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' APPLICATION FOR REHEARING

COME NOW Respondents, pursuant to § 386.500, RSMo., and 4 CSR 240.160(1), and submit this Application for Rehearing on the grounds that the Revised Report and Order issued in this cause on October 11, 2007, (the "Revised Report and Order") is unlawful, unjust, and unreasonable, as set forth more fully below.

I. Legal Standard

In adjudicated proceedings before the Public Service Commission, the Commission's actions must be both lawful and reasonable.[1] In determining whether a Commission order is lawful, reviewing courts exercise unrestricted, independent judgment and must correct erroneous interpretations of the law.[2] Reasonableness depends upon whether (i) the order is supported by substantial and competent evidence on the whole record, (ii) the decision is arbitrary, capricious or unreasonable, or (iii) the

[1] Mo. Const. art. V, § 18; *State ex rel. AG Processing, Inc. v. Pub. Serv. Comm'n*, 120 S.W.3d 732, 734 (Mo. banc 2003); *State ex rel. Competitive Telecom. v. Pub. Serv. Comm'n*, 886 S.W.2d 34, 38 (Mo.App. W.D. 1994).

[2] *Friendship Village of South County v. Public Service Comm'n*, 907 S.W.2d 339, 345 (Mo.App. W.D. 1995).

Commission abused its discretion.[3] A reviewing court will affirm a Commission order only if it is supported by competent and substantial evidence on the record as a whole and not against the weight of the evidence. *State ex rel. Util. Consumers Council of Mo., Inc. v. Pub. Serv. Comm'n*, 585 S.W.2d 41, 47 (Mo. banc 1979). As to the weight of the evidence, a reviewing court will not view the evidence and inferences in the light most favorable to the award but instead must determine whether the agency reasonably could have made its findings and reached its result based upon all of the evidence before it. *Totten v. Treasurer of State*, 116 S.W.3d 624, 629 (Mo.App. 2003); *see also Fitzwater v. Department of Public Safety*, 198 S.W.3d 623 (Mo.App. W.D. 2006).

In the present case, the Report and Order is unlawful and unreasonable with regard to the Commission's rulings on Counts I, III, and IV. These rulings are based upon speculation, unwarranted inferences, and a complete disregard for the substantial evidence contained in the record. As Commissioner Murray wrote in her dissent, "it certainly gives the appearance that the Commission is more interested in obtaining a desired result than in being an impartial administrative tribunal." Dissenting Opinion at 2.

Upon rehearing, Respondents challenge the Commission to revisit its opinion, remove the numerous unsupported findings and conclusions identified in this application, and then modify its substantive decision to reflect the actual evidence in this case rather than to continue to force this adjudicative into what Commissioner Murray so accurately

[3] *Friendship Village of South County* 907 S.W.2d 344-45.

characterizes as a "desired result" rather than an "impartial" one.[4] Upon completing this task, the only possible result is a dismissal of the Complaint in its entirety.

II. Background Findings and Conclusions

The Commission's findings of fact must be "sufficiently definite and certain under the circumstances of the particular case to enable [a] court of review to review the decision intelligently and ascertain if the facts afford a reasonable basis for the order without resorting to the evidence."[5] Obviously, if the Commission's findings of fact make no reference or citation to the record, then they are neither definite nor certain with respect to the circumstances of the particular case, provide no basis for an intelligent review, and require that a reviewing court resort to a review of the actual evidence. This is precisely the situation created by the undocumented, and frequently speculative, findings of fact contained in the Report and Order in the present case.

A. Background Findings of Fact

Before addressing the specific counts in this action, the Report and Order makes a series of findings of fact concerning background matters, such as Respondents' ownership structure, the operation of Respondents' former affiliate, Omega Pipeline Company ("Omega"), and a motion for sanctions filed by Complainant. These findings are deficient and thereby lay a faulty foundation for the Report and Order, as follows:

1. **Omega was an agent of the City of Cuba.** First, the Commission ignores the most salient fact in the case when discussing the operations of Omega. The Commission accurately describes Omega as a "local distribution company. . . not subject to regulation

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[4] Dissenting Opinion at 2.

[5] *AT & T Commc'ns of Sw., Inc. v. Pub. Serv. Comm'n*, 62 S.W.3d 545, 548 (Mo.App. W.D.2001) (emphasis, internal quotations and citation omitted).

by this Commission" when Omega acted in its role as a shipper of natural gas to Ft. Leonard Wood,[6] but the Commission then erroneously implies that in its separate role as an agent and gas marketing company, Omega *was* subject to regulation by the Commission: "Omega's role as a gas marketer is the role about which Staff is concerned in its complaint."[7] The Commission, however, offers no legal basis to exercise jurisdiction over Omega in its role as a gas marketer, and there is no such basis.

