BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

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

AMEREN MISSOURI'S REPLY TO
MOGAS' MEMORANDUM OF LAW IN OPPOSITION

COMES NOW Union Electric Company, d/b/a Ameren Missouri ("Ameren Missouri"), and provides the following reply to MoGas' Memorandum of Law in Opposition to its Motion to Dismiss.

A. No one, including the Missouri Court of Appeals for the Western District, "invited" MoGas to file this action.

In what can only be understood as an implicit acknowledgment that its Application and Complaint has no basis in law, MoGas suggests it has support otherwise by making an astonishing claim—that the appellate court that reviewed and denied MoGas' appeal of the Revised Report and Order somehow "invited" it to bring this action:

> ***MoGas brought this action at the invitation of the Missouri Court of Appeals for the Western District*** which held, in an earlier review of the RRO, that because MoGas had not filed an action such as the present one, it could not review MoGas' claim that the RRO accomplished the prohibited retroactive rate adjustment.[1]

There was no such invitation.

After already having determined that the Commission had authority to interpret section 3.2(b)(1) of the tariff, the Western District was simply explaining

[1] Memorandum of Law at 2 (emphasis added).

why the issue raised by MoGas in its appeal—that tariff provision 3.2(b)(1) was an unlawful automatic rate adjustment—was ***not*** an issue properly before the court on appeal.[2]

Because the MoGas predecessors had not challenged the lawfulness of the tariff but instead had taken the position that the tariffs were "lawful, reasonable, and established pursuant to a lawful ratemaking process," the Court concluded that it "must deem the tariff provision lawful and reasonable" and uphold the Revised Report and Order:

> Accordingly, we hold that the Commission acted lawfully in enforcing the tariffs and in declaring which rate scheme applied to the Transporters' non-affiliate customers. Moreover, the lawfulness of the tariffs is not properly before us, and therefore we reject without deciding the Transporters' argument that the tariffs contain an unlawful automatic rate adjustment clause.[3]

There is a huge difference between actually inviting an appellant to file *another* lawsuit (an invitation that courts are not known to extend in the first place) and politely telling an appellant that it did not pursue the proper procedural path in order to raise the claim of error it is now making on appeal.

Simply put, the Western District did not send an invitation to MoGas, so no R.S.V.P. in the form of a new lawsuit was requested. Instead, the message was quite clear: MoGas did not get the issue properly before the appellate court because it did not challenge the tariff provision. In essence, the statement in the

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[2] State *ex rel*. Missouri Pipeline Co., L.L.C., et al. v. Pub. Serv. Comm'n, 307 S.W.3d 162, 178 (Mo. App. W.D. 2010).
[3] Id.

opinion was nothing more than the appellate court telling the MoGas predecessors "Return to Sender."

B. Even had there been some kind of "invitation" for MoGas to file this suit, MoGas is barred by statute from collaterally attacking the Revised Report and Order.

Inexplicably, MoGas rejects the invitation it claims it received. The appellate court's opinion clearly pointed to the fact that no challenge had been made to the tariff ***language***[4]—therefore, it had no choice but to treat the tariff language as lawful. If an invitation is to be read into the opinion, it would be that the predecessors should challenge the language found in Section 3.2(b)(1). Instead, MoGas challenges the Commission's interpretation and application of that language[5]—the ***exact*** same argument the appellate court rejected.[6] If a collateral attack is not barred in this instance, it is hard to imagine what circumstance a collateral attack would be barred.

On page 4 of its Memorandum of Law, MoGas argues that "even if" its current action was a collateral attack under the specific PSC statute barring such attacks, the bar would not apply because the underlying judgment is void in that the Commission acted outside its authority and violated the due process of

[4] 307 S.W.3d at 178 ("The Transporters did not bring a lawsuit challenging the lawfulness of their tariffs.").
[5] *See* Application and Complaint at ¶ 11 ("This case concerns the lawfulness of certain provisions of Transporters' tariffs ***as interpreted by the PSC***.") (emphasis added); Memorandum of Law at 2 ("MoGas brought this Application and Complaint to challenge the lawfulness of the Tariffs ***as revised and interpreted by the RRO***.") (emphasis added).
[6] 307 S.W.3d at 177 ("The Commission had the authority ***to interpret the tariff*** and to determine which rate scheme applied to certain customers.") (emphasis added).

