

**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.)	<u>Case No. GC-2006-0378</u>
)	
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.)	

ORDER DENYING MOTION TO QUASH SUBPOENA DUCES TECUM

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 May 2, Missouri Pipeline, Missouri Gas, Mogas Energy, United Pipeline Systems, and Gateway Pipeline¹ filed a motion asking the Commission to quash certain subpoenas that Staff has served on the Respondents. That motion was accompanied by suggestions in support. Staff filed a response to the Respondents' motion on May 9.

The Respondents ask the Commission to quash subpoenas that have been issued to David Ries and David Ludholz, seeking testimony and documents concerning the operations and finances of the Respondents. The Respondents contend that Staff's subpoenas are invalid for several reasons.

First, the Respondents argue 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 the Respondents 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.

¹ The sixth respondent, Omega Pipeline Company, has filed a separate motion to dismiss and to quash subpoena.

The Respondents' second challenge to the subpoenas is based on an argument that Staff has issued subpoenas relating to matters that are beyond the Commission's jurisdiction, and that, therefore, the Respondents should not be required to comply with those subpoenas. In support of its argument, the Respondents cite 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, the Respondents argue 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."² 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.

² 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*,³ 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.⁴ 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 the 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.

Third, the Respondents cite Supreme Court Rule 57.02, which provides that depositions may be taken to perpetuate testimony before an action is filed if the party seeking to take the deposition first obtains authority from the Circuit Court. From this, the Respondents argue that Staff's subpoenas should be quashed because they were initially served on the Respondents before Staff filed its complaint.

Section 386.420.2, RSMo 2000, gives the Commission, as well as parties before the Commission, broad authority to gather evidence through the use of depositions while engaging in an investigation or a hearing before the Commission. Thus, the Commission

³ 706 S.W.2d 870 (Mo App. W.D. 1985).

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

can authorize depositions before a formal case is filed. In any event, the Respondents' argument is now moot because there is no question of perpetuating testimony before a formal case is filed because such a case is now undeniably in existence.

Fourth, the Respondents contend that the subpoenas should be quashed because they fail to comply with Commission regulation 4 CSR 240-2.100(1). That regulation requires that a request to the Commission for the issuance of a subpoena duces tecum specify the particular document or record to be produced, and state the reasons why the production is believed to be material and relevant.

The Respondents did not include a copy of the challenged subpoenas as a part of their motion, but Staff attached them as an exhibit to its response to the motion to quash. The subpoenas specify a long list of documents that the Respondents are commanded to produce. The subpoenas themselves do not state reasons why the production is believed to be material and relevant, but the regulation does not require them to do so. Rather, the regulation requires that a *request* for a subpoena specify the materiality and relevance of the requested information. That means that the regulation requires the party requesting a subpoena to explain why the information is needed so that the Commission can decide whether the subpoena should be issued. The regulation does not grant any procedural or substantive right to the Respondents and it is not a basis for quashing the subpoenas that the Commission has seen fit to issue.

The Respondents' fifth argument contends that the subpoenas are unreasonable because the depositions were scheduled for the week before the Respondents' answers to the complaint were due, causing an unreasonable demand on the time of the Respondents' employees. The Respondents refused to appear for the depositions that were scheduled

for various dates in the first two weeks of May and they have now been rescheduled beginning on May 19. The Respondents filed their answer on May 11. The Respondents' argument is now moot.

For their sixth argument, the Respondents complain that Staff is seeking to schedule the depositions too early in the complaint process. Several parties have applied to intervene and others may do so. The Respondents are concerned that the additional parties may seek to depose their employees in a second round of discovery. They argue that Staff should not be allowed to schedule the depositions until all parties are able to participate.

If additional parties seek to depose the Respondents' witness and the Respondents believe that such additional depositions will be unduly burdensome, they may apply to the Commission for relief at that time. However, the mere possibility that a future burden may arise is not a sound basis for forbidding Staff to depose witnesses now.

Finally, seventh, the Respondents argue that certain, unspecified documents sought by Staff are irrelevant to this proceeding. An argument that Staff is seeking irrelevant documents, without telling the Commission or Staff which documents are claimed to be irrelevant gives the Commission nothing upon which to rule. Such a vague argument cannot be the basis for quashing the subpoenas.

The Respondents' motion to quash subpoena duces tecum will be denied.

IT IS ORDERED THAT:

1. The Motion to Quash Subpoena Duces Tecum filed by Missouri Pipeline Company, LLC; Missouri Gas Company, LLC; Mogas Energy, LLC; United Pipeline Systems, LLC; and Gateway Pipeline Company, LLC, is denied.

2. 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