

BEFORE THE PUBLIC SERVICE COMMISSION  
OF THE STATE OF MISSOURI

In the Matter of MoGas Pipeline LLC                     )  
   )  
   )                     Cause No. GC-2011-0138

**MOGAS' APPLICATION FOR REHEARING**

COMES NOW, MoGas Pipeline LLC ("MoGas"), pursuant to MO. REV. STAT. § 386.500 and 4 CSR 240.160(1), and respectfully applies for rehearing of the PSC's Order Regarding Motions to Dismiss issued in this cause on January 26, 2011 (the "Order") in the above-captioned proceeding.

**INTRODUCTION**

MoGas Pipeline LLC ("MoGas") brought this case to contest the unlawfulness of certain provisions of its Tariffs as revised and interpreted by the PSC in its Revised Report and Order ("RRO") issued in Case No. GC-2006-0491.<sup>1</sup> A true and correct copy of the RRO is attached hereto as Exhibit A and incorporated by reference. In the RRO, the PSC found that the Tariffs required that MoGas retroactively, and without any notice or other preliminary action, reduce rates charged and paid by customers for the period of July 1, 2003 to June 1, 2006. Because the Tariffs (which pursuant to the PSC's own actions, remain on file to this day) delineate a very specific process that must be followed before an affiliated transaction driven rate change can occur, and then only a prospective rate change, the RRO effectively rewrote the Tariffs. Application of the rewritten Tariffs, which the PSC and several of MoGas' customers are

---

<sup>1</sup> MoGas was formed by the consolidation of two intrastate natural gas transmission pipelines, Missouri Pipeline Company, LLC ("MPC") and Missouri Gas Company, LLC ("MGC") (collectively, the "Transporters"), with one interstate pipeline, Missouri Interstate Gas, LLC. Until April 20, 2007, the Transporters were gas corporations as defined in MO. REV. STAT. § 386.020(18) and were regulated by the Missouri Public Service Commission (the "PSC"). On April 20, 2007, FERC issued an order granting Transporters' application for authority to reorganize as one interstate pipeline and issuing certificates, thereby asserting jurisdiction over Transporters.

attempting to do in three different pending civil suits, will result in an unlawful and unconstitutional retroactive rate adjustment prohibited by decades of Missouri precedent.

MoGas brought its Application and Complaint to challenge the lawfulness of the Tariffs. Specifically, MoGas alleges that the PSC's revision of the Tariffs (1) violates MO. REV. STAT. § 393.140(11) because it permits the PSC to impose rate changes without publishing the proposed rates for thirty days in a form plainly stating the changes proposed to be made in the schedule then in force and the time when the change would go into effect and it permits the PSC to order a rate change without the filing and approval of a compliance tariff by the PSC, and (2) violates due process and the Filed Rate Doctrine in that it permits the PSC to establish new rates for the Transporters different from those properly filed with the PSC, it permits the PSC to order automatic and retroactive rate cuts without observing the procedures of a general ratemaking case, without weighing ratemaking factors, and without considering the reasonableness of the Transporters' resulting rates, and (3) it permits the PSC to impose confiscatory rates.

Both Staff and Ameren filed motions to dismiss the Application and Complaint, arguing, *inter alia*, that it constitutes a collateral attack on the RRO and that the PSC does not have subject matter jurisdiction over the issues raised in the Application and Complaint. On January 26, 2011, the PSC issued its Order in which it found that the Application and Complaint constitutes an impermissible collateral attack on the RRO and that the PSC has no jurisdiction to declare "the lawfulness and constitutionality of a provision in the tariffs of two former pipeline companies that are no longer within the jurisdiction of the Commission." Order, p. 9-10. As a result, the PSC has foreclosed all consideration of the Application and Complaint on the merits,

namely whether the revised Tariffs violate Missouri statutes and the Missouri and federal Constitutions.<sup>2</sup>

However, as explained herein, the PSC's Order is unlawful, unjust and unreasonable. Accordingly, MoGas respectfully applies to the PSC for rehearing on the issues of whether (1) the Application and Complaint constitutes a collateral attack on the RRO; (2) whether the Application and Complaint is not subject to the special pleading requirements of § 386.390 on the narrow reason that it is about past rates; and (3) whether the PSC has subject matter jurisdiction to consider and rule upon the legality and constitutionality of the Tariffs.

