

**STATE OF MISSOURI
PUBLIC SERVICE COMMISSION**

At a session of the Public Service
Commission held at its office
in Jefferson City on the ____
day of February 2009.

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| In the Matter of FERC Docket No. CP07-450,) | |
| MoGas Request for Authorization under) | Case No. GO-2009-0094 |
| Blanket Certificate.) | |

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| Proposed Order Granting Determination on the Pleadings | |
| Issued: | Effective: |

This matter arises upon the Application to Terminate filed by MoGas on September 9, 2008, on the Supplement thereto filed by MoGas on October 16, 2008 Response to the Applicant's Motion For Determination on the Pleadings, filed by MoGas¹ on January 15, 2009, the First Amended Application to Terminate, filed by MoGas on MoGas' February 5, 2009, a Renewed Motion for Determination on the Pleadings filed by MoGas on February 5, 2009 and MoGas' February 10 Reply to Staff's Response to Motion for Determination on the Pleadings.

The Staff of the Commission responded to MoGas' Application on September 23 and MoGas replied on the following day. Staff responded to MoGas' Supplement on October 20, 2008 and also moved for determination on the pleadings as authorized by Rule 4 CSR 240-2.117(2). On January 15, 2009, MoGas filed its Motion for Determination on the Pleadings. Staff filed Staff's Response to Applicant's Supplement to Application and Staff's Motion for Determination on the Pleadings on January The Commission now makes its determination on the pleadings.

¹ All references to MoGas include its affiliates and corporate parent, as appropriate in the context.

The Issue:

Applicant MoGas complains to the Commission that both the Commission itself and its Staff are acting unlawfully and *ultra vires* by participating in cases involving MoGas at the Federal Energy Regulatory Commission (“FERC”). MoGas insists that the Commission cease its involvement in these FERC cases and rein in its Staff. In its October 16, 2008 *Supplement*, MoGas simultaneously advises the Commission that the subject FERC case has concluded in its favor and broadened its prayer for relief to include all matters involving MoGas, to-wit: MoGas requests that the Commission direct its Staff and General Counsel to terminate involvement in all matters at FERC and in the courts concerning MoGas obtaining interstate authority and to refrain from further involvement in FERC matters concerning MoGas absent express, publicly-disclosed authorization from the Commission.

In its *Supplement*, MoGas lists those “matters at FERC and in the courts” from which it desires the Commission to remove itself:

- FERC Docket CP07-450, the compression station matter, which MoGas fears the Commission will appeal.
- Case No. 08-1160 in the United States Court of Appeals for the District of Columbia Circuit, challenging FERC’s grant of an interstate certificate to MoGas and its approval of MoGas’ corporate reorganization without state authorization.²

² This case was dismissed months ago.

- Case No. WD68506 in the Western District of the Missouri Court of Appeals, appealing the refusal by the Circuit Court of Cole County to enjoin MoGas from reorganizing without prior authorization from this Commission.
- Case No. 08AC-CC00738 in the Circuit Court of Cole County, Missouri, seeking to collect from MoGas its unpaid Commission assessments.

In its *Supplement*, MoGas appears to be adding an allegation that either the General Counsel or the Staff, or perhaps both, are acting without authorization from the Commission.

In its January 15, 2009 *Motion for Determination*, on page 3, MoGas adds the demand the Commission withdraw its intervention in FERC Case No. RP-09-185-000, stating MoGas' "federal tariff sheets are a matter of interstate commerce."

In its February 5 First Amended Application, MoGas adds a matter at FERC from which it desires the Commission to remove itself, FERC Docket No. RP-09-185-000, which MoGas describes as the "FERC rate Case" again raising the interference in interstate commerce issue.

In its First Amended Application, MoGas renews its claims the Commission lacks express authority to intervene at FERC, the Commission lacks specific power to intervene in a FERC matter, and is in fact, specifically prohibited by Section 386.030 RSMo from "interfering" with interstate commerce. MoGas further complains there is no public record of the commission directing its General Counsel to appear for the Commission and that the Commission is improperly expending public funds to retain a private law firm.

In another February 5, 2009 pleading, MoGas filed a Renewed Motion for Determination on the Pleadings. On February 10, 2009 MoGas Responded to *Staff's Response to Motion for Determination on the Pleadings*, and asks the Commission to determine "how to properly discharge its administrative functions".

