

**STATE OF MISSOURI  
PUBLIC SERVICE COMMISSION**

At a session of the Public Service  
Commission held at its office in  
Jefferson City on the 15<sup>th</sup> day of  
July, 2009.

In the Matter of FERC Docket No. CP07-450,	)	
MoGas Request for Authorization Under	)	<b><u>File No. GO-2009-0094</u></b>
Blanket Certificate	)	

**ORDER DENYING APPLICATION TO TERMINATE THE COMMISSION'S  
INTERVENTION BEFORE THE FERC**

Issue Date: July 15, 2009

Effective Date: July 25, 2009

**Procedural History**

On September 9, 2008, MoGas Pipeline, LLC, filed what it called an Application to Terminate. MoGas explained that it is an interstate pipeline, operating in Missouri under the jurisdiction of the Federal Energy Regulatory Commission (FERC). MoGas complains that the Commission, acting through its Staff, intervened to file a protest in a pending FERC case brought by MoGas for approval of a compression project on its interstate pipeline. MoGas contends the Commission has no statutory authority to intervene in a matter of interstate commerce before the FERC. MoGas also complains that the Commission has violated Missouri law by hiring outside counsel to represent its interests before the FERC. On those bases, MoGas asks the Commission to withdraw its protest in the FERC case, terminate its intervention in the FERC case, and instruct Staff to cease its investigation into the substance of the FERC case.

Staff filed a response to MoGas' Application to Terminate on September 23, 2008. Staff contends the Commission has statutory authority to investigate and intervene as its

sees fit in matters before the FERC. Staff also contends the Commission has authority to retain outside counsel to represent it at the FERC. MoGas reiterated its position in its reply to Staff's response, which it filed the next day, on September 24, 2008.

The Commission took no immediate action on MoGas' application, so on October 16, 2008, MoGas filed a supplement to its application. MoGas now explained that the interstate compression case before the FERC in which the Commission had intervened has been resolved. However, MoGas continued to object to the Commission's continued appeal in Federal Court of the FERC's decision to certify MoGas as an interstate pipeline, as well as to the Commission's appeal of a state court decision denying the Commission's petition for an injunction against MoGas becoming an interstate pipeline. MoGas asked the Commission to terminate its involvement in all matters relating to MoGas.

Staff responded to MoGas' supplement to its application on October 20, 2008, and at the same time, asked the Commission to determine the matter in favor of Staff's position, based on the filed pleadings. MoGas countered with its own Motion for Determination on the Pleadings, filed on January 15, 2009.

On February 5, 2009, MoGas filed a First Amended Application to Terminate, which incorporates all its previous filings. That amended application, and an accompanying Renewed Motion for Determination on the Pleadings, reiterates MoGas' position and again urges the Commission to determine this matter on the pleadings.<sup>1</sup> Staff responded on February 17, 2009, with its own Renewed Motion for Determination on the Pleadings.

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<sup>1</sup> MoGas' First Amended Application to Terminate seeks the following specific relief:

MoGas moves that the Commission:

- (A) Withdraw its Intervention and Protest in the FERC rate case;
- (B) Terminate permanently its involvement in all FERC matters related to MoGas;

Subsequently, MoGas filed petitions for writs of mandamus in the Circuit Court of Cole County, the Missouri Court of Appeals - Western District, and the Missouri Supreme Court seeking relief similar to the relief it seeks before the Commission. Each petition for writ has now been dismissed or denied.<sup>2</sup>

### **Findings of Fact**

1. The Public Service Commission is a statutorily created entity, consisting of five member commissioners appointed by the governor, with the advice and consent of the senate.

2. The Commission's Staff consists of various technical and subject matter experts who assist the Commission in its regulatory duties. Staff provides advice to the Commission in contested cases and other proceedings before the Commission in the form of pleadings, briefs, and expert testimony.

3. General Counsel is a statutorily created officer of the Commission, appointed by the Commission, to serve at the pleasure of the Commission. General Counsel represents Staff in proceedings before the Commission. However, General Counsel represents the Commission itself in all outside litigation before various courts as well as before federal regulatory agencies, such as the FERC.

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(C) Instruct Staff, General Counsel, and outside counsel to refrain from further interfering with MoGas' operation as a FERC-regulated entity engaged in interstate commerce; and

(D) Decide the issues of general public importance raised by the pleadings in this action, as set forth in Applicant's Motion for Determination on the Pleadings.

<sup>2</sup> 19<sup>th</sup> Circuit Court, Cole County, Case No. 09AC-CC00246, petition dismissed May 11, 2009; Missouri Court of Appeals – Western District, Case No. WD71005, petition denied May 18, 2009; and Supreme Court of Missouri, Case No. SC90166, petition denied June 30, 2009.

4. MoGas operates an interstate natural gas pipeline that delivers natural gas to customers in Missouri. As an interstate pipeline company, MoGas is subject to regulation by the FERC.

