

IN THE MISSOURI SUPREME COURT

No. SC91968

STATE OF MISSOURI, EX REL. MOGAS PIPELINE LLC,

Respondent,

v.

MISSOURI PUBLIC SERVICE COMMISSION,

Appellant.

Appeal from the Missouri Public Service Commission

RESPONDENT'S SUBSTITUTE BRIEF

**Gerard T. Carmody #24769
David H. Luce #36050
Teresa Dale Pupillo #42975
CARMODY MACDONALD P.C.
120 South Central Avenue, Suite 1800
St. Louis, MO 63105
(314) 854-8600
(314) 854-8660 (Fax)**

**Leland B. Curtis #20550
CURTIS, HEINZ, GARRETT &
O'KEEFE, P.C.
130 S. Bemiston, Suite 200
St. Louis, MO 63105
(314) 725-8788
(314) 725-8789 (Fax)**

Attorneys for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIESiv

JURISDICTIONAL STATEMENT1

INTRODUCTION AND SUMMARY2

STATEMENT OF FACTS4

A. MoGas’ History4

B. The PSC’s Unlawful Response To MoGas’ FERC Activities5

C. Procedural History6

POINTS RELIED ON9

I. THE PSC ERRED IN DENYING MOGAS’ APPLICATION TO TERMINATE THE PSC’S INTERVENTION IN FERC PROCEEDINGS BECAUSE MISSOURI LAW PRECLUDES THE PSC’S ATTEMPTED EXERCISE OF SUPERVISORY JURISDICTION OR POWER OVER INTERSTATE PIPELINE COMPANIES SUCH AS MOGAS IN THAT MISSOURI STATUTES, INCLUDING § 368.030, EXPRESSLY LIMIT, AND DO NOT GRANT, THE PSC AUTHORITY TO INTERVENE IN FERC’S REGULATION AND OVERSIGHT OF MOGAS’ INTERSTATE ACTIVITIES.....9

II. THE PSC ERRED BY DENYING MOGAS’ APPLICATION TO TERMINATE BECAUSE THE PSC IS NOT AUTHORIZED TO PURSUE BY INTERVENTION OR OTHERWISE MATTERS THAT IT DEEMS OF INTEREST TO THE PEOPLE OR STATE OF MISSOURI IN

THAT ONLY THE ATTORNEY GENERAL HAS THIS PLENARY
AUTHORITY10

ARGUMENT11

I. THE PSC ERRED IN DENYING MOGAS’ APPLICATION TO
TERMINATE THE PSC’S INTERVENTION IN FERC PROCEEDINGS
BECAUSE MISSOURI LAW PRECLUDES THE PSC’S ATTEMPTED
EXERCISE OF SUPERVISORY JURISDICTION OR POWER OVER
INTERSTATE PIPELINE COMPANIES SUCH AS MOGAS IN THAT
MISSOURI STATUTES, INCLUDING § 368.030, EXPRESSLY LIMIT,
AND DO NOT GRANT, THE PSC AUTHORITY TO INTERVENE IN
FERC’S REGULATION AND OVERSIGHT OF MOGAS’ INTERSTATE
ACTIVITIES.....11

A. Standard of Review11

B. The PSC Cannot Exercise Jurisdiction or Power over MoGas Because
it is an Interstate Transporter of Natural Gas12

1. Federal Regulation of Interstate Commerce12

2. Missouri’s Public Service Act Recognizes the Basic Principles of
Federal Preemption of Interstate Transportation of Natural Gas13

a. Missouri Law Expressly Precludes the Application of the
PSA to Interstate Commerce14

b. There is no Provision of the United States Constitution and
no Act of Congress that Allows Intervention15

- c. The PSA Specifically Addresses what Powers the PSC has
in Relation to FERC Hearings and its Does Not
Sanction Intervention as a Litigating Adversary 16
- d. The PSA does not Specifically Grant the PSC Authority
to Intervene as a Litigating Party20
- e. Absent any Express Grant of Authority to Intervene,
Such Authority Cannot be Implied26

II. THE PSC ERRED BY DENYING MOGAS’ APPLICATION TO
TERMINATE BECAUSE THE PSC IS NOT AUTHORIZED TO
PURSUE, BY INTERVENTION OR OTHERWISE, MATTERS THAT IT
DEEMS OF INTEREST TO THE PEOPLE OR STATE OF MISSOURI IN
THAT ONLY THE ATTORNEY GENERAL HAS THIS PLENARY
AUTHORITY29

CONCLUSION31

RULE 84.06 CERTIFICATION32

CERTIFICATE OF SERVICE33

TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>Bach v. Winfield-Foley Fire Prot. Dist.</i> ,	
257 S.W.3d 605 (Mo. 2008)	25
<i>California v. Southland Royalty Co.</i> ,	
436 U.S. 519 (1978)	12
<i>Cedar Hill Manor, LLC v. Dep’t of Soc. Serv. Div. of Med. Serv.</i> ,	
145 S.W.3d 447 (Mo. App. 2004)	9, 16, 19
<i>City of Wellston v. SBC Com., Inc.</i> ,	
203 S.W.3d 189 (Mo. 2006)	24
<i>Exec. Bd. of Mo. Baptist Convention v. Carnahan</i> ,	
170 S.W.3d 437 (Mo. App. 2005)	24
<i>Federal Power Comm’n v. Panhandle E. Pipeline Co.</i> ,	
337 U.S. 498 (1949)	12
<i>Fogle v. State</i> ,	
295 S.W.3d 504 (Mo. App. 2009)	29

Friendship Village of S. County v. Pub. Serv. Comm’n,
907 S.W.2d 339 (Mo. App. 1995)11

In re Nautilus Motor Tanker Co.,
85 F.3d 105 (3rd Cir. 1996).....15

Lightfoot v. City of Springfield,
236 S.W.2d 348 (Mo. 1951)13

Mo. Pub. Serv. Comm’n v. Mo. Interstate Gas, LLC,
266 S.W.3d 881 (Mo. App. 2008)4