The Parties:

Staff

The Commission's Staff consists of various technical and subject matter experts who assist the Commission in its regulatory duties. In order to meet the requirements of due process and fundamental fairness, Staff provides its advice to the Commission in contested cases and other proceedings before the Commission in the form of pleadings, briefs and expert testimony. In such proceedings, the General Counsel represents Staff. Rule 4 CSR 240-2.040(1).

The General Counsel, a statutory officer of the Commission, also represents the Commission itself in state and federal courts and administrative tribunals. Section 386.071, RSMo.

MoGas

MoGas, more formally MoGas Pipeline LLC, previously known as Missouri Gas Company, LLC, and self-described as "an interstate natural gas pipeline," and its affiliates, Missouri Interstate Gas, LLC ("MIG"), and Missouri Pipeline Company, LLC ("MPC"), are wholly-owned subsidiaries of United Pipeline Systems, LLC, which is itself a wholly-owned subsidiary of Gateway Pipeline Company, LLC. All are Delaware-limited-liability corporations and all but MPC are duly authorized to do business in Missouri. MPC formerly operated a natural gas pipeline that ran from the Panhandle

Eastern Pipeline at Curryville, Missouri, to Sullivan, Missouri, where it connected to the pipeline operated by MoGas' predecessor, Missouri Gas Company ("MGC"). A spur ran from the MPC pipeline near Wentzville, Missouri, to a connection with the MIG pipeline near West Alton, Missouri. The MGC pipeline ran from Sullivan to Ft. Leonard Wood in near Waynesville, Missouri. The MIG pipeline ran from near West Alton, Missouri, across the Missouri River to the MRT pipeline in Illinois. All of these pipelines are now operated by MoGas pursuant to a certificate issued by the FERC and subsequent compliance tariffs approved by the FERC on June 1, 2008.

Jurisdiction:

The Public Service Commission is an agency of the State of Missouri, charged with the regulation of public utilities including electric, natural gas, steam heat, water, and sewer utilities. See Chapters 386 and 393, RSMo. To that end, the Commission is vested with broad regulatory, rulemaking and adjudicatory powers. *Id.*

Like all administrative agencies, the Commission is a creature of statute, equipped with only those powers expressly granted or necessarily implied by its organic law. *State ex rel. Utility Consumers' Council of Missouri, Inc. v. Public Service Commission*, 585 S.W.2d 41, 49 (Mo. banc 1979). In every matter, therefore, the Commission must consider whether or not it is authorized to proceed. On review of Commission actions, the courts determine whether the Commission's action was lawful and reasonable, and the question of lawfulness includes the question of whether the Commission has exceeded its lawful authority, that is, acted *ultra vires*. *Id.*, at 47. MoGas can certainly challenge the Commission actions complained of as *ultra vires*. It

follows, therefore, that the Commission should have the first opportunity to consider MoGas' assertions.

Determination on the Pleadings:

The Standard

Staff, through the General Counsel, and now MoGas in its January 15, 2009 pleading have moved the Commission to determine this matter on the pleadings pursuant to Rule 4 CSR 240-2.117(2), which provides:

Determination on the Pleadings—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.

A motion for judgment on the pleadings is fundamentally identical to a motion to dismiss for failure to state a claim³ and should be granted where, assuming all well-pleaded facts in the non-moving party's pleadings to be true,⁴ the movant is nonetheless entitled to judgment as a matter of law. J. Devine, *Missouri Civil Pleading & Practice* § 20-7 (1986); *Madison Block Pharmacy, Inc. v. United States Fidelity & Guaranty Co.*, 620 S.W.2d 343, 345 (Mo. banc 1981). "The question presented by a motion for judgment on the pleadings is whether the moving party is entitled to judgment as a matter of law on the face of the pleadings." *Eaton v. Mallinckrodt, Inc.*, 224 S.W.3d 596, 599 (Mo. banc 2007), *quoting RGB2, Inc. v. Chestnut Plaza, Inc.*, 103 S.W.3d 420, 424 (Mo. App., S.D. 2003). Judgment on the pleadings has been held to be appropriate

³ The differences are (1) either party may move for judgment on the pleadings, while only the defendant may move to dismiss for failure to state a claim; and (2) a motion for judgment on the pleadings is ripe only after the pleadings are closed. See J. Devine, *Missouri Civil Pleading & Practice* § 20-7 (1986).