## **ARGUMENT**

### **I. STANDARD OF REVIEW**

In adjudicated proceedings before the PSC, the PSC's actions must be both lawful and reasonable. *State ex rel. Atmos Energy Corp. v. Pub. Serv. Comm'n*, 103 S.W.3d 753, 759 (Mo. banc 2003). MO. REV. STAT. § 386.500.1<sup>3</sup> provides that after the PSC has issued an order, a corporation interested therein “shall have the right to apply for a rehearing in respect to any matter determined therein, and the commission shall grant and hold such rehearing, if in its judgment sufficient reason therefore be made to appear[.]” The application “shall set forth specifically the ground or grounds on which the applicant considers said order or decision to be unlawful, unjust or unreasonable.” § 386.500.2.

The issue of whether an order is lawful turns on whether the PSC had the statutory authority to act as it did. *Friendship Village of South County v. Pub. Serv. Comm'n*, 907 S.W.2d

---

<sup>2</sup> For example, MoGas has raised legitimate statutory and constitutional issues that the revised Tariffs violate the filed rate doctrine (*see State ex rel. Associated Natural Gas Co. v. Pub. Serv. Comm'n*, 954 S.W.2d 520, 531 (Mo. App. 1997)), are constitutionally defective under the vagueness doctrine (*see Bouie v. City of Columbia*, 378 U.S. 347 (1964)), and violate the rule against retroactive ratemaking (*see State ex rel. Util. Consumers' Council of Missouri, Inc. v. Pub. Serv. Comm'n*, 585 S.W.2d 41, 58 (Mo. 1979)).

<sup>3</sup> Unless otherwise indicated, all statutory references are to the Missouri Revised Statutes (2010).

339, 345 (Mo. App. 1995). In making this determination, reviewing courts exercise unrestricted, independent judgment and must correct erroneous interpretations of the law. *Id.* Reasonableness depends upon whether (i) the order is supported by substantial and competent evidence on the whole record; (ii) the decision is arbitrary, capricious or unreasonable; or (iii) the PSC abused its discretion. *Id.* at 344-45. A reviewing court will affirm a PSC order only if it is supported by competent and substantial evidence on the record as a whole and is not against the weight of the evidence. *State ex rel. Util. Consumers Council of Mo., Inc. v. Pub. Serv. Comm'n*, 585 S.W.2d 41, 47 (Mo. banc 1979).

In the present case, the Order is unlawful, unjust and unreasonable with regard to the PSC's rulings that (1) the Application and Complaint constitutes an impermissible collateral attack on the RRO (2) the Application and Complaint is not subject to the special pleading requirements of § 386.390 on the narrow reason that it is about past rates; and (3) that the PSC has subject matter jurisdiction to consider and rule upon the legality and constitutionality of the Tariffs. As a result, the PSC should grant rehearing on these issues so as to permit full consideration of the Application and Complaint on the merits.

## **II. THE PSC ERRED IN CONCLUDING THAT THE APPLICATION AND COMPLAINT CONSTITUTES A COLLATERAL ATTACK ON THE REVISED REPORT AND ORDER.**

### **A. MoGas' Application and Complaint Does Not Constitute A Collateral Attack On the 2006 Order and Appeal.**

Despite the fact that the Missouri Court of Appeals has unequivocally stated in *State ex rel. Missouri Pipeline Co. v. Missouri Pub. Serv. Comm'n*, 307 S.W.3d 162 (Mo. App. 2009) that it did *not* address the issues raised in the Application and Complaint, the PSC has erroneously held that the Application and Complaint constitutes a collateral attack on the RRO. A collateral attack is an attempt to impeach a judgment in a proceeding not instituted for the

