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.	)	

REPLY 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 reply brief.

Introduction

As indicated at the outset of the hearing in this matter, for inexplicable reasons, this case has been more contentious than it should have been. Staff's Initial Brief continues the theme and is replete with inflammatory misstatements, mischaracterizations and ad homonym attacks. When stripped of the rhetoric, Staff's case remains completely without merit.

Staff has failed to present any credible evidence, much less competent and substantial evidence, to support the allegations set forth in it's Complaint. Respondents anticipated many of Staff's arguments and fully addressed them in their Initial Brief. Respondents submit this Reply Brief to respond to portions of the initial briefs of Staff and of Intervenors. Failure to specifically address any point or argument should not be construed as acquiescence or concession on any issue.

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 Pipeline Company LLC ("Omega") to use confidential customer information in a discriminatory manner for each of Omega's contracts with customers served by the Pipelines.

Staff attempts to prove its false discrimination claim by repetitively stating that since Respondents and Omega shared common personnel, they must have provided Omega with an advantage over all other non-affiliated shippers However, Staff has failed to provide a shred of evidence reflecting how Omega received preferential treatment as Respondents' affiliate that led to an economic advantage to Omega. Staff's baseless allegations go against the evidence presented reflecting that Respondents charged Omega the highest rate on the systems and is clearly an illogical conclusion unsupported by any fact presented.

Shared personnel between affiliated entities is common and entirely permitted by law. Accordingly, the fact that Mr. Ries served as an officer of both Omega and the Pipelines is not unlawful. Courts generally presume that officers holding positions with affiliated entities can and do change roles to represent each entity separately.[1] It is further recognized that "It is entirely appropriate for directors of a parent corporation to serve as directors of its subsidiary..."[2] Staff has failed to show how Mr. Ries', or any other employees', dual role led to the preferential treatment of Omega. Without such evidence, the Commission cannot presume that Mr. Ries, or any other shared employee,

---

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

[2] *Id.*

provided Omega any advantage or participated in unfair dealings. In fact, the evidence reflects that all dealings were entirely fair.

Respondents expert testimony, presented by Mr. John, clearly establishes that Omega paid the highest rate on the Pipelines[3] His calculations summarized in his testimony clearly show that the rates paid by Omega are indeed the highest on the system. Given this fact, the only logical conclusion is that Omega did not receive an economic advantage.

Staff was aware that the Pipelines were sharing employees and office space with Omega. This awareness is 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.[4] The Commission, through Staff, intervened in the FERC proceeding on April 12, 2004.[5] and supported the Pipelines' request for waiver of FERC rules requiring the independent functioning of such personnel.[6] FERC granted MIG's request for waiver on July 7, 2004.[7] Staff made no objection to the ruling at that time. To now indicate that Respondents sharing of employees and using their then affiliate Omega as a marketer was somehow a surprise to Staff and improper, is blatantly against the evidence presented.

---

[3] *See* Exhibit 300, Christopher John Rebuttal Testimony (hereafter "John Rebuttal"), October 6, 2006 at 23.

[4] *See* John Rebuttal, Appendix B.

[5] *See* John Rebuttal, Appendix C.

[6] *Id* at 10.

Omega gained no advantage in receiving excess gas off of the Pipelines' system, but by doing so economically benefited all customers on the Pipelines' system by helping the Pipelines manage imbalances on the system for no fee. Staff still fails to understand the fundamental need for balancing of gas on the Pipelines' systems without storage facilities or the ability to buy or sell gas. As Mr. Ries testified, if the Pipelines did not handle the excess gas on their systems, it would cause the Pipelines to incur material penalties from Panhandle Eastern Pipelines (PEPL).[8] Because the Pipelines handled these imbalances without penalty from PEPL, all of the Pipeline's customers benefited. To be sure, there is no free gas or free transportation provided to any Shipper. Staff's claims that Omega somehow received gas without nominating or paying for it is absolutely wrong.