MoGas.[7] Given that the type of due process claims raised by MoGas are not the type necessary to void a judgment and the fact that these very same claims were raised by MoGas in its appeal of the Revised Report and Order (and rejected by the Western District), the Revised Report and Order is not a void judgment subject to collateral attack.

A judgment is void where the court lacked jurisdiction over the subject matter or the parties, or where the court acted "in a manner inconsistent with due process."[8] Making no claim that the Commission lacked jurisdiction, MoGas is left to argue that the Commission acted inconsistent with due process.[9] In order to void a judgment—an act disfavored by the courts[10]—the nature of the due process violations justifying such an action are not of the kind asserted by MoGas here.[11] Due process requires that basic protections be provided a party,

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[7] Memorandum of Law at 5.
[8] Taylor v. Taylor, 47 S.W.3d 377, 385 (Mo. App. W.D. 2001).
[9] Memorandum of Law at 5.
[10] Downing v. Howe, 60 S.W.3d 646, 650 (Mo. App. S.D. 2001) ("'In the sound interest of finality, the concept of void judgment must be narrowly restricted.'").
[11] *See, e.g.,* Taylor v. Taylor, 47 S.W.3d 377 (Mo. App. W.D. 2001) (voiding judgment in divorce proceeding which purported to terminate parental rights because statutory scheme *required* separate action initiated by independent petition); Estate of Pittsenbarger, 136 S.W.3d 558 (Mo. App. W.D. 2004) (where there was no knowing waiver by appellant of her right to take against deceased husband's will, judgment declaring appellant's waiver was valid held void on due process grounds); City of Excelsior Springs v. Elms Redevelopment Corp., 18 S.W.3d 53 (Mo. App. W.D. 2000) (court's failure to ensure that absent parties were adequately represented violated litigants' due process rights resulting in void judgment).

and it generally focuses on whether a party had notice and an opportunity to be heard, as well as whether the process was fundamentally fair.[12]

Having vigorously defended itself in the overcharge complaint before the Commission, MoGas would seem to have little argument that it has a due process complaint. MoGas' argument is further diminished—even negated—by the fact that MoGas continued to vigorously defend itself by appealing the Commission's Revised Report and Order all the way to the Missouri Supreme Court.[13] Had the Commission acted "inconsistent with due process," surely this was a matter of consideration for an independent court reviewing the Commission's conduct.

In fact, it was. MoGas' predecessors raised specific due process concerns in their appeal of the Commission's Revised Report and Order. First, the Transporters claimed that they did not have sufficient notice of the charges against them; after examining their claim, however, the appellate court rejected

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[12] J.C.W. *ex rel.* Webb v. Wyciskalla, 275 S.W.3d 249, 253 (Mo. *banc* 2009) (when a court concludes it lacks personal jurisdiction, "it means simply that the constitutional principle of due process bars it from affecting the rights and interests of a particular person"); C.J.G. v. Missouri Dept. of Social Serv., 219 S.W.3d 244, 248 (Mo. 2007) (fundamental requirement of due process in any judgment to be accorded finality is notice and an opportunity to be heard); Cody v. Old Republic Title Co., 156 S.W.3d 782, 784 (Mo. App. E.D. 2004) (failure to give adequate notice results in a violation of that person's due process rights); Breckenridge Material Co. v. Enloe, 194 S.W.2d 915, 921 (Mo. App. E.D. 2006) ("Constitutional due process requires that for a judgment entered against a party not in default to be valid, there must have been notice of the trial setting and an opportunity to be heard must have been granted at a meaningful time and in a meaningful manner.").

