

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

In re: FERC Docket No. CP07-450, )  
MoGas Request for Authorization ) Case No. GO-2009-0094  
under Blanket Certificate )

## APPLICANT'S REPLY TO STAFF'S RESPONSE

COMES NOW MoGas Pipeline LLC (“MoGas”) and replies to Staff’s Response in this matter as follows.

## I. Points that Staff Has Conceded

Staff concedes that MoGas' operations are solely "interstate operations" (Response at 6) and that the Commission's intervention in the FERC case has involved the Commission in "the sphere of interstate commerce." (Response at 4.)

Staff concedes that the Commission is equipped with "only those powers expressly granted or necessarily implied by its organic law." (Response at 2; *emphasis added*.)

Staff concedes that MoGas has properly presented the issue of the Commission's continued involvement in the FERC case for consideration by the Commission. (Response at 2).

## II. The Real Issue and How Staff's Response Avoids It

Staff fails to cite any grant of express authority for the Commission to intervene in a FERC case solely concerning matters of interstate commerce. In fact, there is no such express authority. The real issue, then, is as follows:

**Does any provision of the Commission's organic law include the necessary implication that the Commission is authorized to intervene in a FERC case solely concerning matters of interstate commerce?**

The task for Staff, then, is to cite a portion of the Commission's organic law that creates some duty or power in the Commission that the Commission cannot carry out absent the

authority to intervene before FERC in a matter solely involving interstate commerce, such that the authority to intervene before FERC must of necessity be read into the law by implication. Staff cites no such law.

Instead, Staff argues the different (and easier) point that "nothing in § 386.071, RSMo, limits the scope of that authority [the authority of the Commission's General Counsel] to state courts or to actions under the Public Service Commission Law." (Response at 3.) This misses the point entirely. The standard is not that the Commission may take any action and exercise any power not expressly denied to it nor that the Commission has broad and unfettered jurisdiction over all matters, except where its authority is expressly limited by statute. Quite the contrary, as a creature of statute, the Commission's powers *are* limited—to those powers conferred by the Commission's enabling statutes, either expressly, or by clear implication "as necessary to carry out the powers specifically granted." *State ex rel. Utility Consumers' Council of Missouri, Inc. v. Public Service Commission*, 585 S.W.2d 41, 49 (Mo. 1979)(emphasis added); *see also State ex rel. GS Technologies Operating Co., Inc. v. Public Service Com'n of State of Mo.*, 116 S.W.3d 680 (Mo. App. W.D. 2003).

Applicant challenges Staff to quote that portion of the Commission's enabling statute that specifically grants the Commission a power that clearly and necessarily requires that the Commission also have the power to intervene before FERC in a matter solely involving interstate commerce.

Applicant asks: What power, specifically granted by statute, is the Commission exercising by its intervention in the FERC case, and what section of the Commission's enabling statute specifically confers this power?

Applicant further asks: Why is it necessary that the Commission intervene in the FERC case in order to exercise this unidentified statutory power? Is there no other way to exercise the power?

Staff's Response ignores these critical questions. Instead, Staff introduces the irrelevant concept of the "dormant commerce clause" and bootstraps this red herring into the notion that Staff may exercise any power that does not unreasonably discriminate against or unreasonably burden interstate commerce. (Response at 5-6.) Under this erroneous standard, Staff would enjoy enormous discretion, unfettered by the specifics of the Commission's enabling statute and limited only by the doctrine of the dormant commerce clause. This is nonsense, and it leads Staff to argue that Staff may "lawfully and properly represent[] the state of Missouri's interests at the FERC by intervening and litigating there. . ." based not on any provision of Missouri law or on the Commission's enabling statute, but based instead on FERC regulations (*see* Response at 6), as if FERC rulemaking can grant powers to a Missouri state agency that the Missouri legislature has not seen fit to grant the agency. Moreover, the FERC rules at issue merely "provide for participation" by a state agency without requiring it and certainly do not pretend to grant to any state agency power that it does not otherwise enjoy under its own, organic state law.