Nw. Cent. Pipeline Corp. v. State Corp. Comm’n of Kan.,
489 U.S. 493 (1989)13

Osterloh’s Estate v. Carpenter,
337 S.W.2d 942 (Mo. 1960)7

Pub. Serv. Comm’n v. Oneok, Inc.,
318 S.W.3d 134 (Mo. App. 2009)14, 25, 28

Pub. Util. Comm’n v. FERC,
143 F.3d 610 (D.C. Cir. 1998).....13

Roth v. La Societe Anonyme Turbomeca France,
120 S.W.3d 764 (Mo. App. 2003)25

Schneidewind v. ANR Pipeline Co.,
485 U.S. 293 (1988)13

Scoggins v. Timmerman,
886 S.W.2d 135 (Mo. App. 1994)19

State ex rel. & to Use of Northside Church of God v. Church of God,
247 S.W.2d 542 (Mo. App. 1952)30

State ex rel. AG Processing, Inc. v. Pub. Serv. Comm’n,
120 S.W.3d 732 (Mo. 2003)11

State ex rel. Cass County v. Pub. Serv. Comm’n,
259 S.W.3d 544 (Mo. App. 2008)9, 17, 30

State ex rel. Cities Serv. Gas Co. v. Pub. Serv. Comm’n,
85 S.W.2d 890 (Mo. 1935)12

State ex rel. Igoe v. Bradford,
611 S.W.2d 343 (Mo. App. 1980)29

State ex rel. Laclede Gas Co. v. Pub. Serv. Comm’n,
156 S.W.3d 513 (Mo. App. 2005)11

State ex rel. Laundry, Inc. v. Pub. Serv. Comm’n,
34 S.W.2d 37 (1931)14

State ex rel. MoGas Pipeline LLC v. Pub. Serv. Comm'n,
 2011 WL 2534074 (Mo. App. June 28, 2011)8

State ex rel. Monsanto Co. v. Pub. Serv. Comm'n,
 716 S.W.2d 791 (Mo. 1986).....14, 16

State ex rel. Praxair, Inc. v. Pub. Serv. Comm'n,
 344 S.W.3d 178 (Mo. 2011).....10, 30

State ex rel. Taylor v. Wade,
 231 S.W.2d 179 (Mo. 1950).....10, 29

State ex rel. Util. Consumers Council of Mo. v. Pub. Serv. Comm'n,
 585 S.W.2d 41 (Mo. 1979).....9, 12, 14, 17, 21

State of Mo. ex rel. Mo. Pub. Serv. Comm'n v. MoGas Co., LLC,
 311 S.W.3d 368 (Mo. App. 2010), *appeal denied*, No. SC90957 (Mo. 2010)4, 5

State v. Planned Parenthood of Kansas,
 66 S.W.3d 16 (Mo. 2002).....29

USAA Fed. Savings Bank v. Pa. Human Relations Comm'n,
 2011 WL 3715113 (E.D. Pa. August 23, 2011)15

STATUTES

15 U.S.C. § 717p (2010)18

CONN. GEN. STAT. § 16-2a (2010).....20

MD. CODE, PUB. UTIL. § 2-119 (1998)20

MINN. STAT. § 216A.05, SUBD. 6 (2010)19

MO. REV. STAT. § 386.030.....9, 13, 14, 15, 21, 22, 23, 25

MO. REV. STAT. § 386.07124, 25, 26

MO. REV. STAT. § 386.120.....23, 24

MO. REV. STAT. § 386.210.....17, 18, 19, 20

MO. REV. STAT. § 386.250.....21, 22, 25

MO. REV. STAT. § 386.266.....18

MO. REV. STAT. § 386.510.....1, 17, 18, 19, 20

MO. REV. STAT. §507.010.....30

OR. REV. STAT. § 756.040 (2009)20

OTHER AUTHORITIES

18 C.F.R. § 385.130518, 19

18 C.F.R. § 385.130619

18 C.F.R. § 385.21415, 16

House Bill No. 2095, (95th General Assembly, 2011)7, 27

MO. CONST. ART. V, § 1811

Senate Bill No. 897 (95th General Assembly, 2011).....7, 27

JURISDICTIONAL STATEMENT

This is an appeal from a July 15, 2009 order of the Missouri Public Service Commission (“PSC”) denying MoGas Pipeline LLC’s Application to terminate the Public Service Commission’s involvement in all Federal Energy Regulatory Commission matters related to MoGas Pipeline LLC (“MoGas”).

On July 24, 2009, MoGas filed an Application for Rehearing which the PSC denied on July 29, 2009. MoGas then filed a timely Petition for Writ of Review in the Circuit Court of Cole County pursuant to MO. REV. STAT. § 386.510.¹ On March 5, 2010, the Circuit Court entered its final judgment for MoGas.

The PSC appealed the Circuit Court’s ruling to the Western District Court of Appeals pursuant to Article V, Section 3 of the Missouri Constitution. On June 28, 2011, that court reversed the trial court’s decision and affirmed the PSC’s denial of MoGas’ Application. On July 13, 2011, MoGas sought transfer from the Western District Court of Appeals pursuant to Rule 83.04 of the Missouri Supreme Court Rules, and on October 4, 2011, this Court granted transfer.

Pursuant to Rule 84.05(e), MoGas although denominated as Respondent is required to file the opening brief.

¹ Unless otherwise stated, all statutory references are to Missouri Revised Statutes (2010).

INTRODUCTION AND SUMMARY

This case presents a question of law involving the jurisdiction of the PSC, a creature of statute with limited powers and jurisdiction and, specifically, whether the PSC retains supervisory jurisdiction and control over natural gas transportation companies that are under the exclusive jurisdiction of the Federal Energy Regulatory Commission (“FERC”).

Prior to 2007, MoGas, a transporter of natural gas, operated solely within the state of Missouri and was therefore subject to the jurisdiction of the PSC. In 2007, MoGas began operating as an interstate pipeline company and became subject to the exclusive jurisdiction of FERC. Undaunted by its loss of jurisdiction over MoGas, the PSC has intervened in nearly every FERC matter involving MoGas – almost a dozen matters and counting, all after it lost jurisdictional control over MoGas.

MoGas therefore brought this action before the PSC in 2008 seeking an order that the PSC terminate its involvement in FERC matters because no Missouri statute gave the PSC the power to intervene in such cases. Not surprisingly, the PSC held that it had such powers because the statute setting forth its jurisdiction “makes no distinction between operators of interstate and intrastate natural gas pipelines.” The Circuit Court reversed this far-reaching conclusion, but the Missouri Court of Appeals, Western District, reversed and upheld the PSC’s Order.

