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.	)	

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW 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 hereby submit their Proposed Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

Procedural History

1. 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]

[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. On June 21, 2006, Staff filed this Complaint against the Pipelines alleging certain tariff violations.[2]

3. On October 30, 2006, Staff filed a motion to suspend the GC-2006-0378 complaint case and on November 9, 2006, the Commission granted the motion and suspended the procedural schedule in that case.

4. Subsequently, the evidentiary hearing in this matter was held December 13-15, 2006. Post-hearing briefs have been filed.

FACTS

1. Extensive evidence has been presented in the form of: (i) data request responses submitted to Staff[3]; (ii) emails between MPSC Staff members as well as between MSPC Staff members and the Pipelines[4]; (iii) FERC pleadings[5] to which this Commission was a party; (iv) pre-filed testimony; and (v) affidavits.

2. Staff was advised as early as 2002 that certain small towns had approached the Pipelines seeking assistance to more effectively buy their gas.[6]

3. The Pipelines sought 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

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

[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.

approached the Pipelines looking for assistance in more efficiently handling their purchasing needs.[7]

4. 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] Omega was specifically identified as an affiliate of the Pipelines and fully disclosed that it was sharing employees with the Pipelines[9].

5. The Pipelines suggested to Staff in writing three specific options to consider in how best to assist these small towns. Specifically, in an August 23, 2002, email from Mr. Ries to Mr. Wood of the Staff, 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) <u>"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</u>."*[10][Emphasis added]

6. 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].

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[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.

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

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

7. 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[12].

8. 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.

9. The options that the Pipelines had described to Staff in its discussions in 2002 and detailed in its December 2002 Responses to Data Requests is precisely what transpired with the small towns and small users, which was to use Omega as an agent to buy and sell gas for the small towns and small customers. There were no "secret customers."

10. 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.[13]

11. 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.[14]

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

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

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

12. Staff supported FERC's waiver allowing this sharing of employees and space to continue.

13. The Commission, through its Staff, intervened in the FERC proceeding on April 12, 2004.[15] 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.[16]

14. FERC granted MIG's request for waiver on July 7, 2004.[17] Staff and the Commission made no objection to the ruling at that time.

15. 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.

16. The Pipelines do not have the authority to buy or sell any quantity of gas off their systems to correct imbalance problems, the Pipelines are totally dependant upon Shippers' nominations and actual usage to balance the Pipelines' systems.[18]

17. The Pipelines have never penalized a Shipper for being out of balance.[19]

18. 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.[20]

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

[16] *Id* at 10.

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

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

[19] *See* Exhibit 304 at 12.

[20] *Id* at 12.

19. If 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. [21]

20. Omega has managed the Pipelines' imbalances without compensation from the Pipelines.[22]

21. 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.[23]

22. 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.[24]

23. Evidence in the record demonstrates that Omega consistently paid the highest rates of any Shipper on the Pipelines' systems. [25]

24. In 1999 the City of Cuba entered into independent transportations contracts with each of MPC and MGC, in which the City of Cuba was Shipper of gas on the Pipelines' systems.[26]

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[21] *Id* at 11-13

[22] *See* Exhibit 304 at 15.

[23] *Id*. at 11.

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

[25] *See* Exhibit 300, John Rebuttal, at 23-26

25. Omega entered into an independent Sales and Agency Agreement in May of 2003 with the City of Cuba to act as its agent to acquire and manage the delivery of gas.[27]

26. Omega entered into independent transportation contracts with each of MPC and MGC in February 2005 that enabled it to ship gas on the Pipelines' systems.[28]

27. Respondents' expert testimony reflects that the agency relationship between Cuba and Omega (as evidenced by the Sales and Agency Agreement) is commonly utilized for the benefit of small customers[29] and Staff knew other marketing entities were using agency contracts[30].

28. Agency agreements are non-jurisdictional agreements under which services are not required to be offered on a cost-basis, while transportation agreements are jurisdictional and services are required to be provided pursuant to tariff rates.[31]

29. For years other cities have been receiving gas without a contract by using capacity other parties already held on the Pipelines' systems.

30. The City of Cuba has a discounted rate for transporting gas on the Pipelines' systems.[32] 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.

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[26] *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.

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

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

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

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

[31] *See* Exhibit 300, John Rebuttal at 11.

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

31. In its comparison of rates charged by the Pipelines to Omega and the charges of Omega to its customers, Staff incorrectly compares rates for service under transportation service agreements between the Pipelines and Omega with payment provisions from gas sales and agency agreements between Omega and Omega's customers.[33]

32. 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.