Although it is understandable that Staff desires to intervene in FERC cases as the agencies of some other state do, this "me, too" argument has no foundation in Missouri law. As made clear by the Missouri Supreme Court, not even convenience, expediency, and necessity are proper matters for consideration in determining the scope of the Commission's authority. *State ex rel. Utility Consumers' Council*, 585 S.W.2d at 49, quoting *State ex rel. Kansas City v. Public Service Comm'n*, 301 Mo. 179, 257 S.W. 462 (Mo. banc 1923). Staff's desire to "ensure that

Missourians will pay only for prudent and necessary pipeline improvements" (Response at 8) on an interstate pipeline, and the purported value of doing so, are simply beside the point.

### **III. The Dispositive Point as to Which Staff Has Neglected to Respond**

It is a canon of statutory construction that, where one statute deals with a particular subject in a general way, and a second statute deals with the same subject in a more detailed manner, the more general statute should give way to the more specific. *See Boyd v. State Bd. of Registration for the Healing Arts*, 916 S.W.2d 311, 315 (Mo. App. 1995).

In the present case, Applicant has cited the only section of the Commission's enabling statute that specifically relates to the Commission's relationship to FERC investigations and FERC hearings, in which the legislature has expressly and specifically authorized the Commission to conduct FERC investigations and participate in FERC hearings, but only when the matters involved are "joint investigations" and "joint hearings" in which the Commission acts as an "agent" of either FERC or the United States:

The commission may make joint investigations, hold joint hearings. . . without [outside] the state, and issue joint or concurrent orders in conjunction or concurrence with any. . . public utility. . . commission of. . . the United States of America. . . , except that in the holding of such investigations or hearings. . . the commission shall function. . . as an agent of the United States of America, or any official, agency or instrumentality thereof. . . .

§ 386.210.7, RSMo.<sup>1</sup>

Staff does not contend (and it would be ludicrous to do so) that the present matter involves any joint investigation or joint hearing in which FERC has appointed the Commission

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<sup>1</sup> The entire text of the statute reads as follows:

The commission may make joint investigations, hold joint hearings within or without the state, and issue joint or concurrent orders in conjunction or concurrence with any railroad, public utility or similar commission, of other states or the United States of America, or any official, agency or any instrumentality thereof, except that in the holding of such investigations or hearings, or in the making of such orders, the commission shall function under agreements or contracts between states or under the concurrent power of states to regulate interstate commerce, or as an agent of the United States of America, or any official, agency or instrumentality thereof, or otherwise. § 386.210.7, RSMo.

to act as an agent of FERC. Quite the contrary, the present matter involves, in the view of Staff, the Commission "suing or being sued" at FERC (*see* Response at 3-4), activities not authorized by the statute.

Rather than address the statute and explain how it pertains to the present matter, Staff makes no response whatsoever. Applicant's arguments regarding the statute remain unrebutted.

Instead, Staff cites other statutes that—even when construed most favorably to Staff's position—deal with the subject of the Commission's relationship to FERC investigations and FERC hearings in a general way, such that these statutes must "give way to the more specific" statute quoted above. *Boyd*, 916 S.W.2d at 315.

Furthermore, "[u]nder the prevalent rule for construction of statutes. . . the expression of one thing is the exclusion of another, and. . . nothing can be added to or deducted from the thing or class embraced in the terms of the exception." *Ex parte Helton*, 93 S.W. 913, 914 (Mo. App. 1906). Accordingly, the expression, in § 386.210.7, of the Commission's authority in relation to FERC investigations and FERC hearings operates to exclude the Commission from exercising any different authority, and nothing may be added to the explicit exception found in this statute that in the holding of such investigations or hearings, the Commission shall function "as an agent of the United States of America, or any official, agency or instrumentality thereof." Because in the present matter the Commission is acting unilaterally as an intervener and litigant appearing before FERC rather than as an agent of FERC investigating or hearing a case jointly with FERC, the Commission's actions are unauthorized and illegal. To this dispositive point, Staff did not respond.