⁴ Note conclusory allegations are ignored. *Holt v. Story*, 642 S.W.2d 394, 395-96 (Mo. App., E.D. 1982).

where the sole issue is the construction to be given to words in an insurance contract. *Madison Block Pharmacy*, 620 S.W.2d at 345.

Is Determination on the Pleadings Appropriate?

In this case yes. The present case does not seek a rate increase and is not subject to an operation of law date. Therefore, determination on the pleadings is permissible under the rule cited above so long as it is not otherwise contrary to law⁵ or the public interest.

In the present case, the sole issue is one of law – is the Commission authorized, through its General Counsel, to litigate at the FERC? The Commission concludes that it is authorized to bring actions at the FERC and to intervene in actions at the FERC. Section 386.120.4, RSMo, provides that “[t]he commission may sue and be sued in its official name” and no limitation is set either with respect to the actions regarding which the Commission may sue and be sued nor the venues where these suits may be brought. Section 386.071, RSMO, provides:

The public service commission may appoint and fix the compensation of a general counsel to serve at the pleasure of the commission. He shall be an attorney at law and shall have resided in this state prior to his appointment. **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, and to expedite in every way possible, to final determination all such actions and proceedings; to advise the commission and each commissioner, when so requested, in regard to all matters in**

⁵ Determination on the pleadings would be otherwise contrary to law, for example, in a case in which the authorizing statute requires a hearing, despite the absence of any dispute of fact.

connection with the powers and duties of the commission and the members thereof, and generally to perform all duties and services as attorney and counsel to the commission which the commission may reasonably require of him.
(emphasis added).

The Commission's authority to engage in litigation is necessarily just as broad as the authority granted to the General Counsel as the Commission's attorney. As with § 386.120.4, RSMo, nothing in § 386.071, RSMo, limits the scope of that authority to state courts or to actions under the Public Service Commission Law. Indeed, § 386.071, RSMo, expressly states that the scope of the General Counsel's litigation authority extends to "all actions and proceedings involving any question under this or any other law," so it is unmistakably the legislative intent that the Commission's authority to sue and be sued is not limited to the Public Service Commission Law. Under § 386.071, RSMo, the General Counsel may appear for the Commission in any court or before any tribunal, on questions involving any law, as the Commission may direct, without limitation.

MoGas cites to § 386.030, RSMo, claiming that it "explicitly states that such purposes do *not* include matters of interstate commerce." This is a mischaracterization of the statute. The full text of § 386.030, RSMo, is as follows:

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).

MoGas ignores the final clause of the statute, emphasized above, which provides that Missouri's Public Service Commission Law, and the Commission it creates, shall have however much authority in the sphere of interstate commerce as the federal constitution or acts of Congress permit. When read in its entirety, the section is seen to be a grant of authority intended to push the state's police power into the realm of interstate commerce as far as is constitutionally permitted rather than a prohibition intended to keep the Commission from meddling in matters of interstate commerce.

The FERC, created by acts of Congress, specifically permits intervention by state commissions. This Commission has jurisdiction to regulate rates and charges for the sale or distribution of natural gas to consumers in this State. It is, therefore, a "State Commission" within the meaning of Section 1.101(k) of the FERC's general regulations.

Section 386.030, RSMo, is, of course, a formula intended to ward off a fatal collision with the so-called "dormant commerce clause." The dormant commerce clause prohibits states from enacting laws that "discriminate against or unduly burden interstate commerce." *Jones v. Gale*, 470 F.3d 1261, 1267 (8th Cir. 2006). Although the commerce clause reads as an affirmative grant of regulatory power to Congress, the Supreme Court has read into this language a "dormant" component that grants courts the power to invalidate state laws that discriminate against, or unduly burden, interstate commerce. *Minnesota ex rel. Hatch v. Hoeven*, 456 F.3d 826, 831 (8th Cir. 2006). A dormant commerce clause analysis asks whether the state's law discriminates against or burdens interstate commerce and whether sufficient justification exists for the burden imposed. *Id.* MoGas' dependence on § 386.030, RSMo, is thus misplaced.

