

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

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

**Staff's Response to Applicant's  
Motion for Determination on the Pleadings  
First Amended Application, Renewed Motion for Determination  
on the Pleadings and Reply to Staff**

**COMES NOW** the Staff of the Missouri Public Service Commission, by and through the Commission's General Counsel, as authorized by § 386.071, RSMo, and Commission Rule 4 CSR 240-2.040(1), and, for its Response to the Applicant's Motion For Determination on the Pleadings, filed by MoGas<sup>1</sup> on January 15, 2009, MoGas' February 5 First Amended Application to Terminate, MoGas' February 5 Renewed Motion for Determination on the Pleadings and its February 10 Reply to Staff's Response to Motion for Determination on the Pleadings and states:

***The Issue:***

In its *Motion for Determination on the Pleadings*, MoGas reminds the Commission that on September 9, 2008, it complained the Commission and its Staff are acting unlawfully and *ultra vires* by participating in a case involving MoGas at the Federal Energy Regulatory Commission ("FERC"). MoGas insisted that the Commission cease its involvement in the FERC case and rein in its Staff. In its *Supplement*, MoGas simultaneously advised the Commission that the subject FERC

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

case has concluded in its favor. MoGas then broadens its prayer for relief to include all FERC matters involving MoGas.

Specifically MoGas complains outside counsel for the Commission filed an intervention and Protest in FERC Docket No, RP09-185-000 and this case is a matter of interstate commerce. MoGas repeats its demand the Commission direct its Staff and General Counsel to terminate involvement in all matters at FERC and in the courts concerning MoGas and to refrain from further involvement in FERC matters concerning MoGas absent express, publicly-disclosed authorization from the Commission. MoGas adds its contentions there is no express provision of law permitting the Commission to intervene in this case at FERC, there is no clear implication in statute permitting the Commission's intervention at FERC.

MoGas reargues a number of earlier complaints including the lack of public records that the Commission directed its General Counsel to intervene.

In its *Reply to Staff Response* MoGas raises the same issues and adds the statement the Commission is "legally accountable" for the actions of its General Counsel. In raising this issue, MoGas inexplicably relies on two civil rights cases alleging constitutional violations under 42 U.S.C.A. § 1983.

***Is there any merit to MoGas' position?***

As was explained in detail in Staff's *Response* filed in this case on September 23, 2008, MoGas' position lacks any legal merit. Nothing contained in MoGas' subsequent filings has cast any doubt on that analysis. MoGas' broader request for relief announced in its *Motion for Determination*, that the Commission not participate in MoGas' FERC tariff case RP09-185 because the tariffs are "a matter of interstate

commerce” has been answered in Staff’s earlier responses, as a mischaracterization of Missouri statute.

The Commission exercises the police power of the state when it intervenes in matters before the FERC. Sections 386.040.<sup>2</sup> “As an agency of the legislature, the Commission's powers are derived from the police powers of the state.” *State ex rel. GTE North, Inc. v. Missouri Public Service Comm'n*, 835 S.W.2d 356, 362 (Mo. Ct. App. 1992). The Commission exercises its statutory authority in the public interest. *City of Kirkwood v. Union Elec. Co.*, 896 S.W.2d 946, 947 (Mo. Ct. App. 1995). By statute, the Commission has authority to assure that the public receives safe and adequate service at just and reasonable rates, Sections 393.130 and 393.150.2.

The Legislature created the Public Service Commission and by statute designated the duties of the Commission’s General Counsel, which are “to represent and appear for the commission **in all actions and proceedings involving any question under this or any other law. . . and to intervene, if possible, as directed by the Commission.**” Section 386.071 (emphasis added)

Under 386.240 “the commission may authorize any person employed by it to do or perform any act, matter or thing which the commission is authorized by this chapter to do or perform provided . . . [the commission] expressly authorizes or approves it.” The Commission expressly authorizes its General Counsel to hire outside counsel and participate at the FERC.

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<sup>2</sup> All statutory references are to the Missouri Revised Statutes (2000) as currently supplemented.

MoGas relies on *State ex rel. Nixon v. American Tobacco Co.* 34 S.W.3d 122 (Mo. banc 2000) for the proposition the general counsel or the Commission may not retain private counsel. This case does not stand for that proposition.

In the absence of a statute to the contrary, we conclude that the attorney general does have the power to [hire] special assistant attorneys general. [As the representative of the public] the General Assembly can revoke that power and withhold its consent as the [attorney general's] client by enacting legislation that forbids the attorney general from entering into the fee arrangement or otherwise provide an alternative mechanism for compensating the special assistant attorneys general.

The Commission is a "State Commission" authorized to participate at FERC under FERC's general regulations at §1.101(k). In this regard, the Commission has statutory authority to intervene in cases at the FERC and FERC's authorization to participate on behalf of Missouri consumers. The Commission has a direct and unique interest in FERC proceedings to protect the interests of Missouri consumers and is entitled to party status in FERC cases upon filing this notice of intervention pursuant to 18 CFR §385.214(a)(2).

***What should the Commission do in this case?***

The Commission should make its determination on the pleadings and issue its Order forthwith under Rule 4 CSR 240-2.117(2), which authorizes the Commission to determine a case such as this one on the pleadings, in that MoGas has failed to show that it is entitled to any relief.

A motion for judgment on the pleadings is essentially identical to a motion to dismiss for failure to state a claim and should be granted where, assuming all well-pleaded facts in the non-moving party's pleadings to be true, 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.) (i.e., conclusory allegations are ignored); *Holt v. Story*, 642 S.W.2d 394, 395-96 (Mo. App. E.D. 1982).

Judgment on the pleadings has been held to be appropriate, for example, where the sole issue is the construction to be given to words in an insurance contract. *Madison Block Pharmacy, supra*, at 345. 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 General Counsel has demonstrated in his *Response* of September 23, 2008, that, in fact, the Commission is so authorized. There are no questions of material fact remaining to be determined by an evidentiary hearing and the Commission can – and should – resolve this matter forthwith on the pleadings before it. MoGas may then pursue further relief in the courts, which is where this matter properly belongs.

***Proposed Order:***

Attached hereto, for the Commission's convenience, is a proposed order granting determination on the pleadings in favor of Staff.

**WHEREFORE**, Staff prays that the Commission will grant it a favorable determination herein on the pleadings as authorized by Rule 4 CSR 240-2.117(2), dismiss MoGas' *Application to Terminate*, filed on September 9, 2008, and its

*Supplement* filed on October 16, 2008, as being without merit; and grant such other and further relief as may be just.

Respectfully submitted,

/s/ Lera L. Shemwell

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For the Staff of the Missouri Public  
Service Commission

### **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 17th day of February, 2009.

/s/ Lera L. Shemwell