

**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI**

Staff of the Missouri Public Service
Commission,

Complainant,

v.

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

Respondents.

Case No. GC-2006-0378

**Reply to Respondent Omega's Motion to Dismiss Complaint and
Quash Subpoenas**

COMES NOW Staff of the Public Service Commission of Missouri, and in reply to Respondent Omega Pipeline, LLC's (Omega) Motion to Dismiss Complaint and Quash the Subpoenas, states:

1. The Staff, at the direction of the Commission, began an investigation of Missouri Pipeline Company, LLC (MPC) and Missouri Gas Company, LLC (MGC) in November, 2005. On March 31, 2006, the Staff filed a complaint against MPC; MGC; Omega; and their affiliates, United Pipeline Systems Inc, LLC (UPSI); Gateway Pipeline Company, LLC (Gateway); and Mogas Energy LLC (Mogas) (jointly, the Respondents). The complaint alleged, among other things, that MPC's and MGC's rates were too high (Count I), and that Respondents conducted business in such a manner as to subject them all to regulation as a gas corporation, as that term is used in Chapters 386 and 393, RSMo, 2000 (Count II).

2. Prior to the filing of this complaint, the Commission issued at Staff's behest, a number of subpoenas *duces tecum* for each of the Respondents, and for David (BJ) Lodholz, an employee of MPC. At the request of Respondents, Staff agreed to postpone the scheduled depositions, and has now noticed the depositions of Mr. Lodholz and MPC for May 3 and 4, respectively. Staff intends to notice the depositions of the other Respondents to occur in the next few weeks.

3. On April 26, 2006, Omega filed its Motion to Dismiss and to Quash Subpoenas (the Motion). Omega alleges that Omega's business with Fort Leonard Wood is not subject to Commission jurisdiction (Arguments I and II, pp. 3-9); that the complaint does not allege facts showing Omega is a gas corporation subject to the Commission's jurisdiction (Argument III, pp. 9-11)); and that the subpoenas are faulty and defective (Argument IV, pp. 11-14).

4. "A complaint under the Public Service Commission Law is not to be tested by the technical rules of pleading; if it fairly presents for determination some matter which falls within the jurisdiction of the Commission, it is sufficient." *State. ex rel. Kansas City Terminal Railway Co. v. Public Service Commission*, 308 Mo. 359, 372, 272 S.W. 957, 960 (banc 1925). When reviewing the dismissal of a petition, the pleading is granted its broadest intendment, all facts alleged are treated as true, and it is construed favorably to the plaintiff to determine whether the averments invoke substantive principles of law which entitles plaintiff to relief. *Welch v. McReynolds*, 928 S.W.2d 433, 435 (Mo. App. 1996). Appellate review of the grant of a motion to dismiss is also de novo, but is based on an examination of the pleadings to determine whether the plaintiff's petition invokes principles of substantive law. The pleadings are liberally

construed and all alleged facts are accepted as true and construed in a light most favorable to the pleader. *Koger v. Hartford Life Ins. Co.*, 28 S.W.3d 405, 409 (Mo. App 2000).

Arguments I and II -- Omega's dealing with Fort Leonard Wood are outside the Commission's jurisdiction

5. The Staff did not, does not now, and will not later contend that this Commission has jurisdiction over Omega's operation of facilities at Fort Leonard Wood. Such is not the basis for Staff's complaint against Omega. Rather, Staff suggests that in its other operations involving its Missouri-regulated affiliates, Omega so intermingles its business with that of MPC and MGC to subject those aspects of its business to regulation by the Commission as a gas corporation. Further, in assessing the expenses and revenues of MPC and MGC, the Commission will need to consider Omega's operations, including those with the Fort, in ascertaining those of MPC and MGC.

Argument III -- The Complaint does not allege Omega is a gas corporation or otherwise subject to Commission jurisdiction

6. Omega's assertion that Staff has not alleged sufficient facts to support its complaint (that is, Counts I and II) against Omega ignores the facts set out in the Staff Report incorporated into the complaint. Specifically:

- a. Finding 3, p. 2 (MPC has paid for goods and services delivered to Omega);
- b. Finding 5, p. 2 (MPC reimbursed R2 Development for Omega expenses);
- c. Finding 8, p. 2 (MPC pays salaries and benefits for Omega activities);
- d. Finding 11, p. 3 (Omega has failed to pay for its customers' transportation on MPC and MGC);
- e. Pages 11 – 12 (Omega's structure and affiliate contract facts);
- f. Pages 18 – 21 (Need for cost allocation to, and revenue from, Omega);
- g. Page 22 (Omega's construction costs charged to MPC);
- h. Pages 25 - 26 (transfer of MIG contract from Omega to MPC);
- i. Page 28 (MPC charged for Aquila services to Omega);
- j. Pages 39 – 40 (No payroll costs allocated to Omega);

- k. Pages 41 – 42 (Omega’s customers not paying MPC or MGC for transportation).

