BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

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

MOGAS' COMBINED MEMORANDUM OF LAW IN OPPOSITION TO STAFF'S AND AMEREN UE'S MOTIONS TO DISMISS

COMES NOW, MoGas Pipeline LLC ("MoGas"), by and through its counsel of record, and for its Opposition to the Motions to Dismiss filed by Staff and Union Electric d/b/a Ameren Missouri ("Ameren"), states as follows:

INTRODUCTION

MoGas Pipeline LLC ("MoGas") brought this case to contest the unlawfulness of certain provisions of its predecessors' tariffs as interpreted and revised by the PSC in its Revised Report and Order ("RRO") issued in Case No. GC-2006-0491.[1] In the RRO, the PSC found that MoGas provided services to its affiliate Omega at a discount and then found that the rates MoGas charged certain other customers should, beginning July 1, 2003, be retroactively reduced to the same rate. In so holding, the PSC disregarded the express terms of § 3.2 of the Tariffs, which delineates a very specific process Staff must follow in order to implement a prospective rate change if it is believed that the Transporters were offering lower rates to their affiliates than they offered to their other customers. Instead, without notice to MoGas, the PSC created a new interpretation of § 3.2 of the Tariffs in direct opposition to the clear and unambiguous language of the Tariffs. This revision of the Tariffs may result in an unlawful and unconstitutional

[1] 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.

retroactive rate adjustment. In fact, the Tariffs are currently being used as the basis for several civil suits for statutory penalties and refunds in Missouri civil courts to accomplish the retroactive rate adjustment prohibited by decades of Missouri precedent.

MoGas brought this Application and Complaint to challenge the lawfulness of the Tariffs as revised and interpreted by the RRO. 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. Specifically, in this case, 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 it permits the PSC to impose confiscatory rates.

Both Staff and Ameren have filed motions to dismiss the Application and Complaint, arguing that the Application and Complaint 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. As explained below, however, these arguments are meritless, and both motions to dismiss must be denied.

ARGUMENT

I. THE APPLICATION AND COMPLAINT IS NOT A COLLATERAL ATTACK ON THE RRO

Ameren argues that MoGas' Application and Complaint constitutes a collateral attack on the PSC's Revised Report and Order issued in Case No. GC-2006-0491 (the "RRO") and therefore should be dismissed. Ameren's argument is without merit because the relief sought by MoGas in the Application and Complaint is entirely different from the issues addressed in the RRO. Furthermore, even if the present Application and Complaint did constitute a collateral attack on the RRO, the rule prohibiting collateral attack does not apply when the underlying order is void.

In support of its argument, Ameren cites § 386.550, which simply provides that "[i]n all collateral actions or proceedings the orders of the commission which have become final shall be conclusive." Contrary to Ameren's misleading characterization of MoGas' Application and Complaint, MoGas does not collaterally attack the RRO. Instead, MoGas very clearly alleges that the PSC, while exercising its quasi-judicial powers in GC-2006-0491, improperly *revised* § 3.2 of the Tariffs, which in turn results in an unlawful and unconstitutional retroactive and automatic rate adjustment. This allegation is completely separate and distinct from what was at issue in the RRO and its subsequent appeal – whether the Transporters violated their Tariffs.

In fact, the Court of Appeals of the Western District of Missouri expressly acknowledged that the RRO and its subsequent appeal did not and could not address the issue of whether the PSC's interpretation was unlawful, as MoGas presently alleges in its Application and Complaint. *State ex rel. Missouri Pipeline Co., LLC, et al. v. Mo. Pub. Serv. Comm'n*, 307 S.W.3d 162 (Mo. App. 2009). The court distinguished between a suit filed to challenge the validity and lawfulness of the Tariffs from what was at issue in the appeal of the RRO. *Id*. at 178. The Court of Appeals

