

**STATE OF MISSOURI
PUBLIC SERVICE COMMISSION**

At a session of the Public Service
Commission held at its office in
Jefferson City on the 26th day of
January, 2011.

In the Matter of MoGas Pipeline, LLC's)
Application and Complaint) **File No. GC-2011-0138**

ORDER REGARDING MOTIONS TO DISMISS

Issue Date: January 26, 2011

Effective Date: February 5, 2011

On November 9, 2010, MoGas Pipeline, LLC, filed a pleading entitled Application and Complaint. That pleading includes three counts. The first count asks the Commission to declare that a section of the tariffs of Missouri Gas Company, LLC, and Missouri Pipeline Company, LLC, MoGas' predecessor companies, is unlawful, unconstitutional, and void *ab initio*. The second count asks the Commission to declare that the rates set forth in those tariffs as "revised, interpreted and applied by the Missouri Public Service Commission in the Revised Report and Order, are invalid, unlawful, unconstitutional, void, and of no force and effect."¹ The third count asks the Commission to 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."

On November 15, the Commission directed that notice of MoGas' filing be given to potentially interested parties and established December 3 as the deadline for submission of applications to intervene. Union Electric Company, d/b/a Ameren Missouri and the

¹ The Revised Report and Order to which MoGas refers was issued by the Commission on October 11, 2007, in File No. GC-2006-0491.

Municipal Gas Commission of Missouri filed timely applications to intervene and the Commission allowed both entities to intervene.

The Staff of the Commission filed a motion on November 16, asking the Commission to dismiss MoGas' application for lack of subject matter jurisdiction. Ameren Missouri filed a separate motion to dismiss on December 1. MoGas responded to both motions on December 7. Ameren Missouri replied to MoGas' response on December 15. Staff replied the next day, on December 16.

The motions to dismiss filed by Staff and Ameren Missouri argue on several bases that the Commission lacks subject-matter jurisdiction over MoGas' application and complaint. The first basis offered by Staff and Ameren Missouri is a contention that MoGas' action is a complaint about its rates.

Section 386.390.1, RSMo 2000, the statutory section under which MoGas purports to bring its action, generally allows anyone to bring a complaint before the Commission regarding:

... 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.

Furthermore, Section 386.400, RSMo 2000, specifically allows "[a]ny corporation, person or public utility" to "complain on any of the grounds upon which complaints are allowed to be filed by other parties." Thus, MoGas clearly has a right to bring a complaint before the Commission.²

² Because MoGas is clearly a "corporation, person or public utility," Staff's argument that MoGas is now regulated by the FERC and thus is no longer a public utility is irrelevant to the determination of the Commission's jurisdiction to hear MoGas' complaint.

However, complaints about a utility's rates are treated differently under the statute.

Section 386.390.1 goes on to state:

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

MoGas does not fall within the category of entities authorized to bring a complaint about its rates. On that basis, Staff urges the Commission to dismiss MoGas' action.

Staff's assertion that MoGas is not authorized to bring a complaint about its own rates is supported by a 1975 decision of the Missouri Supreme Court. In *State ex rel. Jackson County v. Public Service Commission*,³ the Supreme Court held that Sections 386.390 and 386.400, RSMo, do not give a utility a right to file a complaint about the reasonableness of its own rates.⁴

In its response, MoGas asserts that the pleading it has filed is not, in fact, a challenge to its own rates. Instead, it claims to be challenging the legality and constitutionality of the Commission's interpretation of the tariff by which the Commission indicated those rates were to be calculated.

On that narrow point, MoGas is correct. 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

³ 532 S.W.2d 20 (Mo. banc 1975)

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.

Since this is not a rate complaint, the question must be asked, what sort of complaint is it? That question leads into the next argument raised by Staff and Ameren Missouri for the Commission's dismissal of MoGas' action. Ameren Missouri and Staff contend MoGas' action is an improper collateral attack on an earlier order of the Commission.

Section 386.550, RSMo 2000, simply states: "In all collateral actions or proceedings the orders and decisions of the commission which have become final shall be conclusive." The Commission's revised report and order in File Number GC-2006-0491, which interpreted the tariffs of MoGas' predecessors, and about which MoGas complains, was appealed to the Missouri Court of Appeals, and was affirmed by that court in *State ex rel. Missouri Pipeline Co. v. Mo Pub. Serv. Comm'n.*⁵ Thus, that Commission decision is now conclusive and MoGas cannot challenge that decision in this new proceeding.