The most salient legal point in this case, ignored by the Commission, is that in its role as a gas marketer, Omega operated as an agent of the City of Cuba ("Cuba"), managing Cuba's shipping capacity on Respondents' Pipelines.[8] The legal relationships in this situation are both clear and obvious. Cuba, which was party to a transportation contract with Respondents and thereby held capacity on Respondents' pipelines, was, for purposes of Missouri law, the "shipper" to itself and the third-party customers.[9] Omega, which managed this capacity, was agent to Cuba in the resulting transactions. [10] At no point in these transactions did Omega own the capacity that it was managing as an agent, at no point in these transactions was Omega acting in the legal capacity of a "shipper"[11]

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[6] Report and Order at 6.

[7] Report and Order at 6.

[8] *See* Exhibit 303, Smith Rebuttal at 10 and App. I.

[9] *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, MP-1009-TAF;

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

[11] *See* Decision on Count II, Report and Order at 22-26 (refusing to adopt Staff's definition of a "shipper" that would have included "all current and potential transportation customers on a regulated gas corporation's natural gas distribution system" and holding that gas marketers, such as Omega, may market gas on the MPC and MGC pipelines without obtaining separate transportation agreements between the marketer's customers and the pipelines, precisely because such marketing companies, including Omega, do not fall within applicable legal definition of a "shipper.")

and at no point in these transactions was Omega subject to the jurisdiction of the Commission.[12]

Given that the Commission approved, in its decision on Count II, the legality of the practice of gas marketing without obtaining separate jurisdictional transportation agreements for third-party customers of the gas marketer, it is arbitrary and capricious for the Commission to attempt to take jurisdiction over issues relating to the rates charged in non-jurisdictional contracts between an unregulated gas marketer (Omega) and its unregulated third-party customers. To the extent that the Report and Order seeks to regulate the non-jurisdictional marketing activities of Omega, it is unlawful and cannot stand.

None of these critical and undisputed facts and legal relationships are acknowledged in the Report and Order. Instead, the Commission erroneously—and without citation to the record—finds that "several entities. . . obtained natural gas through MPC or MGC."[13] Although these entities are unnamed in the background section, presumably they are the companies named later in the Report and Order, which obtained natural gas through Omega while managing the City of Cuba's capacity, which was the shipper of said gas, not the third parties nor MPC nor MGC, as the Report and Order erroneously implies.[14] This intentional confusion of the background facts concerning the legal relationships of the parties confounds the Commission's analysis of issues in this

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[12] *See* Exhibit 303, Smith Rebuttal at 10; note that the transactions at issue were fully and properly regulated by the Commission through its exercise of its jurisdiction over Respondents and their fully-regulated transportation contract with the City of Cuba.

[13] Report and Order at 6.

[14] Report and Order at 6.

case throughout the remainder of the Report and Order and renders the analysis arbitrary, capricious, and unreasonable.

2. **The third-party gas consumers were customers of Omega and were not Respondents' customers.** The confusion continues when the Commission erroneously suggests that the third-party customers served by use of Cuba's pipeline capacity were, in fact, "additional customers" of Respondents.[15] In fact, Cuba was the customer of Respondents in these transactions, and the third parties, in turn, were customers only of Omega.[16] To hold otherwise is a mistake of law concerning both the law of contract and the law of agency. It is also inconsistent with the Commission's decision on Count II.

The Commission further confuses the facts when it writes that, "Actual invoices received from Cuba revealed that some of the gas that MPC and MGC showed as delivered to Cuba was actually being delivered to other customers."[17] To the contrary, the evidence cited by the Commission in support of this proposition shows something quite different. The testimony at issue refers to invoices not from Respondents to the third parties but are in fact Omega invoices to Cuba which also shows deliveries to the third parties which relied upon the use of the Cuba transportation agreements.[18] The Commission's intended implication that Respondents were clandestinely delivering gas directly to these third parties is simply not true; as a matter of law, Respondents delivered the gas to Omega in Omega's capacity as agent for Cuba. There is nothing unlawful or improper about such an arrangement, which the record reveals was also practiced by

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[15] Report and Order at 7-8.

[16] *See* footnotes 8-10, *supra*.

[17] Report and Order at 8.

[18] Exhibit 252.

other shippers, with the full blessing of the Commission,[19] and which the Commission held to be lawful in its decision on Count II.