cited § 386.270 for the proposition that the court is "required to deem a tariff lawful unless a lawsuit has been filed whose purpose is to challenge the tariff." *Id*. Noting that the Transporters had not yet challenged the lawfulness of § 3.2 of the Tariffs, the court refused to consider the issue of whether the Tariffs were lawful and constitutional. *Id*. Thus, from the clear and unambiguous text of the Court of Appeal's decision, the lawfulness of the Tariffs at issue in MoGas' Application and Complaint have not been decided and could not have been decided in GC-2006-0491 and its subsequent appeals. Accordingly, MoGas' Application and Complaint does not address any issue that was decided in the RRO and its appeal and does not constitute a collateral attack of the RRO.

Even if MoGas' Application and Complaint did qualify as a collateral attack under § 386.550, which MoGas expressly denies, that statute still would not warrant dismissal of the Application and Complaint. Even assuming the RRO had the same effect as a judgment, the "rule prohibiting collateral attacks does not apply . . . when a judgment is void." *Travis*, 928 S.W.2d at 369. "[A] judgment which is void on the face of the record is entitled to no respect, and may be impeached at any time in any proceeding in which it is sought to be enforced or in which its validity is questioned by anyone with whose rights or interests it conflicts." *Id*. at 370 (*quoting La Presto v. La Presto*, 285 S.W.2d 568, 570 (Mo. 1955)). Stated differently, a "void judgment" is:

> [o]ne which has no legal force or effect, the invalidity of which may be asserted by any person whose rights are affected at any time and at any ***place directly or collaterally***. One which, from its inception is and forever continues to be absolutely null, without legal efficacy, ineffectual to bind parties or support a right, of no legal force and effect whatever, and incapable of confirmation, ratification, or enforcement in any manner or to any degree.

K & K Investments, Inc. v. McCoy, 875 S.W.2d 593, 596 (Mo. App. 1994) (emphasis added). *See also Burke v. Hutto*, 243 S.W.3d 431 (Mo. App. 2007) ("a potentially void judgment may be

impeached in any proceeding in which it is sought to be enforced or in which its validity is questioned"); *Reid v. Steelman*, 210 S.W.3d 273 (Mo. App. 2006) (same); *Hussman Corp. v. UQM Elecs*., 172 S.W.3d 913, 920 (Mo. App. 2005) ("A void judgment can have no conclusive effect, either as res judicata or as an estoppel, because the proceeding that culminated in the void judgment was itself without integrity."). The rule against collateral attacks equally applies to orders issued by administrative agencies acting in a judicial capacity. *Eagles v. Samuels*, 329 U.S. 304, 314 (1946) (an administrative proceeding infected with fundamental procedural error, like a void judicial judgment, is a legal nullity and subject to collateral attack).

Courts have found judgments to be void, and therefore subject to collateral attack, where "the court that rendered judgment lacked jurisdiction of the subject matter, or of the parties, or acted in a manner inconsistent with due process." *K & K Investments*, 875 S.W.2d at 596 (*quoting* BLACK'S LAW DICTIONARY 1574 (6th ed. 1990)). *See also American Economy Ins. Co. v. Powell*, 134 S.W.3d 743, 748 (Mo. App. 2004) ("a judgment rendered by a court acting in a manner inconsistent with due process can and should be declared void"). MoGas' Application and Complaint repeatedly alleges that the PSC acted outside of its statutory authority and in violation of due process in its issuance of the RRO. (*See* Application and Complaint, ¶¶ 5, 7, 30, 39-46, 53, 54, 57-59, 64). Therefore, even if MoGas' Application and Complaint is deemed to be a collateral attack on the RRO, it expressly alleges the grounds upon which the RRO may be collaterally attacked. Accordingly, Ameren's Motion to Dismiss must be denied.

