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 REPLY 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 (Facsimile)

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 (Facsimile)

Attorneys for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

I. ARGUMENT

A. Summary

Abandoning the bases set forth in the Order for its authority to intervene in FERC matters, the Public Service Commission ("PSC") advances theories made for the first time in its Substitute Brief of Appellant. Like its now discarded rationales, these new theories fail to identify any specific grant of authority under Missouri law allowing it intervene in matters before FERC. While it argues that such intervention is "expedient" and claims it to be beneficial to Missouri ratepayers, "[n]either convenience, nor expediency, nor necessity is a proper matter to consider in determining whether the Commission's actions are authorized by statute." *Pub. Serv. Comm'n v. Oneok, Inc.*, 318 S.W.3d 134, 137 (Mo. App. 2009).

Rather, the PSC is a creature of statute and "is vested with only such powers as are conferred upon it by the Public Service Commission Law, by which it was created." *State ex rel. Laundry, Inc. v. Pub. Serv. Comm'n*, 34 S.W.2d 37, 43 (1931). Now known as the Public Service Act ("PSA"), by any name, Missouri Courts recognize that the law "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 134, 138 (Mo. App. 2009).

Because the PSC sites no provision of Missouri law authorizing it to intervene in FERC matters, and none exists, the Commission's July 25, 2009 Order dismissing MoGas' Application to Terminate should be vacated and the PSC ordered to terminate permanently its unlawful participation in FERC matters related to MoGas.

B. Standard of Review

The PSC contends that the Order has a "presumption of validity." (Appellant's Brief, ("App. Brief") p. 9). This is incorrect. The only issue in this case is whether the Order is lawful. 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), and the Court does not defer to the judgment of the commission. *Deaconess Manor Ass'n v. Pub. Serv. Comm'n*, 9 94 S.W.2d 602, 609 (Mo. App. 1999). As such, the Order receives no presumption of validity.

C. The PSC has Abandoned the Legal Rationales Set Forth in the Opinion to Support its Authority to Intervene

In the Order, the PSC correctly acknowledged that it had to "find positive authority to allow it to intervene before the FERC." (L.F. 136). The PSC then went on to conclude that such authority existed under MO. REV. STAT. § 386.250(1)[1] (the general jurisdictional grant) and a combination of §§ 386.120.4 (the right to sue and be sued) and 386.071 (the authority to hire a general counsel). (L.F. 136-137).

In its Substitute Brief on Appeal, the PSC does not argue that either theory supports its authority to intervene. Instead, the PSC makes entirely new arguments based

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

on §§ 386.030 and 386.210.1 as the requisite "positive authority." Nor were these provisions briefed or argued by the parties before the Circuit Court or the Western District Court of Appeals. While this Court reviews the Order *de novo,* that the entire basis for the Order has now been abandoned by the PSC and replaced with a new set of contrivances amply demonstrates that the authority to intervene is not a power specifically granted by the legislature.

D. Section 386.030 Does Not Expressly Authorize the PSC to Intervene Before FERC

The PSC argues that § 386.030 provides that its jurisdiction "is extended to matters affecting interstate commerce to the extent such involvement is permitted by federal law." (App. Brief, p. 20). The statute, however, provides no such thing. Section 386.030 is not a positive grant of authority. Rather, it is a positive *limitation* on the PSC's authority.[2] It states:

> 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,

[2] Indeed, the PSC in the Order reached this very conclusion noting that § 386.030 was a limitation on its authority, albeit one that in its erroneous view did not limit the authority to engage in intervention. (App. Brief, p. 5). It then correctly concluded that having found this limitation in applicable was not enough and that must "positive authority." (*Id.*, p. 7). It did not find that authority in § 386.030. (*Id.*, pp. 7-8).

except insofar as the same may be permitted under the provisions of the Constitution of the United States and the acts of Congress.

The PSA does contain a jurisdictional grant of authority to the PSC, namely § 360.250(1). Indeed, it was upon this provision that the PSC relied (in error) in the Order as being the "positive authority" that allowed it to intervene. (L.F. 136).[3] Abandoning this theory without explanation, the PSC now argues that the exception to the jurisdictional limitation the legislature placed on it through § 386.030 swallows up that limitation. According to the argument, the legislature, in expressly limiting the PSC's reach, actually intended to expand the PSC's jurisdiction to include any powers permitted by any "federal law." Not surprisingly, the PSC does not cite a single Missouri case in which a court sanctioned such a vague and sweeping grant of power to the PSC. Nor does the PSC cite any authority that sanctions the state's blind delegation of the authority to set the PSC's jurisdiction to any federal agency. The absence of any authority supporting its position is consistent with this Court's consistent holding that the PSC's powers are strictly limited to those specifically granted by its enabling statute and such powers that "by clear implication [are] necessary to carry out the powers specifically granted." *State ex rel. Util. Consumers Council of Mo., Inc. v. Pub. Serv. Comm'n*, 585 S.W.2d 41, 49 (Mo. 1979).[4]

---

[3] Legal File is abbreviated as "L.F."