3. **There was no basis to "infer" transportation rates charged during 2003.**

The Commission lays another piece of faulty foundation for the Report and Order when it invokes the spoliation doctrine to "infer" transportation rates charged to shippers on Respondents' pipelines during the year 2003. The spoliation doctrine requires that there is evidence of an intentional destruction of the evidence indicating fraud and a desire to suppress the truth.[20] When spoliation is urged as a rule of evidence which gives rise to an adverse inference, it is necessary that there be evidence showing intentional destruction of the item, and also such destruction must occur under circumstances which give rise to an inference of fraud and a desire to suppress the truth.[21] Simple negligence, however, is not sufficient to apply the adverse inference rule.[22]

In the present case, Staff sought to obtain copies of invoices sent to Respondents' customers from the first quarter 2006 back through calendar year 2003. The record reflects that Respondents retained the requested data in an electronic form and provided the requested data for the period back to January 2004 in multiple forms to Staff.[23] As the record further reflects, Respondents have maintained all the data electronically. However, producing information in the level of detail requested by Staff for calendar year 2003 is onerous, burdensome, and unnecessary in light of the data already given to Staff.

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[19] Exhbit 304, Ries Rebuttal at 18.

[20] *Baldridge v. Director of Revenue, State of Mo.* 82 S.W.3d 212, 223 (Mo.App. 2002)(citations omitted).

[21] *Id.*

[22] *Brissette v. Milner Chevrolet Co.,* 479 S.W.2d 176, 182 (Mo.App.1972).

[23] *See* Transcript at 146:3-22; *see al* Exhibit 311.

Although the Commission gratuitously comments that it finds it incredible that Respondents did not retain those invoices in a readily accessible form,[24] the Commission did not conclude, nor was there any evidence in the record to support, that Respondents intentionally destroyed evidence.[25] Therefore, as a matter of law, the spoliation doctrine does not apply, and Complainant was entitled to no evidentiary inference.

Nevertheless, in order to underpin an otherwise nonexistent case, the Commission allowed Complainant to "infer" transportation rates charged to shippers simply because Complainant "needed" this evidence.[26] This makes a farce of the spoliation doctrine, which provides evidentiary inferences as a sanction for the deliberate destruction of evidence, not as a way for a biased decision maker to assist a favored party with its evidentiary "needs" by granting evidentiary inferences to overcome a simple failure of proof.

B. Findings of Fact Regarding Counts I, III, and IV

In addition to the erroneous findings of fact on background matters, the Report and Order contains numerous erroneous findings of fact on critical matters directly related to Counts I, III, and IV, often without any citation to the record. These insufficient findings of fact are discussed below within the sections of this application addressing the lack of substantial evidence on each count, and those examples are incorporated by reference into the present argument concerning the insufficiency of the findings of fact.

C. Remedy for insufficient findings of fact.

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[24] Report and Order at 10.

[25] Report and Order at 11.

[26] *Id.*

For the reasons discussed above, the erroneous and unsupported findings of fact in the Report and Order provide no basis for an intelligent review of the Commission's Report and Order and thus, will require a reviewing court to resort to a review of the actual evidence. For this reason alone, the Report and Order must be withdrawn. Any such effort to simply modify the Report and Order or to provide citations to the record for each finding would be futile because there is no such evidence in the record to support the Commission's conclusions.

III. Count I

Count I charges that MPC and MGC violated both the terms of their tariffs and the Commission's affiliate transaction rules by (A) "permitting Omega Pipeline Company to use confidential customer information in a discriminatory manner" and (B) "allowing gas to be transferred to Omega at an amount lower than the greater of full market value or cost."[27] Notably, the Commission's conclusions of law on Count I are at variance with this charge. This renders the conclusions arbitrary, capricious, and unreasonable.

A. Mere "access" to information is not misconduct.

Nowhere in the Report and Order does the Commission determine that Omega actually used customer information "in a discriminatory manner." Instead, the Commission concludes only that MPC and MGC gave Omega "access" to information about the natural gas nominations and gas usage of shippers on the pipeline.[28] There is no finding, and indeed there was no evidence, that Omega ever made use of this alleged

[27] Report & Order at 20-21.

[28] Report and Order at 20-21.

"access" in a discriminatory manner. Clearly, Complainant failed to prove this key element of the charge.

The basis for the Commission's finding of "access" to confidential information by Omega is that Mr. David Ries served contemporaneously as president of both Respondents and Omega.[29] There is, however, no evidence that Mr. Ries ever made any inappropriate use of this "access" to information, and, as a matter of law, it is presumed that officers holding positions with affiliated entities can and do change roles to represent each entity separately.[30] "It is entirely appropriate for directors of a parent corporation to serve as directors of its subsidiary…."[31] Consequently, the mere fact that Mr. Ries had "access" to confidential information as an officer of the Pipelines while also serving as an officer of Omega was entirely proper, and it is legally presumed that he represented each entity separately and appropriately. The record does not show otherwise, and the Commission's presumption to the contrary has no basis in law or fact.

Furthermore, the evidence clearly establishes that Staff and the Commission were well aware that the Pipelines shared employees with Omega and that the Commission publicly supported this practice. 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.[32] The Commission, through its Staff, intervened in the FERC

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[29] Report and Order at 12.

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

[31] *Id*.

