

**STATE OF MISSOURI  
PUBLIC SERVICE COMMISSION**

At a session of the Public Service  
Commission held at its office in  
Jefferson City on the 16th day of  
May, 2006.

The Staff of the Missouri Public  
Service Commission,

Complainant,

v.

Missouri Pipeline Company, LLC; Missouri Gas  
Company, LLC; Omega Pipeline Company, LLC;  
Mogas Energy, LLC; United Pipeline Systems, Inc.;  
and Gateway Pipeline Company, LLC.

Respondents.

**Case No. GC-2006-0378**

**ORDER GRANTING MOTION TO DISMISS OMEGA PIPELINE  
COMPANY AS A PARTY BUT DENYING MOTION TO QUASH  
SUBPOENAS**

Issue Date: May 16, 2006

Effective Date: May 16, 2006

On March 31, 2006, the Commission's Staff filed a complaint against Missouri Pipeline Company, LLC; Missouri Gas Company, LLC; Omega Pipeline Company, LLC; Mogas Energy, LLC; United Pipeline Systems, Inc.; and Gateway Pipeline Company, LLC. Staff's complaint alleges that the first two Respondents – Missouri Pipeline and Missouri Gas – are public utilities subject to the Commission's regulation. Staff's complaint alleges that those two utilities are over-earning and asks that the Commission reduce the rates they are allowed to charge their customers.

Staff's complaint also alleges that the other named respondent companies – Omega, Mogas Energy, United Pipeline System, and Gateway Pipeline – are affiliated with Missouri Pipeline and Missouri Gas. Staff contends that the books, records, and operations of those affiliated companies are so intermingled as to make all of the respondent companies gas corporations, and thus, public utilities, subject to the Commission's regulatory authority.

On April 26, Omega, acting separately from the other Respondents, filed a motion asking the Commission to dismiss it from Staff's complaint. Omega also asks the Commission to quash certain subpoenas that Staff has served on Omega. Staff filed a response to Omega's motion on May 3, and Omega replied to Staff's response on May 11. The Commission will first address the question of whether Omega is properly a party to this complaint. Thereafter it will decide whether Staff's subpoenas to Omega should be quashed.

### **The Motion to Dismiss**

The standard for review for consideration of a motion to dismiss for failure to state a claim has been clearly established by Missouri's courts as follows:

A motion to dismiss for failure to state a cause of action is solely a test of the adequacy of the plaintiff's petition. It assumes that all of plaintiff's averments are true, and liberally grants to plaintiff all reasonable inferences therefrom. No attempt is made to weigh any facts alleged as to whether they are credible or persuasive. Instead, the petition is reviewed in an almost academic manner to determine if the facts alleged meet the elements of a recognized cause of action, or of a cause that might be adopted in that case.<sup>1</sup>

By that standard, the Commission must consider Omega's motion to dismiss based on the facts alleged in Staff's complaint.

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<sup>1</sup> *Eastwood v. North Central Missouri Drug Task Force*, 15 S.W.3d 65, 67 (Mo. App. W.D. 2000).

Omega's motion to dismiss reveals that it owns and operates a natural gas distribution system within the confines of the federal military reservation at Fort Leonard Wood, pursuant to a contract with the United States, Department of Defense. In its role as a Local Distribution Company, it does not serve any customers aside from the Department of Defense. Omega contends that as a federal contractor on a federal reservation, it is subject to federal law. Therefore, its operations are not subject to regulation by this Commission.

In its reply to Omega's motion to dismiss, Staff concedes that the Commission does not have jurisdiction over Omega's operation as a local natural gas distribution company at Fort Leonard Wood. Instead, Staff contends that Omega's other operations and interactions with affiliated companies are so intermingled as to subject those aspects of its business to regulation by this Commission as a gas corporation. Staff further asserts that because of the intermingling, the Commission will need to consider Omega's operations, including those at Fort Leonard Wood, in ascertaining the expenses and revenues of Missouri Pipeline and Missouri Gas.

Section 393.140(12), RSMo 2000, which is the statute dealing with transactions of affiliates of regulated utilities, provides some support for Staff's assertion of the right to regulate Omega. That statute provides, in relevant part, that the Commission does not have jurisdiction over the affairs of an affiliate of a regulated utility that is not engaged in regulated activities, if the operations of that affiliate are "so conducted that its operations are to be substantially kept apart and separate from the owning, operating, managing or controlling of such gas plant, electric plant, water system or sewer system." By implication, the Commission is not prohibited from claiming jurisdiction over the operation of affiliates

that are not “substantially kept apart and separate” from the operations of the regulated utility. Indeed, that is the basis for Staff’s assertion of jurisdiction over the intermingled affairs of Omega.

However, the fact that the Commission may have some regulatory authority over Omega does not mean that that company can be treated as a gas company, subject to all the regulatory authority that such designation entails. Section 386.020(18), RSMo Cum. Supp. 2005, defines a “gas corporation” as an entity “owning, operating, controlling or managing any gas plant operating for public use.” As Staff concedes, Omega’s operations on the federal reserve at Fort Leonard Wood do not render it subject to regulation by this Commission as a gas corporation. The question then becomes, does Omega’s entanglement with admittedly regulated entities make it subject to regulation as a gas corporation?

