



**IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

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|-----------------------------|---|------------------------------|
| STATE OF MISSOURI, ex rel., |) | |
| MOGAS PIPELINE LLC, |) | |
| |) | |
| Respondent, |) | |
| |) | |
| v. |) | WD72355 |
| |) | |
| MISSOURI PUBLIC SERVICE |) | Opinion filed: June 28, 2011 |
| COMMISSION, |) | |
| |) | |
| Appellant. |) | |

APPEAL FROM THE CIRCUIT COURT OF COLE COUNTY, MISSOURI
The Honorable Gael D. Wood, Judge

Before Division Two: Karen King Mitchell, Presiding Judge,
Joseph M. Ellis, Judge and Victor C. Howard, Judge

Since June 1, 2008, MoGas Pipeline LLC ("MoGas") has operated an interstate natural gas pipeline, part of which is situated in the State of Missouri, under the regulatory jurisdiction of the Federal Energy Regulatory Commission ("FERC"). In Fall 2008, after MoGas filed a motion with FERC to modify provisions of its gas tariff, the Missouri Public Service Commission ("the PSC") filed a Notice of Intervention and Protest in that FERC tariff action. In response, MoGas filed an application with the PSC asking it to terminate the PSC's participation in the FERC action, asserting that the PSC lacked statutory authority to participate in that action and was acting *ultra vires*. After

requesting and obtaining a response to the application to terminate from its staff, on July 15, 2009, the PSC entered its order denying MoGas's application to terminate, concluding that it had the statutory authority under Chapter 386 to intervene as a party in the FERC action.

MoGas timely filed a Petition for Writ of Review in the Circuit Court of Cole County. After the matter was briefed and argued, the Circuit Court entered its judgment concluding that the PSC's decision was unlawful and unreasonable.

The PSC timely appealed that judgment. Pursuant to Rule 84.05(e), however, because this Court reviews the decision of the administrative agency rather than the circuit court, MoGas, as the party aggrieved by the PSC decision, assumes the position of the appellant on appeal. On appeal, MoGas again contends that the PSC's decision was erroneous because the PSC lacked statutory authority to intervene as a party in the FERC action.¹

"The role of this court in reviewing the decision of the PSC is to determine whether the PSC's order is lawful and reasonable." ***State ex rel. AG Processing, Inc. v. Public Service Comm'n***, 311 S.W.3d 361, 365 (Mo. App. W.D. 2010) (internal quotation omitted). "An order's lawfulness turns on whether the PSC had the statutory authority to act as it did." ***Hurricane Deck Holding Co. v. Public Service Comm'n***, 289 S.W.3d 260, 263 (Mo. App. W.D. 2009) (internal quotation omitted). Where the PSC's order is lawful, it must then be reviewed to determine whether the order was

¹ While MoGas brings two separate points on appeal, both points assert the lack of statutory authority of the PSC and simply attack different chains of reasoning expressed in the PSC's decision.

reasonable. ***State ex rel. Sprint Mo. Inc. v. Public Service Comm'n***, 165 S.W.3d 160, 164 (Mo. banc 2005). "In so doing, this Court determines whether the order was supported by substantial and competent evidence on the whole record, whether the decision was arbitrary, capricious or unreasonable, or whether the PSC abused its discretion." ***Id.*** (internal quotation omitted).

"As a creature of statute, the [PSC]'s powers are limited to those conferred by statute, either expressly, or by clear implication, as necessary to carry out the powers specifically granted." ***Public Service Comm'n v. OneOk, Inc.***, 318 S.W.3d 134, 137 (Mo. App. W.D. 2009) (internal quotation omitted). "The lawfulness of a PSC decision is determined from the statutory authority of the PSC." ***State ex rel. AG Processing***, 311 S.W.3d at 365 (internal quotation omitted). "In determining whether the PSC's decision was lawful, this court exercises unrestricted, independent judgment and must correct erroneous interpretations of law." ***Id.*** (internal quotation omitted). In conducting this analysis, Chapter 386 must "be liberally construed with a view to the public welfare . . ."

§ 386.610.²

Under § 386.250(1):

The jurisdiction, supervision, powers and duties of the public service commission herein created and established **shall extend** under this chapter . . . **to gas and electric plants**, and to persons or corporations owning, leasing, operating or controlling the same.

