BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

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

<u>RESPONSE TO MOTION TO STAY</u>

COMES NOW the Municipal Gas Commission of Missouri ("MGCM") and for its Response to the Motion to Stay filed by Missouri Pipeline Company ("MPC") and Missouri Gas Company ("MGC") (collectively referred to as the "pipelines") respectfully states as follows:

1. On October 19, 2007, the pipelines filed their Motion to Stay the effectiveness of the Commission's October 11, 2007 Report and Order. On October 22, 2007, the pipelines supplemented their Motion with the affidavit of their president, David J. Ries. On October 22, the Commission placed this matter on its agenda for October 23. Given the short notice, MGCM is precluded from a more thorough response. Nevertheless, it finds itself compelled to provide the following comments.

2. In their pleading and affidavit the pipelines make several assertion designed to convince the Commission of: (1) the "irreparable harm" that will result if the Commission's Report and Order is permitted to remain in effect and (2) the pipelines'

likelihood of prevailing on the merits once the Report and Order is subjected to judicial review.

A. NEED FOR CLEAN HANDS

3. It is important to remember that the remedies set forth in Commission's Report and Order have been well known to Respondents. At the time that these pipelines were purchased the provisions in question were fully contained in the pipelines' tariffs. With full knowledge of the effect that affiliate discounts would have on the rates that the pipelines could charge to other shippers, the pipelines nonetheless engaged in a systematic plan to eliminate all non-affiliated natural gas marketers on the pipeline. By providing their affiliate a transportation discount that was not available to other gas marketers, the pipelines were able to effectively eliminate any semblance of gas marketing competition for their affiliate. While Mr. Ries and his partners reaped the riches from this anticompetitive behavior, the residents of many small municipalities suffered from the elimination of competition in the marketing business. Amazingly after profiting for four years from his concerted effort to eliminate such marketing competitors, Mr. Ries is now heard to bemoan the consequences of his action. In fact, the pipelines now claim that such consequences would be contrary to the public interest. At no time, however, during his systematic attempt to eliminate competition for his marketing affiliate did Mr. Ries ever appear to consider the public interest aspects of his anticompetitive behavior. Such action violates the fundamental notion of equity that "one who seeks equity must come with clean hands."[1]

[1] *Leonardi v. Sherry*, 137 S.W.3d 462, 471 (Mo. Banc 2004) (citing to *Franklin v. Franklin*, 283 S.W.2d 483, 486 (Mo. Banc 1955).

B. IRREPARABLE HARM

4. Putting equitable considerations aside, the irreparable harm suggested in the pipelines' pleading should not be considered in the context of a tariff violation proceeding designed to look at discriminatory treatment between affiliate and non-affiliate shippers. Tariff violation proceedings do not normally consider ancillary financial matters. Such a fact is best demonstrated by the pipelines' need to resort to extra-record evidence in the form of a self-serving affidavit, rather than the fully developed record already available.

Instead, such matters are more properly addressed in the context of a rate proceeding. In such a proceeding, matters such as return on capital, expense reserves, debt interest coverage, and property taxes are all thoroughly considered. In fact, if irreparable financial harm is a possibility, then the interim / emergency standard affords instant financial relief.[2] If irreparable harm is truly imminent, then it is not appropriate for this pipelines' management to procrastinate. Rather, it is incumbent on the pipelines' management to file for immediate rate relief.[3] Absent such a filing, one must necessarily ponder the legitimacy of the pipelines' stated financial concerns.

C. LIKELIHOOD OF PREVAILING ON THE MERITS

5. In their Motion, the pipelines also claim a "probability" that they will prevail on the merits. In support of their claim, the pipelines recite a summary of their

---

[2] *State ex rel. Laclede Gas Co. v. Public Service Commission*, 535 S.W.2d 561 (Mo. App. 1976).

[3] Interestingly, these same pipelines have been under a long standing order of the Commission to file a rate proceeding. At the time that it approved the acquisition of these pipelines, the Commission ordered Mr. Ries to file a rate proceeding within 18 months in order to allow the Commission to determine the adequacy of the pipelines' rates. Despite the explicit order of the Commission, the pipelines refrained from making its rate filing. Instead, these same pipelines attempted to reap monopoly profits by eliminating all semblance of competition in the gas marketing industry. In fact, when Staff attempted to engage in a review of the pipelines' earnings (Case No. GC-2006-0378), the pipelines refused to provide the documentation necessary for Staff to complete its review.

well-worn complaints regarding the lawfulness of the Commission's Report and Order. Included in this litany are claims that the Commission's Order violates the doctrine of retroactive ratemaking as well as the prohibition against the ordering of reparations. Such claims were first advanced in the context of the pipelines answer to Staff's complaint. These claims were subsequently reasserted in the pipelines' brief at the close of the hearing. Still again, the pipelines raised these same arguments in their initial Application for Rehearing. At each turn, these assertions were flatly rejected by the Commission. Nonetheless, the pipelines still believe that there is a "probability" that they will prevail on the merits. Interestingly, respondents fail to provide any case law to support their claim. As such, the Commission should once again reject the pipelines' assertions, deny the Motion to Stay, and allow its Report and Order to remain in effect.

D. CONCLUSION

6. The Commission is undoubtedly aware of the protracted nature of this proceeding. For the past 18 months all parties including the pipelines were well aware of the possibility that, in response to the historical discriminatory conduct exhibited by the pipelines, the affiliate discounts offered by those pipelines would be made available to all other non-affiliated shippers. Once the Commission made the finding that such affiliate discounts had been provided, the provisions of the pipelines' tariff dictate a finding that the pipelines had overcharged these non-affiliate shippers.

Despite their complete understanding of the possible outcome of this proceeding, the pipelines nonetheless refrained from initiating the rate proceeding that would allow the Commission the opportunity to review whether such rates would be just and reasonable rates on a prospective basis. Absent such a rate proceeding, the Commission is left with the mandated outcome of the pipelines' tariff – the applicability of the affiliate discount rate to all non-affiliate shippers. After all, it defies logic that the pipelines would charge their affiliate a rate that does not even cover their variable cost of doing business – costs such as property taxes and interest on outstanding debt. Therefore, if the discounted rate is "just and reasonable" for purposes of serving their affiliate, it must necessarily be "just and reasonable" for purposes of serving all shippers.

It was entirely within the pipelines' ability to avoid this possibility. Instead of filing a rate proceeding and eliminating the possibility that the affiliate discount would be given prospective effect, the pipelines instead engaged in a campaign to undermine the Commission's jurisdiction. At every turn the pipelines sought to prevent Staff from obtaining the documentation necessary to prove its case. At the same time, the pipelines were deliberately violating the conditions of their Missouri certificate by seeking to merge themselves into an interstate pipeline and thus removing themselves from Missouri jurisdiction. Unfortunately for the pipelines, the well developed plan failed: Staff proved its case and FERC withheld final approval of its certification and tariffs.

Respectfully submitted,

David L. Woodsmall (MBE #40747)
Stuart W. Conrad (MBE #23966)
FINNEGAN, CONRAD & PETERSON, L.C.
428 East Capitol Avenue, Suite 300
Jefferson City, MO 65102-0148
Voice: 573-635-2700
Fax: 573-635-6998
Email: dwoodsmall@fcplaw.com
stucon@fcplaw.com

Attorneys for the Municipal Gas Commission of Missouri

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served the forgoing pleading by email, facsimile or First Class United States Mail to all parties by their attorneys of record as provided by the Secretary of the Commission.

David L. Woodsmall

Dated: October 23, 2007