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

proceeding on April 12, 2004.[33] In its intervention, Staff and the Commission acknowledged 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.[34] When FERC granted MIG's request for waiver on July 7, 2004,[35] Staff and the Commission made no objection to the ruling. It is entirely inconsistent for the Commission to imply now in the Report and Order that this sharing of employees was clandestine or nefarious and to cite this practice as *per se* proof of misconduct because it provided theoretical "access" to confidential information.

B. Omega did not sell lost and unaccounted for gas.

Nowhere in Count I does the Commission determine that gas was ever transported for Omega at any rate other than the highest rate charged on Respondents' pipeline system.[36] Instead, the Commission nonsensically concludes that Omega was "allowed" to sell lost and unaccounted for gas, presumably at no cost to Omega, which the Commission characterizes as an "improper transfer of utility assets."[37] This is apparently a theory developed by one of more of the Commissioners during the course of the hearing of this matter; it is, however, wildly beyond the scope of Count I and entirely unsupported in the record. Nowhere in the record, and nowhere in the Report and Order, is there described any mechanism by which Omega—or any other party—could have sold lost and unaccounted for gas. Not surprisingly, the Commission cites no evidence in the

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

[34] *Id* at 10.

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

[36] Quite the contrary, the Commission candidly acknowledges that Omega paid the highest rates for any shipper on the system when transporting gas for Ft. Leonard Wood. Report and Order at 32. These shipments were made pursuant to the only jurisdictional affiliate transportation agreement in place on the system, and they were the only shipments as to which Omega acted in the legal capacity of a "shipper."

[37] Report and Order at 21.

Report and Order to support the speculative, unproven, and untrue conclusion that Omega did so.

In fact, the record establishes that it is not possible to sell lost and unaccounted for gas. By definition, lost and unaccounted for gas is gas that is, in the words of the Commission, "inevitably lost while it is being transported on the system."[38] The Commission appears to imply that, using some unknown mechanism, the Pipelines stole known and accounted for gas, misidentified it as "lost an unaccounted for," and then transferred it to Omega at no cost so that Omega could later sell the stolen gas for a pure profit. There is no evidence in the record to support any part of this untenable theory, and, in fact, it is against the evidence, which established that there is no storage capacity on the Pipelines.[39] Without the ability to store gas, it is physically impossible for the Pipelines to have "accumulated"[40] lost and unaccounted for gas for later sale by Omega. The Commission's assertion that "unaccounted for gas can accumulate on the system"[41] is physically impossible on a system with no storage capacity. Not surprisingly, the Commission fails to cite to the record when it makes this naked assertion against the laws of physics.

Furthermore, the Commission does not cite any evidence to support its conclusion that Omega profited from its role in balancing nominations on Respondents' pipeline system. This conclusion is against the weight of the evidence, which showed that upon the sale of Omega to Tortoise Capital Resources Corporation, an independent third party,

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[38] Report and Order at 17.

[39] Exhibit 88 at 45: lines 1-17.

[40] Report and Order at 17.

[41] Report and Order at 17.

this new owner refused to continue to perform the balancing role without compensation because the balancing role provided it no benefit and carried too much risk.[42] The rational conclusion to be drawn here is not that Omega was stealing gas for profit but that it was providing an uncompensated benefit to the pipeline system, allowing the system to maintain balances and operate safely.[43]

Moreover, the Commission continues to mischaracterize Omega as the "shipper" on contracts as to which the City of Cuba was, as a matter of law, the "shipper" and Omega merely an agent for Cuba.[44] This misstatement allows the Commission to erroneously characterize shipping discounts properly provided to Cuba as if they were shipping discounts provided to Omega under circumstances where Omega was not acting as a shipper and cannot, as a matter of simple logic, have received a discount on an activity in which it was not engaged. This entire line of reasoning is against the weight of the evidence, the law of agency, and the law of contract.

IV. Count III

A. The Commission's Findings are Not Supported by Competent and Substantial Evidence

The Commission's decision on Count III is not based on competent and substantial evidence. The Commission's decision is, in part, a finding that Omega began receiving a discount on July 1, 2003.[45] There is absolutely no evidence to support this finding. The Commission acknowledges this in stating that Staff lacked "the evidence it

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[42] *See* Exhibit 304, Ries Rebuttal, App. Z.

[43] Transcript at 583:16-584:6.

[44] Report and Order at 22.

[45] Report and Order at 29.

needs to firmly establish the transportation rates charged to shippers on MPC and MGC's pipelines in 2003."[46] To create an evidentiary basis that does not exist, the Commission brazenly determines that it "will allow Staff to infer those rates." This unsupported inference is not competent and substantial evidence and serves as no basis to presume a discount was given to Omega in 2003. It also does not take into account the evidence provided by Respondents of the discounts provided before and after July, 2003 to the City of Cuba.