Staff uses an "apples to oranges" comparison in attempting to prove its discrimination claim that **_____________** was discriminated against by virtue of **________** paying more than Omega to MGC for "commodity" or "usage" charges. However, Staff failed to compare **________** with Omega to determine if they were similarly situated Shippers. If Staff had made such a comparison it would have discovered that Omega and **________** were not similarly situated Shippers and **___________** was not discriminated against. When **____________** transported gas to Fort Leonard Wood, it did so under short-term (one year or less) contracts with the Pipelines. Omega's February, 2005 transportation contract with MGC was ten (10) years

---

[7] *See* John Rebuttal, Appendix D.

[8] *See* Exhibit 304, Dave Reis Rebuttal Testimony (hereafter "Ries Rebuttal"), October 6, 2006 at 9.

in length. This long-term contract is entirely different than the short-term contracts between **___________** and the Pipelines prior to February 2005.

In addition, **_______** never requested any price quotes from the Pipelines for a 10-year contract, and cancelled its contracts with the Pipelines in 2005. Further, **________** did not submit a bid on the transportation and sales functions to the Fort when the Fort went though it Request for Proposal process, so Omega was not even in competition for the capacity with **_________** at the time Omega signed its ten (10) year contract with MGC. Staff incorrectly compares the rates of a long-term Shipper (Omega) with the rates of a short term and subsequent non-Shipper **_________**. Staff also fails to point out that Omega's and **__________** contracts covered different historical time periods and therefore, reflect different market conditions of the different years. Staff simply ignores the obvious factors demonstrating that **_______** and Omega were not similarly situated. Because of these factors and the difference in the nature of long-term and short-term agreements, the two cannot be compared.

Staff has failed to provide any competent and substantial evidence to support the allegation 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.**

Staff's allegation that the Pipelines hid "secret" customers for personal benefit has no basis and is slanderous in nature. There have never been any "secret" customers and Staff continues to use that term in attempt to support its baseless assertions. This was pointed out at the hearing when, after the Pipelines explained that the customers' names were made "Highly Confidential" in the proceedings because the contracts were price sensitive and proprietary, the ALJ suggested that those entities be referred to as Customers A, B and C. Staff has nonetheless continued to refer to those customers as "secret" when clearly they are not.

The Pipelines have had written transportation agreements with all Shippers in accordance with the Commission's rules. No agreements were necessary between the Pipelines and **__________________________ ** because they were not Shippers. The gas delivered to **__________________________** was delivered on transportation capacity held by Cuba on the Pipelines' systems, **______________ _________________** were not Shippers on the systems and thus were not required to have transportation agreements.

Staff has historically accepted the practice of entities/cities receiving gas without transportation agreements under the capacity of another entity's transportation agreement. However, due to Omega's then affiliated status, Staff attempts to penalize the Pipelines by applying an inconsistent interpretation of the tariff language and regulations. As discussed in Respondents Initial Brief, Staff has been aware of similar arrangements in the past. 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, yet, this City has received all of its gas transported on the Pipelines' systems without ever having a transportation agreement.[9] Other examples include end-use customers behind the City Gate stations at **_____** and **___________**. These customers receive transported

---

[9] *Id.* at 18.

volumes from **____________** but are not Shippers on the Pipelines. Staff is fully aware of these transportation customers because they would be identified in the **____________** PGA and ACA proceedings. Nowhere in these proceedings did Staff ever suggest that those customers need to have their own transportation agreements with the Pipelines. This disparity in treatment by Staff is blatant discrimination against the City of Cuba. Nothing in the Cuba transportation agreements with the Pipelines limits with whom Cuba can conduct the business of managing its capacity and that Cuba still holds the capacity on the Pipelines' systems. Pipelines' expert witness Smith testified that this practice is typical and widely accepted in the industry.[10] No contrary evidence was even presented which contradicted Smith's testimony on this point.

There are no "secret" customers. In fact, the Pipelines and their officers have been open about the arrangements and the reasons behind them. Instead of trying to avoid scrutiny, Mr. Ries openly and voluntarily approached Staff as early as August of 2002 to explain that small customers had requested the Pipelines help in purchasing their gas and that without the Pipelines having authority to buy and sell gas and the Pipelines themselves could not assist these customers with gas purchasing. Mr. Ries went on to explain to Staff which towns initially wanted help and how Omega or another marketing affiliate would market gas (as an agent for others) for these towns, even going so far as providing Staff with preliminary proposals to some of these towns. In a January 2003 letter, Staff expressed its preference that these small towns be assisted by a marketing affiliate of the Pipelines and that MGC not market the gas directly.[11] These actions of open disclosure are hardly those of deceit as Staff suggests.

