

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

In the Matter of MoGas Pipeline LLC's     )  
Application and Complaint.                     )

**Case No. GC-2011-0138**

**MOTION TO DISMISS**  
**FOR LACK OF SUBJECT-MATTER JURISDICTION**

**COMES NOW** the Staff of the Missouri Public Service Commission, by and through the Chief Staff Counsel, and hereby moves to dismiss the above-styled docket for lack of jurisdiction, stating:

**Introduction:**

1. This docket is an application and complaint brought by MoGas Pipeline, L.L.C. ("MoGas"), on November 9, 2010, praying that the Commission will "declare that all rates determined by the PSC pursuant to § 3.2 of the Tariffs of Missouri Gas Company, LLC, and Missouri Pipeline Company, LLC, are invalid, unlawful, unconstitutional, void, and of no force and effect."

**Complainant is Regulated by the FERC and Not by the PSC:**

2. MoGas is, it avers in Paragraph 1 of its Application and Complaint, "an interstate pipeline regulated by the Federal Energy Regulatory Commission ("FERC"). Staff has no reason to doubt MoGas' characterization of itself and believes that characterization to be true.

3. The Missouri Public Service Commission ("PSC" or "Commission") does not regulate interstate pipelines in general and does not regulate MoGas in particular. Therefore, none of the many grants of regulatory jurisdiction to the

PSC in the Public Service Commission Law at Chapters 386 and 393, RSMo, apply to MoGas.

**Complainant has Not Engaged the PSC's Jurisdiction Over Rates:**

4. MoGas asserts in the commencement of its Application and Complaint that it brings its action pursuant to §§ 386.270 and 386.290, RSMo, which provide:<sup>1</sup>

**Section 386.270, RSMo:**

All rates, tolls, charges, schedules and joint rates fixed by the commission shall be in force and shall be prima facie lawful, and all regulations, practices and services prescribed by the commission shall be in force and shall be prima facie lawful and reasonable until found otherwise in a suit brought for that purpose pursuant to the provisions of this chapter.

**Section 386.390, RSMo:**

1. Complaint may be made by the commission of its own motion, or by the public counsel or any corporation or person, chamber of commerce, board of trade, or any civic, commercial, mercantile, traffic, agricultural or manufacturing association or organization, or any body politic or municipal corporation, by petition or complaint in writing, setting forth any act or thing done or omitted to be done by any corporation, person or public utility, including any rule, regulation or charge heretofore established or fixed by or for any corporation, person or public utility, in violation, or claimed to be in violation, of any provision of law, or of any rule or order or decision of the commission; provided, that 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 aldermen 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

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<sup>1</sup> The "commencement" of a pleading is that introductory paragraph beginning "comes now." See J. Devine, *Missouri Civil Pleading and Practice*, § 12-7 (1986).

twenty-five consumers or purchasers, or prospective consumers or purchasers, of such gas, electricity, water, sewer or telephone service.

5. As its prayer, set out verbatim under Paragraph 1, above, makes clear, MoGas' complaint is about rates. Pursuant to § 386.390.1, RSMo, under which authority MoGas purports to bring its complaint, a rate complaint cannot be brought by just anyone, but only by certain enumerated eligible parties: the PSC, on its own motion; or the public counsel, the mayor or the president or chairman of the board of aldermen 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 the utility service at issue. MoGas' complaint is not brought by the PSC on its own motion and is not signed by any of the other eligible parties enumerated above. Consequently, the PSC lacks subject-matter jurisdiction over this complaint.

#### **Complainant is Not a Public Utility:**

6. Section 386.400, RSMo, which was not cited by MoGas, is of no help to it because, being regulated by FERC and not by the PSC, MoGas is not a public utility within the intendments of Chapter 386, RSMo.<sup>2</sup>

#### **PSC May Not Make Declaratory Judgments:**

7. MoGas' prayer is that the Commission will "declare" the invalidity as a

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<sup>2</sup> A "public utility," pursuant to §386.020(43), RSMo, "includes every pipeline corporation, gas corporation, electrical corporation, telecommunications company, water corporation, heat or refrigerating corporation, and sewer corporation, as these terms are defined in this section, and each thereof is hereby declared to be a public utility and to be subject to the jurisdiction, control and regulation of the commission and to the provisions of this chapter." As a matter of law, MoGas is **not** subject to regulation by the PSC or Chapter 386, therefore, it is **not** a public utility.

matter of law of rates based upon § 3.2 of the tariffs of Missouri Gas Company, LLC, and Missouri Pipeline Company, LLC.