MoGas attempts to avoid the conclusive effects of the Commission's prior decision by arguing that it is not attacking that decision, but rather is challenging the legality and constitutionality of the underlying tariff that the Commission interpreted in that decision. It claims the validity of the tariff itself was not at issue in the 2006 case and refers to a paragraph in the Court of Appeals' decision affirming the Commission's revised report and order to support that conclusion. In that decision, the court found that because MoGas' predecessors did not bring a lawsuit to challenge the lawfulness of the tariff, the lawfulness of the tariff was not properly before the court. For that reason, the court rejected without

⁴ *Jackson County*, at 27.

deciding the argument that the tariffs contain an unlawful automatic rate adjustment clause.⁶ MoGas claims this Application and Complaint is its attempt to properly challenge the lawfulness of the tariff.

MoGas' argument is undermined by a reading of its Application and Complaint, which is mainly devoted to attacking the validity of the Commission's revised report and order in GC-2006-0491. Those portions are clearly an improper collateral attack on the revised report and order. Any question of the validity and correctness of the Commission's interpretation, or what MoGas calls a revision, of the tariff, was resolved by the Court of Appeals when it decided MoGas' direct appeal of the Commission's revised report and order. That aspect of the Commission's decision cannot be attacked again in this action.

MoGas argues that its collateral attack on the Commission's revised report and order is nonetheless appropriate because that report and order is void. In support of that argument, MoGas asserts the Commission violated the company's due process rights when making its decision against MoGas' predecessor companies in GC-2006-0491.

In support of this argument, MoGas cites various cases in which judgments were found to be subject to collateral attack because the court that rendered the judgment was without jurisdiction or acted in a manner inconsistent with due process. MoGas does not challenge the jurisdiction of the Commission and its allegations that the Commission denied it procedural due process were already raised in the direct appeal of the Commission's

⁵ 307 S.W.3d 163 (Mo. App. W.D. 2010).

⁶ *Missouri Pipeline*, at 178.

report and order in that earlier case. The Court of Appeals thoroughly examined and explicitly rejected those due process arguments in its decision.⁷

MoGas also alleges the Commission's decision in its report and order denied it substantive due process. However, that sort of due process claim is itself a collateral attack on an order that the Court of Appeals affirmed after finding it to be "lawful and reasonable in all respects."⁸ MoGas' allegation is not the sort of claim that the courts have indicated would justify a collateral attack on a procedurally valid order.

In part, MoGas is attempting to attack the Commission's prior interpretation of the tariff. That attack is a collateral attack on a conclusive order of the Commission and is improper by the explicit terms of Section 386.550, RSMo. As a result, that portion of MoGas' Application and Complaint must be dismissed.

However, in part, MoGas is challenging the tariff itself. Is that part of its Application and Complaint barred as a collateral attack on the Commission's order?

The Missouri Court of Appeals rejected a similar attempt to challenge a tariff provision in *State ex rel. Licata, Inc. v. Pub. Serv. Comm'n.*⁹ In that case, Licata, Inc., owned and operated a mobile home park in Kansas City. Before 1985, Licata took natural gas service from Kansas Power & Light for the mobile home park through a master meter. Licata resold the natural gas to its tenants and delivered that gas to the individual mobile homes through its own distribution system. In 1985, after conducting a hearing, the Commission approved a change in the gas company's tariff that prohibited the resale of natural gas delivered to a master meter, the arrangement that Licata had been using.

⁷ *Missouri Pipeline*, at 174-175.

⁸ *Missouri Pipeline*, at 183.

Subsequently, the gas company notified Licata that because of the tariff change, it would no longer be able to supply it with gas under the old arrangements. Licata responded by filing a complaint with the Commission challenging the legality and constitutionality of the gas company's tariff provision. The Commission dismissed Licata's complaint and the matter was appealed.