(emphasis added). "Gas plants" are defined as "all real estate, fixtures and personal property owned, operated, controlled, used or to be used for or in connection with or to

² All statutory references are to RSMo 2000 unless otherwise noted.

facilitate the manufacture, distribution, sale or furnishing of gas, natural or manufactured, for light, heat or power." § 386.020(19). MoGas acknowledges that it operates a natural gas pipeline in Missouri. As that pipeline is a real estate fixture used for the distribution of natural gas, § 386.250.1 clearly grants the PSC supervisory jurisdiction and power over MoGas.³

MoGas, the PSC, and the Missouri legislature have all recognized, however, that the federal Natural Gas Act⁴ preempts Chapter 386 by placing regulatory authority over interstate gas pipelines with FERC. In order to avoid conflicting with federal preemption over subjects to which Chapter 386 would otherwise apply, § 386.030 provides:

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.

Thus, the PSC's supervisory jurisdiction and powers established in Chapter 386 are inapplicable to interstate gas pipelines except insofar as they are permitted under the U.S. Constitution or an act of Congress.

FERC regulations clearly permit any state commission, like the PSC, to intervene in a proceeding before FERC simply by filing a timely application. **18 C.F.R. § 385.214(a)(1)**. FERC regulations are promulgated pursuant to the authority vested in

³ In arguing that the PSC lacked jurisdiction under § 386.250.1, MoGas focuses on an earlier provision of that subsection granting jurisdiction to the PSC over the "manufacture, sale or distribution of gas, natural and artificial . . . within the state." MoGas contends that the "within the state" language restricts the PSC's jurisdiction to intrastate manufacture, sale or distribution. The "within the state" language is not, however, included in the applicable provisions related to gas plants.

⁴ 15 U.S.C. § 717 et seq.

them by federal statute and are, accordingly, instituted pursuant to an act of Congress. See *California Sportfishing Protection Alliance v. Federal Energy Regulatory Comm'n*, 472 F.3d 593, 595 (9th Cir. 2006). We are, therefore, left to consider whether any of the provisions of Chapter 386, expressly or by clear implication, grant the PSC the power to intervene in a FERC action.

Sections 386.210 through 386.380 address the powers and duties of the PSC. Section 386.210.1⁵ provides that the PSC "may confer in person, by correspondence, by attending conventions, **or in any other way**, with . . . any public utility or similar commission of this and other states and the United States of America, or any official, agency or instrumentality thereof, **on any matter relating to the performance of its duties.**" (emphasis added). Section 386.210.2 states that "[s]uch communication may address any issue that at the time of such communication is not the subject of a case that has been filed with the [PSC]." The subject of MoGas's tariff is not the subject of any case before the PSC. Thus, the PSC is clearly empowered to communicate with FERC in any way on any matter related to the performance of its duties.

Section 386.210.7 empowers the PSC to engage in joint investigations, hold joint hearings, and/or issue joint orders with any similar commission from another state or the federal government. Accordingly, this subsection clearly contemplates and authorizes the PSC to cooperate with and act in conjunction with FERC or similar federal commissions or agencies in regulatory activities.

⁵ All references related to § 386.210 are to RSMo Cum. Supp. 2008.

Participating as a party in a FERC action to protest a tariff modification certainly falls within the general gambit of "conferring" with FERC on a matter relating to the performance of the PSC's duty to supervise companies operating gas plants in the state and is also closely akin to participation in a joint investigation or hearing. Section 386.210.6 dictates that the PSC's dealings with FERC or similar commissions or agencies should be "proper, expedient, fair and equitable and in the interest of the state of Missouri and the citizens thereof." Clearly, intervening in a FERC proceeding to protest what the PSC perceives to be an unfair and inequitable tariff adjustment is in the interest of the State of Missouri and its citizens.

Thus, while § 386.210 does not explicitly grant the PSC the authority to assume the position of a party to a hearing before a federal regulatory commission like FERC, when construed with a view to the public welfare, the authority of the PSC to participate in such a manner is clearly implied by the provisions of § 386.210. Certainly, the PSC's participation in the action is the most expedient way for the PSC to communicate its concerns in the matter to FERC.

Having concluded that the Commission's order was lawful, we must next address whether it was reasonable. "Missouri courts have long recognized that when the decision involves the exercise of regulatory discretion, the PSC is delegated a large amount of discretion, and many of its decisions necessarily rest largely in the exercise of a sound judgment." ***State ex rel. Sprint Mo. Inc.***, 165 S.W.3d at 164 (internal quotations omitted). Section 386.210 grants the PSC the discretion to determine when, where, and how to interact with other similar commissions. "Under these

circumstances, the reviewing court will not substitute its judgment for that of the PSC on issues within the realm of the agency's expertise." *Id.* (internal quotations omitted). The PSC's denial of MoGas's motion was not arbitrary, capricious, unreasonable, or an abuse of discretion.

For the foregoing reasons, the trial court's judgment reversing the PSC's decision is reversed, and the Commission's denial of MoGas's motion to terminate the PSC's participation in the FERC action is affirmed.

All concur.

Joseph M. Ellis, Judge