

**IN THE SUPREME COURT OF THE
STATE OF MISSOURI**

STATE OF MISSOURI EX REL.)	
MOGAS PIPELINE LLC,)	
)	
Respondent,)	No. SC91968
v.)	
)	
MISSOURI PUBLIC SERVICE)	
COMMISSION,)	
Appellant.)	

**SUBSTITUTE BRIEF OF APPELLANT
MISSOURI PUBLIC SERVICE COMMISSION**

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Jurisdictional Statement

This case is before the Court on MoGas Pipeline, LLC's (MoGas) Application to Transfer under Article V, Section 10 of the Missouri Constitution and Missouri Supreme Court Rule 83.04. This Court granted transfer after an opinion by the Western District Court of Appeals affirming the Missouri Public Service Commission's (Commission) order denying an application by MoGas requesting that the Commission terminate its involvement in matters involving MoGas that are pending at the Federal Energy Regulatory Commission (FERC) and in the United States Court of Appeals for the District of Columbia Circuit.

The Honorable Gael D. Wood sitting by special designation in the Circuit Court of Cole County reversed the Commission's order on March 5, 2010. The Court of Appeals affirmed the Commission's order on June 28, 2011. This Court ordered transfer from the Court of Appeals on October 4, 2011.

Standard of Review

An order of the Commission has a presumption of validity. *State ex rel. Office of Public Counsel v. Public Service Commission*, 289 S.W.3d 240, 246 (Mo. Ct. App. W.D. 2009). The party challenging the order has the burden of proving its invalidity. *Id.* The reviewing court views the evidence in the light most favorable to the order and affords the Commission the benefit of all reasonable inferences. *Id.* at 246-47. Commission orders are *prima facie* lawful and remain in effect until the ultimate conclusion of the appellate process. *State ex rel. Office of Public Counsel v. Public Service Commission*, 210 S.W.3d 344, 360 (Mo. Ct. App. W.D. 2006). In non-contested cases, the

Commission is not required to make factual findings and the order will be reviewed only for lawfulness. *Id.* at 355.

A Commission order is lawful if the Commission acted within its statutory authority. *Id.* In determining whether the order is lawful, the reviewing court exercises unrestricted independent judgment and must correct erroneous interpretations of the law. *State ex rel. Missouri Gas Energy v. Public Service Commission*, 186 S.W.3d 376, 381 (Mo. Ct. App. W.D. 2005). Commission orders are reasonable if they are supported by substantial and competent evidence on the record and if they are not arbitrary, unreasonable or an abuse of the Commission's discretion. *State ex rel. AG Processing, Inc. v. Public Service Commission*, 102 S.W.3d 732, 735 (Mo.banc 2003).

This Court reviews the decision of the Commission, not the judgment of the circuit court. *Public Counsel*, 289 S.W.3d at 246. This standard of review is applicable to each point relied on.

Statement of Facts

The Commission is the state agency responsible for the regulation of investor-owned utilities in Missouri. (L.F., p. 132). The Commission was created by the legislature. (L.F., p. 132). In legal matters, the Commission is represented by its statutorily-created general counsel. (L.F., p. 132) The general counsel represents the Commission in all cases in any forum outside the Commission, including state courts, federal courts and federal agencies such as the FERC and the Federal Communications Commission. (L.F., p. 132).

Appellant MoGas is an interstate natural gas pipeline company regulated by the FERC. (L.F., p. 132). The interstate natural gas pipeline operated by MoGas delivers natural gas to customers in Missouri. (L.F., p. 133). Prior to becoming an interstate pipeline, predecessor of MoGas operated as intrastate pipelines regulated by the Commission. (L.F., p. 133). The FERC took jurisdiction of the newly combined interstate pipelines on June 1, 2008.¹

The Commission has intervened in several matters involving MoGas and its predecessor Missouri Interstate Gas at the FERC. (L.F., p. 133). The majority of the Commission's interventions predate the MoGas application underlying this case. Prior to the underlying application, neither MoGas nor any of its predecessors had ever objected to the Commission's participation in matters pending before the FERC.