#### **IV. Points as to Which Staff Has Made Erroneous or Misleading Responses**

Although no further analysis is required to determine that the Commission is acting ultra vires, Staff's Response—which does not even acknowledge the dispositive line of argument discussed above—contains other arguments, and, unlike Staff, Applicant will not shrink from addressing all arguments raised in this matter.

#### **A. Legal Capacity to Sue in the Name of the Commission**

Staff's primary argument is that the Commission is authorized to intervene at FERC by general statutory language establishing the Commission's legal capacity to "sue and be sued in its official name." (Response at 3-4.) Staff misconstrues this general declaration of legal capacity as an unlimited grant of authority to initiate any claim of any character in any tribunal. (*See* Response at 3.) In fact, this language merely establishes the legal capacity of the Commission to be named as a party in a lawsuit.

Certain entities that are a collective of individuals (like the Commission) lack the legal capacity to sue or be sued in the entity's name and must instead sue or be sued in the names of the individuals that comprise the entity. *See Executive Bd. of Missouri Baptist Convention v. Carnahan*, 170 S.W.3d 437 (Mo. App. W.D. 2005). As a result, where the legislature intends that a statutorily-created entity have the capacity to sue or be sued in its own name, it includes in the enabling statute a provision establishing such legal capacity. The provision relied upon by Staff is such a routine declaration of capacity to sue and is not, as Staff wishes, a sweeping grant of prosecutorial authority that knows no bounds "either with respect to the actions. . . nor the fora where these suits may be brought." (Response at 3.) Staff's preposterous view would allow the Commission to charge war crimes in the forum of the World Court.

Notably, "[c]apacity to sue refers to the status of a person or group as an entity that can sue or be sued, and is not dependent on the character of the specific claim alleged in the lawsuit. .

. ." *City of Wellston v. SBC Communications, Inc.*, 203 S.W.3d 189, 193 (Mo. 2006). In other words, the concept of "capacity to sue" is unrelated to the concept of "character of claim," so that it is a mistake to read a statute concerning legal capacity as if it relates to or controls the character of claims that an entity may sue or be sued for, which is an entirely different issue.

Furthermore, as argued above, there is a specific statute (§ 386.210.7) that explicitly governs the authority of the Commission in relation to FERC investigations and FERC hearings, and the specific dictates of that statute trump any vague implication that Staff might infer from a general statute that relates to the separate and distinct issue of the Commission's legal capacity to sue or be sued in its official name.

Moreover, as discussed above, the question is not whether there is a general statute into which can be read the power to intervene at FERC; the dispositive question is whether there is a statute that confers a specific power that makes it necessary that the Commission intervene at FERC in order to carry out the specified power so that the power to intervene at FERC is necessarily implied. There is nothing in the general grant of authority to sue in the name of the Commission that makes it necessary for the Commission to intervene at FERC to carry out the power of suing in the name of the Commission. This statute is a non-starter.

Finally, it is shocking to note that even under Staff's erroneous legal theory, the General Counsel is acting ultra vires and appears to be doing so knowingly. The statute that the General Counsel invokes as his authority expressly limits the circumstances under which the General Counsel may intervene in an action or proceeding. He may do so only "if directed to do so by the commission." § 386.071, RSMo. (*See* Response at 3, citing this provision.) Applicant is aware of no Order of the Commission directing the General Counsel to intervene in the FERC case.

Consequently, even if the General Counsel had the statutory authority he asserts, in this specific case the FERC intervention has not been authorized and is ultra vires.

## **B. Exclusion from Matters of Interstate Commerce**

Staff seeks to disarm Applicant's argument that § 386.030 expressly excludes matters of interstate commerce from the authority granted by the remainder of the Public Service Commission Law by arguing that this statute actually expands the authority granted to the Commission to include all matters of interstate commerce so long as the Commission does not unreasonably interfere with interstate commerce. (Response at 4-5.) In truth, the language of the statute is ambiguous because the phrase "except insofar as the same" grammatically refers to "commerce with foreign nations or commerce among the several states" and not, as the Staff's interpretation requires, to "this chapter [or] any provision of this chapter." Fortunately, no interpretation of this ambiguous language is required to determine the proper course of action for the Commission in the present matter.