Initially, the Commission incorrectly states that "Before July 1, 2003, Respondents charged the maximum tariff rates for transportation service for all shippers.[47] In fact, the record reflects that Cuba, the other municipal shippers and several other shippers, had been receiving discounts both before and after July 1, 2003.[48]

The Commission further asserts that "Omega was charging Cuba the transportation costs set in the sales and agency agreement, while paying MPC and MGC the discounted commodity charges identified by Staff. Omega kept the difference as extra profit." The Commission has no evidentiary basis for these assertions and fails to cite any portion of the record to support its erroneous conclusion. In fact, there was no evidence presented regarding Omega's profits or the sources of Omega's profits. There was certainly no evidence to support the Commission's speculation that Omega profited from a "difference" in cost that does not exist in the evidence. The Commission had no evidence on which to base its conclusion in this regard.

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[46] Report and Order at 11.

[47] Report and Order at 28.

[48] Exhibit 304, Ries Rebuttal at 24:12-15, App. I.

The Commission implies that Omega had no authority under the contract[49] when, in fact, its contract with Cuba was silent.[50] In fact, Staff subpoenaed a representative of Cuba who was available at the hearing to testify on this matter. However, Staff elected not to present testimony from this witness which would have either confirmed or denied the unsupported finding that the Commission makes in its order. The failure of a party to call a witness who has knowledge of facts and circumstances vital to the case generally raises a presumption or inference that the testimony would be unfavorable to the party failing to offer it.[51]

As argued fully in Count I, there is no evidence proving that Mr. Ries used his role as officer in Omega to provide any improper preference for Omega or to transfer funds to an unregulated affiliate. The Commission's assertion in this regard is entirely unsupported by the record in this matter.[52]

The Commission concludes that an increased profit was "possible" based upon the unproven discounted transportation rate it speculates gave Omega an unfair advantage to offer its customers a "better deal", but cites no actual evidence in the record supporting this conclusion.[53]

Furthermore, the Commission ignores overwhelming evidence that Respondents February 1, 2005 transportation agreement with Omega for transportation service to Fort Leonard Wood charged the highest rate paid on the system. The Commission also selects

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[49] Report and Order at 31.

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

[51] *Porter v. Toys 'R' Us-Delaware, Inc.* 152 S.W.3d 310, 318 (Mo.App. 2004).

[52] *Id*.

[53] Report and Order at 32.

May 1, 2005 as a critical date upon which to begin retroactive tariff adjustments.[54] This date is arbitrary, and there is no evidence in the record that justifies a tariff change on this date because Respondents were charging its affiliate the highest rate on the system. There is no substantial evidence in the record to the contrary. Finally, the Commission's use of the September 1, 2003 date[55] to reflect the rates Respondents were charging to Omega is arbitrary, capricious, and unsupported by the record because, in fact, Respondents had not yet entered into any agreement with Omega at that time.

Moreover, Section 3.2.b applies only to "Transportation Agreements entered into by Transporter with any affiliate of Transporter." Section 3.2.b(4) requires that "rate comparisons for compliance with these provisions will be calculated assuming a 25% load factor." The Commission fails to use this load factor in its rate comparisons, leading it to its erroneous conclusion that Respondents were not charging its affiliate the highest rate on the system.

Missouri law allows Respondents to charge customers differing rates when they are not under the "same or substantially similar circumstance"[56] In the present case, however, the Commission presumes that all of Respondents customers are similarly situated without performing any analysis to support this proposition. In fact, the evidence shows that the customers were not similarly situated in that some of the customers were interruptible and others were not. This critical difference renders meaningless the rate comparisons relied upon by the Commission in its Report and Order. In fact, the tariffs require a much more rigid mechanism for the comparison of rates.

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[54] *Id* at 35-36.

[55] *Id*. at 34.

[56] § 393.130, RSMo.

The Commission's ultimate conclusion on this count hinges on its incorrect and unsupported finding that Omega shipped gas for customers other than Fort Leonard Wood.[57] In reaching this conclusion, the Commission ignores the overwhelming evidence that Omega served as the agent of the City of Cuba, acting that capacity. Given this fact, the Commission's assertion that the Pipelines charged an affiliated shipper the lowest rate on the system is unsupported by the record and only based on bald contentions by Staff. Therefore, the discounted rate was actually the rate given to Omega customers under the City of Cuba's transportation agreement with Cuba as the shipper and Omega merely acting as their agent.[58]

The Commission acknowledges that "a discount given to Cuba would not need to be extended to non-affiliated shippers."[59] The rest of the Commission findings regarding discounted rates which Omega charged to it's customers ignore the unyielding evidence that the only discounts that were given pursuant to the City's transportation agreement were extended to the City of Cuba as a non-affiliated shipper on the system. The discounts the Commission infers were given to Omega were *never* given to Omega but were in fact given to the City of Cuba as a non-affiliated shipper with Omega acting only as its agent.