II. THE APPLICATION AND COMPLAINT PROPERLY INVOKES THE PSC'S JURISDICTION UNDER SECTION 386.390.

A. MOGAS HAS PROPERLY PLEAD THE REQUISITES UNDER THE FIRST CLAUSE OF SECTION 386.390.

Both Staff and Ameren argue that MoGas has failed to invoke the PSC's jurisdiction under § 386.390. The first clause of § 386.390 provides that a complaint can be brought by "any corporation or person . . . 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***." (emphasis added). Ameren argues that MoGas has failed to invoke the PSC's jurisdiction under the first clause of § 386.390.

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. For example, MoGas explicitly alleges that the PSC's revision of the Tariffs "violates MO. REV. STAT. § 398.140(11) . . . [and] due process." (Application and Complaint, ¶¶ 53, 54). Ameren tries to escape this fact by rehashing its argument that § 386.550 bars MoGas from collaterally attacking the RRO. However, as explained above, MoGas 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.

B. THE APPLICATION AND COMPLAINT IS NOT ABOUT RATEMAKING, AND THUS, THE SPECIAL PLEADING REQUIREMENTS OF THE SECOND CLAUSE OF SECTION 386.390 ARE INAPPLICABLE.

Staff incorrectly characterizes MoGas' Application and Complaint as one regarding the reasonableness of rates and, having created this straw man argument, knocks it down by noting

that MoGas did not comply with the special procedural requirements for such complaints under § 386.270. However, because MoGas' Application and Complaint is not about the reasonableness of its rates, Staff's argument fails.

In the Application and Complaint, MoGas asks the PSC to rule on the propriety and lawfulness of the automatic and retroactive revision of tariffs in the context of a contested hearing. In contrast, Missouri courts have made it clear that § 386.390's reference to "reasonableness of rates" concerns complaints seeking to invoke the PSC's quasi-legislative ratemaking powers. In ratemaking cases, the question considered is a calculation of what should be charged for a utility service. "A public utility is entitled to such rates as will permit it to earn a return on the value of the property which it employs for the convenience of the public equal to that generally being made at the same time and in the same general part of the country on investments in other business undertakings." *State ex rel. Assoc. Natural Gas Co. v. Pub. Serv. Comm'n of Mo.*, 706 S.W.2d 870, 873 (Mo. App. 1985). In arriving at such a reasonable rate, the ratemaking process requires the regulatory body to determine the utility's cost of capital. The calculations are used to ultimately arrive at a rate charge that will not be burdensome to the customer and at the same time will be just and reasonable to the Company. *State ex rel. Associated Natural Gas Co. v. Pub. Serv. Comm'n of Mo.*, 706 S.W.2d 870, 873-74 (Mo. App. 1985). If the total effect of the rate order cannot be said to be unjust and unreasonable, judicial inquiry is at an end. *Id*. at 873.

When speaking as to the "reasonableness of rates," in § 386.390, that language relates to the rate-making function of the utility and is limited to complaints seeking a determination that a rate is reasonable and just. The present action is not such a complaint and, instead, is akin to the complaint brought in *State ex rel. Laundry, Inc. v. Pub. Serv. Comm'n*, 34 S.W.2d 37 (Mo.

1931). In *Laundry*, the complainants, two laundry businesses, filed a complaint before the PSC alleging they had been improperly charged the consumer rate for water rather than the manufacturer's rate. *Id*. at 38. After the PSC dismissed the complaint, the complainants sought relief in the Circuit Court, which remanded the case to the PSC for a determination that the business should qualify for the reduced rates. *Id*. at 101-102. The PSC appealed to the Supreme Court to consider whether the PSC had jurisdiction to determine to which rate the complainants were entitled.