5. Before reorganizing in a manner that brought the pipeline within the interstate jurisdiction of the FERC, affiliates of MoGas operated intrastate pipelines within the borders of the state of Missouri and thus were subject to the jurisdiction of the Missouri Public Service Commission.

6. The Commission has intervened in several matters before the FERC involving MoGas.

### **Conclusions of Law**

Both MoGas and Staff have asked the Commission to determine this matter on the pleadings. Commission rule 4 CSR 240-2.117(2) provides:

Except in a case seeking a rate increase or which is subject to an operation of law date, the commission may, on its own motion or on the motion of any party, dispose of all or any part of a case on the pleadings whenever such disposition is not otherwise contrary to law or contrary to the public interest.

There are no facts in dispute between the parties and this matter can be resolved as a question of law.

The controlling FERC regulation, 18 C.F.R. Section 385.214(a)(1), allows any state commission, including this Commission, to intervene in a proceeding before the FERC as a matter of right, simply by filing a timely application to intervene. In view of that regulation, MoGas does not contend this Commission cannot intervene at FERC under FERC's law. Instead, MoGas argues Missouri law prevents this Commission from intervening at FERC.

MoGas points to Section 386.040, RSMo 2000, the statute that establishes the Commission, for the proposition that the Commission's powers are limited to those

“necessary or proper to enable it to carry out fully and effectually all the purposes of this chapter”. MoGas then points to Section 386.030, RSMo 2000 as support for its claim that this Commission is expressly forbidden to become involved in matters of interstate commerce.

Section 386.030 states in full:

Neither this chapter, nor any provision of this chapter, except when specifically so stated, shall apply to or be construed to apply to commerce with foreign nations or commerce among the several states of this union, **except insofar as the same may be permitted under the provisions of the Constitution of the United States and the acts of Congress.** (Emphasis added).

When read in full, Section 386.030 is the legislature’s disclaimer of any intent to allow the Commission to become entangled in interstate commerce in any way that would violate the Commerce Clause of the United States Constitution. However, it specifically does not forbid the Commission to involve itself in interstate commerce to the extent it is allowed to do so by the Constitution and federal law. As previously indicated, the Commission is allowed to intervene before the FERC as a matter of right under the applicable FERC regulation. Therefore, Section 386.030 does not forbid the Commission to intervene before the FERC.

As further support for its argument that the Commission is forbidden to intervene at the FERC, MoGas points to Section 386.210.7, RSMo Supp. 2008. That section gives the Commission explicit authority to engage in joint investigations, hold joint hearings, or issue joint orders with federal utility commissions or public utility commissions of other states. MoGas interprets that grant of specific authority as an implied restriction on the authority of the Commission to become involved with a federal agency such as the FERC.

In its Reply to Staff's Response, filed on September 24, 2008, MoGas selectively and misleadingly slices and dices a quote of the statute to make it appear that the Commission can only become involved in matters at the FERC if it is doing so as an agent of the FERC. This is the entire section of the statute to which MoGas refers:

The commission may make joint investigations, hold joint hearings within or without the state, and issue joint or concurring orders in conjunction or concurrence with any railroad, public utility or similar commission, of other states or the United States of America, or any official, agency or any instrumentality thereof, except that in the holding of such investigations or hearings, or in the making of such orders, the commission shall function under agreements or contracts between states or under the concurrent power of states to regulate interstate commerce, or as an agent of the United States of America, or any official, agency or instrumentality thereof, or otherwise.

Viewed in its entirety, this section merely authorizes the Commission to engage in joint activities with other state and federal agencies under terms of agreements or contracts between the states, or as an agent of the federal government, or otherwise. It does not limit the Commission's authority to intervene before the FERC.

In its Application to Terminate, MoGas cites Section 386.330.1 RSMo 2000 for the proposition that "the investigatory power of the Commission with regard to public utilities is expressly limited to the investigation of violations of law." MoGas completely misrepresents the meaning of the statute.

This is the complete text of the cited statute:

The Commission may, of its own motion, investigate or make inquiry, in a manner to be determined by it, as to any act or thing done or omitted to be done by any telecommunications company subject to its supervision, and the commission shall make such inquiry in regard to any act or thing done or omitted to be done by an such public utility, person or corporation in violation of any provision of law or in violation of any order or decision of the commission.

Clearly, this section of the statute does not limit the Commission's authority to investigate MoGas. First, the cited section of the statute applies only to the commission's regulation of telecommunications companies. Second, the statute allows the Commission to investigate any act of a telecommunications company and requires it to investigate acts alleged to be in violation of any provision of law or an order or decision of the Commission. It certainly does not limit the Commission's investigative authority to the investigation of alleged violations of law.

Thus far, the Commission has found that there is no provision in either Missouri or federal law that would prevent the Commission from intervening before the FERC. However, as MoGas points out, this Commission is a creature of statute, and therefore, its powers are limited to those powers conferred by the enabling statutes, "either expressly, or by clear implication as necessary to carry out the powers specifically granted."<sup>3</sup> Therefore, the Commission must find positive authority to allow it to intervene before the FERC.