The PSC’s Order is unlawful and unreasonable because, as a creature of statute, the PSC can only exercise those powers that the legislature has expressly given it. No

statute confers upon the PSC the power to intervene and Missouri law expressly precludes it from doing so. The PSC Order should be reversed.

STATEMENT OF FACTS

A. MoGas' History

MoGas has operated an interstate natural gas pipeline under the exclusive jurisdiction of FERC since 2007 (L.F. 133).² Prior to becoming federally regulated, MoGas' predecessors, Missouri Pipeline Company, LLC and Missouri Gas Company, LLC, operated pipelines only in the state of Missouri and were subject to the PSC's exclusive jurisdiction (*see* L.F. 51, 133). In 2006, those entities consolidated with each other and with an interstate affiliate named Missouri Interstate Gas, LLC to become one federally-regulated interstate pipeline, MoGas (*see* L.F. 51).

The PSC vigorously opposed MoGas' departure from its exclusive jurisdiction. It filed a lawsuit against MoGas seeking, *inter alia*, to enjoin MoGas from becoming subject to FERC's jurisdiction. *Mo. Pub. Serv. Comm'n v. Mo. Interstate Gas, LLC*, 266 S.W.3d 881 (Mo. App. 2008). The Court of Appeals concluded that the PSC could not preclude MoGas from applying to FERC for authority to commence interstate operations and observed that "FERC has exclusive jurisdiction over the transportation and sale of natural gas in interstate commerce. Thus, [MoGas is] no longer under the PSC's jurisdiction." *Id.* at 885.

While the injunction action was pending, the PSC filed a separate action to penalize MoGas for even seeking FERC jurisdiction without first obtaining PSC's permission. *State of Mo. ex rel. Mo. Pub. Serv. Comm'n v. MoGas Co., LLC*, 311 S.W.3d

² Legal File is abbreviated as "L.F."

368 (Mo. App. 2010), *appeal denied*, No. SC90957 (Mo. 2010). That case was dismissed by the trial court and the Western District Court of Appeals affirmed the dismissal.

B. The PSC's Unlawful Response To MoGas' FERC Activities

Since becoming regulated by FERC, MoGas is naturally and routinely engaged in matters before FERC that concern MoGas' federally regulated, interstate activities (*See, e.g.*, L.F. 16, 48, 51-73, 79-82, 88-98, 107-109 and 133). The PSC's response to its failed efforts to retain direct jurisdiction over MoGas has been to intervene in nearly every MoGas FERC matter. Each time, it takes positions adverse to MoGas and asks FERC to rule against MoGas (*Id.*).

For example, in September 2007, MoGas filed an application with FERC seeking its approval of MoGas' construction of a new gas compression station (L.F. 51). The PSC intervened and opposed that construction, advancing a variety of procedural and substantive challenges to MoGas' efforts which required extensive briefing and argument (*See generally*, L. F. 51-73, the FERC Order setting forth and resolving the various challenges presented by the PSC).

After costly legal proceedings, FERC concluded that the relief sought by MoGas was "routinely" granted (L.F. 57), that the PSC presented "no support" for its challenge to "the reliability of the compressor units MoGas proposes to install" (L.F. 70), and that the PSC's claims were "speculative and without merit" (L.F. 70).

The PSC also intervened in MoGas' initial action requesting a federal certificate for the interstate transportation of natural gas, its application for a federal tariff setting rates for the interstate transportation of natural gas, and various other routine matters such

as annual and mid-year fuel adjustment filings (*See* Appendix, A-11-12;³ L.F. 16, 48, 51-73, 79-82, 88-98, 107-109 and 133). In the course of intervention before FERC, the PSC conducts and responds to discovery, presents testimony (including expert testimony), presents evidence in evidentiary hearings, and submits lengthy motions and briefs (*See, e.g.,* L.F. 51-73).

C. Procedural History

On September 9, 2008, MoGas initiated this action by filing an Application with the PSC (L.F. 16) seeking an order that the PSC terminate its involvement in certain FERC matters, including the compression station case (L.F. 16-19). The Application was supplemented twice (L.F. 48, 79) and amended once (L.F. 107) (collectively, the “Application”). The parties filed cross motions for a determination on the pleadings (L.F. 74, 111). MoGas moved for an order that the PSC terminate permanently its involvement in all FERC matters related to MoGas and to instruct PSC Staff, general counsel and outside counsel to refrain from further interfering with MoGas’ operation as a FERC-regulated entity engaged in interstate commerce (L.F. 109, 111-12).

On July 15, 2009, the PSC entered a final order (the “PSC Order”) denying the Application (L.F. 130). The PSC held that: (1) § 386.250(1) confers jurisdiction over MoGas’ interstate transportation of natural gas into Missouri because the statute “makes

³ A complete list of the matters in which the PSC has intervened is included in the Appendix. The list also contains, for the Court’s convenience, citations to the applicable publications containing the referenced FERC matters.

no distinction between operators of interstate and intrastate natural gas pipelines” (L.F. 136); (2) § 386.030 grants the PSC the authority to “become involved in interstate commerce” because a FERC regulation permitting intervention by various state commissions is tantamount to an “Act of Congress” (L.F. 136); and (3) § 386.120.4 gives the PSC the authority to sue and be sued and § 386.071 authorizes the PSC to appoint a general counsel to represent the PSC in legal matters, including those by intervention, and these provisions constitute a “very broad grant of authority to intervene” (L.F. 137).

On July 24, 2009, MoGas filed an Application for Rehearing (L.F. 142), which the PSC denied on July 29, 2009 (L.F. 148). MoGas then filed a timely Petition for Writ of Review in the Circuit Court of Cole County (L.F. 4). On March 5, 2010, the Circuit Court entered its final judgment reversing the PSC Order and finding that it was unlawful and unreasonable (L.F. 8).

Two days later, on March 7, 2010, the PSC introduced a bill before the Missouri General Assembly that would give the PSC the power to “appear in and participate in any administrative, regulatory, or judicial proceedings, federal or state ...” S.B. 897, H.B. 2095 (2010).⁴ The bill was not enacted.

The PSC appealed the Circuit Court’s ruling to the Western District Court of Appeals (L.F. 10), which reversed the trial court and affirmed the PSC’s denial of

⁴ MoGas requests that the Court take judicial notice of S.B. 897 and H.B. 2095 (2010). See *Osterloh’s Estate v. Carpenter*, 337 S.W.2d 942, 946 (Mo. 1960) (a court can take judicial notice of an attempt to enact legislation).