When its action was challenged as an improper collateral attack on the Commission's order approving the tariff provision, Licata argued that it was not attacking the Commission's order, but was instead challenging the tariff provision. The Court of Appeals rejected that argument holding "[w]hen Licata attacks Article 10, it must necessarily attack the order which enabled KPL to adopt and enforce Article 10." Since Licata could not collaterally attack that order, the Court of Appeals held that Licata could not attack, and was bound by, the tariff provision.¹⁰

Ameren Missouri suggests the *Licata* decision is controlling in this case and requires the dismissal of MoGas' entire action as an improper collateral attack. However, *Licata* differs from the current case in that the Commission order that was subject to collateral attack in *Licata* was the order that approved the challenged tariff provision. As MoGas argues, the Commission's revised report and order and the Court of Appeal's decision affirming that report and order never addressed the legality or constitutionality of the tariff provision that reduced MoGas' rates to nonaffiliated shippers on the pipeline. Perhaps MoGas is collaterally attacking the Commission order that originally approved the tariff provision, but if so, that order does not appear in the record currently before the Commission.

⁹ 829 S.W.2d 515 (Mo. App. W.D. 1992).

Assuming MoGas' challenge to the tariff is not an improper collateral attack on the Commission's previous order, does the Commission have jurisdiction to consider that challenge? If stripped of its extraneous collateral attacks against the Commission's Revised Report and Order in GC-2006-0491, all that is left of MoGas' Application and Complaint is a prayer that the Commission declare the company's tariff to be unlawful or unconstitutional.

Missouri law is clear; the power to issue a declaratory judgment is a judicial remedy that is not available to administrative agencies.¹¹ More specifically, this Commission has "no power to declare or enforce any principle of law or equity."¹² MoGas correctly points out that although this Commission may not render declaratory judgments, it has subject matter jurisdiction to apply existing law to resolve the issues before it.¹³ More specifically, "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.'"¹⁴ However, "[a]gency adjudicative power extends only to the ascertainment of facts and the application of existing law thereto in order to resolve issues within the given area of agency expertise."¹⁵

MoGas asks the Commission to declare that certain tariff provisions are unlawful and unconstitutional. The challenged tariffs were issued by MoGas' predecessor companies, Missouri Pipeline Company, LLC, and Missouri Gas Company, LLC. Those two companies

¹⁰ *Licata*, at 518.

¹¹ *State Tax Comm'n v. Admin. Hearing Comm'n*, 641 S.W. 2d 69 (Mo. banc 1982).

¹² *Lightfoot et al. v. City of Springfield*, 361 Mo. 659, 669, 236 S.W. 2d 348, 352 (Mo 1951).

¹³ *Mikel v. Pott Indus./St. Louis Ship*, 896 S.W. 2d 624 (Mo. banc 1995).

¹⁴ *State Tax Comm'n*, at 75, quoting *Liechty v. Kansas City Bridge Co.*, 162 S.W. 2d 275, 279 (Mo. 1942).

were reorganized into MoGas and the resulting interstate pipeline company is now subject to the exclusive jurisdiction of the Federal Energy Regulatory Commission.¹⁶ Therefore, the tariffs on file with the Commission are no longer in effect and the Commission's decision about those tariffs can have not prospective effect on MoGas or its customers.

That is not to say that the question of the lawfulness and constitutionality of the tariff provision is moot. As MoGas indicates, several customers have used the tariff provision to bring civil suits asserting a right to refunds from MoGas. However, the Commission's jurisdiction to decide upon the validity of the challenged tariffs is limited to "the ascertainment of facts and the application of existing law thereto in order to resolve issues within the given area of agency expertise."¹⁷

This Commission 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. Such a decision is properly within the jurisdiction of the circuit court, not this Commission. On that basis, the Commission finds that it has no jurisdiction over that portion of the Application and Complaint that directly challenges the lawfulness and constitutionality of the tariff.

The portion of MoGas' Application and Complaint that seeks to challenge the Commission's decision in its Revised Report and Order issued in File Number GC-2006-0491 is an improper collateral attack on that conclusive order. Furthermore, the Commission has no jurisdiction over MoGas' request for a declaration regarding the lawfulness and constitutionality of a provision in the tariffs of two former pipeline companies

¹⁵ *State Tax Comm'n*, at 75.

¹⁶ *Application and Complaint*, Paragraphs 1-3.

that are no longer within the jurisdiction of the Commission. The Commission will therefore dismiss MoGas' Application and Complaint.

THE COMMISSION ORDERS THAT:

1. The Application and Complaint of MoGas Pipeline LLC is dismissed.
2. This order shall become effective on February 5, 2011.

BY THE COMMISSION



Steven C. Reed
Secretary

(S E A L)

Clayton, Chm., Davis, Jarrett, Gunn,
and Kenney, CC., concur.

Woodruff, Chief Regulatory Law Judge

¹⁷ *State Tax Comm'n*, at 75.