On September 9, 2008, MoGas filed what it titled an Application to Terminate (application) before the Commission, which it later amended. (L.F., p. 1). In its application, MoGas argued that the Commission lacks the statutory authority to intervene at FERC. (L.F., p. 2). MoGas requested that the Commission withdraw a protest in a FERC matter and terminate any investigation into the FERC case. (L.F., p. 18). The Commission's Staff opposed the request to terminate. (L.F., p. 25-32). Staff also opposed

¹The exact date that MoGas became an interstate pipeline is not directly relevant to this case. In its brief, however, MoGas erroneously states that it has been an interstate pipeline since 2007. The FERC's order providing June 1, 2008 as the date it took jurisdiction over MoGas is attached at Appendix, pp. (A059-A063).

the legal positions taken by MoGas. (L.F., pp. 25-32). After the parties filed cross-motions for determination on the pleadings, the Commission issued its order denying the relief requested in the application. (L.F. p. 131).

Before the Commission issued any decision on the cross-motions for determination on the pleadings, MoGas sought the relief requested in the application through extraordinary writ, in the circuit court, the Court of Appeals and this Court. (L.F., p. 132). The petitions for extraordinary relief filed by MoGas were all dismissed or denied. (L.F., p. 133).

After the Commission issued its final order, MoGas filed a timely application for rehearing. (L.F., p. 148). The Commission denied the application for rehearing. (L.F., p. 154). MoGas filed a petition for writ of review in the circuit court. (L.F., p. 4). The circuit court reversed the Commission's order. (L.F., p. 8). The Commission appealed the circuit court's reversal. (L.F., p. 10). The Court of Appeals for the Western District affirmed the Commission's order. (Appendix p. A058). This Court granted post-opinion transfer.

Points Relied On

I

The Commission's order denying the application to terminate its involvement in FERC proceedings must be affirmed because its order was lawful under Section 386.510 in that the Commission has authority to participate in proceedings at the FERC under both federal and state law and because the Commission is not attempting to exercise its rate-setting jurisdiction over MoGas by participating as a litigant in

proceedings at the FERC. (Responds to Point I of MoGas's Points Relied On).

Statutes

15 U.S.C. § 717

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15 U.S.C. § 717c

15 U.S.C. § 717d

15 U.S.C. § 717f

15 U.S.C. § 717l

15 U.S.C. § 717o

Section 386.030, RSMo (2000)

Section 386.040, RSMo (2000)

Section 386.210, RSMo (2000) (Supp. 2010)

Section 386.250, RSMo (2000)

Alabama Code 1975 § 37-1-46

Arkansas Code Annotated § 23-18-507

Colorado Revised Statutes Annotated § 40-2-115

Delaware Code 26 § 214

Idaho Code Annotated § 61-505

Illinois Statutes Chapter 220 § 5/4-301

Kansas Statutes Annotated 66-106

35-A Maine Revised Statutes Annotated § 118

New Hampshire Revised Statutes § 363.18

North Dakota Century Code Annotated § 49-02-02

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Northern Natural Gas Co. v. State Corp. Commission of Kansas, 372 U.S. 84, 83 S.Ct. 646 (1963)

United Distribution Cos. v. F.E.R.C., 88 F.3d 1105 (D.C. Cir. 1996)

Superior Oil Co. v. F.E.R.C., 563 F.2d 191 (D.C. Cir. 1977)

Regulations

18 C.F.R. § 157

18 C.F.R. § 385.214

18 C.F.R. § 385.1305

18 C.F.R. § 385.2101

II

The Commission's order denying the application to terminate must be affirmed because the Commission's order was lawful under Section 386.510 in that under Missouri law, the Attorney General does not perform the functions of the Public Service Commission. (Responds to Point II of MoGas's Points Relied On).

Statutes

Section 27.060, RSMo (2000)

Section 386.071, RSMo (2000)

Section 386.120, RSMo (2000)

Section 386.610, RSMo (2000)

Section 386.700, RSMo (2000)

Section 386.710, RSMo (2000)

Section 620.010, RSMo (2000)

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(Mo.banc 1943)

State ex rel. Utility Consumers' Council of Missouri v. Public Service Commission, 585

S.W.2d 41 (Mo.banc 1979)

Argument

I

The Commission's order denying the application to terminate its involvement in FERC proceedings must be affirmed because its order was lawful under Section 386.510 in that the Commission has authority to participate in proceedings at the FERC under both federal and state law and because the Commission is not attempting to exercise its rate-setting jurisdiction over MoGas by participating as a litigant in proceedings at the FERC.

The Natural Gas Act allows state utility commissions to participate in FERC proceedings.