MoGas' Application, holding that, despite FERC's exclusive jurisdiction over MoGas, the PSC retained "supervisory jurisdiction and power over" it. *State ex rel. MoGas Pipeline LLC v. Pub. Serv. Comm'n*, 2011 WL 2534074 (Mo. App. June 28, 2011). This Court granted transfer on October 4, 2011.

POINTS RELIED ON

I. THE PSC ERRED IN DENYING MOGAS' APPLICATION TO TERMINATE THE PSC'S INTERVENTION IN FERC PROCEEDINGS BECAUSE MISSOURI LAW PRECLUDES THE PSC'S ATTEMPTED EXERCISE OF SUPERVISORY JURISDICTION OR POWER OVER INTERSTATE PIPELINE COMPANIES SUCH AS MOGAS IN THAT MISSOURI STATUTES, INCLUDING § 368.030, EXPRESSLY LIMIT, AND DO NOT GRANT, THE PSC AUTHORITY TO INTERVENE IN FERC'S REGULATION AND OVERSIGHT OF MOGAS' INTERSTATE ACTIVITIES.

MO. REV. STAT. § 386.030;

State ex rel. Util. Consumers Council of Mo. v. Pub. Serv. Comm'n, 585 S.W.2d 41, 49 (Mo. 1979);

Cedar Hill Manor, LLC v. Dep't of Soc. Serv. Div. of Med. Serv., 145 S.W.3d 447, 451 (Mo. App. 2004);

State ex rel. Cass County v. Pub. Serv. Comm'n, 259 S.W.3d 544, 547-48 (Mo. App. 2008).

II. THE PSC ERRED BY DENYING MOGAS' APPLICATION TO TERMINATE BECAUSE THE PSC IS NOT AUTHORIZED TO PURSUE BY INTERVENTION OR OTHERWISE MATTERS THAT IT DEEMS OF INTEREST TO THE PEOPLE OR STATE OF MISSOURI IN THAT ONLY THE ATTORNEY GENERAL HAS THIS PLENARY AUTHORITY.

State ex rel. Taylor v. Wade, 231 S.W.2d 179, 182 (Mo. 1950);

State ex rel. Praxair, Inc. v. Pub. Serv. Comm'n, 344 S.W.3d 178, 186 (Mo. 2011).

ARGUMENT

I. THE PSC ERRED IN DENYING MOGAS' APPLICATION TO TERMINATE THE PSC'S INTERVENTION IN FERC PROCEEDINGS BECAUSE MISSOURI LAW PRECLUDES THE PSC'S ATTEMPTED EXERCISE OF SUPERVISORY JURISDICTION OR POWER OVER INTERSTATE PIPELINE COMPANIES SUCH AS MOGAS IN THAT MISSOURI STATUTES, INCLUDING § 368.030, EXPRESSLY LIMIT, AND DO NOT GRANT, THE PSC AUTHORITY TO INTERVENE IN FERC'S REGULATION AND OVERSIGHT OF MOGAS' INTERSTATE ACTIVITIES.

A. Standard of Review

This court reviews the PSC's Order, not that of the circuit court or the court of appeals. *State ex rel. Laclede Gas Co. v. Pub. Serv. Comm'n*, 156 S.W.3d 513, 520 (Mo. App. 2005). The PSC's decision must be both lawful and reasonable. MO. CONST. ART. V, § 18; *State ex rel. AG Processing, Inc. v. Pub. Serv. Comm'n*, 120 S.W.3d 732, 734 (Mo. 2003). In determining whether a PSC order is lawful, this Court exercises unrestricted, independent judgment and must correct erroneous interpretations of the law. *Friendship Village of S. County v. Pub. Serv. Comm'n*, 907 S.W.2d 339, 344 (Mo. App. 1995). All legal issues are reviewed *de novo*. *State ex rel. AG Processing, Inc. v. Pub. Serv. Comm'n*, 120 S.W.3d 732, 734 (Mo. 2003).

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. *Friendship Village*, 907 S.W.2d at

344-345 (Mo. App. 1995). Only if the reviewing court determines that the order is lawful must it then decide whether it was reasonable. *State ex rel. Util. Consumers Council of Mo., Inc. v. Pub. Serv. Comm'n*, 585 S.W.2d 41, 47 (Mo. 1979). If, as in the present case, the order is unlawful, the reviewing court need not address the reasonableness thereof. *See id.*

B. The PSC Cannot Exercise Jurisdiction or Power over MoGas Because it is an Interstate Transporter of Natural Gas

1. Federal Regulation of Interstate Commerce

The PSC's ability to intervene in MoGas' interstate activities must initially be examined in the larger context of the role generally allocated to the states in the area of interstate commerce in natural gas. Interstate transportation of natural gas – what MoGas undisputedly does – is interstate commerce subject to the Commerce Clause of the United States Constitution. *California v. Southland Royalty Co.*, 436 U.S. 519 (1978). Thus, both the United States and Missouri Supreme Courts have held that state agencies are powerless to interfere in the interstate segment of the natural gas business. *Federal Power Comm'n v. Panhandle E. Pipeline Co.*, 337 U.S. 498 (1949); *State ex rel. Cities Serv. Gas Co. v. Pub. Serv. Comm'n*, 85 S.W.2d 890, 898 (Mo. 1935) (“We think that the Pipe Line was engaged in interstate commerce and that it was not subject to the jurisdiction of the Commission.”). As such, the PSC's conclusion that § 386.250.1 “makes no distinction between operators of interstate and intrastate natural gas pipeline” and thus enables the PSC to exercise jurisdiction over MoGas (L.F. 136) is patently wrong.

Similarly, the federal Natural Gas Act (the “NGA”) confers upon FERC the “*exclusive* jurisdiction over the transportation and sale of natural gas in interstate commerce.” *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 300-01 (1988) (emphasis added); *see also Lightfoot v. City of Springfield*, 236 S.W.2d 348, 350 (Mo. 1951). This grant of authority was made to the exclusion of state commissions such as the PSC. *Nw. Cent. Pipeline Corp. v. State Corp. Comm’n of Kan.*, 489 U.S. 493, 513-14 (1989) (because “[i]nterstate pipelines operate within the field reserved under the NGA for federal regulation . . . the States are pre-empted from directly regulating these pipelines in such a way as to affect their cost structures”) (internal citations omitted). The only exception for state regulation, the Hinshaw Amendment, is inapplicable in the present case because that exception permits only state regulation of *intrastate* pipelines, which MoGas is not. *See Pub. Util. Comm’n v. FERC*, 143 F.3d 610, 614 (D.C. Cir. 1998).

