

**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.)	

**RESPONDENTS' REPLY TO MUNICIPAL GAS COMMISSION OF
MISSOURI'S MOTION SEEKING COMMISSION ORDER**

COME NOW Respondents Missouri Pipeline Company (hereafter "MPC") and Missouri Gas Company (hereafter "MGC") and respond to the Staff's Motion for Sanctions for Destruction of Documents. In support of this response, Respondents' state as follows:

1. Staff's Motion for Sanctions for Destruction of Documents (hereafter "Staff's Motion") is without merit, is prejudicial, and seeks a remedy for actions that did not occur. Since the initiation of Staff's informal investigation beginning in November 2005, and the filing of its formal complaints in March and June 2006, Respondents have spent hundreds of hours to provide thousands of documents in response to Staff's discovery requests, Production of Documents. Respondents have further made three of its employees available for three depositions on three different occasions as well as make the president of the pipelines available for depositions lasting between four to five days. In fact, during the informal discovery phase, when Staff asked for billing information, Respondents delivered electronic spreadsheets that reflected billing information for 2004

through 2005 (the period requested by Staff), by customer by month, with rates, MDQ, volumes, and total charges to Staff. When Staff requested the invoices at a later date, Respondents worked diligently to reproduce hard copies of invoices that it had simply not maintained in the ordinary course of business. There has been no intentional destruction of documents as Staff attempts to lead this Commission to believe.

2. Respondents have put forth every effort and tremendous resources into complying with Staff's discovery requests. Staff has received virtually every financial document of Respondents. Since the informal investigation began in November 2005, Staff has received or had access to thousands of pages of records, including but not limited to audited financial statements for 2002-2005; tax returns, volumetric gas deliveries; bank statements; loan documents; general ledgers; check ledgers; copies of third-party vendor bills; current contracts for transportation; as well as billing information for 2004-2005; and invoices to customers for 2004 through first quarter 2006. The amount of information provided by Respondents only suggests Respondents' thorough attempts to comply with each of Staff's requests. This is not sanctionable behavior.

3. Staff's requested remedy is not made in good faith and is based on an inapplicable doctrine. By Staff's own admission, the "doctrine of spoliation" applies only when documents have been destroyed intentionally. *See* Staff's Motion, page 8, paragraph 26. The Missouri Supreme Court recently rejected this doctrine where there was no evidence of a state trooper's intentional behavior citing, "The spoliation doctrine creates an inference of bad faith on the part of the state when evidence is destroyed or altered. Simple negligence is not enough to invoke the adverse inference rule; the destruction must be intentional." *State v. Pike*, 162 S.W.3d 464, 474 (quoting *Baldrige*

v. Dir. of Revenue, 82 S.W.3d 212, 222-23 (Mo.App.2002)). Significantly, the Court rejected the doctrine, reasoning, "Legitimate reasons for the trooper's decision to conduct the testing behind his patrol car were presented." *Id.*

4. In this instance, Respondents had legitimate reasons for retaining electronic data that allowed it to re-create hard copies while only retaining hard copies of invoices for a short period due to their voluminous nature. This retention practice was conducted in the normal course of business and not for the purpose of avoiding Staff's examination. In fact, it was a practice followed by Respondents well before Staff filed its complaints. The affidavits of Respondent employees Dave Wallen, Patty Hawkins and Michael Mertz are attached as Exhibits A, B, and C and are incorporated herein by reference. These affidavits of the Respondents' office staff support the fact that no such destruction of documents has taken place. Staff is not able to produce evidence of intentional or willful behavior, because Respondents have not engaged in such behavior. Therefore, the doctrine of spoliation does not apply.

5. Staff has mischaracterized the events leading up to this point. In June 2006, well before any depositions were taken, Staff requested and agreed that it was sufficient for Respondents to produce invoices from the electronic files of MPC and MGC customers for 2004, 2005 and the first three (3) months of 2006. When Staff made its request, Respondents thoroughly explained that the hard copies of those invoices, which included a cover sheet showing charges assessed, rates of assessment and volumetric data, had not been retained in the ordinary course of business, but that the data existed electronically and the hard copies would have to be produced from the electronic data. Respondents explained that the paper records had not been kept beyond a short

period of time after they were mailed to the customers and payments were received.

Respondents further explained that it would take many hours of time to electronically produce the full invoice and supporting data for each month. Nonetheless, these invoices were provided to Staff on or about July 2006.