8. The Missouri Supreme Court has made clear that administrative tribunals of the State of Missouri are without jurisdiction to make declaratory judgments, even where their organic law purports to grant such authority, which the Public Service Commission Law does not.<sup>3</sup>

#### **The Issue Sought to be Adjudicated is Moot:**

9. MoGas' complaint concerns rates based upon the tariff under which it formerly operated when it was an intrastate pipeline regulated by the PSC.<sup>4</sup>

10. MoGas now operates under federal tariffs. On April 20, 2007, FREC issued a conditional certificate to MoGas. Since June 1, 2008, when FERC approved its tariffs MoGas has been subject to federal regulation and the tariffs that are the subject of its complaint were superseded.

11. A case is moot when a tribunal's decision would not have any practical effect upon any live controversy.<sup>5</sup> Where an event occurs that makes granting effectual relief impossible, the case is moot and generally should be dismissed.<sup>6</sup> This rule applies to contested cases before administrative agencies just as it applies to courts. With respect to utility matters, the general rule is that

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<sup>3</sup> ***State Tax Commission v. Administrative Hearing Commission***, 641 S.W.2d 69, 75 (Mo. banc 1982); ***Lightfoot v. City of Springfield***, 361 Mo. 659, 669, 236 S.W.2d 348, 352 (1951) (Public Service Commission "has no power to declare . . . any principle of law or equity"). ***State Tax Commission*** involved a statute that purported to authorize the Administrative Hearing Commission to declare administrative rules invalid.

<sup>4</sup> See ¶¶ 11-14, MoGas' Application and Complaint.

<sup>5</sup> ***State ex rel. Reed v. Reardon***, 41 S.W.3d 470, 473 (Mo. banc 2001).

<sup>6</sup> *Id.*; and see ***Armstrong v. Elmore***, 990 S.W.2d 62, 64 (Mo. App., W.D. 1999).

"issues under old, superseded tariffs are moot and therefore not subject to consideration."<sup>7</sup>

### **Lack of Subject-Matter Jurisdiction is Fatal:**

12. Subject-matter jurisdiction is the power of the tribunal to hear and determine a controversy and grant the requested relief.<sup>8</sup> Subject-matter jurisdiction is derived from the law and cannot be conferred by consent.<sup>9</sup> The Public Service Commission is a creature of statute and “[w]hatever power [it] has must be warranted by the letter of law or such clear implication flowing therefrom as is necessary to render the power conferred effective.”<sup>10</sup> When a tribunal lacks subject matter jurisdiction, any action it takes is null and void.<sup>11</sup> In the absence of subject-matter jurisdiction, the only course the Commission can take is to dismiss.<sup>12</sup>

**WHEREFORE**, Staff prays that the Commission will grant its motion and dismiss this matter for lack of subject-matter jurisdiction; and grant such other

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<sup>7</sup> **St. ex rel. Missouri Public Service Co. v. Fraas**, 627 S.W.2d 882, 885 (Mo. App., W.D. 1981) (citations omitted).

<sup>8</sup> **J.C.W. ex rel. Webb v. Wyciskalla**, 275 S.W.3d 249, 253 (Mo. banc 2009) (“Subject matter jurisdiction, in contrast to personal jurisdiction, is not a matter of a state court's power over a person, but the court's authority to render a judgment in a particular category of case”). In Missouri, it encompasses the tribunal's authority to grant the requested relief. **State Tax Commission**, *supra*, 641 S.W.2d at 72.

<sup>9</sup> **Hightower v. Myers**, 304 S.W.3d 727, 733 (Mo. banc 2010).

<sup>10</sup> **State ex rel. City of St. Louis v. Public Service Commission of Missouri**, 335 Mo. 448, 457-58, 73 S.W.2d 393, 399 (banc 1934).

<sup>11</sup> *Id.*

<sup>12</sup> **State ex rel. Larkin v. Oxenhandler**, 159 S.W.3d 417, 420 (Mo. App., W.D. 2005) (“A circuit court lacking subject matter jurisdiction may take no action other than to dismiss the suit”).

and further relief as the Commission deems just.

Respectfully submitted,

s/ Kevin A. Thompson  
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**Certificate of Service**

I hereby certify that a true and correct copy of the foregoing was served, either electronically or by hand delivery or by First Class United States Mail, postage prepaid, on this **16<sup>th</sup> day of November, 2010**, on the parties of record as set out on the official Service List maintained by the Data Center of the Missouri Public Service Commission for this case.

s/ Kevin A. Thompson