FERC’s exclusive jurisdiction over interstate pipelines is so well-accepted that the PSC itself has conceded that it does not have jurisdiction over MoGas (*See* Appendix A13, Order Regarding Motions to Dismiss, PSC GC-2011-0138, p. 9 (Jan. 26, 2011) (noting that FERC has “exclusive jurisdiction” over MoGas)).

2. Missouri’s Public Service Act Recognizes the Basic Principles of Federal Preemption of Interstate Transportation of Natural Gas

Recognizing the long-held principles of federal control over the interstate transportation of natural gas, Missouri law expressly precludes application of the entire Public Service Act (“PSA”) to such interstate activities. § 386.030. Since the PSC is a creature of statute that can only function in accordance with the PSA, this limitation is

dispositive. *State ex rel. Monsanto Co. v. Pub. Serv. Comm'n*, 716 S.W.2d 791, 796 (Mo. 1986). The PSC “is vested with only such powers as are conferred upon it by the [PSA], by which it was created.” *State ex rel. Laundry, Inc. v. Pub. Serv. Comm'n*, 34 S.W.2d 37, 43 (1931). The PSC may exercise only powers specifically granted by its enabling statute and such powers that “by clear implication [are] necessary to carry out the powers specifically granted.” *Util. Consumers Council*, 585 S.W.2d at 49. The PSA “is not a license to engage in any conceivable activity for the protection of ratepayers. No matter how noble the cause, we must administer the law as it is, not as the [PSC] wishes it to be.” *Pub. Serv. Comm'n v. Oneok, Inc.*, 318 S.W.3d 134, 138 (Mo. App. 2009).

a. Missouri Law Expressly Precludes the Application of the PSA to Interstate Commerce

It is axiomatic that if the PSC only has those powers expressly conferred on it by the PSA, it cannot act when the legislature has expressly limited its powers. In the first substantive provision of the PSA, even before the section establishing the Commission itself, the legislature set forth a sweeping limitation on the application of that law:

Neither *this chapter, nor any provision of this chapter*, except when specifically so stated, *shall apply to or be construed to apply to commerce with foreign nations or commerce among the several states of this union*, except insofar as the same may be permitted under the provisions of the Constitution of the United States and the acts of Congress.

§ 386.030 (emphasis added).

MoGas is engaged in commerce among the several states. Thus, the PSA

affirmatively bans PSC intervention unless there is a provision of the PSA that “specifically” allows the PSC to intervene in FERC regulation and unless such intervention is “permitted under the provisions of” the federal constitution or an “act[] of Congress.”

Two considerations control here. First, there is no constitutional provision or act of Congress which would allow intervention in the face of § 386.030. Second, state law forbids the PSC from engaging in the conduct that is the subject of this case.

b. There is no Provision of the United States Constitution and no Act of Congress that Allows Intervention

The PSC Order does not cite any provision of the United State Constitution that would create an exception to § 386.030’s broad prohibition of applying the PSA to interstate commerce.

Nor does the PSC Order cite to any act of Congress that creates an exception to § 386.030’s broad prohibition of applying the PSA to interstate commerce. Instead, the PSC Order ambiguously suggests that FERC Rule of Practice and Procedure 214(a)(1) (18 C.F.R. § 385.214(a)(1)) “allows any state commission ... to intervene as a matter of right” (L.F. 133).

Initially, a FERC regulation, like any agency rule, is not an act of Congress. *USAA Fed. Savings Bank v. Pa. Human Relations Comm’n*, 2011 WL 3715113 at 5 (E.D. Pa. August 23, 2011) (authority granted by Congress to agency to create regulations does not “transform the regulations into an Act of Congress”); *In re Nautilus Motor Tanker Co.*, 85 F.3d 105, 111 (3rd Cir. 1996).

Moreover, Missouri statutes, not federal rules, determine whether the PSC is acting outside of its authority. *Cedar Hill Manor, LLC v. Dep't of Soc. Serv. Div. of Med. Serv.*, 145 S.W.3d 447, 451 (Mo. App. 2004); *see also Monsanto*, 716 S.W.2d at 796 (PSC must function within statutory limitations). The PSC may only engage in activities permitted by the state legislature. Rule 214(a)(1) merely sets forth the procedure by which a state agency may seek intervention and does not, and cannot, create the substantive right to intervene. As explained below, the Missouri legislature has not granted the PSC the authority to proceed under Rule 214. Because the PSC cannot support intervention by reference to any Missouri legislation, these FERC Rules are immaterial to the court's review. *See Monsanto*, 716 S.W.2d at 796.

c. The PSA Specifically Addresses what Powers the PSC has in Relation to FERC Hearings and It Does Not Sanction Intervention as a Litigating Adversary

Since there is no federal constitutional provision or act of Congress permitting the PSC to intervene in FERC matters, the PSC must look to some provision of the PSA that extends this jurisdiction to it. Nothing does. However, the Missouri legislature has addressed what the PSC *may* do in relation to federal agency proceedings. The PSA provides:

The [PSC] may make joint investigations, hold joint hearings within or without the state, and issue joint or concurrent orders in conjunction or concurrence with any railroad, public utility or similar commission, of other states or the United States of America, or any official, agency or any

instrumentality thereof, except that in the holding of such investigations or hearings, or in the making of such orders, the commission shall function as an agent of the United States of America, or any official, agency or instrumentality thereof, or otherwise.

§ 386.210.7.

This statute explicitly defines, and limits, the PSC's powers in relation to FERC hearings and investigations. The statute provides no right to intervene as a litigating adversary but limits the PSC's participation to joint investigations, hearings and other joint action. Since § 386.210.7 addresses the subject of the PSC's powers in federal agency matters in a specific way and does not include the right to intervene as an advocating litigant, it controls over the more general statutes that the PSC relies upon, discussed *supra*. See *State ex rel. Cass County v. Pub. Serv. Comm'n*, 259 S.W.3d 544, 551 (Mo. App. 2008).

