003 reports to the Commission's Energy Staff.

No. The Pipelines did not charge Omega rates lower than any non-affiliates, but instead, charged Omega rates higher than any other Shipper on the Pipelines' systems.[83] Any required reports of any discount to Omega were properly reported to the Commission's Energy Staff.[84]

The Pipelines' tariffs require the reporting of all discounts to any affiliate.[85] The Pipelines have complied with this condition. For instance, MGC reported the only discount provided to Omega, effective February 1, 2005. Staff acknowledges that it received this report and the report included the rate comparison as required by Paragraph 3.2b confirming that this discounted rate still exceeded the maximum rate for all other

[82] *See* State of Missouri ex. rel. City of Joplin v. Missouri Public Service Commission, 186 S.W.3d 290, 297 (Mo.App. Dec. 2005), holding that the Public Service Commission lacks authority to retroactively correct rates, to refund alleged overpayments that are not held in a segregated account, or to take into account overpayments when fashioning prospective rates.

[83] *See* Exhibit 300, John Rebuttal, Appendices N, O, and P.

[84] *See* Exhibit 71, MPC Tariff, P.S.C. No. 3, Original Sheet No. 39.

[85] *Id.*

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Shippers.[86] In fact, the reservation rates paid by Omega to the Pipelines were the full tariff rates. In addition, the full tariff rate paid by Omega on MGC is **____** per dth, the highest reservation rate paid by any customer. The usage or commodity charge paid by Omega to MPC is the maximum usage or commodity rate on MPC's system. Since Omega signed a 10 year contract with Fort Leonard Wood in 2005 (the longest duration contract of any Shipper on MGC's system), Omega received a slight discount on the usage or commodity rate. Even with this slight discount since 2005 (only on the MGC commodity or usage charge), the critical and uncontroverted fact is that the total rates charged by the Pipelines (measured on a on a 25% load factor s required by the tariffs) Omega's combined rate was **___________** per dth, which is the highest charge to any customer on the Pipelines' systems.

Despite the tariff requirements only providing for the reporting of discounts to affiliates, Staff now claims that the Pipelines are responsible for reporting all business activities of its affiliates, including gas marketing activities regarding how Omega conducts its business as an agent for Cuba which holds capacity on the Pipelines. Staff fails to point to any specific discount that was given to any Shipper and not reported. There is no tariff provision that requires the Pipelines to report agency agreements, whether with affiliated Shippers or otherwise. Likewise, there is no requirement that implies that the Pipelines must report the gas sales agreements entered into by their affiliates.[87]

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[86] *See* Exhibit 304, Ries Rebuttal, Appendix FF.

[87] *Id*. at 40.

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There is no law that supports Staff's allegations and thus, no tariff violation has occurred. Staff has failed to provide any competent and substantial evidence to support the allegations raised by this issue.

V. Issue Five

Did MGC construct a lateral line for **____________ ** to benefit its affiliate, Omega, without demanding reimbursement from either Omega or **______________ ** in violation of its tariff.

The Pipelines did not improperly build or pay for a new delivery meter station on MGC's system. The line construction was a business decision made for the benefit of MGC, not Omega. The line was extended to **______________**, a customer that has already increased the Pipelines' revenues.[88] Another reason behind the decision to extend the line was to allow **_____________ ** to serve potential customers on the eastern end of the city limits at some point in the future.[89] The MGC line to **______________ ** created an incentive for **___________** to eventually extend its system and make its distribution extension less costly to complete.[90]

Without the interconnection, MGC would lose the opportunity to serve the **_______________** plant. In addition, **________________ ** plant's primary usage was during off-peak periods on the MGC system. This allows MGC to add throughput without impacting existing customers' needs.

Prior to extending the line to **____________**, the Pipelines met with Staff to discuss what size and scope of project would constitute an extension of the system versus

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[88] *See* Exhibit 304, Ries Rebuttal at 42.

[89] *Id*.

[90] *Id*. at 43.

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simply adding a delivery point off of the existing meter. In describing those discussions, Mr. Ries testified at the hearing that:

> "We did talk about this in a hypothetical sense. . . The general impression that I walked away with is that if it was plus or minus a mile - - a mile either side of the pipeline, it was, in reality, a part of the existing pipeline certificate. . .In this case we put a meter station in for a new delivery point in an uncertificated area. There was no utility franchise there. It was all on the right-of-way or all on the property of the - - the same property that the delivery was being made to. So there was - - wasn't even any new right-of-way being acquired. It was just a tap in a short lateral, about 1,400 feet, I think, and then a meter station."[91]

Thus, the Pipelines did not believe it was necessary to seek any additional authority prior to constructing the subject line.

