

**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 Company, LLC; Mogas Energy,
LLC; United Pipeline Systems, Inc; and
Gateway Pipeline Company, LLC,

Respondents.

Case No. GC-2006-0378

FILED⁴

MAY 17 2006

**Missouri Public
Service Commission**

**RESPONDENTS' SUGGESTIONS IN SUPPORT OF
THEIR MOTION TO DISMISS**

COMES NOW Missouri Pipeline Company, LLC (hereafter "MPC"), Missouri Gas Company, LLC (hereafter "MGC"), Mogas Energy, LLC (hereafter "Mogas"), United Pipeline Systems, LLC (hereafter "United"), and Gateway Pipeline Company, LLC (hereafter "Gateway") (hereafter collectively referred to as "Respondents"), by and through the undersigned counsel, and respectfully move to dismiss this matter before the Missouri Public Service Commission (hereafter "Commission") for lack of standing, subject matter jurisdiction, failure to state a claim upon which relief can be granted, and federal pre-emption. In support of this motion, Respondents state as follows:

I. Staff Does Not Have Adequate Standing to Bring This Complaint

Staff does not have standing to bring the complaint in this matter. Section 386.390.1, RSMo states, "...no complaint shall be entertained by the commission, except upon its own motion, as to the reasonableness of any rates or charges of any gas, electrical, water, sewer, or telephone corporation, unless the same be signed by the public

counsel or the mayor or the president or chairman of the board of alderman or a majority of the council, commission or other legislative body of any city, town, village or county, within which the alleged violation occurred, or not less than twenty-five consumers or purchasers, or prospective consumers or purchasers, of such gas, electricity, water, sewer or telephone service." As such, complaints can only be made by motion of this Commission or by certain parties as authorized by statute. Staff is not among those authorized by § 386.390.1 to file complaints on its own.

The complaint in this matter was filed by Staff, through the General Counsel's Office, without the motion of this Commission. Since Staff is not authorized by statute to bring complaints of this nature without the motion of this Commission, the complaint is invalid on its face and should be dismissed accordingly.

II. The Commission Lacks Subject Matter Jurisdiction Over Mogas, United, and Gateway

This Commission lacks subject matter jurisdiction over Mogas, United, and Gateway since they are not "gas corporations" or "public utilities" as defined in §§ 386.020(18) or (42), RSMo. "Subject matter jurisdiction exists only when a court or agency has the right to proceed to determine the controversy at issue or grant the relief requested. This jurisdiction is derived from law and cannot be conferred by waiver or consent. (*Garcia-Huerta v. Garcia*, 108 S.W.3d 684,686 (Mo.App. W.D. 2003))(internal citations omitted). This Commission has only those powers as are expressly conferred upon it by the statutes and are reasonably incidental thereto. (*State ex. rel. and to Use of Kansas City Power & Light Co. v. Buzard*, 350 Mo. 763, 168 S.W.2d 1044, 1046 Mo. 1943)).

Section 386.250, RSMo gives the Commission jurisdiction to regulate public utilities, including gas corporations, and "to the manufacture, sale or distribution of gas, natural and artificial, and electricity for light, heat and power, within the state, and to persons or corporations owning, leasing, operating or controlling the same; and to gas and electric plants, and to persons or corporations owning, leasing, operating or controlling the same." Entities that are not public utilities and those that do not conduct the activities described in this section are beyond the Commission's jurisdiction.

Staff fails to establish how Respondents Mogas, United, and Gateway meet the definition of a "gas corporation" or "public utility" as defined by §§ 386.020(18) or (42) or otherwise fall under the Commission's jurisdiction as established in § 386.250.

Missouri is a fact-pleading state. (*ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp.*, 854 S.W.2d 371, 379-380 (Mo. 1993)). As such, Staff must assert facts sufficient to show that Mogas, United, and Gateway qualify as gas corporations or public utilities or otherwise own, lease, operate or control the manufacture or sale of natural gas by regulated pipelines. Staff has asserted no such facts in this instance.

Gateway, United, and Mogas are in fact not "gas corporations" or "public utilities" as defined in §§ 386.020(18) or (42), RSMo. Further, Gateway, United, and Mogas do not own, lease, operate or control the manufacture or sale of natural gas by regulated pipelines, MPC or MGC. These entities, in fact, have no employees, contracts with MPC or MGC customers or the pipelines themselves, and transport no gas. They are limited liability companies that conduct no business and maintain books completely separate from MPC or MGC. By their very nature, none of these entities qualify as public utilities, and their activities do not fall under the jurisdiction of this Commission.