Once again, the two points that truly matter are (1) there is a much more specific statute expressly governing the authority of the Commission in relation to FERC investigations and FERC hearings (§ 386.210.7 is more specific than § 386.030), and (2) nothing in the interstate commerce provision (§ 386.030) makes it necessary that the Commission intervene at FERC in order to carry out any power specifically granted by this provision. These arguments are dispositive of all of Staff's points.

## **C. Investigations Are Limited to Violations of Law**

Staff challenges Applicant's argument that § 386.330.1, RSMo. limits the investigatory power of the Commission with regard to public utilities by asserting that this statute applies only to telecommunications companies. (Response at 5.) There is ambiguity in the statute, which



refers in one instance to "any telecommunication company" and in a later instance to "such public utility, person or corporation." Staff assumes that these are identical references, but Staff's interpretation, as usual, is contrary to the canons of statutory interpretation.

"Where the legislature uses two different terms in the same statute, it must be presumed that it intended the terms to be given different meanings." *City of Wellston v. SBC Communications, Inc.*, 203 S.W.3d 189, 196 (Mo. 2006). Accordingly, it must be presumed that the term "public utility" has a different meaning than the term "telecommunication company," and it is easy to ascertain what those different meanings are because both are defined terms in the Public Service Commission Law. It must be presumed that "telecommunications company" refers to that statutorily-defined subset of "public utilities" and that "public utility" refers to all "public utilities."

Accordingly, the Commission's investigatory authority with regard to "public utilities" is limited to the investigation of violations of law:

[T]he 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.

§ 386.030, RSMo.

Again, such statutory interpretation is not required to determine the proper course of action for the Commission in the present matter because the two points that truly matter are (1) there is a much more specific statute expressly governing the authority of the Commission in relation to FERC investigations and FERC hearings (§ 386.210.7), and (2) nothing in the investigation statute (§ 386.330.1) makes it necessary that the Commission intervene at FERC in order to carry out any power specifically granted by this provision. These arguments remain dispositive.

#### **D. No Specific Authority to Investigate Natural Gas Companies**

After arguing that § 386.330.1 authorizes investigation only with regard to telecommunication companies, Staff appears to recognize that under the canons of statutory interpretation (discussed more fully above), the expression of investigatory authority over telecommunications companies is an exclusion of investigatory authority over gas companies. And so Staff cites § 386.250(1), which relates to gas companies, with the implication that this statute authorizes investigations of gas companies. In fact, § 386.250(1) does not mention or relate to investigations, and it in no way authorizes the Commission to conduct any investigation of any gas company. Consequently, this statute does not advance Staff's position.

#### **E. No Authority to Hire Outside Counsel**

Staff fails to distinguish. *State ex rel. Nixon v. American Tobacco Co.*, 34 S.W.3d 122 (Mo. banc 2000). The expenditure by a state agency of public funds to retain a private law firm, if not contemplated by the agency's enabling legislation, is illegal and subject to injunction. *State ex rel. Nixon*, 34 S.W.3d at 133. This holding is directly on point.

Rather than address the obvious implications of *State ex rel. Nixon*, Staff plays word games, arguing that the General Counsel for the Commission is authorized to have "staff" and that "staff" may include outside counsel because "staff" is not defined and therefore is not limited to "employees." (Response at 7.)

First, it is worth noting that, by statute, the Attorney General also has "staff." § 27.100, RSMo. Consequently, the statute cited by Staff does not distinguish the position of the Commission from that of the Attorney General in any way. *State ex rel. Nixon* applies and remains unanswered by Staff.