Further, no other Shippers incurred any expense from the construction of the line. MGC has not filed a rate case since these facilities went into service. Consequently, none of the costs of these facilities are included in the currently effective rates. Other Shippers ultimately will benefit from MGC retaining and expanding the usage of the MGC system. MGC's actions were prudent and necessary to meet existing and potential growth on its system. The **_____________** plant's off-peak usage enables MGC to increase utilization of the system when others are not putting great demands on the system. Based on these factors, MGC's actions in making the investment in the **__________** facilities was prudent.[92]

There has been no violation of law or tariff. The prudence of the Pipelines' judgment to seek additional business by paying for (at present entirely by its shareholders at their sole financial risk) additional pipeline facilities is solely a cost-benefit analysis

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[91] Transcript pages 668-669.

[92] *Id.* at 29.

for its shareholders to conduct. This business decision is not an appropriate subject for scrutiny in the context of this complaint case. Staff has failed to provide any competent and substantial evidence to support the allegations raised by this issue.

VI. Issue Six

Did the Pipelines violate their respective tariffs by providing preferential terms of payment to their affiliate, Omega.

No. Omega paid its invoices from the Pipelines faster than any other Shipper. Staff's witness, Schallenberg, in his Surrebuttal Testimony, represented that Staff has dropped this count from its complaint.[93]

However, to the extent that this is still a pending issue, the table in Mr. John's Rebuttal Testimony clearly shows the dates of the month in which invoices were sent to all Shippers for the period January 2005 to March 2006. The table shows that Omega was billed at the same time as all other Shippers on the Pipelines' systems and that in every month during this period, the invoices were sent out by the 3rd of the month. The billing dates for the Pipelines were clearly before the 10th of the month required by Paragraph 6.a of the Pipelines' tariffs.[94]

The following table, attached as Appendix S to Mr. John's Rebuttal Testimony, further shows the average days for each MPC and MGC Shipper to make their payments after the invoices have been sent.

Shipper	Avg. Payment Period
Omega – Emhart	4.3
Omega – Cuba	7.8

[93] *See* Exhibit 67, Schallenburg Surrebuttal at 1.

[94] *See* Exhibit 300, John Rebuttal at 31, Appendix R.

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Shipper	Avg. Payment Period
Omega – FLW	8.3
Ameren UE	11.3
UM Rolla	11.5
Fidelity	12.6
Royal Canin	18.8
Phelps	19.5
Laclede	20.3
Oneok – St. James	20.8
Oneok – St. Robert	20.8
Oneok – Waynesville	20.8
Busy Bee	27.5

The period reflected covers January 2005 to March 2006. As the table shows, Omega, as Cuba's agent, averaged 7.8 days to pay the Pipelines invoices and Omega has paid its invoices under its transportation contract with the Pipelines on average within 8.3 days. The remaining Shippers on average take from 11.3 days to 27.5 days to make their payments. Consequently, Omega is the only entity who, on average, makes payment within 10 days from the date of the billing, as is required pursuant to Paragraph 6.b of the General Terms and Conditions.[95] Staff failed to provide any competent and substantial evidence to support the allegations raised by this issue. After seeing the unequivocal evidence that the Pipelines produced in the above chart, Staff withdrew its count in the face of overwhelming evidence to the contrary.

[95] *Id*. at 31, Appendix S.

VII. Issue Seven

Did the Pipelines destroy documents warranting sanctions or an adverse inference pursuant to the doctrine of spoliation.

No. The Pipelines have not destroyed any documents as Staff suggests. For efficiency reasons, the Pipelines maintain their invoice data in electronic format. There is no law prohibiting the Pipelines' maintenance of records in this manner. The Pipelines have provided all invoice data for the period beginning January 2004 through March 2006 to Staff in accordance with Staff's requests. Despite having access to all of that data, as well as invoices obtained directly from customers, Staff has failed to present any evidence to show that the Pipelines' invoices to any Shippers were inaccurate or excessive.

Staff's entire argument is based on its incorrect comparison of the Pipelines' invoices to Cuba sent to Omega, as Cuba's agent, with the invoices from Omega to Cuba. Staff makes this comparison to raise a red herring. As has been explained to Staff, these invoices are not comparable since they represent different types of sales. The invoices from the Pipelines to Omega, as Cuba's agent, were only for transportation services sold to Cuba under the Pipelines' transportation agreements. On the other hand, the Omega invoices to Cuba included the reimbursement for the transportation costs and for gas sold by Omega to Cuba. Staff refuses to acknowledge this clear distinction and attempts to confuse the issue by attacking the accuracy of the Pipelines' electronic records. The Pipelines lawfully maintain their data in electronic format. The invoice data has been reconciled with corresponding bank statements to demonstrate its accuracy.[96] Staff

[96] *See* Exhibit 312, Summary Sheets.

points to nothing in the electronic data provided by the Pipelines showing any inaccuracy. Staff's claim is without merit and sanctions are not warranted.

