

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

In the Matter of MoGas Pipeline, LLC)))	Case No. GC-2011-0138
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AMEREN MISSOURI’S MOTION TO DISMISS

COMES NOW Union Electric Company, d/b/a Ameren Missouri (“Ameren Missouri”), and hereby moves to dismiss the Application and Complaint filed by MoGas.

In its Application and Complaint, MoGas (now a FERC-regulated entity) seeks to have this Commission issue a declaratory judgment that (1) a provision of tariffs no longer in effect be held “invalid, unlawful, unconstitutional, void, and of no force and effect,” (2) those tariffs as “revised, interpreted and applied” by the Commission be held “invalid, unlawful, unconstitutional, void, and of no force and effect,” and (3) the Transporters’ rates determined by the Commission in Case No. GC-2006-0491 be found “invalid, unconstitutional, void, and of no force and effect.” The Application and Complaint should be dismissed because MoGas is simply waging yet another collateral attack¹ on a final order of this Commission, thereby failing to state a claim upon which relief may be granted. Moreover, this Commission should dismiss the Complaint because it does not have subject matter jurisdiction to grant the requested relief.

¹ In the overcharge case filed by Ameren Missouri against MoGas in the Circuit Court of Cole County (Case No. 09AC-CC00398), MoGas denies that its predecessor companies overcharged their customers and rejects the notion that the Commission Order in Case No. GC-2006-0491 is binding on that issue.

MoGas Fails to State a Claim

On its face, the entirety of MoGas's complaint constitutes an impermissible collateral attack on the Commission's Revised Report and Order in Case No. GC-2006-0491.² The complaint's claim is simply that the Commission, in Case No. GC-2006-0491, improperly interpreted and applied Section 3.2 of the Tariffs to set new rates which, MoGas asserts, were unlawful.³ The Application and Complaint filed by MoGas should sound quite familiar to this Commission. As MoGas implicitly acknowledges in Paragraph 48 of its Application and Complaint, the predecessors to MoGas appealed this Commission's Revised Report and Order in Case No. GC-2006-0491, and the Commission's order was upheld as both lawful and reasonable.⁴ In that appeal, the predecessors to MoGas raised the same claims they do here -- that the Commission's interpretation and application of the tariff provisions constituted unauthorized ratemaking and an unlawful automatic rate adjustment.⁵

Even though the MoGas predecessors asserted in their appeal of the Revised Report and Order that "the tariffs were lawful, reasonable, and established pursuant to a lawful ratemaking process,"⁶ they now want to take a

² And, though not mentioned, presumably the Commission's orders authorizing those tariffs attached as Exhibits B and C to the Application and Complaint.

³ See Application and Complaint at ¶¶ 11, 24-49, 51-54, 55-59, 61-64.

⁴ State ex rel. Missouri Pipeline Co., L.L.C. v. Missouri Pub. Serv. Comm'n, 307 S.W.3d, 162 (Mo. App. W.D. 2009) (Application for Transfer to Missouri Supreme Court denied on April 20, 2010).

⁵ 307 S.W.3d at 177-78.

⁶ Id. at 177. Having been established by a lawful process and approved by the Commission, each tariff became Missouri law and had the same force and effect as a

second bite at the apple by characterizing their current attack as somehow different--an attack on the validity of the tariffs themselves. Regardless of the semantics employed, however, MoGas' collateral attack on the Revised Report and Order is barred as a matter of law.

Mo. Rev. Stat. § 386.550 provides that “[i]n all collateral actions or proceedings the orders and decisions of the commission which have become final shall be conclusive.” Commission orders on matters properly within its jurisdiction are not subject to collateral attack.⁷ Where a statutory review of an order of the Commission is not successful, the order becomes final and cannot be attacked in a collateral proceeding.⁸

This statutory bar against collateral attacks is so clear that it bars a party from attacking in a later action a prior Commission order when that party chose not to participate in the original Commission proceeding⁹ and even when that party was not given personal notice of the original Commission proceeding.¹⁰ In other words, unlike such common law doctrines as collateral estoppel and *res judicata*, Section 386.550 applies to bar any petitioner, whether or not it was

statute enacted by the legislature. A.C. Jacobs & Co., Inc. v. Union Electric Co., 17 S.W.3d 579, 581 (Mo. App. W.D. 2000).

⁷ State ex rel. Harline v. Pub. Serv. Comm’n, 343 S.W.2d 177, 184 (Mo. App. W.D. 1960).

⁸ State ex rel. Licata, Inc. v. Pub. Serv. Comm’n, 829 S.W.2d 515, 518 (Mo. App. W.D. 1992).

⁹ Id. at 516, 517.