When it passed the Natural Gas Act, 15 U.S.C. § 717 et seq., Congress intended to create a comprehensive regulatory scheme for the natural gas industry. *United Distribution Cos. v. F.E.R.C.*, 88 F.3d 1105, 1122 (D.C. Cir. 1996). Congress delegated its regulatory authority to the Federal Power Commission, the predecessor to the FERC. *Superior Oil Co. v. F.E.R.C.*, 563 F.2d 191, 196 (D.C. Cir. 1977). The states may not directly regulate interstate natural gas pipelines by setting their rates or indirectly regulate them by passing regulations that achieve the same result. *Northern Natural Gas Co. v. State Corp. Commission of Kansas*, 372 U.S. 84, 90-91, 83 S.Ct. 646 (1963). The states are intended to have a role in the regulatory framework created by the Natural Gas Act. *Panhandle Eastern Pipeline v. Public Service Commission*, 332 U.S. 507, 520-21, 68 S.Ct. 190 (1947). A continued role for the states is necessary to protect “the vital interests of the states and their people, consumers and industry alike, in the regulation of rates and service.” *Id.* at 521.

MoGas argues that because the FERC has exclusive jurisdiction over interstate gas pipelines, the Commission is prohibited from appearing at the FERC at all. But MoGas misstates the Commission’s role. It is true that the Commission does not have jurisdiction to set rates or approve tariffs for MoGas. That jurisdiction lies with the FERC. By appearing as a litigant at the FERC, the Commission is not attempting to directly regulate MoGas by setting its rates or approving its tariffs. Nor is the Commission attempting to indirectly regulate MoGas through passing impermissible regulations. The Commission

has not attempted to set rates for MoGas or to pass any regulation that has the effect of setting rates for MoGas. If the Commission had attempted to do either of those things, those actions would be prohibited by the Natural Gas Act and the decision in *Northern Natural Gas Co.* But instead, the Commission is appearing as a party to present evidence to the FERC to allow that agency to decide what rates and tariffs are just and reasonable. The Natural Gas Act allows such activity by the Commission. The Natural Gas Act expressly provides for state commission participation in FERC proceedings in several passages, as described in the following subsection. The Commission's participation in matters involving MoGas is lawful and the underlying denial of the application to terminate must be affirmed.

Section 386.030 allows the Commission to participate in proceedings before the FERC.

The Missouri Public Service Commission was created by the legislature. The Commission's enabling statute is Section 386.040, RSMo (2000). The Commission was created to carry out the provisions of Chapters 386 and 393 relating to public utilities. *Id.* The Commission's authority with respect to natural gas is found in Section 386.250.1, RSMo (2000). To effectuate its purpose, the Commission "shall be vested with and possessed of the powers and duties in this chapter specified, and also all powers necessary and proper to enable it to carry out fully and effectually all the purposes of this chapter." Section 386.040, RSMo (2000). As a creation of the state legislature, the Commission has only the powers that are conferred by statute. *Missouri Public Service Commission v. OneOK*, 318 S.W.3d 134, 137 (Mo. Ct. App. W.D. 2009), reh'g and/or

transfer denied (Feb. 2, 2010), opinion adopted and reinstated after transfer (Sept. 24, 2010). The powers must be granted expressly or be necessary by clear implication to carry out the powers that are specifically granted. *Id.* (citations omitted). The Commission is a “state commission” within the meaning of the Natural Gas Act. 15 U.S.C. § 717a (8).

Section 386.030, RSMo (2000) provides:

Neither this chapter, nor any provision of this chapter, except where specifically so stated, shall apply 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.

When Congress delegated authority to the Federal Power Commission (predecessor to the FERC), it delegated to the federal regulatory agency the authority to make rules and regulations to carry out its regulatory function. *Superior Oil Co.*, 563 F.2d at 196. The rules issued by FERC are “legislative in nature.” *Id.* FERC regulations have the force and effect of law if they are “(a) within the granted power, (b) issued pursuant to proper procedure, and (c) reasonable.” *Id.*

The Natural Gas Act allows state commissions to initiate complaints with the FERC concerning the propriety of any proposed rate schedule filed with the federal

agency. 15 U.S.C. § 717c(e).² The Natural Gas Act also allows state commissions to initiate complaints to decrease existing rates. 15 U.S.C. § 717d. State commissions are