The legislature's limitation on the nature of the PSC's involvement in hearings and investigations with other states or the federal government is very specific – the PSC is to act jointly and as an agent of the federal government, not as an adversary with a cause. This role is consistent with Missouri law which contemplates that the PSC act not as an advocate, but as an arbiter to balance the interests of the utilities and ratepayers. See § 386.230 (whenever a public utility has a controversy with another person, the PSC “shall act” as arbitrator). Thus, the PSC is charged with protecting utility investors, not just ratepayers. *Cass County*, 259 S.W.3d at 549; *Util. Consumers Council*, 585 S.W. 2d at 47 (one purpose of the PSC is to permit utilities a “just and reasonable” return); §

386.266.4 (PSC required to provide utilities “sufficient opportunity to earn a fair return on equity” when determining rates).

Permitting the PSC to expand its statutory authority in FERC matters from arbiter to advocate is a significant deviation from the limited authority provided under § 386.210.7. Moreover, the federal counterpart to § 386.210.7 dovetails with this limited role. The NGA authorizes FERC “to hold *joint hearings* with any State commission in connection with any matter with respect to which the Commission is authorized to act.” 15 U.S.C. § 717p (2010) (emphasis added). FERC Rule 1305 describes two types of joint hearings: (1) hearings in which the state commission sits with FERC for informational purposes or to provide an advisory opinion, and (2) “concurrent hearings” in which the state and federal commissions hear the matter together, making a joint record of the proceeding. 18 C.F.R. § 385.1305(b) (2007). The cooperating commissions may issue a concurrent order. 18 C.F.R. § 385.1305(d)(3).

The terms used in FERC Rule 1305 (*e.g.*, “joint,” “concurrent,” “hearing,” “order”) are identical to those used in § 386.210. Section 386.210 provides the PSC the ability to use the FERC procedural mechanism set forth in Rule 1305. Like § 386.210, Rule 1305 does not authorize intervention as a litigating or advocating party. *Id.* Moreover, Rule 1305 expressly *forbids* a state commission from participating in a joint or concurrent hearing and taking the position of an advocate:

Cooperation between two or more commissions in a concurrent hearing will preclude either from taking the position of an advocate or a litigant. If a commission wishes to take such a position, it will not be a cooperating

participant in that proceeding. In such situation the appropriate method of procedure will be intervention under Rule 214.

18 C.F.R. § 385.1305(g).

Accordingly, when a state commission acts jointly with FERC under Rule 1305 – the only action the PSC is authorized by Missouri statute to take – it is affirmatively precluded from acting as an intervening party. Intervention is only provided for in FERC Rules of Practice and Procedure 1306 and 214 and then only if the state legislature specifically authorizes the agency to engage in such adversarial intervention. *Cedar Hill Manor*, 145 S.W.3d at 451 (Missouri statutes, not federal rules, determine whether the PSC is acting outside of its authority).

With presumed knowledge of the state of the law, the Missouri legislature in § 386.210.7 chose only to allow the PSC to conduct joint hearings with FERC, and not to permit it to intervene. *See Scoggins v. Timmerman*, 886 S.W.2d 135, 137 (Mo. App. 1994) (legislature is presumed to know the state of the law when enacting a statute). In stark contrast, other states have authorized their regulatory agencies to intervene under Rule 1306 by express statutory language:

- Minnesota’s Public Utilities Commission may “participate in any proceedings before any federal agency or commission”;⁵
- Connecticut’s Department of Public Utility Control may “appear in and participate in any regulatory or judicial proceedings, federal or state”;⁶

⁵ MINN. STAT. § 216A.05, SUBD. 6 (2010).

- Oregon’s Public Utility Commission may “participate in any proceeding before any public officer, commission or body of the United States”;⁷
- Maryland’s Public Service Commission “may apply to and appear before appropriate federal units.”⁸

There is no similar language in any Missouri statute. Missouri’s lack of express statutory language is even more apparent in contrast to the statutes found in Minnesota, Connecticut, Oregon, and Maryland, and leaves the PSC with no basis for its self-serving declaration that it has the power to intervene in FERC cases. Indeed, the PSC’s unsuccessful attempt to create such legislation in the bill it introduced after the Circuit Court opinion in this case is an obvious recognition of the lack of such an enabling statute in Missouri.

d. The PSA does not Specifically Grant the PSC Authority to Intervene as a Litigating Party

The PSC dismisses § 386.210.7 by claiming that it “merely authorizes” joint activities but “does not limit” the PSC’s authority (L.F. 135). But the PSC does not even attempt to explain how this statute, which specifically addresses what the PSC can do in relation to FERC hearings, should be ignored in favor of the generalized statutes upon which the PSC relies. Although the PSC correctly conceded in the PSC Order that it

⁶ CONN. GEN. STAT. § 16-2a (2010).

⁷ OR. REV. STAT. § 756.040 (2009).

⁸ MD. CODE, PUB. UTIL. § 2-119 (1998).

must “find positive authority to allow it to intervene before FERC” (L.F. 136),⁹ the “specifically granted” powers cited by the PSC are in fact general in nature. The first statute is the general jurisdictional grant, § 386.250(1) which the PSC blends with a tortured reading of § 386.030 to reach its conclusion. Separately, the PSC looks to its general capacity to “sue and be sued” and the generic duties of its general counsel to find that the legislature has “specifically granted” it the power to intervene as an advocate in federal hearings regarding MoGas’ interstate activities. For the reasons discussed below, these claims are without merit.

- Section 386.250(1) provides: “The jurisdiction, supervision, powers and duties of the [PSC] 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 owning, leasing, operating or controlling the same.” (emphasis added).

As to this provision, the PSC ruled:

⁹ The PSC did not suggest in the PSC Order that its jurisdiction to intervene in FERC matters derived from a specified power that “by clear implication [was] necessary to carry out the powers specifically granted.” *Util. Consumers Council*, 585 S.W.2d at 49. Thus, the PSC Order stands or falls on the question of whether the right to intervene is specifically granted by statute.

MoGas transports natural gas into Missouri through an interstate pipeline and the statute's grant of authority makes no distinction between operators of interstate and intrastate natural gas pipelines. Of course, any authority the [PSC] may have over the interstate transportation of natural gas is limited by the federal jurisdiction of FERC. However, as previously indicated, Section 386.030 RSMO, allows the [PSC] to become involved in interstate commerce to the extent that involvement does not conflict with the United States Constitution or federal law. Moreover, as previously indicated, FERC's regulations allow the [PSC] to intervene in matters before it.

