

**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 RESPONDENTS MPC, MGC, MOGAS,  
UNITED, AND GATEWAY'S MOTION TO DISMISS**

COMES NOW Staff of the Public Service Commission of Missouri, and in Reply to Respondent Missouri Pipeline Company, LLC (MPC), Missouri Gas Company, LLC (MGC), Mogas Energy, LLC (Mogas), United Pipeline Systems, Inc., LLC (United); and Gateway Pipeline Company, LLC's (Gateway) (jointly, the Respondents) Motion to Dismiss, states:

**I. The Staff acted at the direction of the Commission.**

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 Pipeline, LLC (Omega); and their affiliates, United; Gateway Pipeline Company, LLC (Gateway); and Mogas Energy LLC (Mogas). 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 gas corporations, as that term is used in Chapters 386 and 393, RSMo, 2000 (Count II). Staff further alleged that Respondents violated the Commission's affiliate transactions rules (Count III), and that MGC charged, or permitted to be charged, rates to customers in excess of its tariffed rates (Count IV).

2. Respondents allege that the Staff may not make this complaint, because in a complaint concerning rates, the Commission must proceed on its own motion. Not only did Staff proceed at the direction of the Commission in this case, but the Complaint alleges much more misconduct than that the Respondent's charge unjust and unreasonable rates. 4 CSR 240-2.070(1) states:

The commission on its own motion, **the commission staff through the general counsel**, the office of the public counsel, or any person or public utility who feels aggrieved **by a violation of any statute**, rule, order or decision **within the commission's jurisdiction may file a complaint**.  
[Emphasis added]

Therefore, Staff, through the office of General Counsel, does have standing to file its complaint, incorporated by reference herein.

## **II – The Commission has subject matter jurisdiction**

3. Staff replies that Respondents Mogas, United, and Gateway so intermingle their operations with that of MPC and MGC, that by statute, these entities are, subject to regulation by the Commission as gas corporations. See §393.140(12).

4. The corporate officers for these companies are the same. (See attachment listing corporate officers.) More importantly, United, Gateway, and Mogas have asserted control over MPC and MGC property and operations in contracts with lenders, copies of which were attached to Staff's Complaint.

5. MPC and MGC employees perform work for Mogas, United and Gateway but do not keep time sheets so that the costs of the work may be charged separately to the entity for which the work was done. (See ex. Finding 6, p. 2.)

6. Respondents assert that Staff has failed to allege sufficient facts in its complaint. Staff has complied with the Commission's rules for filing complaints found in 4 CSR 240-2.070 (5). "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).

7. 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).

8. Respondents' assertion that Staff has not alleged sufficient facts to support its Complaint ignores the abundant facts set out in the Staff Report incorporated into the complaint. Specifically:

- a. Finding 6, p. 2 (Mogas and Gateway activities costs charged to the pipelines);

- b. See attached HC letter and bill showing that MPC paid for costs associated with an Omega customer.
- c. Pages 16 – 17, 23 (Gateway and Mogas lenders control the MPC/MGC cash flow);
- d. Page 23 (MPC/MGC cost of capital information, held by Mogas, refused to Staff);
- e. Pages 26 – 27 (MPC operating bank account from which checks are drawn for invoices received for services provided by third parties to Gateway and others. However, Respondents refuse to provide documentation to support charges between affiliates);
- f. Pages 28 – 29 (MPC has paid for services provided to Mogas and Gateway);
- g. Page 39 (MPC employees do not maintain time sheets to separate time spent on duties performed for MPC/MGC, Gateway, or other Respondents);

9. These facts alone are more than adequate to support the Complaint and for the Commission to deny Respondents' Motions to Dismiss. Staff expects that further discovery and production of documents will demonstrate that the companies are further commingled. For example, source documents including, but not limited to, balance sheet accounts related to plant, depreciation reserve, other paid-in-capital, long-term debt and retained earnings, probably in the possession of Gateway or Mogas, were not provided. Further, several inappropriate postings and charges have been recorded on MPC and MGC's books that Staff reviewed, indicating further need for inquiry (Audit Report, p.19).

10. While the businesses are so integrated that the Commission may consider all of them to be "gas corporations" the Commission may also inquire into these companies' financial transactions as affiliates under §393.140(12). See also *State ex rel. General Telephone Co. of the Midwest v. Public Service Comm'n*, 537 S.W.2d 655, 659-661 (Mo. App. 1976).

11. When businesses are as integrated as Respondents, the Commission will need to consider all Respondents' operations to prescribe the apportionment of capitalization, earnings, debts and expenses fairly and justly to be awarded to or borne by each of the entities. §393.140(12).

12. Respondents' in their Suggestions in Support of Motion to Dismiss (Suggestions p. 3) argue that Staff's inquiry into affiliate transactions between Gateway, United, and Mogas and MPC and MGC is beyond the Commission's jurisdiction. Respondents cite *State ex. rel. Atmos Energy Corp. v. Public Service Comm'n*, 103 S.W.3d 753 (Mo. 2003) (where the Commission promulgated its affiliate transactions rules for regulated utilities, which many regulated and non-regulated entities appealed, but which the Supreme Court upheld) to support this proposition. However, *Atmos* supports Staff's assertions that the allegations are proper. Specifically, *Atmos* states "where the affiliate is not one 'substantially kept separate' from the utility, the PSC is authorized to 'inquire' into certain aspects of the affiliates' operations as they relate to the capitalization, debts, expenses, etc., of the utility." *Id.* at 764.