express purpose of annulling the judgment. *Beil v. Gaertner*, 197 S.W.2d 611, 613 (Mo. 1946); *Williams v. Rape*, 990 S.W.2d 55, 59 (Mo. App. 1999). Thus, a proceeding constitutes a collateral attack only when it challenges “the validity or conclusiveness of the matters adjudicated.” *Flanary v. Rowlett*, 612 S.W.2d 47, 50 (Mo. App. 1981). Furthermore, suits in which a party requests a court to limit the authority granted under a PSC order do not constitute a collateral attack on that order. *Stopaquila.org v. Aquila, Inc.*, 180 S.W.3d 24, 39 (Mo. App. 2005) (trial court’s order limiting the reach of a certificate of convenience and necessity issued by the PSC “in no way questions the validity of the original order” issuing the certificates because “[i]nterpretation of an order necessarily acknowledges its validity and does not constitute a collateral attack.”).

In its Application and Complaint, MoGas is not attempting to impeach or hold invalid the RRO. Instead, the Application and Complaint seeks a judgment upon an issue about which the Court of Appeals expressly stated it has yet to rule, namely the substantive lawfulness of the RRO’s tariff revision in light of Missouri’s long-held prohibition against tariffs containing provisions allowing for retroactive rate adjustments. In seeking a ruling that the Tariffs as rewritten and applied are unconstitutional and unlawful, MoGas is not seeking to void the RRO. That order, however, applied and interpreted as the PSC, Ameren and others would desire, results in an unjust and unconstitutional, retroactive and confiscatory rate adjustment. In short, the revision to the Tariffs created by the RRO does not need to be voided or overturned; however, the Tariffs cannot be applied in an unconstitutional, unlawful and confiscatory manner.

The Court of Appeals recognized this very distinction when it stated that “the lawfulness of the tariffs in this case has not been challenged.” *Missouri Pipeline*, 307 S.W.3d at 178. The Court then reiterated that “because no lawsuit challenging the lawfulness of § 3.2(b)(1) of the

tariffs has been filed, that issue is not properly before us.” *Id.* The lawfulness of § 3.2(b)(1) is exactly the issue that MoGas has now raised for the first time in its Application before the PSC. The PSC cannot be allowed by some sleight of semantics to deny MoGas its opportunity to correct an injustice that the Missouri Court of Appeals has plainly stated has yet to be addressed.

Because the Missouri Court of Appeals stated that the lawfulness and reasonableness of the Tariffs could only be challenged in a separate proceeding, MoGas filed the present Application and Complaint pursuant to § 386.270. This proceeding, by its very nature, is not a collateral attack on the RRO. In *Stopaquila.org v. Aquila, Inc.*, the Court of Appeals held that interpreting and limiting an order of the PSC does not constitute a collateral attack because “[i]nterpretation of an order necessarily acknowledges its validity and does not constitute a collateral attack.” 180 S.W.3d at 39. Similarly, an action under § 386.270 assumes the validity of all rates, tariffs and orders of the PSC until a suit such as the present one is filed. Section 386.270 provides, “All rates, tolls, charges, schedules and joint rates fixed by the commission shall be in force and shall be prima facie lawful, and all regulations, practices and services prescribed by the commission shall be in force and shall be prima facie lawful and reasonable ***until found otherwise in a suit brought for that purpose pursuant to the provisions of this chapter.***” (emphasis added). Thus, the very existence of this provision presumes that an order (like the RRO) issued by the PSC is valid, yet provides an alternate path for later seeking to declare the order unlawful or unreasonable. Indeed, every regulation, practice, and service prescribed by the PSC necessarily stems from a PSC order, and every suit brought under § 386.270 impugns the original order in some indirect way. For the PSC to hold that an action brought expressly under this statute constitutes a collateral attack on the order at issue, as it does

here, would essentially render § 386.270 a nullity. Accordingly, the PSC erred in finding that the Application and Complaint should be dismissed as an attempt to collaterally attack the RRO.