6. Respondents had no indication that this was not acceptable until recently. In a subpoena dated August 21, 2006, Staff requested that Respondents provide this billing data for the years of 2002 and 2003 and “copies of customer invoices maintained by Mr. B. J. Lodholz while employed by MPC.” Not only was this request for documents provided three months after Mr. Lodholz left the employment with MPC, but it was made after Respondents informed Staff that no hard copies of invoices had been retained. Moreover, Respondents informed Staff that, due to software constraints, the electronic supporting data for 2002-2003 would be nearly impossible to pull up in a way that would allow the invoices to be reprinted for 2002-2003. Respondents have consistently stated that no paper copies exist of invoices prior to 2004. Staff waited until months after receiving the Respondents' billing information before claiming that the billing records were insufficient.

7. Staff has not been prejudiced. Respondents have given Staff the exact information it is seeking through the electronically produced invoices. Staff has the all billing data it could possibly need, including invoices for 2004 through the first quarter of 2006 to make its calculations. It further has all billing data on electronic spreadsheets for 2004-2005, by customer, by month, by volume, and by rate charged. Staff apparently has, or could have subpoenaed the records from all of Respondents' customers, including the two largest customers and the cities which are represented by the Municipal Gas

Commission for Missouri. These customers are also interveners in this matter. Courts generally require a showing that a party's conduct results in prejudice to the opposing party before sanctions are imposed. *See Crumpton v. Curtis-Toledo, Inc.*, 661 S.W.2d 645 (MoApp. 1983). The fact that Respondents did not maintain the paper invoices originally sent and instead produced them from electronic files does not result in prejudice.

8. Staff states, “Staff has not received a copy of the actual invoices MPC and MGC sent to their customers.” See Staff's Motion, page five, paragraph 15. This is misleading. Respondents have given Staff the electronically produced invoices sent to all customers for 2004 through first quarter of 2006. If those bills did not match up to the invoices Staff subpoenaed from the Respondents' customers or to the bank statements produced by Respondents for the same period which show all deposits from all customers, then Staff would be able to detect any discrepancy. Thus, Staff has all information available to it to analyze the charges of the Respondents to their customers. Through the billing information provided by Respondents, Staff is aware of the charges by Respondents to all its customers and can make any calculations it needs without further harassing Respondents for additional document production. It is evident that Staff can make its calculations for any alleged refunds by the fact that an employee of MGCM submitted testimony, subsequently stricken, with calculations.

9. Staff's reliance on Mr. Lodholz's general statements in his deposition is tenuous at best. After Mr. Lodholz testified that he had billing records, all that was found in Mr. Lodholz's files prior to 2006 were billing “summaries”, which contain only a list of customers, by month, and the total charge to that customer. This information is

sufficient to set up a receivable lists but contains no billing data. In fact, Mr. Lodholz' records were not invoices but summaries of the total charge to customers by company. This type of information and much more extensive information has already been given by Respondents to Staff in response to two previous requests. It is nonsensical for Staff to seek sanctions for information which has already been produced by Respondents.

10. Respondents have not violated any rule or statute. Nothing in the Commission's 4 C.S.R 240-10.010 or otherwise requires regulated entities to maintain each and every document ever created in the course of business. Respondents are entitled to retain documents in a manner to promote and streamline office efficiency. Respondents have never willfully or intentionally discarded documents to avoid Staff examination and have always maintained documentation sufficient to reflect its billing activities and have provided such to Staff.

11. Staff's Motion is its last minute attempt prior to the hearing in this matter to prejudice Respondents before this Commission by alleging false actions and ignoring the extreme measures Respondents have taken to accommodate Staff's requests. Since Respondents have the billing information necessary to make their calculations, Staff's request for sanctions is without merit. Respondents are willing to meet with Staff to clarify what information Staff is still seeking.

WHEREFORE, Respondents respectfully request that Staff's Motion for Sanctions for Destruction of Documents be denied.

Respectfully submitted,

LATHROP & GAGE, L.C.

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Attorneys for Respondents

Dated: November 20, 2006

CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the foregoing Respondents' Reply to Municipal Gas Commission of Missouri's Motion Seeking Commission Order, has been transmitted by e-mail or mailed, First Class, postage prepaid, this 20th day of November, 2006, to:

Case No. GC-2006-0491

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