² Various other references to state commission are made throughout the Natural Gas Act, signaling that Congress intended for the state commissions to be active participants in FERC matters. See, 15 U.S.C. § 717b(d) (allowing state commissions to inspect liquefied natural gas facilities); 15 U.S.C. § 717g(a) (requiring pipelines to comply with state record-keeping laws); 15 U.S.C. § 717h (preserving the state commissions' power to determine its jurisdiction with regard to depreciation rates and permitting the state commission to appear and present their views and recommendations about proposed accounting and depreciation rule changes proposed by the FERC); 15 U.S.C. § 717j (giving the FERC authority with respect to state compacts regarding the production and transportation of natural gas); 15 U.S.C. § 717m (providing for the FERC to make available to the state commissions information about investigations undertaken by the FERC); 15 U.S.C. § 717n(b)(2) (requiring state agencies involved in applications for federal authorization to cooperate with FERC and follow its procedures and deadlines); 15 U.S.C § 717p (allowing for the creation of joint boards between FERC and state commissions, providing that the FERC shall confer with state commissions about rare structures, and making information and reports available to the state commissions); 15 U.S.C. § 717r (providing for judicial review of FERC order by parties, including state commissions); 15 U.S.C. § 717t-2 (requiring the FERC's rules to make information available to state commissions in a timely manner).

expressly allowed to bring complaints alleging violations of the Natural Gas Act by natural gas companies. 15 U.S.C. § 717l. Section 15 U.S.C. § 717o delegates authority to make rules and regulations to the FERC.

FERC rules allow state commissions to participate in any of its proceedings. 18 C.F.R. § 157.9(a) provides in pertinent part that notice of all applications for certificates of convenience and necessity filed at FERC “will be issued within 10 business days of filing, and subsequently will be filed in the Federal Register and copies of such notice sent to States affected thereby, by electronic means if practical, otherwise by mail.” 18 C.F.R. 157.9(a) is a regulation under 15 U.S.C. § 717f(d), which provides in pertinent part that the FERC shall issue notice of applications for certificates of convenience and necessity to interested parties as provided by FERC regulation. 18 C.F.R. § 385.214(b) provides in pertinent part that “[a]ny State Commission. . . is a party to any proceeding upon filing a notice of intervention in that proceeding, if the notice is filed within the period established under Rule 210(b).” FERC regulations do not impose any requirement on state commissions to gain intervention other than the filing of a timely notice of intervention, an indication that the FERC recognizes that the state commissions have an interest in FERC proceedings that affect utility matters in their states.

Section 386.030 provides that the Public Service Commission Law is extended to matters affecting interstate commerce to the extent such involvement is permitted by federal law. Federal law, as expressed throughout the Natural Gas Act and in FERC regulations which have the force and effect of statutes, allows states to participate in FERC proceedings involving interstate matters that affect the various states. FERC’s

rules required that notice be given to Missouri when MoGas filed its application for a certificate of convenience and necessity with the FERC. FERC regulations also provide that, upon timely notice of intervention, the Missouri Public Service Commission is automatically a party to any proceeding before it. FERC's authority to promulgate its rules derived from the delegation of authority made by Congress in the Natural Gas Act.

The position adopted by MoGas, if accepted by the Court, would thwart the intentions of the Missouri legislature in creating the Commission to occupy the field of public utility matters and in passing Section 386.030 to allow the Commission to participate in matters involving interstate commerce where permitted under federal law. Federal law permits the Commission's involvement in application cases and in rate cases, which are two of the cases that MoGas claims the Commission may not participate in. MoGas's position would also thwart the intentions of Congress in passing the Natural Gas Act and the intentions of the FERC in promulgating its regulations. This position must be rejected and the underlying order denying the application to terminate must be affirmed.

Section 386.210.1 allows the Commission to confer and communicate with the FERC and Section 386.210.7 does not limit the Commission's ability to appear and participate as an advocate at the FERC.

Section 386.210, RSMo (2000) (Supp. 2010) governs the Commission's communication with other regulatory bodies.³ Section 386.210.1 provides:

The commission may confer in person, or by correspondence, by attending conventions, *or in any other way*, with the members of the public, any

³ A change in Section 386.210 is not necessary because the Commission already has the necessary authority to intervene at FERC. Senate Bill 897 and House Bill 2095, 95th General Assembly, are not an "admission" by the Commission that it does not have the authority to intervene at FERC. MoGas also makes another blatantly false statement in its brief, apparently to make it look both commonplace and easy for the Commission to get new legislation passed, except in the case of S.B. 897 and H.B. 2095. MoGas falsely claims that, after the Court of Appeals found that the Commission could not approve construction of a power plant after the fact, the Commission was the driving force behind the statute that became Section 393.171. In fact, the Commission did not play any role at all in the drafting or passage of that statute. The bill review for this statute was prepared by the Department of Natural Resources, not by the Commission. A hearing was conducted by the House's Special Committee on Utilities. No witness for the Commission testified in favor of the legislation. The legislation was sponsored by Rep. Emery, who stated publicly that Aquila asked that he sponsor the bill. The bill review and hearing minutes can be found at Appendix pp. A064-A076. A newspaper article quoting Rep. Emery's statements about the origin of the bill can be found at Appendix pp. A077-A078.

