

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

In the Matter of MoGas Pipeline LLC's)
Application and Complaint.)

Case No. GC-2011-0138

**STAFF'S RESPONSE TO MOGAS' COMBINED
MEMORANDUM OF LAW IN OPPOSITION**

COMES NOW the Staff of the Missouri Public Service Commission, by and through the Chief Staff Counsel, and for its Response to MoGas' *Combined Memorandum of Law in Opposition*, states as follows:

1. This docket is an application and complaint brought by MoGas Pipeline, L.L.C. ("MoGas"), on November 9, 2010, praying that the Commission will "declare that all rates determined by the PSC pursuant to § 3.2 of the Tariffs of Missouri Gas Company, LLC, and Missouri Pipeline Company, LLC, are invalid, unlawful, unconstitutional, void, and of no force and effect." It arises out of the refusal by the Missouri Court of Appeals to consider MoGas' arguments respecting the lawfulness of its own tariff in its appeal of the Commission's adverse decision in Case No. GC-2006-0491, a complaint brought against MoGas by Staff.¹ The Court, pursuant to § 386.270, RSMo, noted that it was required to deem MoGas' tariff lawful because no one had ever challenged the lawfulness of that tariff in a suit brought for that purpose as the statute requires.²

¹ ***State ex rel. Missouri Pipeline Co. v. PSC***, 307 S.W.3d 162 (Mo. App., W.D. 2009). The Court affirmed the Commission's decision in every respect and that decision is now final.

² *Id.*, at 178.

MoGas has since construed the Court's comments as an "invitation" to bring this action.³

2. Staff filed its *Motion to Dismiss for Lack of Subject Matter Jurisdiction* on November 16, 2010, pointing out several reasons why the Commission is unable to grant MoGas the relief it seeks.

3. Thereafter, Ameren Missouri having been permitted to intervene, filed its *Motion to Dismiss* on December 1, 2010, pointing out other fatal flaws in MoGas' cause of action.

4. MoGas filed its *Combined Memorandum of Law in Opposition* on December 7, 2010, asserting that the motions filed by Staff and by Ameren Missouri "are meritless, and both motions to dismiss must be denied."⁴

5. MoGas asserts, in opposition to Ameren's argument that its application and complaint is an impermissible collateral attack on the Commission's orders in Case No. GC-2006-0491, that (1) there is no collateral attack because the relief MoGas seeks is "entirely different" from the issues addressed in Case No. GC-2006-0491 and (2) that the rule prohibiting collateral attack does not apply when the underlying order is void.⁵

A. MoGas' attempt to characterize this action as something other than a collateral attack on the Commission's decision in Case No. GC-2006-0491 is without merit. Indeed, mischaracterization is the theme of

³ MoGas' *Combined Memorandum of Law in Opposition*, p. 2.

⁴ *Id.*

⁵ *Id.*, at p. 3.

MoGas' memorandum and the principal analytical tool employed. However, insisting that a blatant collateral attack is actually something else is necessarily unavailing.

Nothing prevented MoGas from raising the points it seeks to adjudicate here in Case GC-2006-0491 – indeed, that was where MoGas was required to make those arguments. Having missed that opportunity, MoGas is now without viable options – which is what the Court of Appeals explained to MoGas in the decision that MoGas now mischaracterizes as an “invitation” to file this action.

B. MoGas' attempt to evade § 386.550, RSMo, is also not viable. The Commission's decisions are not judgments and they are protected from collateral attack by a statute, not a judge-made “rule.” The statute in question, § 386.550, RSMo, does not include any exceptions. MoGas seeks to rely on a decision of the United States Supreme Court relating to federal administrative law for the proposition that “an administrative proceeding infected with fundamental procedural error, like a void judicial judgment, is a legal nullity and subject to collateral attack.” Not so in Missouri, however, with respect to a proceeding of the PSC, no matter what MoGas alleges in its *Application and Complaint*. The Commission's decision in Case No. GC-2006-0491 has been affirmed on appeal and is now final. MoGas' insistence that it is somehow void is frivolous.

6. MoGas next challenges Ameren's argument that it failed to invoke the Commission's general complaint authority under § 386.390.1, RSMo, and Staff's

argument that it failed to invoke the Commission's special complaint authority under § 386.390.1, RSMo.

A. With respect to Ameren, MoGas states that "Ameren's argument blatantly ignores the clear and unambiguous allegations in the Application and Complaint, which repeatedly alleges that the PSC's revision of the Tariffs violates Missouri law."⁶ MoGas insists that it "is not collaterally attacking the RRO, but rather, it requests that the PSC's unlawful revisions of the Transporters' Tariffs and rates be declared unlawful."⁷ Taking that assertion at face value, Staff notes that nothing in § 386.390.1, RSMo, however, authorizes its use as a vehicle *to challenge actions of the Commission*:

1. Complaint may be made by the commission of its own motion, or by the public counsel or any corporation or person, chamber of commerce, board of trade, or any civic, commercial, mercantile, traffic, agricultural or manufacturing association or organization, or any body politic or municipal corporation, by petition or complaint in writing, **setting forth any act or thing done or omitted to be done by any corporation, person or public utility**, including any rule, regulation or charge heretofore established or fixed by or for 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; provided, that 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, electrical, water, sewer, or telephone corporation, unless the same be signed by the public counsel or the mayor or the president or chairman 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

⁶ *Id.*, at p. 6.