---

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

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

Staff now ignores these prior occurrences and incredulously claims it did not know of these arrangements in 2005. During the hearing Staff's counsel took the position that Staff had never seen these disclosures and had not received, in December 2002, the data request responses from Mr. Ries[12] detailing all this information, despite the fact that the cover letter delivering the subject responses was hand delivered to Staff's counsel by the Pipelines.[13] Further, Staff member Warren Wood acknowledges, in a January 2003 letter to Mr. Ries, his receipt of the data request responses.[14] It is disingenuous at best for Staff to now ignore Mr. Ries' advance voluntary disclosure of the Pipelines' intentions to use Omega to assist small customers. The Pipelines should not be penalized for this up-front approach and this claim should be dismissed accordingly. Staff has provided no substantial and competent evidence to support its claim.

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.

In an attempt to further its contention that the Pipelines former affiliate, Omega, obtained transportation service at discounted rates, Staff asserts in its Initial Brief that

---

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

[13] *Id.*

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

Mr. Ries shifted revenues to Omega by giving Omega unique discounts[15]. Staff makes two undeniable errors in the effort to support its contention. First, the tariff provisions of the Pipelines[16] require that when comparing rates charged to various Shippers, a load factor of 25 % must be utilized so the rates are compared on an equivalent basis. While claiming that the Pipelines violated their tariffs, ironically, it is in fact Staff that ignores the explicit tariff provisions which detail the method to make proper rate comparisons. Former FERC enforcement staff member and expert witness Christopher John clearly establishes in his expert testimony that Omega is paying the highest rate on the Pipelines. His calculations, performed in strict accordance with the tariff provisions, are summarized in Exhibit 300 and clearly show without a doubt that the rates paid Omega are the highest.

Second, Staff refuses to acknowledge that the contracts between the Pipelines and the City of Cuba,[17] which have been in place since 1999, are separate and distinct from the Sales and Agency Agreement between the City of Cuba and Omega (two unregulated entities). Staff refuses to accept these contracts are independent of each other even though it was also shown[18] that **________________**, a non affiliate of the Pipelines, had a similar contract with the City of Cuba to do for Cuba during a period prior to 2003 what Omega did for Cuba after 2003. The Sales Agreement between Cuba and Omega has specific language wherein Cuba acknowledges that the two contracts are different and separate.

---

[15] *See* Staff's Initial Brief, page 3.

[16] *See* Exhibit 300, John Rebuttal at 21.

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

[18] *See* Exhibit 303, Smith Rebuttal, App. M.

> "In Section 16 of the 'Terms and Conditions' of the Sales Agreement, Cuba agrees it had a choice, understood the affiliated relationship of MPC/MGC to Omega and the Sales Agreement and Transport Agreements were not tied to each other.
>
> **____
> ____
> ____
> ____
> ____
> ____
> ____
> ____
> ____
> ____
> ____
> ____
> __________________________**
>
> Again, this straight forward contract language disproves Staff's implication that the Cuba/Omega Sales Agreement should be disregarded or that it was improperly tied to the MPC/MGC transportation agreements with Cuba. When Cuba specifically acknowledges that there was no improper tie between the contracts and that Cuba had choices, Staff's assertion to the contrary is unambiguously proven false." [19]

Other than simply pretending that separate contracts do not exist, no legal basis is provided by Staff to support its theory that the discounts given to Cuba by the Pipelines must be treated as discounts given to Omega. Not surprisingly, Staff also ignores the fact that the discount to Cuba is the same discount given to three other Shippers on the Pipelines who used **___________** as their sales agent. Staff's contention that Omega received unique discounts is false and unsupportable.

Continuing the theme that rampant discrimination has occurred, Staff next contends that Mr. Ries discriminated against non-affiliated marketers in favor of Omega

---

[19] Exhibit 303, Smith Rebuttal, at 9-10.

so as to enable Omega to steal customers from other marketers[20]. Again, Staff can only support this claim by alleging that any discount the Pipelines gave to the City of Cuba was in reality a discount to Omega. Without any legal or factual support for this theory, Staff must again totally disregard the contracts that existed between Cuba and the Pipelines. In any event, Mr. Ries' plan to assist Omega in stealing customers was apparently an abject failure. The flaw in the plan was clearly the decision to charge Omega the highest rates on the Pipelines' systems. Far from granting Omega any favors, this decision placed Omega at a distinct competitive disadvantage.