[4] In MoGas' opening brief, it noted that the PSC has never argued that its power to intervene in FERC matters derived by "clear implication" from some statute.

Moreover, the PSC's argument flies in the face of standard rules of statutory construction. "The primary rule of statutory interpretation is to ascertain the intent of the legislature by considering the plain and ordinary meaning of the words used in the statute." *S. Metro Fire Prot. Dist. v. City of Lee's Summit*, 278 S.W.3d 659, 666 (Mo. 2009). In the case of the PSA, § 386.250 is the statute through which the legislature granted the PSC its jurisdictional powers. In contrast, the plain and ordinary meaning of § 368.030 is to limit the PSC's powers, not expand them.

Furthermore, the PSC's argument regarding § 386.030 relies on the faulty premise that FERC rules are "act of Congress." As pointed out in MoGas' opening brief, they are not. *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 regulation into an Act of Congress"); *In re Nautilus Motor Tanker Co.*, 85 F.3d 105, 112 (3rd Cir. 1996).

The PSC responds by claiming that FERC's rules are "legislative in nature" and cites *Superior Oil Co. v. F.E.R.C.*, 563 F.2d 191 (D.C. Cir. 1977). *Superior Oil* was a fairly common-place case in which members of the industry challenged a rule promulgated by FERC's predecessor that required them to submit certain annual reports

---

(Respondent's Brief ("Resp. Brief"), p. 21 n. 9). The PSC does not challenge this assertion in its brief and, thus, the sole question is whether there exits a statute that specifically grants the PSC the right to intervene. It is undisputed that no such statute exists.

to the agency. The issue in that case was *not* whether the rule was an "act of congress" but whether the rule was valid – was it within the power granted the agency, had it been issued pursuant to proper procedure and did the agency act arbitrarily or capriciously. *Id.* at 196, 201.

Neither the holding nor dicta in *Superior Oil* has any application to the present case. The statute granting FERC rule-making authority, 15 U.S.C. §717o, does not empower FERC to make substantive laws, only to pass "typical administrative-procedural rules to carry out the authority expressly given by Congress." *Southern Union Gas Co. v. F.E.R.C.*, 725 F.2d 99, 102 (10th Cir. 1984). If this agency cannot create substantive federal law, it has even less ability to create, expand or contract the jurisdiction of a state agency such as the PSC. Certainly the PSC has not cited any authority for the proposition that either the Missouri legislature or FERC intended this rule of agency procedure to confer a power to intervene not found in any state statute. Nor would a FERC procedural rule be a proper mechanism for a jurisdictional grant since only Missouri statutes can establish the PSC's jurisdiction and authority. *Cedar Hill Manor, LLC v. Department of Soc. Serv. Div. of Med. Serv.*, 145 S.W.3d 447, 451 (Mo. App. 2004).

Finally, the PSC cites several provisions of the Natural Gas Act ("NGA"), as well as *Panhandle Eastern Pipeline v. Pub. Serv. Comm'n*, 332 U.S. 507 (1947), for the general proposition that that NGA contemplates state commissions like the PSC being involved with FERC in the regulation of the industry. MoGas does not take issue with the general proposition. However, the issue in this case is much narrower – does

Missouri law grant the PSC supervisory jurisdiction and power over MoGas such that it can intervene as a litigant in every FERC proceeding in which the company is involved? None of the actual acts of Congress – the NGA provisions – cited by the PSC even purport to relate to this question of intervention. Nor does *Panhandle Eastern* touch on this issue. Rather, that case involved the question of whether the commerce clause of the U.S. Constitution prevented certain state action, an issue not before this Court.

E. Section 386.210 Does Not Expressly Authorize the PSC to Intervene Before FERC

The only other state statute that the PSC argues in its brief constitutes an express grant of authority is § 386.210.1. This section provides that the PSC "may confer in person, or by correspondence, by attending conventions, or in any other way, with the members of the public, 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."