The Court held that the complaint was "not a complaint as to the reasonableness of any rates or charges" because the complainants were not "complaining against the price of water as such price has been fixed and established by the various schedules of rates filed by the water company and approved by the Public Service Commission; nor were the complainants challenging the reasonableness of any such rates or charges of the water company as fixed and established by the various schedules of rates on file with the Public Service Commission." *Id*. at 103. Accordingly, the complaint was not subject to the requirement that it be signed by not less than twenty-five consumers or purchasers, or prospective consumers or purchasers, of water, in order to confer jurisdiction of the complaint in the PSC. *Id*. The Court concluded that because the gravaman of the complaint was that a failure to extend to complainants a certain rate, the question was one of the appropriateness of the discriminatory pricing and not one of the reasonableness of the rates. *Id*. at 104.

Courts in other jurisdictions have arrived at similar conclusions in interpreting nearly identical statutes. In *State v. Metaline Falls Light & Water Co*., 141 P. 1142 (Wash. 1914), the statute at issue provided that "that no complaint shall be entertained by the commission except upon its own motion, as to the reasonableness of the schedule of the rates or charges of any gas

company, electrical company, water company, or telephone company, unless the same be signed by the mayor, council or commission of the city or town in which the company complained of is engaged in business, or not less than twenty-five consumers or purchasers of such gas, electricity, water or telephone service." *Id*. at 141 P. at 1143. The question was raised as to whether consumers, who believed they were being overcharged for water, could file a complaint with the commission, or whether they were prohibited by that statutory provision. *Id*. The Court stated that it is apparent that this proviso pertains only to complaints affecting the reasonableness of the schedule of rates or charges of a public service corporation, and that it does not negate the authority of any person to complain about any alleged discrimination in the matter of rates, such as the contention that the utility's rates are unjust, unfair, and unreasonable, and that it has exacted rates of certain customers in excess of those which it is exacting from other consumers. *State v. Metaline Falls Light & Water Co*., 80 Wash. 652, 655, 141 P. 1142, 1143 (1914). *See also Colorado-Ute Elec. Ass'n, Inc. v. Public Utilities Comm'n of State of Colo*., 760 P.2d 627 (Colo. 1988) (statute prohibiting commission from entertaining complaints as to the reasonableness of any rates or charges of any public utility except upon its own motion; commission had jurisdiction to consider whether it was reasonable to require electric companies to provide seasonally adjusted rates).

The instant dispute is not a rate-making inquiry into whether the calculations and formulae used by the regulatory body fairly arrived at a rate charge that is both reasonable to the customer and the utility company. Nowhere does MoGas request that the PSC weigh ratemaking factors and consider the reasonableness of the Transporters' resulting rates. Instead, MoGas' Application and Complaint alleges that the PSC improperly revised the Tariffs by attempting a automatic and retroactive rate change. Accordingly, to properly bring its Application and

Complaint, MoGas was not required to obtain the signature of any of the parties required to bring a rate case. Consequently, MoGas has properly engaged the PSC's jurisdiction over its Application and Complaint, and Staff's Motion to Dismiss should be denied.

III. THE PSC HAS JURISDICTION OVER ITS TARIFFS THAT ARE STILL ON FILE AND THAT ARE PRESENTLY AT ISSUE AND SUBJECT TO INTERPRETATION IN NUMEROUS CIVIL SUITS.

Staff argues that because MoGas is regulated by FERC and not the PSC, the PSC does not have jurisdiction to decide this case. This argument is meritless. The Tariffs at issue in MoGas' Application and Complaint not only remain on file, but are also being used as the basis for several civil suits for statutory penalties and refunds currently pending in Missouri civil courts. Accordingly, MoGas was and 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.

Most tellingly, the PSC itself has admitted that the case is not moot. FERC exercised jurisdiction over MoGas on April 20, 2007, expressly rejecting the PSC's request that it abstain from doing so. Nonetheless, the PSC issued the RRO on October 20, 2007. Therein, the PSC held that it would retain jurisdiction over the Tariffs even while MoGas is under FERC regulation because the events at issue took place before the Transporters fell under FERC jurisdiction: "this case is not moot because Staff's complaint alleges MPC and MGC violated their tariffs at a time when those companies were undeniably subject to regulation by this Commission." RRO, p. 12. The PSC would perpetuate a double standard by concluding that it has jurisdiction to decide issues pertaining to MoGas' Tariffs when it favors a Staff complaint, but then decide that the PSC does not have such jurisdiction upon MoGas' filing of its own complaint. Indeed, if the PSC determines that this matter is moot, then the PSC should overturn

the RRO in its entirety and immediately dismiss the PSC's pending action in Cole County Circuit Court for statutory penalties on the same grounds.