33. All required reports of any discount to Omega were properly reported to the Commission's Energy Staff.[34]

34. The Pipelines' tariffs require the reporting of all discounts to any affiliate.[35] The Pipelines have complied with this provision.

35. MGC reported the only discount provided to Omega, effective February 1, 2005. [36]

36. 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 Shippers.[37]

37. The reservation rates paid by Omega to the Pipelines were the full tariff rates.

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

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

[35] *Id.*

[36] *See* Exhibit 304, Ries Rebuttal, Appendix FF

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

38. The full tariff rate paid by Omega on MGC is **______** per Dth, the highest reservation rate paid by any customer.

39. The usage or commodity charge paid by Omega to MPC is the maximum usage or commodity rate on MPC's system.

40. 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.

41. Even with this discount since 2005 (only on the MGC commodity or usage charge), the total rates charged by the Pipelines (measured on a 25% load factor required by the tariffs) Omega's combined rate was **_______** per Dth, which is the highest charge to any customer on the Pipelines' systems.

42. The tariff requirements of the Pipelines only provide for the reporting of discounts to affiliates. There are no tariff requirements for the Pipelines to report all business activities of their affiliates. Specifically, there are no requirements that state or imply that the Pipelines must report the gas sales agreements entered into by their affiliates.[38]

43. There is no tariff provision that requires the Pipelines to report agency agreements, whether with affiliated Shippers or otherwise. [39]

44. 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.

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[38] *Id*. at 40.

[39] *See* Exhibit 304, Ries Rebuttal, at 43.

45. The Pipelines provided Staff with invoices that included all volumes transported on the Pipelines' systems for 2004, 2005, and the first three months of 2006. All volumes shipped were subject to a valid and binding transportation agreement as required by the Pipelines' tariffs. [40]

46. Evidence shows numerous examples of Staff's acceptance of the transportation of gas by non-affiliates across the Pipelines' systems without separate transportation agreements.[41]

47. The **______________** is the first. 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.[42]

48. 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.

49. Staff has been aware of similar arrangements with **_________________ _______________** and has deemed such arrangements prudent and thus presumably lawful.[43]

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[40] *See* Exhibit 304, Ries Rebuttal at 21.

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

[42] *Id*. at 18.

[43] *Id*. at 19.

50. 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.

51. The Pipelines' witness Mr. Ries also notes that there are other cities with a similar agency relationship with **________________**. In all prior instances, Staff has done nothing to indicate that these arrangements are improper.

52. 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.

53. 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.[44]

54. 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 transportation to the point of delivery.

55. 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.

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[44] *Id*. at 20.

56. 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.[45]

57. 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.

58. The Agency Sales Agreement between Omega and Cuba clearly states that Omega is Cuba's agent and that Cuba holds capacity on the Pipelines' system.[46]

59. Cuba allows Omega, as its agent, to use the Cuba transportation capacity held by Cuba. Cuba is not an affiliate of the Pipelines.

60. These types of agency sales agreements are typical in the industry, particularly when smaller LDC's are involved.[47]

61. **_________** 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.

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

[46] *Id*. at Appendix I.

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

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

62. Omega's Sales Agreements with **_____________** and **_________________________** are standard across the industry.

63. Most small industrial 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]

64. 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. This bundled service is common to the industry.

65. 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 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.[50]

66. 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."[51]

67. These are two distinct and separate contracts between different parties. First, there is a Natural Gas Sales and Agency Agreement between Cuba and Omega, and second, there is a Transportation Agreement between the Pipelines and Cuba.

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

[50] *See* Exhibit 301, John Surrebuttal, page 9, lines 1-5.

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

68. The Pipelines' line construction for a new delivery meter station on MGC's system was a business decision made for the benefit of MGC, not Omega. [52]

69. The line was extended to **______________**, a customer that has already increased the Pipelines' revenues.[53]

70. The line was also extended to allow **___________** to serve potential customers on the eastern end of the city limits at some point in the future.[54]

71. The MGC line to **_______________** created an incentive for **_______________** to eventually extend its system and make its distribution extension less costly to complete.[55]

72. 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 simply adding a delivery point off of the existing meter.[56]

73. Based on the Pipelines' discussion with Staff, the Pipelines did not believe it was necessary to seek any additional authority prior to constructing the subject line.[57]

74. 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.[58]

75. Other Shippers ultimately will benefit from MGC retaining and expanding the usage of the MGC system.

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[52] *See* Exhibit 304, Ries Rebuttal at 45

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

[54] *Id*.