**B. Even if MoGas' Application and Complaint Were Improperly Construed to Constitute a Collateral Attack on the RRO, the Application and Complaint is Nevertheless Proper Because the RRO is Void.**

MoGas does argue, in the alternative, that even if the Application and Complaint is deemed a collateral attack, the attack is permissible because the RRO is void for constitutional reasons. Missouri recognizes a party's right to plead in the alternative and even to state inconsistent claims or defenses. *See* Rule 55.10; *Rauch Lumber Co. v. Medallion Dev. Corp.*, 808 S.W.2d 10, 12 (Mo. App. 1991). In fact, pleading in the alternative is not only authorized, but is favored under the present law as means toward economy of time and expense in judicial proceedings. *Massey v. Rusche*, 594 S.W.2d 334, 337 (Mo. App. 1980). A party has the right to plead in the alternative and may state as many separate claims or defenses as he has, regardless of consistency and whether based on legal or equitable grounds. *Forry v. Dep't of Natural Res.*, 889 S.W.2d 838, 847 (Mo. App. 1994).

Thus, assuming, *arguendo* that MoGas' current action would somehow constitute a collateral attack, which MoGas vehemently denies, MoGas states that, in the alternative, such a collateral attack would be proper because the RRO is void due to MoGas denial of due process.

**1. MoGas Has Raised Valid Substantive Due Process Issues.**

MoGas demonstrated that the automatic adjustment clause in § 3.2 of the Tariffs, as applied by the PSC, violates due process because retroactive ratemaking by the PSC is prohibited. *See State ex rel. AG Processing, Inc. v. Pub. Serv. Comm'n*, 276 S.W.3d 303, 313 (Mo. App. 2008); *State ex rel. Util. Consumers' Council of Missouri, Inc. v. Pub. Serv. Comm'n*, 585 S.W.2d 41, 58 (Mo. 1979) (to order a refund based upon what a "reasonable rate" would

have been would be (retroactive) rate making . . . something we cannot do.”); *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 578 (1981) (not only do “courts lack authority to impose a different rate than the one approved by the Commission, but the Commission itself has no power to alter a rate retroactively.”); *In re Cent. Vermont Pub. Serv. Corp.*, 473 A.2d 1155, 1158 (Vt. 1984) (retroactive ratemaking is impermissible because it deprives the ratepayer of property without due process of law).

MoGas sets forth in its Application and Complaint detailed grounds as to why the prohibited retroactive ratemaking by the PSC violated its due process rights. Specifically, MoGas alleged that the RRO (1) permits the PSC to establish new rates for the Transporters different from those properly filed with the PSC; (2) permits the PSC to order automatic and retroactive rate cuts without observing the procedures of a general ratemaking case, without weighing the ratemaking factors, and without considering the reasonableness of Transporters’ resulting rates; and (3) permits the PSC to impose confiscatory rates. (Application and Complaint, ¶ 54). MoGas further alleged that the revised Tariff rates themselves further violate due process because (1) the rates are unjust, unreasonable, and confiscatory; (2) the rates were declared in a retroactive manner; and (3) the new rates were declared without regard to whether the rates were appropriate. (Application and Complaint, ¶ 64).

The PSC wholly failed to address a single one of these points or to explain why such actions by the PSC would not violate the substantive due process rights of MoGas. Additionally, contrary to the PSC’s Order, none of these due process issues were addressed let alone discussed in the Court of Appeals case.



## **2. MoGas Has Raised Valid Procedural Due Process Issues.**

The PSC further stated that MoGas cannot advance a procedural due process argument because such argument is improper (1) by the explicit terms of § 386.550, and (2) because the Court of Appeals has rejected MoGas' procedural due process argument. However, MoGas' Application and Complaint is not improper under § 386.550, which merely provides that "in all collateral actions or proceedings the orders and decisions of the commission which have become final shall be conclusive." In the first instance, for the reasons stated above, the present action is not a collateral action but an independent action challenging the application of the rewritten Tariffs. Alternatively, § 386.550 cannot preclude an attack on an order which is unlawful, unconstitutional, impermissibly retroactive or confiscatory.

