

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

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 Commission's Order of September 16, 2008, herein, and the Application to Terminate filed by MoGas on September 9, 2008, states as follows:

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 a case involving MoGas at the Federal Energy Regulatory Commission ("FERC"). MoGas insists that the Commission cease its involvement in the FERC case and rein in its Staff.

Who is 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 tariffs approved by the FERC.

Can the Commission consider the questions raised by MoGas?

Yes. 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.

Is the Commission authorized to intervene at the FERC?

Yes, the Commission 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 fora 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 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.**

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 (emphasis added):

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 inexplicably fails to notice 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 permits. 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.

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.

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, for example, 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.

Can the Commission hire outside counsel to represent it at the FERC?

Yes, the Commission is authorized to spend public money to hire a private law firm 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[.]” However, MoGas is wrong on this point, just as it is wrong in its assertion that this Commission is without authority to litigate at the FERC.

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.

Can the Commission’s Staff investigate matters relating to FERC cases?

Yes, the Commission’s Staff is authorized to investigate matters relating to cases pending at the FERC. Indeed, 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.

Is the Commission's Involvement in the FERC Case Causing Delay and Added Expense?

No. 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.

WHEREFORE, Staff prays that the Commission will conclude that its conduct in the premises was lawful and authorized, and therefore dismiss MoGas *Application to Terminate*, filed on September 9, 2008, as being without merit; and grant such other and further relief as may be just.

Respectfully submitted,

/s/ Kevin A. Thompson
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For the Staff of the Missouri Public
Service Commission

Certificate of Service

I hereby certify that a true and correct copy of the foregoing was served on all of the parties of record or their representatives as set out in the service list maintained for this case by the Commission's Data Center on this **23rd day of September, 2008**, either by hand delivery, electronic mail, facsimile transmission, or First Class United States Mail, postage prepaid.

/s/ Kevin A. Thompson