B. The Commission's Findings are Against the Weight of the Evidence

The Commission's decision on Count III is against the weight of the evidence. The record contains clear and undisputed evidence that the Pipelines gave a discounted

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[57] *Id.*

[58] *Id.*

[59] Report and Order at 29.

commodity rate to the City of Cuba prior to July 1, 2003.[60] Lacking any evidence to rebut the validity of the Pipelines' written correspondence to Cuba, the Commission summarily declares that the evidence was fraudulently created after the discount was given.[61] The Commission's unfounded declaration is against the weight of the evidence presented on this Count.

C. The Commission's Conclusions are Arbitrary and Capricious

The Commission arbitrarily ignores evidence proving Omega's agency relationship with the City of Cuba. In fact, the Commission does not even address the overwhelming evidence in the record proving this fact. The Commission instead sweeps away the legal concept of agency and the voluminous evidence in the record, including Omega's agency agreement with the City,[62] that establish the agency relationship.

To have any proper basis for its decision, the Commission must find that an agency relationship did not exist or that the evidence supporting Omega's agency relationship was not valid. The Commission does neither. The Commission gives no explanation for why it casts away the evidence proving Omega's role as Cuba's agent, arbitrarily ignoring Respondents' entire defense in this matter. Such blatant disregard of the record has resulted in the Commission's arbitrary and capricious conclusions of law on this count.

Because the evidence shows that Omega served in an agency role managing Cuba's capacity, with Cuba receiving any discounted rate as a non-affiliated shipper, the Commission's application of Section 3.2(b) and 12(c) of the General Terms and

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[60] Exhibit 26.

[61] Report and Order at 30.

[62] Exhibit 304, Ries Rebuttal at 20:11-16, App. I.

Conditions of the Pipelines' tariffs to Omega is erroneous. The Commission does not contest that Cuba and other third-parties were non-affiliates. These tariff provisions apply to affiliates of the Pipelines shipping gas on the system. Omega merely served as Cuba's agent, while Cuba was shipping gas on the system. The mere fact that Omega was an affiliate of the Pipelines does not invoke these provisions since, as a matter of law, Cuba remained the shipper of gas on the system. Accordingly, the transportation rate given to Cuba was not a transportation rate charged to an affiliate required to be the maximum rate charged to all other non-affiliates on the system per tariff provisions 3.2(b) and 12(c) of the General Terms and Conditions. It was simply a negotiated and agreed upon rate charged to a non-affiliate, Cuba.[63] The Commission makes no mention of this evidence and fails to cite any evidence in the record refuting Omega's agency relationship with Cuba, because there is no such evidence. The Commission has further shown no basis to confer affiliate rate status to transactions involving non-affiliates.

The most critical basis upon which this count fails is in Staff's failure to trigger the effect of the tariff provisions altogether. For the sake of argument, even if tariff provisions 3.2(b) and 12(c) of the General Terms and Conditions applied to Omega, Staff failed to follow the requisite procedure to change the rates that should be charged to non-affiliate shippers. On June 1, 2006, Omega was sold to Tortoise Capital Resources Corporation.[64] Staff filed its Complaint on June 21, 2006, which the Commission, *sua sponte*, accepted as the required "notice" under Section 3.2(c) of the tariff in its initial Report and Order. Pursuant to the clear and explicit terms of the tariff, any new

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[63] Exhibit 26.

[64] *See* Transcript at 174:5-8 and 540:9-12.

transportation rates for non-affiliated shippers could not be implemented until after the requisite notice was filed on June 21, 2006. As of the operative date, June 21, 2006, Omega was no longer an affiliate of the Pipelines. Therefore, rates could not automatically change under the subject tariff provision because Omega was not an affiliate of the Pipelines at the time notice was given. In fact, the Pipelines did not provide service to any affiliate as of or after that date.

The Commission now, without adequate explanation, changes its tariff interpretation to render the notice requirement of Section 3.2.c ineffective. As correctly interpreted by the Commission in its original Report and Order, Section 3.2.c provides a procedure that effectuates Respondents' due process rights. Specifically, this section affords Respondents notice of the Commission's intention to impose adjusted rates and gives Respondents a timely opportunity to respond before any rate adjustments are imposed. This interpretation is also mandated by the filed-rate doctrine. Under the interpretation set forth in the Commission's Revised Report and Order, Respondents are now exposed to both retroactive rate reductions that clearly violate the filed-rate doctrine and Respondents' due process rights. The Commission's arbitrary change in tariff interpretation has no foundation in law and the Commission should return to its original and correct tariff interpretation.