Furthermore, the Tariffs are still on file, even though the PSC could have taken the Tariffs off file at any time after MoGas became FERC-regulated. Indeed, as pleaded in MoGas' Application and Complaint, Staff took the initial steps required to cancel MoGas' Tariffs in PSC Case No. GC-2009-0378, but affirmatively abandoned this action. Accordingly, the PSC continues to keep MoGas' Tariffs on file, clear indicia that the PSC still believes those Tariffs have some current effect or purpose.

Moreover, the standard for demonstrating that a case should be declared moot is high: a case is moot only when an event occurs that makes a court's decision "unnecessary or makes it impossible for the court to grant effectual relief" and there is "no practical effect on an existent controversy." *State ex rel. Jackson County v. Mo. Pub. Serv. Comm'n*, 985 S.W.3d 400, 403 (Mo. App. 1999). The opposite is true here – the relief MoGas asks the PSC to grant in the Application and Complaint will have a very definite effect on an existent controversy. Namely, if the PSC finds the PSC' retroactive ratemaking to be lawful, MoGas is at risk to incur substantial monetary harm. The instant case is clearly not moot, both because the Tariffs are currently being used as a mechanism for the PSC to obtain statutory penalties and by customers to obtain refunds[2] and because to declare a superseded Tariff of the sort considered here to be moot would create a situation which would continue to evade review. Thus, the PSC's unlawful

[2] Specifically, the Tariffs are currently being used as a mechanism for the PSC to obtain statutory penalties against MoGas in *State of Missouri, ex rel. Missouri Public Service Commission v. Missouri Pipeline Company, LLC and Missouri Gas Company, LLC n/k/a MoGas Pipeline Company, LLC*, Cause No. 07AC-CC01103 pending in Cole County, Missouri. Furthermore, the Tariffs are being used by MoGas' customers to obtain refunds in *Municipal Gas Commission of Missouri et al. v. Missouri Pipeline Company, LLC and MoGas Pipeline LLC*, Cause No. 08PH-CV01132, pending in Phelps County, Missouri, and *Union Electric Company v. MoGas Pipeline LLC*, Cause No. 09AC-CC00398 pending in Cole County, Missouri. These customers' interventions in this docket demonstrate the existing and ongoing controversy.

fixing of purported retroactive rates, tolls, charges or schedules for the transportation of natural gas on the pipelines owned and operated by MoGas harmed and continues to harm MoGas.

Furthermore, even if an issue is moot, a court may always "exercise its discretionary jurisdiction where an issue is presented of a recurring nature, is of general public interest and importance, and will evade appellate review." *State ex rel. City of Joplin v. Mo. Pub. Serv. Comm'n*, 186 S.W.3d 290, 295 (Mo. App. 2005), *quoting State ex rel. Mo. Pub. Serv. Comm'n v. Fraas*, 627 S.W.2d 882, 885 (Mo. App. 1981) (internal quotations removed). Courts "will exercise this discretionary jurisdiction if there is some legal principle at stake not previously ruled as to which a judicial declaration can and should be made for future guidance." *Id*. Courts have applied this exception to superseded tariffs.