The PSC borrows this argument from the Court of Appeals and, as with the PSC's first argument before this Court, the argument under § 386.210.1 was not in the Order and was not briefed or argued by either party below. The PSC nevertheless now claims that a petition in intervention is a method by which the PSC may "confer" with FERC. The notion that the legislature intended pleadings in judicial and quasi-judicial settings to be synonymous with correspondence and attending conventions violates the cannon of statutory construction known as *ejusdem generis*.

> The maxim *ejusdem generis* ("of the same kind") is also of assistance here. By that precept of construction, specific other animals" will usually be construed as including goats, but not bears or tigers.

Standard Operations, Inc. v. Montague, 758 S.W.2d 442, 444 (Mo. 1988).

Similarly, a statute authorizing the PSC to "confer" in person, through correspondence and by attending conferences would authorize other similar methods of conferring such as through the telephone or email. The common thread is the relative informality and practicality and contemporaneous nature of the exchange of ideas inherent in a "conference." That thread is reinforced by the list of people and entities with whom the PSC is authorized to confer, including members of the public. Formal pleadings such as a petition in intervention are vastly different from those methods of conferring specifically listed and few rational members of the public would consider receiving an exhaustive discovery request or a pleading from the PSC as an invitation to "confer."

Another significant error in the PSC's reliance on § 386.210 is the failure to examine the entire statute. Subsection seven of that statute specifically addresses the PSC's authority in relation to FERC matters. It provides only that the PSC may engage in joint investigations and hearings and issue joint orders but solely as the agent of the FERC. § 386.201.7. Importantly, neither this section nor any other portion of § 386.210

grants the agency the authority to participate in FERC matters as a party advocate.[5] Where a statute addresses a particular matter specifically – such as what the PSC may do in relation to FERC – it controls over more general statutes such as the grant of permission to "confer." *See State ex rel. Cass County v. Pub. Serv. Comm'n*, 259 S.W.3d 544, 551 (Mo. App. 2008).

This limited role is also consistent with the PSC's general duty not to take sides but to protect the interests of both ratepayers and utilities. *Cass County,* 259 S.W.3d at 549; *Util. Consumers Council*, 585 S.W.2d at 47. As discussed more fully in MoGas' opening brief (Resp. Brief., pp. 17-19), the PSC's limited role as a joint actor and not as a litigant is also consistent with FERC rules.

---

[5] The PSC does not refute that it introduced Senate Bill 897 and House Bill 2095 two days after the Cole County Circuit Court ruled in this case that the PSC did not have the jurisdiction to intervene in FERC matters. Nor does it refute that these measures sought to amend § 386.210 to include the power "to appear in and participate in any administrative, regulatory, or judicial proceedings, federal or state." The PSC's only response is the disingenuous claim that these legislative efforts were not an admission that the statute does not now provide the language contained in the proffered and rejected amendment. It then quickly changes the topic by denying its role in prior legislative efforts to overcome judicial decisions. (App. Brief, p. 22, n. 3). Even if true (the PSC's only authority is a hearsay newspaper article), the PSC's role in Senate Bill 897 and House Bill 2095 and what that proposed legislation says about § 386.210 is unmistakable.

The PSC does not address these arguments in its brief. Instead, it claims, without authority, that intervention by state commissions "is commonplace." (App. Brief, p. 24). It cites several states' statutes and claims that these states "appear at FERC" (*id.*, p. 25) although it offers no authority for the quoted assertion. It then cites two cases where state agencies intervened before FERC – *American Gas Ass'n v. F.E.R.C.*, 912 F.2d 1496 (D.C. Cir. 1990) and *K N Wattenberg Transmission LLC*, 88 FERC P 61329 (1999). Finally, the PSC attaches a list of FERC matters that it claims it has been a party to "as an intervenor or as an original party." (*Id.*).[6] This list was not offered into evidence in the proceedings below, has not been the subject of any discovery by MoGas, and is not properly before the Court. *Tucker v. United Healthcare Services, Inc.*, 232 S.W.3d 636, 638-39 (Mo. App. 2007).

As to the PSC's claim that intervention is "commonplace" with other states, even if true, it has no bearing on the issue before this Court. This issue here is whether Missouri law authorized intervention, not whether Arkansas or Colorado do. Moreover, there is no basis in the record to even conclude that these other states permitted intervention in the face of a challenge such as MoGas made (and the Circuit Court

[6] Whether the PSC has authority to commence a proceeding at FERC or to defend such a proceeding commenced against it is not an issue before the Court. The issue here is whether the PSC is authorized to engage in the serial and costly meddling, via intervention, that has occurred with MoGas since the PSC unsuccessfully attempted to retain jurisdiction over it.

accepted) in this case. Neither *American Gas Ass'n* nor *Wattenberg* contain any discussion or analysis regarding the propriety of intervention. Nor can MoGas or the Court determine whether anyone has challenged the PSC's standing to participate in any of the FERC matters it presents for the first time in its Appendix.