Furthermore, nothing in Respondents' tariffs or Missouri law requires the Commission's approval to withdraw discounts from customers. Respondents can offer discounts at their discretion. Even if, for the sake of argument, the Commission's interpretation of the tariffs is accepted, upon the elimination of a discount, tariff rates return to normal. Similarly, if an affiliate is sold or eliminated tariff provisions related to

affiliates are no longer applicable. The Commission cites no authority for the proposition that rates can be unilaterally lowered but require approval to return to the approved tariff rates.

Finally, the Commission attempts to make a distinction between tariff enforcement and reparation, refund, or ratemaking authority.[65] The Commission asserts that it is simply exercising its authority in this order to enforce certain tariff provisions.[66] This authority extends only to the Commission's ability to quantify the charges that should be applied under Respondents' tariff. As the Commission admits, and as is consistent with well-established law, the Commission has no authority to impose any reparation, refund, or adjusted rate in this order. Any attempt to impose adjusted rates, refunds, or reparations based on the retroactive application of Respondents' tariffs would be unlawful.[67]

V. Count IV

Count IV contends that Respondents failed to disclose the discounted shipping rates that they purportedly provided to Omega, as charged in Count III. Logically, the determination of Count IV is tied to the Commission's correct determination in Count II, that separate transportation agreements were not necessary for all affiliate customers and

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[65] Report and Order at 40.

[66] *Id*.

[67] The filed rate doctrine precludes a regulated utility from collecting any rates other than those properly filed with the appropriate regulatory agency and explicitly prohibits an entity from imposing a retroactive rate alteration and, in particular, from ordering reparations. *State ex rel. Associated Natural Gas Co. v. Public Service Com'n*, 954 S.W.2d 520, 531 (Mo.App. 1997) (citations omitted). Moreover, a determination whether public-utility rates are just and reasonable must be determined by the exercise of a fair and enlightened judgment, having regard to all relevant facts. *See State ex rel. Missouri Gas Energy v. Public Service Com'n*, 186 S.W.3d 376, 384 (Mo.App. W.D. 2005), *citing Hope and Bluefield Waterworks & Improvement Co. v. Public Service Commission of West Virginia*, 262 U.S. 679, 43 S.Ct. 675, 67 L.Ed. 1176 (1923).

therefore, Respondents were not required to disclose any discounted shipping rates to affiliate customers.

The Commission's determination in Count IV is also dependent on a correct decision on Count III. If the discounts alleged in Count III were not given to Omega, then there can have been no failure to disclose the nonexistent discounts, and Count IV must fail. As demonstrated above, there was, in fact, no discount given to Omega and so there was nothing to report.

Furthermore, the Commission's determination on Count IV does not match the charge in that the charge references only an alleged discount to Omega, whereas the Commission's decision cites "discounts offered to shippers" other than Omega.[68] Assuming for the sake of argument that other shippers received undisclosed discounts (and they did not), this fact would not prove Count IV, which alleges discounts only to Omega.

Moreover, it is against the weight of the evidence to conclude that any discount given to a third party was in fact a discount given to Omega because, as repeatedly shown above, the evidence establishes that the discount at issue was properly provided to Cuba and not to Omega, which was merely an agent and not the legal "shipper" for the transactions at issue.

VI. Due Process

Respondents' due process rights were violated in this case in that Respondents were denied an impartial decision maker, the opportunity to be heard in a meaningful

[68] Report and Order at 43.

manner, knowledge of the claims upon which the Commission would ultimately base its decision, and the right to cross examine witnesses.

The procedural due process requirement of fair trials by fair tribunals applies to administrative agencies acting in an adjudicative capacity. *Stonecipher v. Poplar Bluff R1 School Dist.*, 205 S.W.3d 326, 329 (Mo.App. S.D. 2006). In an administrative proceeding, due process is provided by affording parties the opportunity to be heard in a meaningful manner, including by having knowledge of the claims of his or her opponent, and by having a full opportunity to be heard, and to defend, enforce and protect his or her rights." *Weinbaum v. Chick*, 223 S.W.3d 911. 913 (Mo.App. S.D. 2007). It also includes "confronting and cross examining witness." *Lewis v. City of University City*, 145 S.W.3d 25, 32 (Mo.App. E.D. 2004); *Graves v. City of Joplin*, 48 S.W.3d 121, 124 (Mo.App. S.D.2001).

In addition, administrative decision makers must be impartial. *Stonecipher*, 205 S.W.3d at 329. "Not only is a biased decisionmaker constitutionally unacceptable but 'our system of law has always endeavored to prevent even the probability of unfairness.' " *Fitzgerald v. City of Maryland Heights*, 796 S.W.2d 52, 59 (Mo.App.1990), *quoting Withrow v. Larkin*, 421 U.S. 35, 47, 95 S.Ct. 1456, 43 L.Ed.2d 712 (1975). "[O]f all the rights encapsulated within due process, the requirement of an impartial decisionmaker is the most important because without that right, the other rights become meaningless." *Stonecipher*, 205 S.W.3d at 329, *quoting* Arnold Rochvarg, *Is the Rule of Necessity Really Necessary in State Administrative Law: The Central Panel Solution*, 19 J. NAT'L ASS'N ADMIN. L. JUDGES 35 (Fall 1999).