[55] *Id*. at 43.

[56] Transcript pages 668-669.

[57] *Id.*

[58] *Id.*

76. MGC's actions were prudent and necessary to meet existing and potential growth on its system.

77. 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.[59]

78. The Pipelines maintain their invoice data in electronic format. The Pipelines have provided all invoice data for the period beginning January 2004 through March 2006. The invoice data has been reconciled with corresponding bank statements to demonstrate its accuracy.[60] Staff has failed to show any discrepancy in the documents provided by the Pipelines and further has failed to produce any evidence of any destruction of documents.

CONCLUSIONS OF LAW

1. As the moving party, Staff has the burden of proof in this matter.[61] Courts have affirmed placing the burden of proof on the Complainant because the burden of proof properly rests on the party asserting the affirmative of an issue.[62] Staff must demonstrate by competent and substantial evidence that it's allegations are true. Staff has failed to meet it's burden of proof on each count of its Complaint.

Count One

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[59] *Id.* at 29.

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

[61] *See* State ex rel. GS Technologies Operating Co., Inc. v. Public Service Commission 116 S.W.3d. 680 (Mo.App. W.D. 2003).

[62] *See* State ex rel. Tel-Central of Jefferson City, Inc. v. Pub. Serv. Comm'n, 806 S.W.2d 432, 435 (Mo.App.1991).

2. The Commission's affiliate transaction rules provide, "A regulated gas corporation shall not provide a financial advantage to its affiliate."[63] The Pipelines never provided such an advantage. The findings clearly demonstrate that Omega, the Pipelines' then marketing affiliate, was consistently charged the highest transportation rate under the Pipelines' tariffs and therefore, the Pipelines did not improperly use confidential customer information to benefit Omega. Staff has failed to present any information to the contrary. Staff's comparison of rates did not comply with the methodology required by the Pipelines' tariff which mandate a comparison using a 25% load factor for each Shipper being compared.

3. 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.[64] It is further recognized that "It is entirely appropriate for directors of a parent corporation to serve as directors of its subsidiary..."[65]

4. In this case the findings establish that Staff and the Commission have been aware of the relationships between the Pipelines and their former affiliate, Omega, since 2002. Staff presented no evidence to support a conclusion that the Pipelines' shared personnel led to the violation of any tariff provision or Commission regulation.

5. Nothing in law or tariff prevents Omega from assisting Pipelines in managing imbalances on the Pipelines' system, particularly when that assistance was

[63] 4 CSR 240-40.016(3).

[64] *See* United States v. Best Foods, 118 S.Ct. 1876, 1888 (U.S. 1998).

[65] *Id.*

provided without compensation to Omega and was to the benefit of all other Shippers who avoided being assessed penalties.

6. Staff has failed to present any legal or factual basis to establish any violation of the affiliate transaction rules. It is not sufficient as a matter of law to establish a violation simply by stating Mr. Ries served as an officer of both Omega and the Pipelines, a fact of which Staff was aware and did not object to in the course of the proceeding before FERC. The available information demonstrates that the affiliate contracts entered into between Omega and the Pipelines while Mr. Ries served as an officer of both entities, were the firm transportation agreements between Omega and the Pipelines of February 2005, which supports the conclusion that Omega was not given preferential treatment, but instead was paying under these transportation agreements the highest rates on the Pipelines' systems of any Shipper. Therefore, this affiliate transaction cannot be viewed as preferential. Furthermore, Staff's misunderstanding of Omega's role in assisting the Pipelines in managing imbalances on the Pipelines' system without compensation (even in light of the transportation agreements reflecting that Omega paid the highest rate), has led to an erroneous claim of preferential treatment. The evidence presented established that the Pipelines' Shippers were not assessed penalties for gas imbalances due to the Pipelines' ultimate ability to balance their system's gas with the assistance of Omega. The balancing was a benefit to all customers and not a preference granted Omega. Staff has failed to provide any competent and substantial evidence to support the allegations raised by this issue.

Count Two

7. The Pipelines did not violate their tariffs by transporting natural gas to Omega customers **____________________** without separate executed transportation agreements. No agreements were necessary because the gas was being transported pursuant to other existing transportation agreements between the Pipelines and Cuba.

8. Staff cannot, as a matter of law, impose a retroactive and inconsistent standard only against Omega without any Commission rule or regulation allowing it to do so. No law, rule or tariff provision supports Staff's unilateral pronouncement that a "Shipper" is any party that owns gas moving through the Pipelines' systems.