Staff's position is mistakenly based on its misreading of Mr. Lodholz' deposition testimony. Even though Mr. Lodholz in his deposition explicitly referred to "summary sheets" by stating, "that it is what I would call the summary sheet, the front page,"[97] Staff continues to believe that Mr. Lodholz meant invoices. In effort to support its claim, Staff points to Mr. Ries' deposition, attempting to use Mr. Ries' statement to show that the documents he produced at his deposition were the ones Mr. Lodholz referred to in his deposition.[98] For clarification, Exhibit 254 consists of invoices from the Pipelines to their various Shippers from February 2006 through April 2006.

Staff's reliance on Mr. Ries' deposition and Exhibit 254 is erroneous. Mr. Lodholz himself is the best authority to explain which document he was referring to in his deposition. Mr. Lodholz clarified his testimony by executing his affidavit. In his affidavit, Mr. Lodholz clearly explains that he was referring to summary sheets, not invoices, in his deposition testimony. He further states that he has never destroyed documents outside the normal course of business.[99] Staff's pasting together bits of deposition testimony out of context does not change Mr. Lodholz' own explanation as reflected in his sworn affidavit. Staff is blatantly wrong in its position.

Staff attempts to use the Pipelines' production of electronic invoices as evidence to indicate that they unlawfully destroyed documents. Representatives of the Pipelines have explained that the Pipelines kept their invoice data in electronic form only and that

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[97] *See* Exhibit 19, Schallenburg Direct, Schedule 5 at 191.

[98] *See* Exhibit 254, Deposition of Mr. Dave Ries August, 2006.

[99] S*ee* Exhibit 311, Mr. David ("B.J.") Lodholz Affidavit.

hard copies of invoices were not retained for business efficiency reasons until the beginning of 2006. In this day and age, this data retention policy is common and entirely lawful. In fact, when Ms. Janice Fischer was asked if hard copies of records are commonly unavailable, she stated, "No, I mean, they're either maintained or the customer information is in electronic format and it's easily retrievable."[100] Staff thus admits that electronic data retention is common and does not point to any law prohibiting the retention of invoice data in electronic format.

Most significantly, the accuracy of the Pipelines' electronically produced invoices was validated by the electronic invoices matched with corresponding bank statements in Exhibit 312. Staff has failed to show any discrepancy in the documents provided by the Pipelines and has utterly failed to produce any evidence of any destruction of documents.

Finally, contrary to Staff's contentions, the doctrine of spoliation does not apply to this issue. By definition, this doctrine applies only to the "intentional destruction, mutilation, alteration, or concealment of evidence. . . ."[101] Since the doctrine of spoliation is a "harsh rule of evidence, prior to applying it in any given case it should be the burden of the party seeking its benefit to make a prima facie showing that the opponent destroyed the missing [evidence] under circumstances manifesting fraud, deceit or bad faith."[102] Under this standard, mere negligence is insufficient to trigger the adverse inference rule.[103]

[100] Transcript, page 93.

[101] Baugher v. Gates Rubber Co., Inc., 863 S.W.2d 905, 907 (Mo. App. E.D. 1993) (stating that "'spoliation' is the destruction or significant alteration of evidence.").

[102] Moore v. General Motors Corp., 558 S.W.2d 720, 736 (Mo. App. E.D. 1977).

[103] *See* Baldridge v. Director of Revenue, 82 S.W.3d 212 (Mo. App. W.D. 2002).

This doctrine clearly does not apply. First, the doctrine applies only to evidence destroyed pending the litigation or adverse proceeding. Second, the doctrine applies to circumstances of fraud, deceit or bad faith. Neither circumstance is present here. Hard copies of the invoices in question were not maintained beyond one year as a matter of the Pipelines' internal records retention policy. The Pipelines did not maintain hard copies due to the efficiency of storing invoice data electronically rather than in paper files. The discarding of these hard copies occurred as a matter of course, and was done far prior to Staff's initiation of this Complaint. This method of record retention was utilized to promote internal efficiency and in no way to deceive Staff or the Commission.

Staff has failed to show that any destruction of documents has occurred warranting the application of the doctrine of spoliation. Staff has provided no substantial and competent evidence to support its claim. Accordingly, this claim must be dismissed and its Motion for Sanctions denied.

Conclusion

For the forgoing reasons, the Commission should dismiss all counts in Staff's Complaint and deny its Motion for Sanctions for Destruction of Documents.

Respectfully submitted,

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Dated: February 9, 2007

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CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the foregoing Respondents' Initial Post Hearing Brief has been transmitted by e-mail or mailed, First Class, postage prepaid, this 9th day of February, 2007, to:

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