As to the PSC's argument that MoGas cannot raise a due process argument because the argument was already rejected by the Court of Appeals, the PSC is, in essence, arguing for the application of collateral estoppel. For collateral estoppel to apply, the PSC must find that the four required elements are satisfied: (1) the issue decided in the prior adjudication was identical to the issue presented in the present action; (2) the prior adjudication resulted in a judgment on the merits; (3) the party against whom estoppel is asserted was a party or was in privity with a party to the prior adjudication; and (4) the party against whom collateral estoppel is asserted had a full and fair opportunity to litigate the issue in the prior suit. *James v. Paul*, 49 S.W.3d 678, 682-83 (Mo. banc 2001).

The PSC cannot use the Court of Appeal's decision as to whether procedural due process standards were satisfied in the instant matter because the PSC cannot establish elements (1), (2) or (4) of the above test. Element (1) is unsatisfied for the reasons enumerated in greater detail in Section A of this Application. In short, it requires identical issues, and here, the RRO litigation

was focused on the rightfulness of the *application* of the Tariffs, while the issue currently before the PSC is the lawfulness of the Tariff revision. For the same reasons, the prior action did not result in a judgment on the merits of the issues raised by the Application and Complaint and, thus, element (2) is not met.

Element (4) is unsatisfied because the “driving force” in considering whether a full and fair opportunity to litigate in cases of collateral estoppel was had “is the concern for equity and sound public policy.” *James*, 49 S.W.3d at 687. Applying these principles, courts have rejected the use of collateral estoppel on unfairness grounds. *See, e.g., James*, 49 S.W.3d at 689; *SSM Health Care St. Louis v. Radiologic Imaging*, 128 S.W.3d 534, 541-43 (Mo. App. 2003) (stressing that “[f]airness is the overriding consideration”). MoGas contends that granting preclusive effect to the Court of Appeal’s ruling would also be unfair because the PSC has acted outside of its statutory authority in effecting the rate change at issue.

**III. THE PSC ERRED IN CONCLUDING THAT MOGAS’ APPLICATION AND COMPLAINT IS NOT SUBJECT TO § 386.390 ONLY BECAUSE IT IS ABOUT PAST RATES.**

The PSC’s Order is additionally unlawful and unreasonable as to its conclusion that MoGas’ Application did not constitute a § 386.900 ratemaking case only because it was concerned with past rates. The PSC reasoned that:

MoGas’ Application and Complaint does not ask the Commission to undertake a “rate case” to determine the just and reasonable rates that MoGas may charge its customers. MoGas is only concerned about past rates. And since that company is now regulated by the FERC, this Commission would have no jurisdiction to set future rates. For that reason, MoGas’ Application and Complaint does not fall within the restriction on the bringing of rate complaints found in Section 386.390.1, RSMo.

Order, pp. 3-4.

MoGas however, contends that its Application and Complaint is not barred by § 386.390, not only narrowly because of its concern as to past rates, but also more broadly because it is not a ratemaking case. In ratemaking cases, the question considered is a calculation of what should be charged for a utility service. *State ex rel. Assoc. Natural Gas Co. v. Pub. Serv. Comm'n of Mo.*, 706 S.W.2d 870, 873 (Mo. App. 1985). The PSC must consider all relevant factors, including all operating expenses and the utility's rate of return, when determining a rate. *State ex rel. Office of Pub. Counsel v. Pub. Serv. Comm'n*, 858 S.W.2d 806, 812 (Mo. App. 1993). Ratemaking thus involves a balancing of the investor and the consumer interests such that there is enough for operating expenses and for the capital costs of the business, including service on debt and dividends on stock. *State ex rel. Associated Natural Gas Co. v. Pub. Serv. Comm'n of Missouri*, 706 S.W.2d 870, 873 (Mo. App. 1985). The return to the equity owner should also be commensurate with returns on investments in other enterprises having corresponding risks. *Id.* See also *State ex rel. Laundry, Inc. v. Pub. Serv. Comm'n*, 34 S.W.2d 37 (Mo. 1931) (When a dispute is based upon the application of a particular rate to a particular set of customers, and not about the price of the commodity as such price has been fixed and established by the various schedules of rates approved by the PSC, the question is one of the appropriateness of discriminatory pricing and not one of reasonableness of the rates and is not subject to the requirements of § 386.390).