9. In its Complaint, Staff retroactively applies its change in interpretation to the definition of "Shipper" to the Pipelines. Staff ignores the fact that for years other cities have been receiving gas without a contract, but use other parties' contracted for capacity. To now impose a new definition of "Shipper" would have a devastating effect on the industry and the Pipelines. Staff fails to cite any law or industry treatise to support its new interpretation.

10. 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.[66] Neither Cuba, **__________** or **_______________** are required to have transportation agreements under the Commission's rules. The gas supply contracts between two non-regulated entities using receiving gas under Cuba's valid transportation agreement are beyond the jurisdiction of this Commission. Similarly, there is no lawful authority to arbitrarily determine the identity of the Pipelines' Shippers in contradiction to the Pipelines' written agreements.

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[66] *Id*. at 20.

11. The Agency Sales Agreement between Omega and Cuba clearly states that Omega is Cuba's agent and that Cuba holds capacity on the Pipelines' system.[67] Staff has incorrectly attributed affiliate status to this transaction between Omega and Cuba through a "host" transportation agreement concept. Staff incorrectly concludes that Omega, the agent[68], becomes the Shipper under the Cuba transportation contract. 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 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.[69]

12. The Pipelines have valid agreements with all Shippers, including Omega.[70] Staff has failed to provide any competent and substantial evidence to support the allegations raised by this issue.

Count Three

13. No factual findings support Staff's claim that the Pipelines provided transportation service to Omega at a discounted rate or that any such discounted rate

[67] *Id*. at Appendix I.

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

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

[70] *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.

should have been the maximum rate charged to other non-affiliated customers for similar services.

14. Omega has consistently paid the highest rates of any Shipper on the Pipelines' systems. 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.[71] Second, Omega acts as an agent for other customers.

15. 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.[72]

16. Staff's allegations are based on a fundamental misunderstanding of agency agreements and a lack of recognition of the differences 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.[73]

17. 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. 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

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

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

[73] *See* Exhibit 301, John Surrebuttal, page 9, lines 1-5.

charges from these transportation agreements only reflect charges for transportation provided by the Pipelines to the contracting Shipper. Any comparison between these service agreements and these agency agreements is not appropriate.[74]

18. 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 agent.[75]

19. 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.[76] 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 cannot 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.

20. Staff has failed to provide any competent and substantial evidence to support the allegations raised by this issue. Accordingly, the Commission will not consider the issue of refunds or reduction of rates prospectively.[77]

Count Four

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

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

[76] *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).

[77] *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.

21. The Pipelines' tariffs require the reporting of all discounts to any affiliate.[78] The Pipelines have complied with this condition. The factual findings show that the Pipelines reported the only discount provided to Omega, which became effective February 1, 2005.

22. Despite the tariff requirements only providing for the reporting of discounts to affiliates, Staff assets 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.

23. 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.[79]

24. 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.

<u>Count Five</u>

25. There has been no violation of law or tariff for the Pipelines' construction of a lateral line for **_________** without receiving payment from either Omega or **_____________**. 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 for its shareholders to conduct. This

[78] *Id.*

[79] *Id*. at 40.

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.

Count Six

26. 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. Staff has failed to present any evidence to show that the Pipelines' invoices to any Shippers were inaccurate or excessive.

The Pipelines lawfully maintain their data in electronic format. The invoice data has been reconciled with corresponding bank statements to demonstrate its accuracy.[80] Staff 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.

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,"[81] 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.[82] For clarification, Exhibit 254 consists of invoices from the Pipelines to their various Shippers from February 2006 through April 2006.

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

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

[82] *See* Exhibit 254, Deposition of Mr. Dave Ries August, 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.[83] Representatives of the Pipelines have explained that the Pipelines kept their invoice data in electronic form only and that hard copies of invoices were not retained for business efficiency reasons until the beginning of 2006.

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.

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. . . ."[84] 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."[85]

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

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

[84] 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.").

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

and competent evidence to support its claim. Accordingly, this claim must be dismissed and its Motion for Sanctions denied.

Conclusion

The Pipelines submit the foregoing Proposed Findings of Fact and Conclusions of Law for the Commission's consideration in deciding this case. The Pipelines reiterate their request that the Commission 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 26, 2007

CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the foregoing Proposed Findings of Fact and Conclusions of Law of Missouri Pipeline Company and Missouri Gas Company has been transmitted by e-mail or mailed, First Class, postage prepaid, this 26th day of February, 2007, to:

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

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