Courts applying this exception have made it clear that when it is a refund or overpayment under a tariff is at issue, the case is not moot even if the tariff is no longer current. In *State ex rel. City of Joplin v. Mo. Pub. Serv. Comm'n*., 186 S.W.3d 290, 296 (Mo. App. 2005), the court held that superseded tariffs were not moot, and therefore subject to challenge, when the city had allegedly overpaid under the superseded tariffs. The court explained that because it is not unusual in public utility rate cases for new tariffs to overtake proceedings involving old tariffs, the issue will continue to evade appellate review unless courts are allowed to consider it. *Id*. In fact, the need to prevent this wrong is so important that even when there is no effective remedy for a plaintiff, courts can still consider the merits of the superseded tariff issue under the mootness exception. *Id*. at 297.

Other jurisdictions concur. In *Colorado-Ute Elec. Ass'n, Inc. v. Pub. Utilities Comm'n of State of Colo*., 760 P.2d 627, 633 (Colo. 1988), which again dealt with the mootness of a superseded tariff, the court held that the case was not moot because the issue of proper rate

design survives a more recent tariff filing. The court emphasized that while the utility company may have changed the level of its rates with its most recent filing, the level of rates was never a matter of dispute. *Id*. at 633-34. The issue which had given rise to the appeal was the authority of the commission to prescribe rates, which presented no less a controversy under the new tariffs than the previous tariffs. *Id*. at 634. The court further cautioned that if a utility company could render an appeal moot merely by filing a new tariff while an appeal is pending, the Commission's authority to regulate cooperative utilities would be undermined. *Id*.

In *Colorado-Ute* the plaintiffs sought an order directing the utility to pay refunds to customers who might have over paid under the utility's rate scheme. *Id*. The court stated that in circumstances where a refund is demanded, claims for damages or other monetary relief automatically avoid mootness, so long as the claim remains viable. *Id*. *See also Memphis Light, Gas & Water Div. v. Kraft*, 436 U.S. 1, 7-8 (1978) (although injunctive relief from utility's termination of service had been mooted, customer's claim for damages saved case challenging termination procedures from the bar of mootness); *Ass'n of Commc'n Enterprises v. Ameritech Illinois, Inc*., 2002 WL 1943562 (Ill. C.C. Feb. 20, 2002) (a superseded tariff was not moot because a utility could always render a complaint obsolete with a new tariff, which would unfairly allow the mootness doctrine to essentially trump the legislative scheme); *Seibert v. Clark*, 619 A.2d 1108, 1111; *Buckhannon Bd. and Care Home, Inc. v. West Virginia Dep't of Health and Human Res*., 532 U.S. 598, 606-07 (2001) ("so long as the plaintiff has a cause of action for damages, a defendant's change in conduct will not moot the case").

IV. THE PSC MAY PROPERLY PASS ON THE REASONABLENESS AND LAWFULNESS OF RATES.

Staff argues that an administrative tribunal cannot make declaratory judgments, and, accordingly, the PSC does not have jurisdiction over the Application and Complaint. This is an

oversimplification of the true state of the law and a mischaracterization of MoGas' request for relief. MoGas asks the PSC to reach a decision on the law: whether its Tariffs and rates, as revised by the PSC in the RRO, are lawful. While it is true that the PSC cannot determine damages or award pecuniary relief, the Missouri Supreme Court has expressly held that "the power [of the PSC] to pass on the reasonableness and lawfulness of rates necessarily includes the power to determine the reasonableness and lawfulness of such limitations of liability as are integral parts of the rates." *A.C. Jacobs & Co., Inc. v. Union Elec. Co*., 17 S.W.3d 579, 583 (Mo. App. 2000) (*citing State ex rel. Western Union Telegraph Co. v. PSC*, 264 S.W. 669, 672 (Mo.banc 1924). Further, though the legislature could not give the PSC the authority to render a declaratory judgment as to the validity of its rules, Missouri courts have expressly found that administrative agencies have full authority to reach a decision on the law. *See Bridge Data Co. v. Dir. of Revenue*, 794 S.W.2d 204, 207 (Mo. 1990) (abrogated on other grounds by *Int'l Bus. Machines Corp. v. Dir. of Revenue*, 958 S.W.2d 554 (Mo. 1997)) (when review of decisions of the Director of Revenue is sought, the Administrative Hearing Commission has full authority to reach a decision on the law as it finds it, subject, of course, to judicial review); *Harris v. Pine Cleaners, Inc*., 296 S.W.2d 27, 30 (Mo. 1956) (holding that an agency possesses the power and authority to apply principles of law as announced by the appellate courts to the facts found and to rule upon every issue presented which pertains to a determination of liability and further noting that the Court is impelled to this conclusion by the firm view that the Commission must have such power, otherwise endless complications and delays would be introduced into administration).