The PSC properly concluded that MoGas' Application and Complaint was not barred by § 386.390. However the PSC erred in coming to what it called a "narrow" conclusion on that issue based only on the fact that the Application was concerned with past rates. Instead, MoGas' Application and Complaint is not subject to § 386.390 under any circumstances because it does not present a question of calculating the reasonable rate a utility may charge for its services.

**IV. THE PSC ERRED IN CONCLUDING THAT IT IS WITHOUT JURISDICTION TO DECIDE THE  
LAWFULNESS AND CONSTITUTIONALITY OF THE TARIFFS.**

**A. The Missouri Supreme Court has Expressly Held that the PSC Must Pass on  
the Types of Issues Raised in the Application and Complaint.**

The PSC's Order is further unlawful and unreasonable as to its conclusion that the PSC is without jurisdiction to decide the lawfulness and constitutionality of the Tariffs and the rates therein. The Missouri Supreme Court has expressly held that the PSC not only has subject matter jurisdiction to consider constitutional claims related to issues within its jurisdiction, but it in fact *must* pass on such issues. *Speas v. Kansas City*, 44 S.W.2d 108, 114-15 (Mo. 1931). In *Speas*, Kansas City taxpayers brought suit against Kansas City in Circuit Court, alleging that certain provisions of the city's charter permitting it to supply water to nonresidents violated due process. *Id.* at 114. The Court looked to the regulatory powers conferred upon the PSC in the Public Service Commission Act, which provides that "the jurisdiction, supervision, powers, and duties of the [PSC] shall extend to the service and rates of any municipally owned water plant where such service or rates are for water to be furnished or used beyond the corporate limits of such municipality." *Id.* The Court concluded that "[c]omplaints of this character must be heard and passed on first by the public service commission." *Id.* See also *State ex rel. Orscheln Bros. Truck Lines, Inc. v. Pub. Serv. Comm'n*, 110 S.W.2d 364, 366 (Mo. App. 1937) (following *Speas* and holding that the PSC has jurisdictional authority to interpret its prior orders, noting that "[d]enial of the power of the commission to ascribe a proper meaning to its orders would result in confusion and deprive it of power to function. In interpreting its orders it does not act judicially, but as a fact-finding agency."). Furthermore, the PSC has subject matter jurisdiction "to pass on the reasonableness and lawfulness of rates." *A.C. Jacobs and Co., Inc. v. Union Electric Co.*, 17 S.W.3d 579, 583 (Mo. App. 2000). Because matters within the PSC's

jurisdiction must first be determined by it before the courts have jurisdiction to make judgments in the controversy, the PSC erred in finding it lacks subject matter jurisdiction in the present case. *See State ex rel. Hoffman v. Public Serv. Comm'n*, 530 S.W.2d 434 (Mo. App. 1975).

**B. The Issues Raised in the Application and Complaint are Incidental and Necessary to the Proper Discharge of the PSC's Functions and are Within the PSC's Expertise.**

The PSC bases its denial of subject matter jurisdiction on the illogical and unsubstantiated conclusion that it “has no particular expertise in deciding the lawfulness or constitutionality of a provision of a tariff issued by two companies that no longer exist, and which are not subject to the jurisdiction of this Commission.”<sup>4</sup> Order, p. 9 (*quoting Tax Comm'n v. Admin. Hearing Comm'n*, 641 S.W.2d 69, 75 (Mo. 1982)). This holding is not only legally unsupported; it is in direct contravention of Missouri law.