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 provides that the communications permissible under Section 386.210.1 can address any matter that is not the subject of a case before the Commission. The primary purpose of the Commission is to serve and protect ratepayers. *State ex rel. Capital City Water Co. v. Public Service Commission*, 850 S.W.2d 903, 911 (Mo. Ct. App. W.D. 1993).

FERC is a federal regulatory agency with which the Commission is permitted to confer and communicate under Section 386.210.1. MoGas's federal rates and tariffs are not the subject of any case pending before the Commission, so this communication is permitted under Section 386.210.2. Taking a position as an advocate at the FERC to protest a tariff adjustment that the Commission believes is unfair or unjust is a communication permissible under 386.210.1. It is also expressly allowed by FERC Rule 214.⁴

Section 386.210.7 provides:

⁴The Court of Appeals upheld this reasoning in the case below. *State ex rel. MoGas Pipeline, LLC v. Missouri Public Service Commission*, 2011 WL 2534074 *3 (June 28, 2011). The Court of Appeals also cites to Section 386.210.6 for the proposition that the Commission's activities at the FERC should be "proper, expedient, fair and equitable and in the interest of the state of Missouri and the citizens thereof." *Id.*

The commission 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 under agreements or contracts between states or under the concurrent power of states to regulate interstate commerce, or as an agent of the United States of America, or any official, agency or instrumentality thereof, or otherwise.

MoGas argues that the provision for joint hearings in Section 386.210.7 precludes the Commission from appearing as a litigant at the FERC. But several other states that also appear at the FERC have similar provisions in their public service commission law. See, Alabama Code 1975 § 37-1-46; Arkansas Code Annotated § 23-18-507; Colorado Revised Statutes Annotated § 40-2-115; Delaware Code 26 § 214; Idaho Code Annotated § 61-505; Illinois Statutes Chapter 220 § 5/4-301; Kansas Statutes Annotated 66-106; 35-A Maine Revised Statutes Annotated § 118; New Hampshire Revised Statutes § 363.18; North Dakota Century Code Annotated § 49-02-02.

Initiation of suits by (or against) state commissions and intervention by state commissions with statutory language similar to Section 386.210.7 is commonplace. The Illinois Commerce Commission sought review of a rate determination made by the FERC in *Illinois Commerce Commission v. F.E.R.C.*, 576 F.3d 470 (7th Cir. 2009). The Public Service Commission of North Dakota was the defendant in a FERC action challenging an

assertion of jurisdiction by that commission. *F.E.R.C. v. Public Service Commission of the State of North Dakota*, 513 F.Supp. 653 (D. N.D. 1981). Examples of intervention by state commissions with statutory language similar to Section 386.210.7 include *American Gas Ass'n v. F.E.R.C.*, 912 F.2d 1469, 1502 (D.C. Cir. 1990) (intervention by the Arkansas Public Service Commission); and *K N Wattenberg Transmission Limited Liability Co.*, 88 FERC P 61329 (1999) (intervention by the Colorado Public Utilities Commission). Examples of the Missouri Public Service Commission's participation in cases at the FERC, either as an intervenor or as an original party, can be found in the table on Appendix pp. A079-A086. As the table demonstrates, the Commission is an active participant in the FERC in many cases, the vast majority of which have had no impact on MoGas. On the other hand, the Commission's participation at the FERC has benefited Missouri ratepayers in numerous ways.

One of the most notable examples of the Missouri Public Service Commission's participation at the FERC for the benefit of Missouri ratepayers occurred in *Missouri Public Service Commission v. F.E.R.C.*, 234 F.3d 36 (D.C. Cir. 2000). In that case, the Commission on judicial review challenged the FERC's initial rate setting decision for the Kansas Pipeline Company. *Id.* at 38. The D.C. Circuit agreed with the Commission's contention that FERC had failed to demonstrate that the rates set were in the public interest and remanded the case to FERC for further ratemaking proceedings. *Id.* at 42. On remand, the FERC reaffirmed the same rates, but relied on different rationales. *Missouri Public Service Commission v. F.E.R.C.*, 337 F.3d 1066, 1068 (D.C. Cir. 2003). The Missouri Commission again challenged the rates on judicial review. *Id.* The D.C. Circuit

again agreed with the Commission that the FERC had acted arbitrarily and capriciously. *Id.* The FERC's rate order was vacated and the case was remanded a second time. *Id.* at 1077. The D.C. Circuit also ordered the FERC to address the issue of what an appropriate refund would be. *Id.* at 1077-78.

