

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
Supplement to Application and
Staff's Motion for Determination on the Pleadings**

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 Supplement to its Application to Terminate, filed herein by MoGas¹ on October 16, 2008, and for its Motion for Determination on the Pleadings, states as follows:

The Issue:

In its *Application to Terminate*, MoGas complained to the Commission that 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 insisted that the Commission cease its involvement in the FERC case and rein in its Staff. In its *Supplement*, MoGas simultaneously advises the Commission that the subject FERC case has concluded in its favor and broadens its prayer for relief to include all matters involving MoGas, to-wit:

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

MoGas requests that the Commission direct its Staff and General Counsel to terminate involvement in all matters at FERC and in the courts concerning MoGas obtaining interstate authority and to refrain from further involvement in FERC matters concerning MoGas absent express, publicly-disclosed authorization from the Commission.

In its *Supplement*, MoGas lists those “matters at FERC and in the courts” from which it desires the Commission to remove itself:

- FERC Docket CP07-450, the compression station matter, which MoGas fears the Commission will appeal.
- Case No. 08-1160 in the United States Court of Appeals for the District of Columbia Circuit, challenging FERC’s grant of an interstate certificate to MoGas and its approval of MoGas’ corporate reorganization without state authorization.²
- Case No. WD68506 in the Western District of the Missouri Court of Appeals, appealing the refusal by the Circuit Court of Cole County to enjoin MoGas from reorganizing without prior authorization from this Commission.³
- Case No. 08AC-CC00738 in the Circuit Court of Cole County, Missouri, seeking to collect from MoGas its unpaid Commission assessments.⁴

In its *Supplement*, MoGas appears to be adding an allegation that either the General Counsel or the Staff, or perhaps both, are acting without authorization from the Commission.

² This case was dismissed months ago. Perhaps Mr. Brown has overlooked that fact.

³ This case is now awaiting decision. It is an important case with respect to the Commission’s authority over an interstate pipeline that has decided to become a federally-regulated interstate pipeline.

⁴ Contrary to the express statement of MoGas’ counsel in its *Supplement*, MoGas did not become a FERC-regulated interstate pipeline until June 1, 2008, when it began operations under FERC-approved tariffs. Prior to that date, as FERC has expressly acknowledged, MoGas remained subject to the jurisdiction of this Commission and is thus liable for pro-rated Commission assessments up to that date.

Is there any merit to MoGas' position?

No, MoGas' position is without substantial legal merit, as was explained in detail in the *Response* filed herein on September 23, 2008. Nothing contained in MoGas' subsequent filings has cast any doubt on that explanation. MoGas' broader request for relief announced in its *Supplement*, that the Commission, its General Counsel and its Staff cease all activity adverse to MoGas, is absurd on its face and requires no further attention.

What should the Commission do in this case?

The Commission should dismiss MoGas' *Application* forthwith as authorized by 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,⁵ 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.

⁵ I.e., conclusory allegations are ignored. *Holt v. Story*, 642 S.W.2d 394, 395-96 (Mo. App., E.D. 1982).

2003). 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 undersigned has shown 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/ Kevin A. Thompson
KEVIN A. THOMPSON
Mo. Bar No. 36288

General Counsel
Missouri Public Service Commission
P.O. Box 360
Jefferson City, Missouri 65102
573-751-6514 (voice)
573-526-6969 (FAX)
kevin.thompson@psc.mo.gov

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 **20th day of October, 2008**, either by hand delivery, electronic mail, facsimile transmission, or First Class United States Mail, postage prepaid.

/s/ Kevin A. Thompson