Second, the lack of a statutory definition of "staff" does not mean that the Commission has free rein to hire outside subcontractors under the guise of "staff." In the absence of statutory definitions, courts derive the plain and ordinary meaning of words from a dictionary and by considering the context of the entire statute in which it appears. *State ex rel. Burns v. Whittington*, 219 S.W.3d 224, 224 (Mo. banc 2007).

Here is the definition of "staff," from Dictionary.com (*emphasis added*):

staff – noun 1. a group of persons, as employees, charged with carrying out the work of an establishment or executing some undertaking.<sup>2</sup>

Also, the definition of "staff member" from thefreedictionary.com (*emphasis added*):

staff member - an employee who is a member of a staff of workers (especially a member of the staff that works for the President of the United States).<sup>3</sup>

Finally, it must be noted that Staff's Response lacks candor on this point. The relevant statute reads as follows:

The public service commission is authorized to employ such staff as it deems necessary for the functions performed by the general counsel other than those powers, duties and functions relating to representation of the public before the public service commission.

§ 620.010.6, RSMo.

In its response, Staff omits from the quotation the word "employ," allowing Staff to argue to the Commission with a straight face that, "[t]he statute does not require that the members of this 'staff' be employees. . . ." (Response at 7.) Quite the contrary, the plain language of the statute specifies that the staff be employed.

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<sup>2</sup> <http://dictionary.reference.com/browse/staff>

<sup>3</sup> <http://www.thefreedictionary.com/staff+member>

Furthermore, considering the context of the entire statute, it is ridiculous to suggest that the legislature intended to authorize the Commission to hire outside counsel as a part of its regular, "employed" staff.

#### **F. Attorney Ethics Rules Do Not Grant Authority to the Commission**

Staff notes that pursuant to the rules of professional conduct governing attorneys, the Commission's General Counsel is required to have a basis in fact for any legal proceeding that he brings or defends. (Response at 7.) From this, Staff leaps to the conclusion that the Commission is authorized to conduct an investigation into the FERC case.

Obviously, the rules of professional conduct governing attorneys are not the organic law of the Commission, form no part of the Commission's enabling statute, and do not grant any investigatory authority to the Commission.<sup>4</sup> Staff will have to look elsewhere to justify its FERC investigation, perhaps to § 386.210.7, which is a part of the enabling statute and which, as discussed above, establishes that Staff can only participate in joint FERC investigations as an agent of FERC.

#### **G. Delay and Expense**

Staff disclaims responsibility for delay in the MoGas compression project and blames MoGas for a lack of promptness in responding to the Commission's FERC protests. (Response at 8.) This is disingenuous because absent the Commission's protests, there would have been no delay, and MoGas has acted in a timely manner in the FERC case.

### **V. Conclusion**

The Commission has admittedly and intentionally entered into "the sphere of interstate commerce" by intervening in a FERC case and protesting MoGas' need for compression on an

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<sup>4</sup> As a side note, given that outside counsel is handling the FERC case, it is outside counsel that has the ethical duties and not the General Counsel.

interstate pipeline regulated by FERC as a matter of interstate commerce. The Commission is expressly authorized by its enabling statute to participate in FERC hearings, but only if FERC conducts the hearing on a joint basis with the Commission and authorizes the Commission to act as FERC's agent. None of these prerequisites have occurred. Instead, the Commission is acting ultra vires by unilaterally intervening in the FERC case and advocating against the interests of MoGas, purportedly to "ensure that Missourians will pay only for prudent and necessary pipeline improvements" on an interstate pipeline where such improvements are subject to the exclusive regulation and control of FERC. To make matters worse, Staff has illegally retained outside legal counsel, at taxpayer expense, to litigate the FERC case. All of this appears to have occurred outside the authority of any Order of the Commission.

For the foregoing reasons, MoGas again requests that the Commission withdraw its protest in the FERC case, terminate its intervention in the FERC case, and instruct Staff to cease its investigation into the substance of the FERC case.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing has been hand-delivered, transmitted by e-mail or mailed, First Class, postage prepaid, this 24th day of September, 2008, to:

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