It is easy to find numerous examples of state commissions with statutory language similar or identical with Section 386.210.7 participating in cases before the FERC. The Commission did not, however, find any case supporting MoGas's argument that the utility commissions with such statutory language are prohibited from participation at the FERC, either as an original party or as an intervenor. MoGas has cited no such case. Both the Natural Gas Act and its associated FERC regulations contemplate active involvement by state utility commissions. If the Court adopted the argument made by MoGas, Missouri's utility commission would be the only state commission without the ability to participate as an intervenor at the FERC. This interpretation is not supported by the law and would deprive the Commission of the ability to perform one of its most important functions in a way that no other state utility commission has been deprived. That result surely was not the legislative intent behind Section 386.210.7.

Federal law recognizes and permits two kinds of participation by state commissions. 18 C.F.R. § 386.1305. A state commission may act jointly with the FERC, either by acting in an advisory capacity or by issuing a concurrent opinion. A state commission may also intervene as a litigant or an advocate. *Id.* FERC regulations simply require that the two kinds of participation may not overlap. *Id.* Where a state commission

is acting as an advocate, it is not acting in cooperation with the FERC, but as a party before the agency.

FERC regulations differentiate between actions in which the state is acting in a joint capacity with federal regulators and when a state is acting as an advocate. FERC Rule 1305 governs the two kinds of joint hearings that may be held at the federal level. The first is an informational hearing, where the state provides information or serves in an advisory capacity. The second type of joint hearing is where the FERC and the state commission make a joint record and issue a concurrent order. Rule 1305 also prohibits a state commission that is acting in such a joint capacity from taking a position as an advocate or a litigant in such joint proceeding. Rule 1305 expressly provides that when a state is taking a position as a litigant or an advocate, the proper means of participation is by intervention under FERC Rule 214.⁵

The differentiation made by the FERC between joint action between it and a state commission and situations where the state commission takes a position before it is fair

⁵ By arguing that the Commission only has the authority to appear jointly at the FERC, MoGas is essentially arguing that the Commission should have more regulatory authority over it, not less, because if the Commission and the FERC were acting with concurrent jurisdiction, the Commission would have some decision-making authority. In its position as an intervenor, the Commission is merely presenting a position as an advocate that the FERC is free to accept or reject. This argument makes no sense in light of the relief MoGas seeks from this Court.

and reasonable. When the state commission is acting jointly with the FERC to issue a concurrent opinion, the state commission's role is to act as an impartial adjudicator along with the FERC. If a state commission wants to advocate for a certain position, it must do so through intervention as provided by Rule 214. Both kinds of participation are allowed by Section 386.030, 386.210 and federal law as expressed in the Natural Gas Act and FERC regulations.

The Commission's denial of MoGas's request to terminate its involvement at the FERC is lawful because the Commission has the statutory authority to engage in activity at the FERC. The Commission's denial of MoGas's application to terminate is also reasonable, since intervention and participation as an advocate against a tariff provision the Commission deems unfair to Missouri ratepayers is an expedient way for the Commission to convey its concerns to the FERC. This action was not arbitrary, capricious or an abuse of the Commission's discretion. The Commission's order denying the application to terminate must be affirmed on this point.

II

The Commission's order denying the application to terminate must be affirmed because the Commission's order was lawful under Section 386.510 in that under Missouri law, the Attorney General does not perform the functions of the Public Service Commission.

Section 27.060, RSMo (2000) provides that the Attorney General has the authority to bring civil actions in the name of the state and may also otherwise appear in such cases. This Court has examined the relationship between Section 12901 (now Section

27.060) and the duties of the Commission. *State ex rel. McKittrick v. Missouri Public Service Commission*, 175 S.W.2d 857 (Mo.banc 1943). In *McKittrick*, the Attorney General sought to appeal from an order issued by the Commission allowing one utility to sell assets to another utility. *Id.* at 859. The Attorney General relied on Section 12901 (now Section 27.060) to bring the appeal. *Id.* at 861. This Court examined the Attorney General's reliance on the statute and found: “. . .two important questions must be answered: (1) have Sec. 12901 and the common law been limited or circumscribed by other later statutes, as regards the Public Service Commission; and (2) is the state 'interested' within the meaning of the statute.” *Id.*