These facts are more than adequate to support the complaint and the subpoenas.

7. Further, Staff reminds the Commission that Missouri Interstate Gas Company (MIG) -- yet another affiliate of Omega, MPC and MGC – asserted in its petition to the FERC only two years ago that the business of Omega, MPC, MGC, and MIG were intertwined. There (Petition, p.4) MIG stated:

Similarly, Missouri Interstate shares some of the same employees with Omega, a distribution system, providing distribution services on Fort Leonard Wood army base. The same management and administrative personnel are shared with Missouri Interstate and MPC and MGC. Omega does not hold capacity on either Missouri Interstate, or on MPC or MGC.

A copy of the Petition is attached hereto as Attachment A. Of course, Omega now holds capacity on MPC and MGC, and has secured discounted rates on MGC. This admission is sufficient alone to support Staff’s complaint and subpoenas.

8. Omega’s motion contains factual misrepresentations. For example, Omega asserts that MPC and MGC have provided audited financial statements to the Staff. That assertion is false. MPC and MGC have provided an audit report of the consolidated financial statements of Gateway. That report expressly denies that the audit covers the financial statements on MPC and MGC (Audit Report, page 10). The audit report for the 2004/2005 consolidated Gateway financial statements are attached hereto as Attachment B HC.

Argument IV -- Subpoenas exceed Commission’s jurisdiction

9. Omega’s objections to the subpoenas are misplaced. The subpoenas are regular on their face, and the information sought is clearly material and relevant to resolution of the issues in the complaint.

10. Omega's mewlings about the failure to tender witness fees are also unavailing. First, Staff need not tender witness fees at the time of service of a subpoena pursuant to section 386.440.2. That section provides:

Whenever a subpoena is issued at the instance of a complainant, respondent, or other party, except the public counsel to any proceeding before the commission, the cost of service thereof and the fee of the witness shall be borne by the party at whose instance the witness is summoned. Any witness subpoenaed **except one whose fees and mileage may be paid from the funds of the commission** may, at the time of service, demand the fee to which he is entitled for travel to and from the place at which he is required to appear, and one day's attendance. ...
[Emphasis added.]

Because all witnesses subpoenaed by the Staff will be paid from Commission funds, Staff is not required to tender such fees at the time of service.

11. Further, the purported objections cited by Omega in the Motion provide it no relief. First, the objections are not in the form of pleadings. More importantly, the letters do not comply with 4 CSR 240-2.080(6) because they are not signed by an attorney licensed to practice law in Missouri. Finally, Omega's Motion to Quash the Subpoenas is not timely filed under Commission rules. Omega's subpoena was served on March 23, 2006, while its motion was filed April 26, 2006, more than ten days after service. 4 CSR 240-2.100(3) states:

Objections to a subpoena or subpoena *duces tecum* or motions to quash a subpoena or subpoena *duces tecum* shall be made within ten (10) days from the date the subpoena or subpoena *duces tecum* is served.

The referenced letters and Staff's response are attached as Attachment C hereto.

12. Omega also appears to claim, remarkably and without citation to authority, that the Commission can examine only the parties to a case, and their employees. Witnesses other than parties are routinely subpoenaed and examined in Commission

proceedings, and Staff recalls no objection on the grounds that the witness is not a party.

Indeed, section 393.140(10) provides:

[The commission shall h]ave power in all parts of the state, either as a commission or through its members, 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.

It appears from the statutory provisions that the legislature has provided the Commission broad investigatory power, and these subpoenas fall well within the ambit of the legislative grant.

WHEREFORE, having fully addressed Omega's contentions, Staff respectfully asks the Commission to overrule Omega's motion to dismiss the Staff complaint, and to overrule Omega's motion to quash subpoenas.

Respectfully submitted,

/s/ Thomas R. Schwarz, Jr.

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Certificate of Service

I hereby certify that copies of the foregoing have been mailed, hand-delivered, or transmitted by facsimile or electronic mail to all counsel of record this 3rd day of May, 2006.

/s/ Thomas R. Schwarz, Jr.