MoGas also asserts, citing § 386.330.1, RSMo, that “[t]he investigatory power of the Commission with regard to public utilities is expressly limited to the investigation of violations of law.” In fact, that statute pertains only to telecommunications companies, as a consideration of its actual language clearly reveals:

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 any such public utility, person or corporation in violation of any provision of law or in violation of any order or decision of the commission.

(emphasis added)

As for natural gas utilities, § 386.250(1), RSMo, provides that the jurisdiction, supervision, powers and duties of the public service commission herein created and established shall extend under this chapter:

(1) 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.

The language of § 386.250(1), RSMo, does not distinguish between interstate and intrastate natural gas operations in Missouri, and pursuant to § 386.030, RSMo, it is clear that the Commission’s authority with respect to interstate operations, such as MoGas’, is however great as the federal constitution allows.

As a matter of federalism, federal law recognizes the appropriate role that state regulatory agencies such as this Commission play in the federal regulation of energy utilities. Thus 16 U.S.C. § 824a-3(f) requires the state regulatory authority to make rules implementing the FERC’s rules for regulated electric utilities in that state with respect to

cogeneration. In the area of natural gas, FERC regulations provide for the participation of interested parties in certification proceedings. Accordingly, notice of each application is published in the Federal Register, a copy of the notice is mailed to the affected state, 18 C.F.R. §§ 157.9, 157.10, and state commissions may intervene as a matter of right. 18 C.F.R. § 385.214. Thus, the Commission lawfully and properly represents the state of Missouri's interests at the FERC by intervening and litigating there as the rules of that agency permit.

MoGas also questions the Commission's authority to retain outside counsel to represent it at the FERC. MoGas complains that "[t]here is no provision of Missouri law by which the legislature has conferred upon the Commission the power to retain a private law firm to intervene in a FERC case or to litigate matters relating to interstate commerce." Therefore, MoGas further complains, the Commission's expenditure of public money for this purpose "is illegal".

Chapter 620, RSMo, which creates the Department of Economic Development, provides for "such staff as [the Commission] deems necessary for the functions performed by the general counsel." Section 620.010.6, RSMo. The statute does not require that the members of this "staff" be employees rather than private attorneys under contract. Given that the Commission's activities at the FERC are lawful and that the General Counsel is specifically authorized to represent the Commission there, it follows that a private law firm, under contract with the Commission and directed by the General Counsel, may represent the Commission at the FERC at public expense.

MoGas also questions the authority of Staff to investigate matters relating to cases pending at the FERC. The General Counsel, as the Commission's attorney in

those matters, is obligated to investigate them thoroughly by the rules of professional conduct, Rule 4, Missouri Supreme Court Rules. Rule 4-3.1 provides, in pertinent part:

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification, or reversal of existing law.

The technical staff acts as the investigatory arm of the General Counsel's Office in FERC cases. MoGas suggests, as well, that the Commission's involvement in FERC Docket CP07-450 is creating additional expense for Missouri consumers and causing unnecessary delay. However, it is the fact that any delay is due entirely to MoGas' failure to promptly resolve the protests filed by the Commission and by Union Electric Company, doing business as AmerenUE, a customer of MoGas. The protests, in turn, were filed because MoGas failed to include necessary information in its initial filing. Rather than costing Missourians more money by its protest, the Commission is acting to ensure that Missourians will pay only for prudent and necessary pipeline improvements.

Conclusion

The Commission concludes that determination on the pleadings is appropriate in this matter, because it is not otherwise contrary to law and would in fact promote the public interest, and because Staff has demonstrated that MoGas' Application and Supplement are without substantial legal merit.

IT IS THEREFORE ORDERED:

1. That the Application to Terminate filed by MoGas Pipeline, LLC, on September 9, 2008, is denied.
2. That the Supplement to the Application to Terminate filed by MoGas Pipeline, LLC, on October 16, 2008, is denied.

3. That Staff's October 17, 2008 Motion for Determination on the Pleadings is granted.

4. That this order shall become effective on [ISSUE DATE + 10 DAYS], 2009.

5. That this case may be closed on [ISSUE DATE + 11 DAYS], 2009.

BY THE COMMISSION

Colleen M. Dale

Secretary/Chief Regulatory Law Judge

(S E A L)