Staff's next attempt to establish a pattern of discrimination in favor of Omega lies in its claim that the Pipelines discriminated in favor of Omega by charging Omega a **_______________** commodity rate while Omega collected **______________** from the Fort.[21]

Omega, as an unregulated Marketer, is entitled to earn profits by marking up charges for elements of the bundled services it provided, especially in light of the economic risks taken to procure gas supply and upstream transportation from third parties. Omega had a firm obligation to deliver gas and to operate and maintain Omega's gas distribution system on the Fort, including a propane air plant, for a predetermined, set price. Moreover, Omega, as a non regulated entity, is free to charge another non regulated entity to perform not only bundled sales services, but also to operate a distribution system and such charges are not subject to regulation by the Commission. Staff’s attempt to focus attention on Omega’s charges to the Fort for the bundled services

---

[20] *See* Staff's Initial Brief at 4.

[21] *Id.* at 22-24.

it provided is yet another attempt to indirectly regulate Omega and confuse the record with irrelevant facts.

Staff's final contention with respect to this issue is that the discounts the Pipelines gave Omega should, pursuant to the Pipelines' tariffs, become the highest rate to be charged to all non-affiliate customers.[22] Staff is again absolutely wrong. 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 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.[23]

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 because no discount has been given to Omega, which would have allowed it to pay less than the highest rate on the systems, no rate reduction is required pursuant to tariffs for other Shippers. Staff's interpretation of the subject tariff provisions is also wrong. Even if a discount below other rates had

---

[22] *See* Staff's Initial Brief at 20, 25.

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

been provided to Omega, retroactive rate reductions and refunds would not be lawful or appropriate.

Staff cites the provisions of 3.2(b) of the Pipelines tariffs for the proposition that the "…lower affiliate discount rate automatically becomes the highest rate that may be charged on the system to any customer." Staff's reading and interpretation of the tariff is not only incorrect but it is incomplete. Section 3.2 of the Pipelines tariffs provides as follows:

> 3.2 Range of Rates.
>
> a. Unless otherwise agreed upon in writing between Shipper and Transporter, or unless as otherwise set forth herein, the commodity rate applicable to a Shipper for service hereunder shall be the applicable Maximum Rate as set out above. In the event an amount less than the applicable Maximum Rate and not less than the applicable Minimum Rate as set out above is agreed upon, such commodity charge shall be applicable prospectively and Transporter shall be responsible for compliance with any reporting requirements prescribed by the MoPSC.
>
> b. For all Transportation Agreements entered into by Transporter with any affiliate of Transporter after the effective date of tariff sheets having a Date of Issue of January 19, 1995, in those instances in which the term of the Agreement is greater than three (3) months:
>
> (1) The lowest transportation rate charged to an affiliate shall be the maximum rate that can be charged to non-affiliates. Any renegotiation or other type of modification to the rates of any then-effective Transportation Agreement is to be considered an applicable Transportation Agreement for the purpose of setting this maximum rate for non-affiliates.
>
> (2) Transporter will submit each such Transportation Agreement for Commission approval in those instances in which the rate offered to a non-affiliate is proposed to be greater than any rate offered to any affiliate.

(3) Transporter will submit a rate comparison for all Transportation Agreements.

(4) These provisions will be applied to the Transporter's service area and the service area of Missouri Gas Company as separate entities and on a separate basis.

c. If at some point in time the Staff of the Commission determines that the provisions of Section 3.2(b) and Section 12(c) of the General Terms and Conditions are not effective in preventing rate discrimination to non-affiliates, after contacting Transporter, the Staff may file a notice to that effect with the Commission. As a consequence, on the date of such notice filing, said provisions will be terminated and at that point in time the following provisions will automatically replace Section 3.2(b) and Section 12(c) of the General Terms and Conditions with regard to all Transportation Agreements in effect at the time of Staff's filing of said notice with the Commission:

> The transportation rate charged to any affiliate on the Transporter's pipeline pursuant to a Transportation Agreement for a term greater than three (3) months entered into after January 15, 1995 shall be the maximum rate which may be charged to non-affiliates.