¹⁰ State ex rel. Ozark Border Elec. Coop. v. Pub. Serv. Comm’n, 924 S.W.2d 597, 301 (Mo. App. W.D. 1996).

a party in the prior proceeding or has any relationship with any party in the prior proceeding, from the collateral attack of a Commission order.¹¹

Despite this obvious bar to their collateral attack, MoGas attempts to avoid this result by characterizing the present proceeding as a new, *direct* attack against the lawfulness of the tariffs themselves--somehow provided for in the recent appellate opinion affirming the Commission's order in Case No. GC-2006-0491 and authorized by statute.¹² But, as noted earlier, Missouri courts have held that Section 386.550 bars such attacks brought before this Commission, including those actions brought under the general complaint statute, Section 386.390.1.¹³ The bottom line is this: MoGas' collateral attack on the Commission's order in Case No. GC-2006-0491 is barred by Mo. Rev. Stat. § 386.550.

In addition, MoGas' collateral attack on the Commission orders authorizing the original tariffs, which were issued in 1996, is likewise barred by Mo. Rev.

¹¹ Tari Christ v. Southwestern Bell Tel. Co., Case No. TC-2003-0066 Order Regarding Motions to Dismiss at 22-23 (Mo. P.S.C. January 9, 2003). While it is not clear in this particular case that the bar to collateral attack may be avoided by alleging substantially changed circumstances (as suggested in Tari Christ), MoGas alleges no substantially changed circumstances in its Application and Complaint. Indeed, the only possible circumstance that is a substantial change is the fact that MoGas is no longer a utility operating under the authority of the Commission, and that fact strongly suggests that its challenge to tariffs no longer in effect is moot. See In re Southwestern Bell Tele. Co.'s Proposed Revision to General Exchange Tariff, 18 S.W.3d 575, 577 (Mo. App. W.D. 2000) (where circumstance [*here, the expiration of a tariff*] occurs that makes a court's decision unnecessary or makes it impossible for the court to grant effectual relief, the case is moot and should be dismissed).

¹² Application and Complaint at Introduction and ¶ 48.

¹³ Tari Christ, Order at 23, *citing* Licata, 829 S.W.2d 515, and Ozark Border, 924 S.W.2d 597.

Stat. § 386.550. That the MoGas predecessors purchased the pipelines already subject to these tariffs¹⁴ makes no difference: the first page each of the tariffs complained of (Exhibit B and Exhibit C, respectively, of the Application and Complaint) is the Adoption Notice filed by the president of the predecessor companies of MoGas giving notice that these tariffs were adopted “in every respect as if the same had been originally filed by it.” The MoGas predecessors chose to fully adopt the existing tariffs¹⁵ rather than file new tariffs; as such, they cannot complain here that these tariffs were not properly binding on them, nor can they now argue that the tariffs are somehow unlawful.

WHEREFORE, for the foregoing reasons, MoGas’ Application and Complaint should be dismissed for its failure to state a claim.

This Commission Lacks Subject Matter Jurisdiction

Moreover, MoGas Application and Complaint must be dismissed because the Commission does not have subject matter jurisdiction to hear this complaint. MoGas purports to bring this action pursuant to the authority granted by Mo. Rev. Stat. §§ 386.270 and 386.390. Neither statute provides subject matter jurisdiction over MoGas’ complaint. In addition, this Commission lacks subject matter jurisdiction to grant the relief requested by MoGas.

¹⁴ Application and Complaint at ¶ 13.

¹⁵ When the Commission approved the plans for reorganization of the MoGas predecessors, the Commission allowed them to either adopt the tariffs in place or to file new tariffs. See Order Approving Plan of Reorganization at 5, Case No. GN-2003-0017, (December 3, 2002 Mo. P.S.C.); Order Approving Plan of Reorganization at 5, Case No. GN-2003-0016 (December 3, 2002 Mo. P.S.C.).

No Jurisdiction Under Section 386.270

MoGas finds no support here. Section 386.270 simply provides that rates fixed by the Commission are *prima facie* lawful and reasonable until held otherwise “in a suit brought for that purpose pursuant to the provisions of this chapter.” Consequently, this statutory section provides no independent basis for MoGas’ lawsuit; instead, it simply points to those actions authorized by the Missouri statutes governing the Commission found in Chapter 386. On the face of the pleading, then, MoGas’ only remaining basis for subject matter jurisdiction is Mo. Rev. Stat. § 386.390.

No Jurisdiction Under Section 386.390

Likewise, the Commission’s general complaint statute does not provide the necessary subject matter jurisdiction to the Commission over MoGas’ complaint about rates. In a broad grant of authority, Section 386.390 first authorizes the Commission to determine complaints as to “any act or thing done or omitted to be done by 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[.]”¹⁶ As a consequence, a complaint brought under this authority necessarily must include an allegation of a violation of a law or of a Commission rule, order or decision.¹⁷

¹⁶ Mo. Rev. Stat. § 386.390.1.

¹⁷ Tari Christ, Order at 20, *citing* Ozark Border, 924 S.W.2d 599-600.

The deficiency here is that MoGas' complaint is about the rates charged under tariffs which no longer are effective; as such, MoGas' complaint does not allege a violation of law or a Commission rule, order or decision. Because it does not allege a violation of a Commission order but a challenge to a Commission order, which is barred by statute,¹⁸ this Court does not have subject matter jurisdiction over this complaint, and it should be dismissed.