Section 386.250(1), RSMo 2000 expressly gives the Commission jurisdiction regarding:

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.

MoGas transports natural gas into Missouri through an interstate pipeline and the statute's grant of authority makes no distinction between operators of interstate and intrastate natural gas pipelines. Of course, any authority the Commission may have over the

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<sup>3</sup> *State ex rel. Utility Consumers' Council of Missouri, Inc. v. Pub. Serv. Comm'n*, 585 S.W.2d 41, 49, (Mo banc 1979).

interstate transportation of natural gas is limited by the federal jurisdiction of the FERC. However, as previously indicated, Section 386.030, RSMo, allows the Commission to become involved in interstate commerce to the extent that involvement does not conflict with the United States Constitution or federal law. Moreover, as previously indicated, FERC's regulations allow the Commission to intervene in matters before it.

There are other provisions of law that grant the Commission specific authority to appear or intervene in various forums, including the FERC. Section 386.120.4, RSMo 2000, gives the Commission authority to sue and be sued in its official name. In addition, Section 386.071, which authorizes the appointment of a general counsel to represent the Commission, provides in relevant part:

It shall be the duty of the general counsel for the commission to represent and appear for the commission in all actions and proceedings involving any question under this or any other law, or under or in reference to any act, order, decision or proceeding of the commission **and if directed to do so by the commission, to intervene, if possible, in any action or proceeding in which any such question is involved;** to commence and prosecute in the name of the state all actions and proceedings authorized by law and directed or authorized by the commission. ... (Emphasis added).

That is a very broad grant of authority to intervene and the Commission's authority to engage in litigation is necessarily as broad as the authority granted to the general counsel as the Commission's attorney.

MoGas also complains that there is no public record in which the Commission has directed its general counsel to intervene in proceedings before the FERC involving MoGas. However, MoGas does not cite any authority for the proposition that the Commission can provide direction to its legal counsel only by issuing an order or by some other means that would appear in the public record. Indeed, Missouri's Sunshine Law specifically exempts



discussion of legal actions and a governmental body's communications with its legal counsel from disclosure as a public record.<sup>4</sup>

Finally, MoGas complains that the Commission is spending public funds to retain the services of outside legal counsel to represent it before the FERC. MoGas then cites *State ex rel. Nixon v. American Tobacco Co.*<sup>5</sup> for the proposition that “the expenditure by a state agency of public funds to retain a private law firm, if not contemplated by the agency’s enabling legislation, is illegal and subject to injunction.”<sup>6</sup> That may be a true statement of the law, but it certainly is not the holding of the *Nixon v. American Tobacco* case. In fact, that case held that the attorney general has authority to hire outside counsel in the absence of a statute to the contrary.<sup>7</sup>

In any event, Section 620.010.6, RSMo 2000, specifically gives the Commission authority to “employ such staff as it deems necessary for the functions performed by the general counsel ....” MoGas contends such staff must be full-time state employees, thereby excluding the employment of contract attorneys. However, aside from some dictionary definitions, MoGas cites no authority for that proposition.

Section 386.040, RSMo 2000, gives the Commission the authority to exercise “all powers necessary or proper to enable it to carry out fully and effectually all the purposes of this chapter.” As previously indicated, the Commission has the authority to intervene in matters pending at the FERC. Appearances before the FERC are a specialized area of

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<sup>4</sup> Section 610.021(1) RSMo Supp. 2008.

<sup>5</sup> 34 S.W.3d 122, 133 (Mo. banc 2000).

<sup>6</sup> First Amended Application to Terminate, Paragraph 13.

<sup>7</sup> *Nixon v. American Tobacco*, at 136. The portion of the decision cited by MoGas is dicta concerning a taxpayers standing to bring suit alleging an illegal public act. It does not specifically relate to the legality of an agencies employment of outside legal counsel.

legal practice that, in the judgment of the Commission, may best be handled by specialized legal counsel, employed by the Commission on a contract basis. The power to employ such legal counsel is necessary and proper to enable the Commission to fully carry out the purposes for which it was created.

### **Decision**

Based on its findings of fact and conclusions of law, the Commission concludes it has authority to intervene before the FERC in matters involving MoGas. Furthermore, the Commission finds it has authority to employ outside legal counsel to represent it in matters before the FERC.

MoGas' First Amended Application to Terminate is without merit and shall be denied.

### **THE COMMISSION ORDERS THAT:**

1. MoGas Pipeline LLC's First Amended Application to Terminate, including its original Application to Terminate, which was incorporated therein, is denied.
2. This order shall become effective on July 25, 2009.

**BY THE COMMISSION**



Colleen M. Dale  
Secretary

( S E A L )

Clayton, Chm., Jarrett and Gunn, CC., concur.  
Davis, CC., concurs, with separate concurring opinion to follow.

Woodruff, Deputy Chief Regulatory Law Judge