Administrative agencies in Missouri have the power and authority to apply principles of law as announced by the appellate courts to the facts found “to resolve issues within the given area of agency expertise.” *Tax Comm'n*, 641 S.W.2d at 75. Furthermore, administrative agencies have full authority to 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.” *Id.* (internal citations omitted). Indeed, if an administrative agency “should be denied such power, it would practically be impossible for [it] to perform its duty of administering [its governing act].” *Liechty v. Kansas City Bridge Co.*, 162 S.W.2d 275, 280 (Mo. 1942). Missouri courts have readily found in various contexts that the

---

<sup>4</sup> It bears noting that the PSC also erroneously notes that that MPC and MGC “no longer exist.” This is simply not the case. As well known by the PSC, and as clearly alleged in the Application and Complaint, MGC and MPC consolidated along with their affiliate entity Missouri Gas Company, LLC under the new name of MoGas. *See* Application and Complaint, ¶ 2. Specifically, as part of the consolidation, MGC changed its name to MoGas Pipeline LLC and has never ceased to exist. A true and correct copy of the Amendment to MGC's LLC Certificate of Registration filed with the Missouri Secretary of State and reflecting MGC's name change is attached hereto as Exhibit B and incorporated by reference.

determination of legal issues is incidental and necessary to the proper discharge of administrative functions. *See e.g., id.* (legal determination of the validity of a divorce proceeding is incidental and necessary to the Workmen’s Compensation Commission’s determination of whether a widow is entitled to file a claim for her former deceased husband’s employment injury).

Here, the determination of the lawfulness of tariffs issued by the PSC and which are currently being applied to and litigated by the PSC itself and natural gas entities and end users under its regulation is clearly incidental and necessary to the discharge of the PSC’s administrative functions and within its expertise. Section 386.250(1) delineates a broad spectrum of administrative functions entrusted to the PSC:

[t]he 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 PSC’s governing statutes expansively provide that the PSC shall “have general supervision of all gas corporations.” § 393.140(1). Furthermore, the Missouri legislature has conferred to the PSC broad powers regarding determining, setting and approving gas corporations’ rates. *See* §§ 393.140(5), 393.140(11). *See also Inter-City Beverage Co. v. Kansas City Power & Light Co.*, 889 S.W.2d 875, 877-78 (Mo. App. 1994) (“the regulation and fixing of rates or charges for public utilities . . . is the function of the MPSC”). Moreover, Chapter 386 expressly contemplates that the PSC shall determine whether “regulations, practices and services prescribed” by it are lawful and reasonable. *See* § 386.270. In conferring upon the PSC these broad duties and functions of regulating rates charged by and to Missouri natural gas corporations, the Missouri legislature has recognized the PSC’s expertise relating to tariffs and

rates. An analysis of the lawfulness of tariffs issued by the PSC undoubtedly falls within this grant of authority to the PSC.

Indeed, the PSC exercised its broad expertise relating to rates and tariffs when it approved and issued the very Tariffs it now declines to consider – a process which necessarily invoked the PSC’s rate expertise and an in depth analysis of the Tariffs. Furthermore, the PSC utilized this same expertise when it willingly and enthusiastically “enforced” MPC and MGC’s Tariffs in issuing the RRO in GC-2006-0491. The PSC’s conclusion in its Order that it lacks the “expertise” to rule upon the lawfulness of the Tariffs diametrically conflicts with its earlier position in approving the Tariffs and then later “enforcing” the Tariffs in 2006. For the PSC to conclude it has jurisdiction to decide issues pertaining to MoGas’ Tariffs in 2007, but deny jurisdiction in 2011 is wholly irrational and arbitrary.

Furthermore, the determination of the lawfulness of tariffs and rates set by the PSC and which are presently at the center of litigation involving PSC-regulated entities and the PSC itself invokes issues incidental and necessary to the PSC’s administrative functions. That MGC and MPC have consolidated to form MoGas and that MoGas is now FERC-regulated is wholly irrelevant to the issue of whether the PSC has jurisdiction to consider this issue. In its Order, the PSC fails to show why its admitted expertise relating to tariffs is somehow lost simply because the Tariffs at issue (which the Order itself acknowledges are presently being utilized in civil courts and are still on file with the PSC) were issued to two companies that consolidated or because MoGas is now FERC-regulated. In fact, the PSC’s purported lack of expertise for these reasons is belied by the PSC’s consistent advancement of a contrary position. Most tellingly, the PSC itself found in the RRO that it would retain jurisdiction over the interpretation and

enforcement of the Tariffs even though MoGas (the successor to MGC and MPC) was subject to the exclusive jurisdiction of FERC at that time. RRO, p. 12.