The second grant of authority to hear and determine complaints contained in Section 386.390.1 provides no support whatsoever for MoGas to bring its complaint. The Commission's authority to hear complaints about "the reasonableness of any rates or charges" of a gas corporation is limited to rate complaints brought by certain enumerated parties:

. . . 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 . . . corporation, *unless the same be signed by the public counsel or the mayor or the president or chairmen 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 such gas . . . service.*¹⁹

There is no allegation anywhere in MoGas' complaint that its complaint is being brought on behalf of current or prospective customers, the public

¹⁸ Section 386.390.1 authorizes complaints alleging violations of Commission orders, while Section 386.550 bars complaints *attacking* Commission orders. Licata, 829 S.W.2d at 519. In Licata, the plaintiff attempted to avoid the bar to collateral attack by framing his complaint as an attack on a "utility rule" found in the tariff, rather than an attack of the tariff itself; finding that Licata's attack on a provision in the tariff was an attack on the order itself, the appellate court affirmed the Commission's dismissal of Licata's complaint. 829 S.W.2d at 518-19.

¹⁹ Mo. Rev. Stat. § 386.390.1 (emphasis added).

counsel, the mayor, board of alderman or any other enumerated party.

Accordingly, this Commission has no jurisdiction over MoGas' complaint.

As MoGas no doubt knows, the sole procedure for challenging a tariff order of the Commission by a utility is to petition for rehearing before the Commission in the same proceeding which resulted in the Report and Order authorizing the tariff, followed by the filing of a writ of review in circuit court and, if necessary, an appeal.²⁰ Because the tariffs complained of in this lawsuit are final, MoGas cannot now attack them.

No Authority to Issue Declaratory Judgment

This Commission further lacks subject matter jurisdiction over MoGas' complaint because the Commission does not have the authority to provide the relief MoGas requests—a declaratory judgment that Section 3.2 of the tariffs are invalid as a matter of law. As pointed out by the Staff in its Motion to Dismiss, the Missouri Supreme Court has clearly held that administrative tribunals of the State of Missouri are without jurisdiction to make declaratory judgment.²¹

WHEREFORE, for the foregoing reasons, MoGas' Application and Complaint should be dismissed for its lack of subject matter jurisdiction.

²⁰ Mo. Rev. Stat. §§ 386.500, 386.510, 386.540; see also Licata, 829 S.W.2d at 518 (“The court held that § 386.510 provides the sole method of obtaining review of any final order of the commission.”) (citing State ex rel. State Highway Comm’n v. Conrad, 310 S.W.2d 871, 876 (Mo. 1958)).

²¹ State Tax Comm’n v. Admin. Hearing Comm’n, 641 S.W.2d 69, 75 (Mo. banc 1982); Lightfoot v. City of Springfield, 236 S.W.2d 348, 352 (Mo. 1951) (Public Service Commission “has no power to declare . . . any principle of law or equity”).

Respectfully submitted,

SMITH LEWIS, LLP

/s/ Michael R. Tripp

Michael R. Tripp, #41535
Amanda Allen Miller, #57873
111 South Ninth Street, Suite 200
P.O. Box 918
Columbia, MO 65205-0918
(573) 443-3141
(573) 442-6686 (fax)
tripp@smithlewis.com
miller@smithlewis.com

Wendy K. Tatro, # 60261
Associate General Counsel
Ameren Services Company
1901 Chouteau Ave.
P.O. Box 66149 (MC 1310)
St. Louis, MO 63166-6149
(314) 554-3484 (phone)
(314) 554-4014 (fax)
AmerenMOService@ameren.com

Attorneys for Ameren Missouri

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing Ameren Missouri's Motion to Dismiss was served via electronic mail (e-mail) on this 1st day of December 2010, on

Kevin A. Thompson
Chief Staff Counsel
Public Service Commission
P.O. Box 360
Jefferson City, MO 65102
kevin.thompson@psc.mo.gov
Attorney for the Staff of the Commission

Office of the Public Counsel
P.O. Box 2230
Jefferson City, MO 65102
opcservice@ded.mo.gov
Attorney for the Office of Public Counsel

Gerard T. Carmody
David H. Luce
Lauren M. Wacker
Carmody MacDonald P.C.
120 South Central Avenue, Suite 1800
St. Louis, MO 63105
gtc@carmodymacdonald.com
dhl@carmodymacdonald.com
lnw@carmodymacdonald.com
Attorneys for MoGas Pipeline, LLC

David G. Brown
Brown Law Office LC
1714 Brandeis Court, Suite A
Columbia, MO 65203
dbrown@brown-law-office.com
Attorney for MoGas Pipeline, LLC

David Woodsmall
428 E. Capitol Avenue, Suite 300
Jefferson City, MO 65101
dwoodsmall@fcplaw.com
Attorney for Municipal Gas Commission of Missouri

/s/ Michael R. Tripp
Attorney for Ameren Missouri