As is readily apparent from the highlighted language, it is Section 3.2(c), not Section 3.2(b), that contemplates even a possibility of a change in rates charged to all non-affiliate Shippers if certain conditions are met. In this case the conditions precedent to such a change have not been met. Prior to June 1, 2006, when Omega was affiliated with the Pipelines, Staff had not filed a notice with the Commission indicating that it has determined "…that the provisions of Section 3.2(b) and Section 12(c) of the General Terms and Conditions are not effective in preventing rate discrimination to non-affiliates…", nor had Staff notified Transporter (Pipelines) prior to filing such notice.

Staff has utterly failed to follow the procedure set forth in the very tariffs it seeks to enforce.

Given even a very liberal reading of the tariff and Staff's actions seeking enforcement, there would still be no lawful justification for somehow lowering rates to all Shippers. Assuming the filing of its Complaint constituted the necessary "notice," there would be no rate charged to an affiliate to compare and impose on all non-affiliate Shippers. Staff's Complaint was filed herein on June 21, 2006. As of June 1, 2006, three weeks prior to Staff's Complaint, Omega was no longer an affiliate of the Pipelines and thus there were no rates charged to an affiliate. Accordingly, the Commission cannot consider the issue of refunds or reduced rates prospectively.[24]

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.

Respondents did not provide any discounts to Omega in these quarters to report. There is no tariff or other legal requirement that the Pipelines report agency agreements, whether affiliated or not, entered into with a Shipper of the Pipelines. All discounts to Omega were properly reported to the Commission's Energy Staff pursuant to the Pipelines' tariffs.[25] MGC reported the only discount provided to Omega, effective February 2005. The Pipelines' report included the rate comparison as required by the Pipelines' tariffs.[26] Staff acknowledges that it has received this report.

---

[24] *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.

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

It remains a fact that the total rates charged by the Pipelines to Omega, considering the 25% load factor as required by the Pipelines' tariffs, were a combined rate of **_______________**, the highest rate charged to any Shipper on the Pipelines' system.

Despite this clear fact, Staff continues to argue 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 hold capacity on the Pipelines' systems. Staff fails to cite one law or regulation that requires Omega, a non-regulated entity, to file reports on its transactions with non-affiliates, which were the only reports not filed by the Pipelines because there was and is no requirement to do so.

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.**

Staff steadfastly clings to the notion that by extending a line to **____________** the Pipelines have violated their tariffs. Staff appears to believe that the tariffs mandate that the cost of line extensions be collected from the end user customer or the Shipper. Nothing in the tariffs mandate that the Pipelines seek reimbursement for line extensions. The tariffs provide a mechanism to enable the Pipelines to seek reimbursement if, in their judgment, it is warranted. In this instance the line construction was a business decision made for the benefit of MGC. Apparently the decision to make the extension was sound because the customer added has already increased the Pipelines' revenues.[27]

In addition, as previously indicated, no other customers have 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.[28]

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 for its shareholders to conduct. This business decision is not an appropriate subject for scrutiny in the context of this complaint case.

VII. Issue Seven

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

This issue is apparently born of Staff's frustration over its inability to produce evidence of violations or any actionable wrongdoing. Because Staff can't prove its case

---

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

[28] *Id.* at 29.

the Pipelines must have destroyed the evidence. Nothing could be further from the truth. The Pipelines have not destroyed any documents as Staff suggests. For efficiency reasons, the Pipelines maintain their invoice data in electronic format, a practice Staff witness Fischer acknowledged is common.[29]

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 complains that despite its further request, invoices for calendar year 2003 have not been provided. The Pipelines have repeatedly explained that due to a significant change in the billing software in early 2004, producing 2003 invoices would be extremely difficult and time consuming. While accurate data still exists, its probative value is outweighed by the substantial burden of producing it. In any event, despite having access to over two years worth of 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 position is ultimately based on its misreading of Mr. Lodholz' deposition testimony and subsequently ignoring his affidavit with the "summary sheets" he referenced as attachments. The "summary sheets" attached to Exhibit 311 are in fact the sheets Mr. Lodholz referenced in his deposition and were created contemporaneously with invoices that were sent to customers for those months. The accuracy of the Pipelines' electronically produced invoices was validated by matching them to the "summary sheets" produced by Mr. Ludholz and by further matching them with corresponding bank statements in Exhibit 312. There can be no doubt as to the accuracy

---

[29] *See* Evidentiary Hearing Transcript, GC-2006-0491, page 93.

of the electronic invoices produced by the Pipelines. 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.

