

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

COMES NOW Applicant, MoGas Pipeline LLC (“MoGas”), and states as follows.

2. This is not the first time General Counsel has sought to avoid a determination in this matter by way of a Motion to Dismiss. The last time he did so, the Commission rejected his effort based upon reasoning that remains sound:

3. Furthermore, General Counsel’s argument for dismissal misstates the law and misses the point of this matter entirely.

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“[t]erminate permanently its involvement in all FERC matters related to MoGas” and “[i]nstruct Staff, General Counsel, and outside counsel to refrain from further interfering with MoGas’s operation as a FERC-regulated entity engaged in interstate commerce.” The Commission has ample authority to issue an Order that accomplishes these ends.

5. The Commission’s General Counsel has a duty to represent the Commission and may only intervene in a proceeding "if directed to do so by the commission." He may commence actions only when "authorized by law and directed or authorized by the commission," and he is "generally to perform all duties and services. . . which the commission may reasonably require of him." § 386.071, RSMo.

6. Any person employed by the Commission, including General Counsel, is bound "to do or perform any act" that the Commission expressly authorizes or approves. § 386.240, RSMo.

7. The Commission is legally accountable for the actions of General Counsel that take place pursuant to the Commission’s instructions, including any pattern of misconduct as to which the Commission was deliberately indifferent or which the Commission tacitly authorized. *See Pembaur v. City of Cincinnati*, 475 U.S. 469, 106 S.Ct. 1292, 1299, 89 L.Ed.2d 452 (1986)(legal accountability); *see also Larson v. Miller*, 76 F.3d 1446, 1453 (8th Cir.1996) (en banc)(indifference or tacit authorization).

8. In light of the foregoing, it is beyond dispute that the Commission may issue—and prudently should issue—an order determining what legal actions will, or will not, be brought in its name by its General Counsel or by outside counsel retained by its General Counsel.

9. General Counsel argues that the Commission lacks authority to rule on this Application because the Commission lacks the judicial authority to declare the law. As shown

above, the Commission need not exercise judicial authority or declare the law to grant relief to Applicant and resolve the ongoing dispute between General Counsel and Applicant.

10. The primary case relied upon by General Counsel (*State Tax Com'n v. Administrative Hearing Com'n*) stands for the proposition that an administrative agency cannot declare the validity of another agency's administrative rules. Applicant requests no declaration of the validity of any rule, and the issues at play relate only to the Commission's internal governance, not an attempt to limit or control a co-equal state agency.

11. General Counsel fails to note that administrative agencies are supposed to interpret their own rules, and such interpretations receive great deference. *See Willard v. Red Lobster*, 926 S.W.2d 550, 553 (Mo.App.1996); *State v. Missouri Resource Recovery, Inc.*, 825 S.W.2d 916, 931 (Mo.App. S.D.1992).

12. General Counsel also fails to cite to the Commission the most salient portion of the *State Tax Comm'n* case upon which he relies:

This Court has recognized that executive agencies may exercise quasi judicial powers that are incidental and necessary to the proper discharge of their administrative functions, even though by doing so they at times determine questions of a purely legal nature.

*State Tax Com'n v. Administrative Hearing Com'n*, 641 S.W.2d 69, 75 (Mo. 1982)(emphasis added).

13. In the present case, the Commission must determine several legal questions in order to determine how to properly discharge its administrative functions. *State Tax Com'n*, relied upon by General Counsel, makes clear that the Commission has the quasi judicial

authority to do so, and so the case actually supports the position of Applicant and not General Counsel.

14. General Counsel relies upon a second case, *Lightfoot v. City of Springfield*, for the proposition that the Commission has no power to declare any principle of law. Notably, the Commission was not a party to *Lightfoot*, the issue of the Commission's power was not before the court, and the citation made by General Counsel is to a passage that is purely dicta. Furthermore, as shown above, the Commission has ample authority to determine questions of law in relation to the discharge of its own functions, which is quite distinct from the attempt to make judicial declarations of the law that are binding on other entities, which is not at issue in this Application.

WHEREFORE, Applicant requests the Commission's ruling granting Applicant's Motion for Determination on the Pleadings.

Respectfully submitted,

LATHROP & GAGE, L.C.

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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 February 10, 2009, to:

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*/s/David Brown*