Staff’s audit report, which was incorporated into its complaint, describes a tangled web of interrelated companies affiliated by common ownership. Staff describes Mogas Energy, Gateway Pipeline, and United Pipeline Systems – the other named respondent companies – as members of the chain that owns Missouri Pipeline and Missouri Gas. As owners of the regulated companies, Staff can reasonably assert that those companies are subject to regulation as a gas corporation when their affairs are intermingled with the regulated company. Omega, on the other hand, is not described as a link in that chain of ownership. Rather, it merely shares common ownership with the regulated companies. Staff does not allege that Omega owns, operates, controls, or manages any gas plant, even indirectly. Therefore, Omega does not meet the definition of a gas corporation.

As it discovers more information about the interrelationship of Omega and the regulated companies, Staff may be able to amend its petition to establish a basis for some regulation of Omega. If it is able to do so, Staff may once again seek to add Omega as a party to this complaint. However, the complaint, as it currently stands, seeks only to have Omega declared to be a gas corporation. Staff has not pleaded sufficient facts to establish such a claim against Omega and for that reason, Omega must be dismissed as a party.

The fact that Omega will no longer be a party to this complaint does not, however, mean that Staff will be precluded from discovering information from that company. That leads to a discussion of the second portion of Omega's Motion; the request to quash the subpoenas that Staff has served on Omega.

### **The Motion to Quash Subpoenas**

Omega asks the Commission to quash subpoenas that have been issued to David Ries and David (BJ) Ludholz, seeking testimony and documents concerning Omega's operations and relationship with the U.S. Department of Defense at Fort Leonard Wood. Omega contends that Staff's subpoenas are invalid for several reasons.

First, Omega argues that the subpoenas are invalid because, when Staff served them, they were not accompanied by a witness fee. Indeed, Section 386.440, RSMo 2000, the statute that controls the service of Commission subpoenas, provides that any witness that is served with such a subpoena may demand a fee for travel and appearance expenses. If that fee is not provided, the witness need not comply with the subpoena. However, that section specifically provides that witnesses whose fees are to be paid from Commission funds are not entitled to demand payment of fees before they comply with the

subpoena. The witnesses from Omega have been subpoenaed by Staff and their expenses will be paid from Commission funds. Therefore, Staff's refusal to tender such fees along with the subpoenas does not invalidate the subpoenas.

Omega's second challenge to the subpoenas is based on an argument that the Commission lacks jurisdiction over Omega and that, therefore, Omega is not subject to the Commission's subpoena power. In support of its argument, Omega cites Section 386.320(3), RSMo 2000. That section, which is entitled "General supervision of telegraph and telephone corporations," provides that the Commission, and each commissioner, has the power to examine the books and other documents of persons and corporations subject to the Commission's supervision, and to compel the production of such documents by subpoena duces tecum. From this, Omega argues that the Commission has the power to compel the production of documents only by persons and corporations subject to the Commission's supervision.

Staff points out that Section 393.140(10), RSMo 2000, gives the Commission the authority to "subpoena witnesses, take testimony and administer oaths to witnesses in any proceeding or examination instituted before it, or conducted by it, in reference to any matter under sections 393.110 to 393.285."<sup>2</sup> In addition, Section 386.420.2, RSMo 2000, gives the Commission, and parties to actions before the Commission, broad authority to depose witnesses. That authority is not limited to persons and corporations subject to the Commission's supervision. Missouri's courts have also made it clear that the Commission has the authority to inquire into matters beyond the strict confines of entities directly subject to the Commission's regulation.

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<sup>2</sup> Staff's complaint is brought pursuant to the authority granted to it by Section 393.140 to generally supervise gas corporations.

In a 1985 case, *State ex rel. Associated Natural Gas Co. v. Public Service Commission*,<sup>3</sup> the Missouri Court of Appeals held that the Commission has the authority to consider the finances of an unregulated affiliated company when setting rates for a regulated company. Furthermore, the Missouri Supreme Court, citing *Associated Natural Gas*, and Section 393.140(12), has held that the Commission has the authority to require such affiliates to maintain records in compliance with the Commission's regulation when the affiliate is not "substantially kept separate" from the regulated utility.<sup>4</sup> Staff has alleged that the finances and affairs of these affiliated companies are so intermingled as to make it impossible for the Commission to appropriately exercise its authority over the regulated utilities unless it also examines the affairs of the affiliated companies. Accordingly, the Staff has made sufficient allegations to defeat Omega's motion to quash Staff's subpoenas. If the Commission is to exercise the authority that it has been given to examine the books and records of regulated utilities and their affiliated entities, it must also have the authority to compel those affiliated entities to produce witnesses and documents.

Although the Commission, undeniably, does not have jurisdiction over Omega's operations within Fort Leonard Wood, and does not intend to regulate that company's contractual relationship with the Army, Omega's contract with the Department of Defense may have an impact on the regulated operations and rates charged by Missouri Pipeline and Missouri Gas. Therefore, Staff is entitled to investigate that contract, and may do so by subpoenaing witnesses and documents. Omega's motion to quash will be denied.

**IT IS ORDERED THAT:**

1. Omega Pipeline Company, LLC, is dismissed from this complaint.

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<sup>3</sup> 706 S.W.2d 870 (Mo App. W.D. 1985).

<sup>4</sup> *State ex rel. Atmos Energy Corp. v. Public Service Commission*, 103 S.W.3d 753, 764, (Mo.banc 2003)

2. Omega Pipeline Company, LLC's Motion to Quash Subpoenas is denied.
3. This order shall become effective on May 16, 2006.

**BY THE COMMISSION**

A handwritten signature in black ink, appearing to read 'Colleen M. Dale', written over a horizontal line.

Colleen M. Dale  
Secretary

( S E A L )

Davis, Chm., Murray, Gaw, Clayton and Appling, CC., concur

Woodruff, Deputy Chief Regulatory Law Judge