(L.F. 136-37).

Through these four sentences, the PSC performs jurisdictional sleight of hand. First, the statute makes a direct and unmistakable limitation of its application to the "distribution of gas" by those who operate "within the state." The bold statement that the statute makes no such distinction is simply false. Moreover, even if the statute was not clear enough, § 386.030 makes crystal clear that *nothing in the entire chapter of the PSA applies to interstate commerce except insofar as may be permitted by the U.S. Constitution or an act of Congress.*

Apparently recognizing the transparency of its illusion, the PSC employs classic misdirection to accomplish the trick. After falsely claiming § 386.250.1 makes no distinction between inter- and intrastate commerce (and implying it grants the PSC jurisdiction over interstate commerce), the PSC claims that "of course" its jurisdiction is

limited by FERC. This is false. As noted above, its jurisdiction is limited by the Commerce Clause, the NGA, § 386.030 and decades of case law that identifies the PSC as a creature of statute with limited powers. The PSC cites to no authority, because none exists, for the proposition that FERC regulations establish or define the PSC's jurisdiction.

The PSC nevertheless builds upon its false premise by positing that § 386.030 extends jurisdiction to the PSC in interstate commerce "to the extent that involvement does not conflict with the United States Constitution or federal law." This is doubly false. Section 386.030 does *not* extend jurisdiction "to the extent there is no conflict"; it extends jurisdiction only where *permitted* and then not where permitted under "federal law," but only under the Constitution or "acts of Congress." The PSC's attempt to turn this provision which limits its jurisdiction into a positive grant of authority fails (L.F. 137). Far from being such a grant, § 386.030 recognizes the supremacy of federal law over interstate commerce in natural gas.

The PSC finishes its jurisdictional illusion by claiming that the FERC's regulation allowing intervention is a "federal law" that constitutes a positive grant of jurisdiction to the PSC. As noted above, FERC's procedural rules for intervention are not an "act of Congress" as required by § 386.030 and cannot in any event do that which the Missouri legislature alone is able to – but has chosen not to – do, namely grant the PSC jurisdiction over MoGas' interstate transportation of natural gas.

- Section 386.120.4 is the only other "positive authority" cited by the PSC. However, this statute merely provides that the PSC is an entity that may sue and be sued.

The PSC marries this provision with § 360.071, which authorizes it to appoint a general counsel and sets forth the duties of that position which naturally include the obligation to represent the PSC in various matters. This statutory blend, according to the PSC, amounts to a “very broad grant of authority to intervene” (L.F. 137).

Initially, § 386.120.4 is not a jurisdictional grant. “Capacity to sue refers to the status of a person or group as an entity that can sue or be sued, and is not dependent on the character of the specific claim alleged in the lawsuit.” *City of Wellston v. SBC Com., Inc.*, 203 S.W.3d 189, 193 (Mo. 2006) (internal quotations omitted). In other words, the concept of capacity to sue is unrelated to the character of the claim. Indeed, certain entities lack such legal capacity and must instead sue or be sued in the names of the individuals that comprise the entity. *See, e.g., Exec. Bd. of Mo. Baptist Convention v. Carnahan*, 170 S.W.3d 437, 445 (Mo. App. 2005). Section 386.120.4 is simply a routine declaration of capacity and is not, as the PSC suggests, an unqualified grant of legal authority to pursue claims outside of its statutory grant of authority.

Nor is this statute’s failure to confer jurisdiction remedied by the statute outlining the general counsel’s duties. Section 386.071 authorizes the PSC to employ general counsel and establishes the “duties” owed to the PSC by that general counsel. These duties include representation of the PSC in any proceeding “involving any question under this or any other law, or under or in reference to any act, order, decision, or proceeding of the commission, and if directed to do so by the commission, to intervene, if possible, in any action or proceeding in which any such question is involved.” § 386.071. The PSC

suggests that these defined duties are a jurisdictional grant to engage in any legal proceeding, in any venue, and for any reason (L.F. 137).

The duty of the general counsel can extend no further than the power of the PSC, to whom the general counsel owes the duty. The jurisdiction of the PSC is firmly established by §§ 386.030 and 386.250, which, as discussed above, is limited to gas distribution within the state. Thus, although § 386.071 obligates the PSC's general counsel to represent the PSC in any legal matter in which the PSC is *lawfully* involved (including through intervention), it does not expand the PSC's jurisdiction to become unlawfully involved as an adversary in FERC proceedings. Simply put, § 386.071 does not permit the PSC's general counsel to intervene in matters that the PSC is not authorized to participate in under Missouri law.

An argument comparable to that made by the PSC was summarily rejected by the court in *Oneok*. In *Oneok*, the court stated that § 386.071 merely “specifies the duties of the Commission’s general counsel and does not authorize the general counsel to bring [a refund] action.” 318 S.W.3d at 138. Here, § 386.071 does not authorize FERC intervention. This holding is logical, because it is axiomatic that “an attorney is an agent of his or her client and acts as the client’s alter ego.” *Roth v. La Societe Anonyme Turbomeca France*, 120 S.W.3d 764, 776 (Mo. App. 2003). Because an agent’s legal powers are derived from the principal, an agent has “the power to affect the legal relations of the principal to the same extent as if the principal has so acted.” *Bach v. Winfield-Foley Fire Prot. Dist.*, 257 S.W.3d 605, 610, n.7 (Mo. 2008) (citing RESTATEMENT (SECOND) OF AGENCY § 12, cmt. a (1958)). Therefore, an attorney acting

on behalf of the PSC cannot have greater legal authority than the PSC. Indeed, the general counsel is subordinate to the PSC and appointed “to serve at the pleasure of the commission.” § 386.071. The PSC’s attempted bootstrapping of its general counsel’s generally-described duties into a broad grant of jurisdictional power is unlawful, reasonable and should be rejected.

e. Absent any Express Grant of Authority to Intervene, Such Authority Cannot be Implied

The PSC Order did not cite to any express grant of authority from which it claims the right to intervene in MoGas’ interstate activities can be implied. The PSC’s election not to look to such an implied grant is consistent with case law. The court in *Cass County* faced a nearly identical situation to the present case. In that case, the court examined the question of whether the PSC had the statutory authority to grant *post hoc* approval to a power company, Aquila, to construct an electric power plant. The court held that the PSC lacked such statutory authority and stated: “We are unable to find anywhere in the more than 2,500 words of section 393.140 any express or implied authority to grant permission for the construction of a power plant. Conversely, the provisions of section 393.170 deal explicitly and specifically with the construction of power plants. Having reviewed both statutes and found no explicit or implied authority for the *post hoc* grant of a [certificate of necessity] authorizing the construction the facilities, we conclude that the PSC exceeded its statutory mandate by issuing the [certificates] at issue.” *Id.* at 551.