While State ex. rel. *Atmos Energy Corp. v. Public Service Commission* acknowledged that RSMo §§ 393.130.2 and 393.140(12) provides the Commission with jurisdiction to investigate the regulated entity's dealings with its affiliates, the court further acknowledged that those statutes were not created to expand the jurisdiction of the Commission over the affiliates themselves. (103 S.W.3d 753, 763-64). In spite of this principle, Staff attempts to conclude that Gateway, United, and Mogas are regulated entities. It is not enough for Staff to state this bald conclusion without facts to support it. Since no such facts exist, Respondents Gateway, United, and Mogas do not fall under this Commission's jurisdiction and should be dismissed from Staff's complaint accordingly.

III. Staff Has Failed to State a Claim Upon Which Relief Can Be Granted

Staff has failed to show Respondents have violated § 393.130.1, RSMo. This section provides in pertinent part, "All 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." To be in violation of this section, Staff must show, 1) that Respondents' rates are not just and reasonable, and 2) that Respondents have charged more than allowed by law or order of this Commission. The facts in Staff's complaint prove none of these elements.

In its complaint, Staff contends that MPC and MGC are in violation of § 393.130.1 but fail to show any order of this Commission or other provision of law containing established rates that Respondents' charges have exceeded. In fact, nothing in the Staff's complaint asserts facts that establish that the revenues actually earned by MPC and MGC have exceeded the revenue requirements authorized by the Commission in Case Nos. GR-92-414 or GA-90-280, respectively. In fact the opposite is true. MPC

and MGC have in fact earned less than the revenue requirements ordered in the above two cases. Further, nothing in Staff's complaint shows that MPC or MGC's authorized rates are not just or reasonable. Since Staff has not plead facts sufficient to show any violation of law, Staff has failed to state a claim for which relief can be granted. Counts I and IV of this complaint should be dismissed accordingly.

IV. Federal Law Pre-Empts this Commission From Regulating Gateway, United, and Mogas

This Commission is pre-empted by the Natural Gas Act (hereafter "NGA") from asserting jurisdiction over Gateway, Mogas, and United. By the enactment of the NGA, Congress created a comprehensive federal scheme to regulate the business of transporting and selling natural gas for distribution to the public. (*See* 42 U.S.C. § 7172). Pursuant to the Supremacy Clause of the United States Constitution, all state laws to the contrary are void. (*See* U.S. Constitution, Article VI, clause 2). The Supreme Court has also upheld this principle in *Eric Schneidenwind v. ANR Pipeline Company*. (108. S. Ct. 1145, 1156 (S Ct. 1988)). In *Schneidenwind*, the Court addressed a Michigan statute requiring a public utility transporting natural gas in Michigan for public use to obtain approval from the Michigan Public Service Commission ("MPSC") before issuing securities. The court ruled that the NGA preempted the statute, explaining:

When a state regulation "affects the ability of [FERC] to regulate comprehensively ... the transportation and sale of natural gas, and to achieve the uniformity of regulation which was an objective of the Natural Gas Act," or presents the 'prospect of interference with the federal regulatory power,' then the state law may be pre-empted.

(*Id.*, quoting *Northern Natural Gas Co. v. State Corporation Commission of Kansas*, 372 U.S. at 91-92 (S. Ct. 1989)). Focusing on the potential conflict between the MPSC's

order and FERC's certificate, the Court concluded that MPSC's regulation of respondent's ability to issue securities impinged on the field that the federal regulatory scheme occupied and, consequently, that the state laws were pre-empted. (*Id.*).

Missouri Interstate Gas, LLC (MIG) is an interstate natural gas pipeline regulated by FERC under the NGA. All aspects of MIG's transportation of natural gas are regulated under the NGA. MIG is owned by United, which in turn is owned by Gateway, which is owned by Mogas. Staff 's complaint requests this Commission assert jurisdiction over Mogas, United , and Gateway so presumably the business of these three entities can be regulated by the this Commission. While we point out in the preceding paragraphs that Mogas, Gateway and United are not "gas corporations" under Missouri law and therefore, not subject to this Commission jurisdiction, Staff's request also runs afoul of federal law by attempting to regulate the owners of MIG, a FERC regulated interstate pipeline Therefore, any attempt by this Commission to interfere with the FERC's regulation of MIG under the NGA is pre-empted by federal law. Similarly, Staff's back door attempt to regulate MIG by requesting this Commission assert jurisdiction over Mogas, Gateway, and United is likewise pre-empted by the NGA. Accordingly, Staff's complaint to assert jurisdiction over these entities should be dismissed.

WHEREFORE, Respondents respectfully request this Commission to dismiss Staff's complaint for lack of standing, subject matter jurisdiction, failure to state a claim upon which relief can be granted, and federal pre-emption.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENTS

Dated: May 17, 2006

CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the foregoing Respondents' Suggestions in Support of Their Motion to Dismiss has been hand-delivered, transmitted by e-mail or mailed, First Class, postage prepaid, this 17th day of May, 2006, to:

* Case No. GC-2006-0378

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