In her dissent, Commissioner Murray recognizes that Respondents' due process rights were violated by the biased and unusual procedures adopted by the Commission in this matter. Respondents incorporate that dissent by reference into the present argument.

First, Respondents were denied an impartial decisionmaker. As noted by Commissioner Murray, after hearing all of the evidence and considering the post-hearing briefs in this matter, the majority of the Commission "indicated that they did not have the necessary information to move forward. . . ."[69] Rather than find that the Staff had failed to carry its burden, the Commission requested an on-the-record presentation of additional information, which Commissioner Murray quite accurately describes as "nothing more than an opportunity for Staff to bolster a weak case."[70] It was, in fact, the functional equivalent of allowing a state prosecutor to present additional evidence and argument to a deadlocked jury.

After favoring Staff with a second bite at the apple in the form of the unprecedented and procedurally unauthorized additional on-the-record presentation, a majority of the Commission changed its position and found violations as to Counts I, III, and IV.[71] The creation of an additional opportunity for Staff to bolster its unproven case is indicative of, using the words of Commissioner Murray, a "Commission more interested in obtaining a desired result than in being an impartial administrative tribunal."[72]

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[69] Dissent at 1.

[70] Dissent at 1.

[71] Dissent at 2.

[72] Dissent at 2.

Respondents' due process rights were further violated during the course of the procedurally unauthorized, additional on-the-record presentation in that—as described by Commissioner Murray—"the attorneys for Staff and intervenors made numerous assertions and basically testified, all of which was not subject to cross examination."[73] Respondents timely objected to this procedure.[74] As noted by Commissioner Murray, the un-cross-examined testimony, which was also unsworn, "swayed a majority of the Commission."[75] Certainly, this odd procedure—which did not proceed in an organized fashion but instead encouraged and allowed Staff and intervenors to interrupt the presentation of Respondents at will and in a free-for-all manner[76]—did not afford Respondents the opportunity to be heard in a meaningful manner.

Finally, as discussed more fully above, there were substantial variances between the conduct alleged in the counts charged by Staff as compared to the conduct determined by the Commission to have occurred and cited by the Commission as support for its decisions on Counts I, III, and IV. This violated Respondents' due process right to know the claims upon which the Commission would ultimately base its decision.

VII. Respondents Will Be Irreparably Harmed

If the Commission's Report and Order is allowed to become effective, Respondents will suffer immediate, irreparable harm. Among other forms of relief, the Commission orders a rate adjustment for Respondents' customers, which will reduce the

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[73] Dissent at 2.

[74] Transcript at 736 and 794.

[75] Dissent at 2.

[76] *See*, e.g., Transcript 865:4-866:15, 833:15-23, 863:8-864:7, 858:10-859:4.

rates that Respondents can charge by approximately 80% to MPC shippers and 90% to MGC shippers.

As discussed above, ordinarily a rate adjustment is made based upon the exercise of fair and enlightened judgment, having regard to all relevant facts and with due regard to a reasonable average rate upon capital actually expended and to the necessity of making reservations out of income for surplus and contingencies. The adjusted rates imposed by the Commission in its Report and Order provide a negative return on capital and, rather than allow for reservations out of income for surplus and contingencies, will, to the contrary, deplete and immediately exhaust Respondents' reserves. The immediate effect of the adjusted rates will, in fact, be to render Respondents insolvent—if Respondents are required to operate under the adjusted rates. This will force Respondents to discontinue debt service and forgo payment of property taxes. The ultimate result will be that Respondents' business operations will be interrupted as it will be unable to pay for ongoing operating costs.

The effect of the Commission's order will be to interrupt a Respondents' operations, ruin Respondents' credit, and injuriously affecting the employment of numerous persons.[77] In the present case, it is beyond dispute that the adjusted rates imposed by the Commission will do irreparable harm to Respondents if the Commission's Report and Order takes effect.

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[77] *Washington Capitols Basketball Club Inc. v. Barry*, 304 F. Supp. 1193 (N.D. Cal. 1969), judgment aff'd, 419 F.2d 472 (9th Cir. 1969).

VIII. Conclusion

For the foregoing reasons, Respondents respectfully request that the Commission rehear this matter and subsequently change its Revised Report and Order as to Counts I, III, and IV.

Dated: October 19, 2007

Respectfully submitted,

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CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the foregoing Respondents' Initial Post Hearing Brief has been transmitted by e-mail or mailed, First Class, postage prepaid, this 19th day of October 2007, to:

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

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