Following the court's decision in *Cass County*, the PSC went to the Missouri General Assembly and obtained the passage of special legislation (S.B. No. 720) which expressly gave it the authority to grant *post hoc* approval of the construction of an electric power plant. This legislation was later codified as § 393.171. The PSC's remedy in the present case also lies with the Missouri General Assembly. Unfortunately for the PSC, its attempt to amend § 386.210 failed in the 95th General Assembly. The legislation the PSC proposed within two (2) days of the Circuit Court's amended judgment in the present case would have added a new § 386.210.8(8) to provide:

The commission may appear in any proceeding at the Federal Energy Regulatory Commission, the Nuclear Regulatory Commission, the Federal Communications Commission, or any other federal administrative agency that has jurisdiction over a utility that is regulated by the commission or whose decisions may affect utility rates or service in Missouri. The commission may also file or otherwise participate in appeals from such federal administrative agencies. This subsection applies to all proceedings pending at the time of, or commenced after, the effective date of this section.

Senate Bill No. 897, House Bill No. 2095, 95th General Assembly.

The PSC's failed legislative effort is nothing short of an admission by it that it does not have the power to intervene in MoGas' interstate activities. The rejected bills also confirm that whether the PSC should have that power is a legislative, not a judicial, issue. "[The PSA] is not a license to engage in any conceivable activity for the protection

of ratepayers. No matter how noble the cause, we must administer the law as it is, not as the [PSC] wishes it to be.” *Oneok*, 318 S.W.3d at 138.

II. THE PSC ERRED BY DENYING MOGAS' APPLICATION TO TERMINATE BECAUSE THE PSC IS NOT AUTHORIZED TO PURSUE, BY INTERVENTION OR OTHERWISE, MATTERS THAT IT DEEMS OF INTEREST TO THE PEOPLE OR STATE OF MISSOURI IN THAT ONLY THE ATTORNEY GENERAL HAS THIS PLENARY AUTHORITY.

The PSC Order broadly concludes that the PSC's capacity to sue and be sued, together with the breadth of the duties assigned to its general counsel, amount to "a very broad grant of authority to [the general counsel] to intervene and the [PSC's] authority to engage in litigation is necessarily as broad as the authority granted to the general counsel as the [PSC's] attorney" (L.F. 137). In addition to reversing the roles of principal and agent and wrongly suggesting that the authority of the agent defines the authority of the principle, the PSC's decision advances the dangerous notion that it and its general counsel can pursue whatever litigation they choose, involving whatever issues they choose, in whatever forum they choose. That is not the law in Missouri.

Only the Attorney General is the "proper party to bring an action for the state ... which would prevent injury to the general welfare." *State ex rel. Taylor v. Wade*, 231 S.W.2d 179, 182 (Mo. 1950); *State ex rel. Igoe v. Bradford*, 611 S.W.2d 343, 347 (Mo. App. 1980). The Attorney General alone "is authorized to represent the interests of the State generally," and who is "generally authorized to seek enforcement of the General Assembly's statutory purposes." *Fogle v. State*, 295 S.W.3d 504, 510 (Mo. App. 2009). These common law powers have been codified by the Missouri legislature in § 27.060. *See State v. Planned Parenthood of Kansas*, 66 S.W.3d 16, 19 (Mo. 2002).

In contrast, the PSC is a quasi-judicial body, *State ex rel. Praxair, Inc. v. Pub. Serv. Comm'n*, 344 S.W.3d 178, 186 (Mo. 2011), and is not intended to act as a litigant. The PSC is mandated to consider, balance, and protect the interests of rate payers *and* utilities such as MoGas. *See Cass County*, 259 S.W.3d at 549. As established above, the PSC does not have the statutory authority to pursue litigation. It cannot circumvent that result by attempting to pursue that which only the Attorney General to pursue. *See* § 507.010; *see also State ex rel. & to Use of Northside Church of God v. Church of God*, 247 S.W.2d 542, 546 (Mo. App. 1952) (“An action can only be brought in the name of the State when provided for by statute.”). For these reasons, the PSC Order is unlawful and should be overturned.

CONCLUSION

For the foregoing reasons, MoGas respectfully requests that the PSC Order be vacated and that this Court determine that the PSC has neither express nor implied statutory authority to intervene in FERC matters and is prohibited from intervening in FERC matters under Missouri law; and that this Court order that the PSC immediately withdraw and terminate permanently its unlawful participation in FERC matters related to MoGas.

Respectfully submitted,

CARMODY MACDONALD P.C.

By: /s/ Gerard T. Carmody
Gerard T. Carmody #24769
David H. Luce #36050
Teresa Dale Pupillo #42975
120 S. Central Avenue
Suite 1800
St. Louis, Missouri 63105
(314) 854-8600
(314) 854-8660 – Fax
gtc@carmodymacdonald.com

CURTIS, HEINZ, GARRETT & O'KEEFE, P.C.

Leland B. Curtis, #20550
130 S. Bemiston, Suite 200
St. Louis, Missouri 63105
(314) 725-8788
(314) 725-8789 - Fax
lcurtis@lawfirmemail.com

Attorneys for Respondent MoGas Pipeline LLC

Dated: December 5, 2011

RULE 84.06 CERTIFICATION

I hereby certify, pursuant to Rule 84.06(c) of the Missouri Rules of Civil Procedure, that Respondent's Substitute Brief was prepared using Microsoft Word, in 13-point Times New Roman font and that it contains 6,766 words, as determined by the Microsoft Word word-counting system in compliance with Rule 84.06(b) and Local Rule 360(c).

/s/ Gerard T. Carmody

CERTIFICATE OF SERVICE

I certify that this Respondent's Substitute Brief including the Appendix were served on the counsel identified below by the e-filing system on December 5, 2011:

Jennifer Leigh Heintz
200 Madison Street
P.O. Box 360
Jefferson City, MO 65102

Attorney for Respondent

/s/ Gerard T. Carmody