13. Staff's Complaint sets out several points within Count III that support this assertion. Furthermore, Respondents' own Motion asserts that "Mogas owns the limited liability interests in Gateway, Gateway owns the limited liability interests in United, and United owns the limited liability interests in MPC and MGC..." (Motion to Quash Subpoenas p.2), further supporting the alleged relationship Staff made in its' Complaint.

### **III. Staff's Assertion that MPC and MGC rates are excessive is based on a cost of service analysis**

14. Respondents misread §393.130.1 by inserting the term "and" where the statute says "or" and specifically "[a]ll charges made or demanded by any such gas

corporation . . . or any service rendered or to be rendered shall be just and reasonable and not more than allowed by law **or** by order or decision of the commission.”

15. What the law allows under this section is just and reasonable rates. Respondents remarkably claim that the fact that there is no Commission order setting specific rates somehow permits MPC and MGE to charge unjust and unreasonable rates.

16. MPC and MGC rates are not just and reasonable because current tariff rates exceed the Companies’ cost of service to deliver gas. Moreover, “[a] tariff that has been approved by the Public Service Commission becomes Missouri law and has the same force and effect as a statute enacted by the legislature.” *A.C. Jacobs and Co., Inc. v. Union Elec. Co.*, 17 S.W.3d 579, 582 (Mo.App. W.D. 2000) (*citing* *Bauer v. Southwestern Bell Telephone Company*, 958 S.W.2d 568, 570 (Mo.App. 1997)).

17. Staff specifically alleges that improper costs are charged to the regulated entities. Staff has audited the current revenues and expenses of MPC and MGC, and determined that revenues generated by current tariffs exceed the reasonable cost of providing service. Specific instances follow.

18. In claiming that Staff has plead insufficient facts as the basis for its complaint, Respondents perhaps missed the following examples of expenses on the books of MPC and MGC that have improperly been included in the cost of service:

- a. Upstream capacity of 15,000 Dth/day on affiliate Missouri Interstate Gas (MIG). MPC’s and MGC’s tariffs do not authorize resale of bundled upstream capacity, and including the costs of this transportation contract in MPC’s cost of service improperly requires all downstream shippers to pay for MIG capacity without

the benefit of using it.

- b. Only a portion of travel charged by Mr. Ries to MPC and MGC is related to the provision of intrastate transportation service. Mr. Ries' travel benefited other affiliated and related entities, or Mr. Ries personally.
- c. A significant portion of Mr. Ries' salary has been improperly charged to MPC and MGC since much of his time is devoted to affiliates' business. MPC employees located in St. Peters, MO, operate MPC and MGC on a day-to-day basis.
- d. Mr. Ries' R2 Development (R2) contract salary has been charged to MPC and MGC to help cover the costs of the Colorado office. MPC and MGC have an office in St. Peters, MO so costs to maintain a Colorado office have been eliminated from MPC and MGC cost of service because the office is not necessary to provide intrastate gas service to Missouri customers since the day-to-day operations of MPC/MGC occur in the Companies' St. Peters office.
- e. Mr. Ries' out-of-pocket business expenses were not included as expenses recoverable from MPC because these costs do not benefit MPC or MGC customers..

#### **IV. The Staff is not urging the Commission to regulate MIG.**

19. Respondents' argument that the Commission may not regulate Gateway, Mogas or United because they own MIG is spurious. Staff does not challenge FERC's

regulation of MIG, nor is MIG an entity included in Staff's complaint. Respondents correctly point out that MIG is a FERC regulated interstate pipeline. However, MIG is NOT a party, nor is it listed within the complaint as a Respondent.

20. While the FERC does have a comprehensive regulation of interstate pipelines, the FERC does not regulate intrastate pipelines. 15 USCS § 717 (b). The provisions of this section apply only to the transportation of natural gas in interstate commerce and to natural gas companies engaged in such transportation. Furthermore, the Natural Gas Act (NGA) states intrastate transactions are exempt from the provisions of the NGA. Specifically, 15 USCS §717(c) states:

The provisions of this Act shall not apply to any person engaged in or legally authorized to engage in the transportation in interstate commerce or the sale in interstate commerce for resale, of natural gas received by such person from another person within or at the boundary of a State if all the natural gas so received is ultimately consumed within such State, or to any facilities used by such person for such transportation or sale, provided that the rates and service of such person and facilities **be subject to regulation by a State commission**. [Emphasis added]

The Missouri Public Service Commission has jurisdiction over the Respondents by the statutes, rules and regulations, referred to above. Therefore, the NGA does not pre-empt this Commission from entertaining Staff's Complaint against Gateway, United, and Mogas.

This argument, carried to its logical conclusion, would mean that any LDC in the state could purchase a FERC regulated entity and would then be exempt from Commission oversight.

WHEREFORE, having fully addressed the Respondents' contentions, Staff respectfully asks the Commission to overrule the Respondents' Motion to Dismiss.



Respectfully submitted,

/s/ Lera Shemwell

Lera Shemwell  
Senior Counsel  
Missouri Bar No. 43798  
Shelley E. Syler

Attorneys for the Staff of the  
Missouri Public Service Commission  
P. O. Box 360  
Jefferson City, MO 65102  
(573) 751-7431 (Telephone)  
(573) 751-9285 (Fax)  
[lera.shemwell@psc.mo.gov](mailto:lera.shemwell@psc.mo.gov)

### **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 26<sup>th</sup> day of May, 2006.

/s/ Lera Shemwell