The Court found that the legislature had the authority to limit the common law powers of the Attorney General. *McKittrick*, 175 S.W.2d at 861. With respect to the field of utility rates and service, the Court found:

Looking then to our statutes, as affecting the Public Service Commission, it is to be noted that a number of them specifically require the Attorney General to perform certain duties with respect to other public officers, and to various boards and commissions, some of which have counsel of their own, such as the Insurance Department, the State Highway Commission, the Unemployment Commission and the Workmen's Compensation Commission. But there is no mention in them anywhere of the Public Service Commission. On the other hand, the Public Service Commission Act, adopted in 1913, was made primarily exclusive in its field. It was so held by this court en banc the next year in *State ex inf.*

Barker, Att’y Gen. v. Kansas City Gas Co., 254 Mo. 515, 532(4), 163 S.W. 854, 857(6), where the effort of the then Attorney General was to proceed directly against a utility by mandamus to compel it to furnish an adequate supply of gas to Kansas City, ignoring the Public Service Commission. And in another banc case the same expression was used, viz. that the Commission ‘occupies the entire field’ of utility rates and service. State ex rel. Missouri Southern Rd. Co. v. Public Serv. Comm., 259 Mo. 704, 723, 168 S.W. 1156, 1162 (IIIa).

The Court in *McKittrick* found that the Attorney General’s powers under the previous version of Section 27.060 have been limited by the Public Service Commission Act. The Public Service Commission is exclusive in its field and occupies the entire field of utility rates and service in Missouri. The Attorney General’s powers under Section 27.060 do not extend to the representation of the state in utility matters. Such representation is the responsibility of the Commission under the Public Service Commission Act.

The *McKittrick* court also examined the role of the Commission’s general counsel. *McKittrick*, 175 S.W.2d at 862. That statute is currently codified at Section 386.071, RSMo (2000). Section 386.071 provides in relevant part that the general counsel shall:

represent and appear for the commission in all actions and proceedings involving any question under this or any other law. . .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; to commence and prosecute in the

name of the state all actions and proceedings, authorized by law and directed or authorized by the commission, and to expedite in every way possible, to final determination all such actions and proceedings. . . and generally to perform all duties and services as attorney and counsel to the commission as the commission may reasonably require of him.

According to this Court, “[i]n view of these implicit as well as explicit provisions, it is clear that the Attorney General has no power to represent, control or impede the Commission in its functioning. And if this be true, he cannot do the same thing indirectly by intervention.” The Public Service Commission law is remedial in nature. *State ex rel. Utility Consumers’ Council of Missouri v. Public Service Commission*, 585 S.W.2d 41, 49 (Mo.banc 1979). “The provisions of this chapter are to be liberally construed with a view to the public welfare, efficient facilities and substantial justice between patrons and public utilities.” Section 386.610, RSMo (2000). Section 620.010.6, RSMo (2000) permits the Commission to hire such staff as are necessary for the general counsel to carry out its duties.

The Commission has its own statutorily-created general counsel.⁶ It is the duty of the Commission’s general counsel, not the Attorney General, to represent the Commission in actions and proceedings involving questions of law arising under the

⁶ The Commission “may sue and be sued in its official name.” Section 386.120.4, RSMo (2000).

Public Service Commission Act or “other law[s].”⁷ MoGas argues that the Commission has overstepped its authority by implying that the Commission interprets Section 386.071 to mean that it can intervene in any case under any law. MoGas, however, cites to no examples of the Commission attempting to use Section 386.071 to intervene in non-utility matters. Proceedings at the FERC necessarily involve matters of public utility law. The Commission is the agency in Missouri that has expertise in matters arising under utility law. The Attorney General has no such expertise, nor does it have the authority to represent or control the Commission in utility matters. In light of the Commission’s occupation of the field and the Attorney General’s inability to represent the Commission or to control its functions MoGas’s argument that only the Attorney General may appear at the FERC must be rejected. Such representation properly belongs with the Commission’s general counsel, who oversees the outside counsel who represents the

⁷ That is not to say that the Attorney General has no role at all at the FERC. The Attorney General has filed collectively with other Midwest Attorneys General to provide a gas price study to FERC. Docket AD06-3-000 (2006). The Attorney General has also filed comments on behalf of the Missouri Department of Natural resources in two cases involving a hydroelectric project. Docket No. P-12049 (2001); Docket No. P-459-128 (2004). The Attorney General has also appeared at the FERC on behalf of the Missouri Department of Natural Resources in 15 FERC P 62,038 (1981). The Attorney General has not appeared at the FERC on behalf of the Commission.