⁷ *Id.*, at p. 6.

prospective consumers or purchasers, of such gas, electricity, water, sewer or telephone service.

(Emphasis supplied). The Commission is not “any corporation, person or public utility” and this argument by MoGas, consequently, is without merit.

Staff also notes that this argument by MoGas, too, is nothing more than a mischaracterization. The Commission’s decision in Case No. GC-2006-0491 was upheld on appeal in every respect and is now final. That means that there *were* no “unlawful revisions of the Transporters’ Tariffs and rates” by the PSC. Indeed, a review of the Court of Appeals decision affirming the Commission includes numerous eyebrow-raising descriptions of unlawful conduct by MoGas.⁸

B. With respect to Staff, MoGas pontificates that “because MoGas’ Application and Complaint is not about the reasonableness of its rates, Staff’s argument fails.”⁹ Just what is MoGas’ challenging, if not its rates? In the previous section, Staff took at face value MoGas’ insistence that it “is not collaterally attacking the RRO, but rather, **it requests that the PSC’s unlawful revisions of the Transporters’ Tariffs and rates be declared unlawful**” (emphasis supplied).¹⁰ That sentence unmistakably states that MoGas is challenging its rates.

In Case No. GC-2006-0491, the Commission found that MoGas – among other irregularities -- had been illicitly favoring an affiliate by

⁸ See the full cite at Footnote 1.

⁹ MoGas’ *Combined Memorandum*, at p. 7.

¹⁰ *Id.*, at p. 6.

charging it less to transport its gas than it charged non-affiliates.¹¹ The Commission accordingly enforced a provision of MoGas' tariff that provides that the rates charged an affiliate sets a cap on the rates that other customers may be charged and also determined the date upon which that automatic provision became effective.¹² The result is that a number of customers are now seeking to recover millions of dollars of overcharges from MoGas. It is the lawfulness of that tariff provision and of the Commission's determination of the date on which it took effect that MoGas seeks to collaterally challenge in this proceeding. Consequently, it is clear that MoGas' repeated assertions that this case isn't about rates is should be disregarded.

MoGas attempts to bring this case within the ambit of the line of cases descending from ***State ex rel. Laundry v. PSC***.¹³ In *Laundry*, the PSC was called upon to determine which of several tariffed rate classes applied to a water customer – a commercial laundry. The customer was then able to go forward in circuit court with a suit against the utility for money damages. That line of cases is inapposite here. MoGas *is* the utility and customers are already suing MoGas for money damages in circuit court. The Commission exercised its classification authority in its

¹¹ ***State ex rel. Missouri Pipeline Co. v. PSC***, *supra*, 307 S.W.3d at 170-171.

¹² *Id.*, at 168 (“The lowest transportation rate charged to an affiliate shall be the maximum rate that can be charged to non-affiliates.’ § 3.2(b)(1).”).

¹³ 34 S.W.2d 37 (Mo. 1931).

decision in Case No. GC-2006-0491, which is now final and beyond further appeal.

7. MoGas also contends that the PSC retains jurisdiction over its former intrastate tariffs. Not so. MoGas is no longer an entity regulated by this Commission and, indeed, that status was eagerly sought by MoGas at an earlier stage of its relationship with the Missouri PSC and its Staff as a “safe harbor” from regulation. Having sought that status change, MoGas must abide by the effects thereof.

MoGas insists that it “continues to be harmed by the PSC’s erroneous retroactive revision of its Tariffs, and this is so regardless of the fact that it is now regulated by FERC.”¹⁴ Despite the danger of monotony, Staff points out once again that the Commission’s actions in Case No. GC-2006-0491 have been upheld in every respect on appeal and are now final. What is actually harming MoGas is the continuing legal fallout of its loss of Case No. GC-2006-0491 and the public revelation of its chicanery and self-dealing. Given the facts established in that case, there is no reason why this Commission or any Court should grant any relief to MoGas.

8. MoGas next asserts that Staff has misunderstood and mischaracterized the holding of the Missouri Supreme Court in ***State Tax Commission v. Administrative Hearing Commission***.¹⁵ Certainly, the PSC

¹⁴ *Id.*, at p. 10.

¹⁵ 641 S.W.2d 69, 75 (Mo. banc 1982); ***Lightfoot v. City of Springfield***, 361 Mo. 659, 669, 236 S.W.2d 348, 352 (1951) (Public Service Commission “has no power to declare . . . any principle of law or equity”). **S**

can determine whether a rate or tariff is just and reasonable, but only prospectively. MoGas, by contrast, asks the Commission to declare retrospectively that its tariff was unlawful at some point in the past. The Commission is without power to do this; it is no part of its “core function.”

WHEREFORE, Staff prays that the Commission will grant its motion and dismiss this matter for lack of subject-matter jurisdiction; and grant such other and further relief as the Commission deems just.

Respectfully submitted,

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Certificate of Service

I hereby certify that a true and correct copy of the foregoing was served, either electronically or by hand delivery or by First Class United States Mail, postage prepaid, on this **16th day of December, 2010**, on the parties of record as set out on the official Service List maintained by the Data Center of the Missouri Public Service Commission for this case.

s/ Kevin A. Thompson