[13] Ameren Missouri notes that of the many cases its counsel reviewed involving collateral attacks of judgments, none of the collateral judgments held to be void were judgments that had been directly reviewed by appellate courts.

this claim, holding that due process was "satisfied" in that the Transporters "had the knowledge necessary to defend against the charges."[14] In rejecting the MoGas predecessors' second due process argument—that the Commission improperly re-opened the hearings for oral argument, the appellate court held that because the Transporters' attorney was given the same opportunity to summarize evidence and advocate for the Transporters' position, due process was satisfied.[15] The Transporters' final due process claim was that the Commission improperly relied on re-created invoices to determine when discounted rates were being given to Omega; this, too, was rejected by the appellate court because the Transporters "had ample notice and opportunity to defend themselves on this issue."[16]

In this particular action, MoGas raises "different" due process claims than the Transporters did on appeal. In this action, MoGas specifically sets out the basis for its due process challenge in paragraphs 54, 59 and 64 of the Application and Complaint. However, these "due process" claims are, in fact, substantive rather than procedural claims—that the Commission engaged in retroactive ratemaking, in automatic rate adjustment, and violated the Filed Rate Doctrine by retroactively revising Section 3.2(b)(1) in the Tariffs.[17] Calling them

[14] 307 S.W.3d at 175.
[15] Id.
[16] Id. at 176-77.
[17] Of course, the fact that the appellate court determined that the Commission had not established a "new rate," but instead had lawfully interpreted Section 3.2(b)(1) of the

"due process" violations simply does not make them colorable due process violations. Having failed to convince the appellate court of the unfairness of the Commission's conduct, MoGas cannot now wage its collateral attack on the Revised Report and Order in this action.

C. MoGas' attempt to distinguish between the Revised Report and Order and the Commission's alleged "unlawful ratemaking" does not provide it jurisdiction under Mo. Rev. Stat. § 386.390.

MoGas asserts that its cause of action is proper under Mo. Rev. Stat. § 386.390 because MoGas is not "collaterally attacking the RRO" but is instead attacking the Commission's "unlawful revisions of the Transporters' Tariffs."[18] Why the Commission's purportedly unlawful revisions, which were ***announced*** in the Revised Report and Order, are separate and distinct from the Revised Report and Order is not explained—most likely because there can be no explanation for this bit of fiction. Because MoGas' attack is nothing more than a collateral attack on the Revised Report and Order, Ameren Missouri's "rehashing" of its argument that such attacks are barred is entirely appropriate.

No mention is made by MoGas of the State *ex rel.* Licata v. Pub. Serv. Comm'n,[19] a case cited by Ameren Missouri in its original motion for the proposition that any direct attack on the Revised Report and Order can only be

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Tariffs, conduct which the court held was directly within the Commission's authority, undercuts entirely MoGas' current claims. 307 S.W.3d at 177-78.

[18] Memorandum of Law at 6.

[19] 829 S.W.2d 515 (Mo. App. W.D. 1992).

made under Mo. Rev. Stat. § 386.510.[20] In Licata, the plaintiff attempted to avoid the bar to collateral attack by framing his complaint as an attack on a "utility rule" found in the tariff rather than an attack of the tariff itself; finding that Licata's attack on a provision in the tariff was an attack on the order itself, the appellate court affirmed the Commission's dismissal of Licata's complaint.[21] Similarly, MoGas' attack, no matter how creatively worded or persuasively framed, is an attack on the Commission's Revised Report and Order and cannot be asserted under Section 386.390.

Because it does not allege a violation *of* a Commission order but a challenge *to* a Commission order, which is barred by statute, this Commission does not have subject matter jurisdiction over this complaint, and it should be dismissed.

WHEREFORE, for the foregoing reasons, MoGas' Application and Complaint should be dismissed for its lack of subject matter jurisdiction.

Respectfully submitted,

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[20] Id. at 518 ("The court held that § 386.510 provides the sole method of obtaining review of any final order of the commission.") (*citing* State *ex rel.* State Highway Comm'n v. Conrad, 310 S.W.2d 871, 876 (Mo. 1958)).
[21] 829 S.W.2d at 518-19.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing Ameren Missouri's Reply to MoGas' Memorandum of Law was served via electronic mail (e-mail) on this 15th day of December 2010, on

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