Commission at FERC.⁸ The Commission’s general counsel (or its outside counsel hired to assist the general counsel to carry out its duties) is also permitted to appear at the FERC under the FERC’s rule governing appearances:

- (a) A participant may appear in a proceeding in person or by an attorney or other qualified representative. . . . An officer or employee of a State Commission, of a

⁸ At the time *McKittrick* was decided, the Commission’s general counsel also had the responsibility of representing the public in matters before the Commission. *McKittrick*, 175 S.W.2d at 862. The legislature subsequently enacted Section 386.700, RSMo (2000). Section 386.700 created the Public Counsel to represent the public. Section 386.710, RSMo (2000) enumerates the powers of the Public Counsel. Public Counsel has the ability to represent and appear for the Commission in matters before the Commission and appeals from matters that began at the Commission. Section 386.710(2), RSMo (2000). Public Counsel does not have the authority to initiate independent civil actions on behalf of ratepayers in the circuit courts. *Office of the Public Counsel v. Empire District Electric Co.*, 307 S.W.2d 220, 223 (Mo. Ct. App. S.D. 2010). Although the Public Counsel may appear before the Commission and may appeal the Commission’s orders, the Public Counsel may not initiate independent lawsuits on behalf of ratepayers. Since the Public Counsel’s authority is limited to cases at the Commission and the appeals of those cases, the Commission, which has the authority “to sue and be sued” and exists primarily to protect those ratepayers, is the state agency that is authorized to represent the interests of ratepayers in other fora, such as at the FERC and in the federal courts.

department or political subdivision of a state or other governmental authority, may represent the State commission or the department or political subdivision of the State or other governmental authority, in any proceeding.

18 C.F.R. § 385.2101.

The Supreme Court of Missouri did go on to find that the Attorney General could appear as a litigant in a case heard by the Commission as the adjudicator, as long as the Attorney General is representing some interest, whether it is the state's pecuniary interest or "the general welfare of the state." *McKittrick*, 175 S.W.2d at 862.

The Commission's participation at the FERC involves the general welfare of the state. As an intervenor at the FERC, the Commission acts as litigant and the FERC acts as the adjudicator. This is the system that is permitted by the FERC's rules and is consistent with the approach adopted by this Court in *McKittrick*. The difference in this case is that it is the Commission who is acting as the litigant, rather than the Attorney General. This approach is sensible, given the Commission's primacy in the utility field. Under the principles set out in *McKittrick*, it is also the lawful approach.

The Commission is involved in many cases at the FERC, only a small fraction of which affect MoGas.⁹ Commission involvement in FERC cases has resulted in benefits to Missouri ratepayers. In 2011, the Commission intervened in a case involving a request for a tariff variance from the Midwest Independent Transmission Organization (MISO). The Commission protested the request for variance on several grounds, including the

⁹ See the table at Appendix pp. A079-A086.

company's lack of a basis for the waiver in its filing, a concern that costs for one part of MISO's footprint would be borne by another part of the footprint, a concern about the way the stakeholder process was handled and concerns about the lack of detail in MISO's variance request. Six other state utility commissions intervened in the case. FERC relied, in part, specifically on evidence provided by the Commission in denying MISO's requested variance. (Appendix, pp. A087-A101).

The Commission participates in FERC cases involving the fields of electric transmission and natural gas pipelines because those issues affect Missouri ratepayers. Missouri law recognizes that it is the Commission, not the Attorney General, that is tasked with such representation. Federal law also recognizes the right of state utility commissions, such as the Missouri Public Service Commission, to appear and be heard in FERC matters. The Commission's order denying the application to terminate filed by MoGas is lawful and the order must be affirmed on this point.

Conclusion

For the above reasons, the Commission requests that this Court affirm its final Order in GO-2009-0094 in all respects.

Respectfully submitted,


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CERTIFICATE OF COMPLIANCE

I hereby certify, pursuant to Rule 84.06(c) of the Missouri Rules of Civil Procedure, that Appellant's Substitute Brief was prepared using Microsoft Word, in 13-point Times New Roman font and that it contains 6,761 words, as determined by the Microsoft Word word-counting system in compliance with Rule 84.06(b).

/s/ Jennifer Heintz

Jennifer Heintz

CERTIFICATE OF SERVICE

I hereby certify that on January 5, 2012, a copy of the above was served upon all persons requesting electronic notification by filing it with the Court using the electronic filing system.

/s/ Jennifer Heintz

Jennifer Heintz