

At a session of the Public Service Commission held at its office in Jefferson City on the 3rd day of November, 2006.

Respondents.

On October 23, 2006, Terry Matlack and Tortoise Capital Advisors, LLC, filed a motion asking the Commission to quash a *subpoena duces tecum* issued by the Commission's Staff. The challenged subpoena directs Terry Matlack to appear on behalf of Tortoise Capital Advisors on November 7, to give a deposition and to produce certain documents relating to Omega Pipeline Company, LLC. The Commission issued an order on October 24 directing that any party wishing to respond to the motion to quash do so no later than October 30. The Commission's Staff filed its response opposing the motion to quash on October 30. Matlack and Tortoise Capital Advisors replied to Staff's response on November 1. Missouri Pipeline and Missouri Gas filed their reply on November 2.

Matlack, Tortoise Capital Advisors, and Omega Pipeline are not parties in this case, although Omega Pipeline was formerly affiliated with the Respondents in that it shared common ownership with those companies. On June 1, 2006, Tortoise Capital Resources Corporation, a private fund managed by Tortoise Capital Advisors, purchased Mowood, LLC, which owns Omega Pipeline. Omega Pipeline provides natural gas service to Fort Leonard Wood, a federal enclave, and offers natural gas marketing services to several municipalities. It is not currently regulated by the Commission.

Staff's subpoena seeks to compel Matlack and Tortoise Capital Advisors to produce information regarding Omega Pipeline's current business operations and customer relationships. Matlack and Tortoise Capital Advisors argue that Staff's subpoena should be quashed for two reasons: first, because Staff is seeking information that is not relevant to any issue currently before the Commission; and second, because highly confidential information that would be disclosed in response to the subpoena would be at risk of disclosure to Omega Pipeline's direct competitors for the provision of natural gas marketing services. The Commission will first address the question of relevance.

In its response, Staff explained that its subpoena is investigatory in nature and is tied to both the GC-2006-0378 case and the GC-2006-0491 case. An administrative investigative subpoena is appropriate and may be enforced "if; 1) the inquiry is within the authority of the agency; 2) the demand is not too indefinite; 3) the information sought is reasonably relevant."<sup>1</sup> Section 393.140(9) and (10), RSMo 2000, give the Commission the authority to issue subpoenas to compel the production of documents and testimony, and

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<sup>1</sup> Angoff v. M & M Management, 897 SW2d 649, 652 (Mo App. W.D. 1995).

Matlack and Tortoise Capital Advisors do not complain that Staff's demands are too indefinite. That leaves only the question of relevance.

Missouri's courts have indicated that there are two aspects to relevance: logical relevance and legal relevance.<sup>2</sup> Logical relevance simply means that the questioned evidence tends to make the existence of a material fact more or less probable.<sup>3</sup> Staff explains that it is seeking information from Matlack and Tortoise Capital Advisors to determine: 1) the nature of the transaction by which Omega Pipeline was sold; 2) whether there has been any change in the operation of Omega Pipeline in relation to Missouri Pipeline and Missouri Gas; 3) whether Omega Pipeline may be engaging in activities that would bring it within the jurisdiction of the Commission; and 4) to determine whether Omega Pipeline is still affiliated with Missouri Pipeline and Missouri Gas. Staff's response to the motion to quash explains why the information it seeks from Matlack and Tortoise Capital Advisors will assist it in making those determinations. Therefore, the information Staff seeks is logically relevant.

The more difficult question is whether the information Staff seeks is also legally relevant. In deciding whether a party should be allowed to discover certain information, the court, or administrative agency, must weigh "the probative value of the evidence against the dangers to the opposing party of unfair prejudice, confusion of the issues, undue delay, waste of time, cumulativeness, or violations of confidentiality. Evidence is legally relevant if its probative value outweighs its prejudicial effect."<sup>4</sup>

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<sup>2</sup> State v. Kennedy, 107 SW 3d 306, 311 (Mo. App. W.D. 2003). That two-part relevance test is used to analyze the appropriateness of an administrative investigative subpoena in Jackson v. Mills, 142 SW 3d 237 (Mo. App. W.D. 2004).

<sup>3</sup> State v. Kennedy, at 311.

<sup>4</sup> Jackson v. Mills, 142 SW 3d 237, 240 (Mo. App. W.D. 2004).

In weighing the competing interests in this case, the Commission is mindful that Matlack and Tortoise Capital Advisors are not parties to this case. Giving a deposition and producing the documents that Staff seeks is unquestionably a substantial burden. In an effort to address Staff's concerns, Terry Matlack filed an affidavit as an attachment to Matlack and Tortoise Capital Advisors' reply to Staff's response. In that affidavit, Matlack explains the sale transaction by which Tortoise Capital Resources Corp. acquired ultimate ownership of Omega Pipeline. He also emphatically denies that Omega Pipeline is in any way affiliated with Missouri Pipeline or Missouri Gas. That affidavit may answer some or all of Staff's questions. However, the Commission is not willing to deny Staff the opportunity to question Mr. Matlack and to follow any leads it may need to follow to fully resolve its concerns.

The Commission must consider one other factor in weighing the legal relevance of the matters that Staff seeks to explore. That is the question of whether the highly confidential information that would likely be revealed through Staff's deposition of Mr. Matlack would be adequately protected from disclosure to competitors. The Commission has issued a protective order designed to protect such information from inappropriate disclosure. However, as Matlack and Tortoise Capital Advisors indicate in their motion to quash the subpoena, Missouri Pipeline and Missouri Gas have filed a motion in Case No. GC-2006-0491 alleging that highly confidential information has been improperly disclosed to Eve Lissik, an employee of a competitor of Omega Pipeline. In an order issued in that case, the Commission has struck Lissik's rebuttal testimony and has ordered that she not be given access to information designated as highly confidential pursuant to the protective order previously entered in that case. To ease the concerns of

Matlack and Tortoise Capital Advisors, the Commission will again order that Eve Lissik and any other employee of the Missouri Public Utility Alliance, the Missouri Joint Municipal Electric Utility Commission, or the Municipal Gas Commission of Missouri are not to be given access to any highly confidential information that results from the deposition of Terry Matlack.

In conclusion, the Commission finds that the information that Staff seeks to discover through the deposition of Terry Matlack is logically and legally relevant. The motion to quash subpoena will be denied.

**IT IS ORDERED THAT:**

1. The Motion to Quash Subpoena Duces Tecum filed by Terry Matlack and Tortoise Capital Advisors, LLC, is denied.
2. No employee of the Missouri Public Utility Alliance, the Missouri Joint Municipal Electric Utility Commission, or the Municipal Gas Commission of Missouri shall be given access to any highly confidential information that results from the deposition of Terry Matlack.
3. This order shall become effective on November 3, 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