The Missouri Supreme Court was instructive in its holding in *Mikel v. Pott Indus.*, 896 S.W.2d 624 (Mo. 1995). There, the plaintiff insurance association argued that by construing a

statute relevant to the dispute and determining the association's duties under that statute, the Labor and Industrial Relations Commission performed a judicial function in violation of the state constitution. *Id*. at 626. The Court disagreed and noted that that agency's adjudicative power extends to the ascertainment of facts and the application of existing law to the facts in order to resolve issues within areas of agency expertise. *Id*. (*citing State Tax Comm'n,* 641 S.W.2d at 75; *Bridge Data Co. v. Director of Revenue,* 794 S.W.2d 204, 207 (Mo. banc 1990)). The Court held that the Commission does not exceed its constitutional jurisdiction when it decides legal issues in the course of performing its core function, and noted that in performing its statutory duties, the Commission must routinely determine questions of a purely legal nature. *Id*. (internal citations omitted).

Examples abound of instances in which courts have upheld administrative agencies' determinations of the law. An agency is authorized to determine the validity of insurance policies, to consider the defense of *res judicata*, to determine whether it should bar recovery, and to determine whether to give full faith and credit to the judgment of a court of a sister state. *See Cain v. Robinson Lumber Co.*, 295 S.W.2d 388 (Mo. banc 1956); *Overcash v. Yellow Transit Co.*, 180 S.W.2d 678, 684 (Mo. 1944); *Liechty v. Kansas City Bridge Co.,* 162 S.W.2d 275, 280 (Mo. 1942).

In fact, even the very case cited and relied upon by Staff, *Tax Comm'n v. Admin. Hearing Comm'n*, 641 S.W.2d 69 (Mo. 1982), for its proposition that the PSC is without power to make declaratory judgments only holds that the Administrative Hearing Commission could not declare an administrative rule invalid. However, the Court in *Tax Comm'n* noted that "this Court has recognized that 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.'" *Id.* at 75.

In the instant case, the PSC is not being asked to declare an administrative rule invalid, as was the case in each decision cited by the PSC. Instead, the PSC is being asked to evaluate, under applicable law, MoGas' tariffs as revised by the PSC, a function which numerous Missouri courts, including the Supreme Court, have explicitly stated that it may do, especially in instances where it is incidental or necessary to performing its administrative functions. Accordingly, the PSC has jurisdiction to decide the issues raised in the instant case, and Staff's Motion to Dismiss must be denied.

WHEREFORE, MoGas Pipeline LLC asks the Public Service Commission to deny the Motions to Dismiss filed by Staff and Ameren, and for such other and further relief as it deems Necessary.

Respectfully submitted,

CARMODY MACDONALD P.C.

By: /s/ David H. Luce
Gerard T. Carmody, # 24769
David H. Luce, #36050
Teresa D. 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 LC

David G. Brown
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 7th day of December 2010, on

Kevin A. Thompson
Chief Staff Counsel
Public Service Commission
P.O. Box 360
Jefferson City, MO 65102
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
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
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
Attorneys for Ameren Missouri

David Woodsmall
428 E. Capitol Avenue, Suite 300
Jefferson City, MO 65101
dwoodsmall@fcplaw.com
Attorney for Municipal Gas Commission of Missouri

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