To reiterate, the doctrine of spoliation does not apply in this circumstance. By definition, this doctrine applies only to the "intentional destruction, mutilation, alteration, or concealment of evidence. . . ."[30] 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."[31] Under this standard, mere negligence is insufficient to trigger the adverse inference rule.[32]

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

Staff has clearly failed to meet its burden of proof in this case on each and every claim. The only possible and realistic conclusion to reach is that once Omega was sold on June 1, 2006, Staff made the blind leap that something must be wrong and filed this Complaint some three weeks later. This presumption of guilt against the unregulated activities of Omega has been investigated for six months, produced thousands of documents and involved approximately 15 days of depositions, without producing any

---

[30] 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.").

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

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

competent and substantial evidence necessary to satisfy the burden of proof against the Pipelines. Staff inexplicably chose to proceed with this case even after the discovery process had clearly established that not only was there no discrimination in favor of Omega, but that Omega was paying the highest rates.

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,

LATHROP & GAGE, L.C.

/s/ Paul S. DeFord_________________
Paul S. DeFord Mo. #29509
Suite 2800
2345 Grand Boulevard
Kansas City, MO 64108-2612
Telephone: (816) 292-2000
Facsimile: (816) 292-2001

Aimee D.G. Davenport Mo. #50989
314 E. High Street
Jefferson City, MO 65101
Phone: (573) 893-4336
FAX: (573) 893-5398
Email: adavenport@lathropgage.com

Attorneys for Respondents

Dated: February 20, 2007

CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the foregoing Respondents' Reply Brief has been transmitted by e-mail or mailed, First Class, postage prepaid, this 20th day of February, 2007, to:

* Case No. GC-2006-0491

Name of Company Name of Party	**Email Phone Fax**	**Mailing Address**	**Street Address**	**City**	**State**	**Zip**
Missouri Public Service Commission General Counsel Office	GenCounsel@psc.mo.gov 573-751-2690 573-751-9285	P.O. Box 360	200 Madison Street, Suite 800	Jefferson City	MO	65102
Office of Public Counsel Mills Lewis	opcservice@ded.mo.gov 573-751-1304 573-751-5562	P.O. Box 2230	200 Madison Street, Suite 650	Jefferson City	MO	65102
AmerenUE Durley J Colly	Durley@smithlewis.com 573-443-3141 Ext 234 573-442-6686	P.O. Box 918	111 S. Ninth St., Suite 200	Columbia	MO	65205-0918
AmerenUE Lowery B James	lowery@smithlewis.com 573-443-3141 573-448-6686	P.O. Box 918	111 S. Ninth St., Suite 200	Columbia	MO	65205-0918
AmerenUE Byrne M Thomas	tbyrne@ameren.com 314.554.2514 314.554.4014	P.O. Box 66149 (MC 1310)	1901 Chouteau Avenue	St. Louis	MO	63166-6149
Missouri Public Service Commission Shemwell Lera	Lera.Shemwell@psc.mo.gov	P.O. Box 360	200 Madison Street, Suite 800	Jefferson City	MO	65102
Municipal Gas Commission of Missouri Woodsmall David	dwoodsmall@fcplaw.com 573-635-2700 573-635-6998		428 E. Capitol Ave., Suite 300	Jefferson City	MO	65102
Municipal Gas Commission of Missouri Conrad Stuart	stucon@fcplaw.com 816-753-1122 816-756-0373		3100 Broadway, Suite 1209	Kansas City	MO	64111

Municipal Gas Commission of Missouri Kincheloe E Duncan	dkincheloe@mpua.org 573-445-3279 573-445-0680		2407 W. Ash	Columbia	MO	65203

/s/ Paul S. DeFord

Attorney for Respondents