Similarly, the PSC's contention that MoGas' being under FERC's exclusive regulation<sup>5</sup> somehow deprives it of jurisdiction is belied by its own prior conduct. When the PSC issued the RRO, MoGas had been under FERC's jurisdiction for several months. If the PSC lacks subject matter jurisdiction in this case because MPC and MGC became FERC-regulated, which was the case at the time the RRO was issued, then the RRO should be deemed void for lack of the PSC's subject matter jurisdiction.

Accordingly, the PSC's conclusion that it is without subject matter jurisdiction to consider and rule upon the issues in the Application and Complaint is unsupported by Missouri law and is unreasonable. The PSC should grant rehearing in order to reconsider the issue and rule in accordance with Missouri law.

### **CONCLUSION**

For the reasons stated herein, MoGas respectfully applies to the Public Service Commission to Order a Rehearing on the issues on Staff's and Ameren's Motions to Dismiss MoGas' Application and Complaint, and for such other and further relief as it deems necessary.

---

<sup>5</sup> This argument itself is disingenuous since the PSC has repeatedly claimed that MoGas is *not* properly under FERC's jurisdiction.



Respectfully submitted,

CARMODY MACDONALD P.C.

By: /s/ David H. Luce  
Gerard T. Carmody, # 24769  
David H. Luce, #36050  
Teresa Dale Pupillo, #42975  
Lauren M. Wacker, #62087  
120 South Central Avenue, Suite 1800  
St. Louis, Missouri 63105  
Telephone (314) 854-8600  
Facsimile (314) 854-8660  
gtc@carmodymacdonald.com  
dhl@carmodymacdonald.com  
tdp@carmodymacdonald.com  
lnw@carmodymacdonald.com

BROWN LAW OFFICE L.C.

David G. Brown, #42559  
1714 Brandeis Court, Suite A  
Columbia, MO 65203  
(573) 777-1188 Telephone  
(800) 906-6199 Facsimile  
dbrown@brown-law-office.com

Attorneys for MoGas Pipeline LLC

## **CERTIFICATE OF SERVICE**

The undersigned hereby certifies that the foregoing was served via electronic mail (e-mail) on this 4th day of February 2011, on

Kevin A. Thompson  
Chief Staff Counsel  
Public Service Commission  
P.O. Box 360  
Jefferson City, MO 65102  
[kevin.thompson@psc.mo.gov](mailto:kevin.thompson@psc.mo.gov)  
**Attorney for the Staff of the Commission**

Office of the Public Counsel  
P.O. Box 2230  
Jefferson City, MO 65102  
[opcservice@ded.mo.gov](mailto:opcservice@ded.mo.gov)  
**Attorney for the Office of Public Counsel**

Michael R. Tripp  
Amanda Allen Miller  
111 South Ninth Street, Suite 200  
P.O. Box 918  
Columbia, MO 65205-0918  
[tripp@smithlewis.com](mailto:tripp@smithlewis.com)  
[miller@smithlewis.com](mailto:miller@smithlewis.com)

Wendy K. Tatro  
Associate General Counsel  
Ameren Services Company  
1901 Chouteau Ave.  
P.O. Box 66149 (MC 1310)  
St. Louis, MO 63166-6149  
[AmerenMOService@ameren.com](mailto:AmerenMOService@ameren.com)  
**Attorneys for Ameren Missouri**

David Woodsmall  
428 E. Capitol Avenue, Suite 300  
Jefferson City, MO 65101  
[dwoodsmall@fcplaw.com](mailto:dwoodsmall@fcplaw.com)  
**Attorney for Municipal Gas Commission of Missouri**

/s/ David H. Luce  
**Attorney for MoGas Pipeline, LLC**