Finally, the PSC argues, apparently as part of its new argument that its authority "to confer" is specific authority to intervene, that the PSC has done great things at FERC[7] (App. Brief, p. 25-26), that adopting MoGas' position would render the PSC the only state commission without the ability to intervene (*id.*, p. 26) and that intervention "is an expedient way for the Commission to convey its concerns to the FERC." (*Id.* p. 28). In short, the PSC asserts its view that intervention at FERC is a good thing and should be allowed. This is an argument that the PSC needs to address (or, rather, readdress) to the Missouri Legislature; it has no merit in this case. "Neither convenience, nor expediency, nor necessity is a proper matter to consider in determining whether the commission's

[7] The PSC's references to the Kansas Pipeline case (App. Brief, p. 25-26) and the Midwest Independent Transmission Organization matter (*id.*, pp. 34-35) are odd. The PSC's role in these matters was not in evidence, briefed or argued below. Thus, MoGas is unable to respond to, let alone challenge, the PSC's contention that it achieved beneficial results in both cases. Whether it did or not has nothing to do with the issues before this Court, however. Nevertheless, since both matters appear to have been hotly contested, it seems sure that at least the PSC's adversaries in those cases would not share its self-serving description of the results reached.

actions are authorized by statute." *Oneok*, 318 S.W.3d at 137. "No matter how noble the cause, we must administer the law as it is, not as the [PSC] wishes it to be." *Id.*, at 138.

F. The PSC's Arguments Regarding the Attorney General and its reliance on *McKittrick* Miss the Point

In the Order, the PSC concluded that its general power to sue and be sued, together with the statutory description of its general counsel's duties, provided "positive authority" for its right to intervene. MoGas pointed out the fallacies of this argument in its opening brief (Resp. Brief, pp. 23-26) and further noted that this argument, taken to its logical conclusion, would allow the PSC and its general counsel to pursue whatever litigation they choose, involving whatever issues they choose, in whatever forum they choose and that such sweeping power would usurp the role of the Attorney General. (*Id.* pp. 29-30).

In reply, the PSC does not refute MoGas' argument; it merely states that the PSC has not abused the power it claims to have and suggests that it would not. (App. Brief, p. 32). It then provides a lengthy and largely irrelevant exposition regarding the historical relationship between the PSC and the Attorney General centered around *McKittrick v. Mo. Pub. Serv. Comm'n.*, 175 S.W.2d 857 (Mo. 1943). The upshot of the PSC's argument appears to be that the Attorney General has no power to represent the PSC (App. Brief, p. 31), that it is more "sensible" for the PSC to be a litigant before FERC than the Attorney General (*id.*, p. 34) and, therefore, that the usurpation of the Attorney General's general role will be limited and permissible this time.

There are multiple flaws in the PSC's reasoning. First, MoGas never argued that the Attorney General, instead of the PSC, is the proper party to intervene before FERC. Rather, the argument was only that the PSC's claim to statutory authority to intervene (its power to sue and be sued/its general counsel's duties) would, if adopted, confer upon the PSC the kind of plenary power only granted the Attorney General under Missouri law. The PSC never addresses this argument in its Brief.

The more fundamental flaw in the PSC's argument is that it begs the question. Its argument assumes the truth of the very issue it seeks to prove, namely, that the PSC has the authority to intervene before FERC. Even assuming that the Attorney General cannot represent the PSC before FERC and that the PSC would be a "better" advocate, neither contention proves that the Missouri legislature empowered the PSC to intervene before FERC. As the PSC has acknowledged, as a creature of statute with limited powers, it must first be granted that power. Without that, the PSC's argument is a red herring.

McKittrick is not on point.[8] It does, however, contain some interesting dicta. In discussing the Attorney General's duty to represent the public, this Court noted that that

[8] The specific issue in *McKittrick* was whether the Attorney General had the statutory power to intervene in PSC proceedings. This Court held that it did, but only if it could prove that it was advancing a unique and particular public interest in the proceedings. *McKittrick*, 175 S.W.2d at 862-65. The statutes analyzed on the intervention question are not similar to those in the present case and the PSC makes no claim that they are.

duty in and of itself could sanction intervention in every PSC case. The court rejected this sweeping authority to intervene:

> This obviously would be officious intermeddling. It will not do to say he can intervene in every such case, marshaling the strong legal forces and vast resources of the State against one or another of adversary interests that really are local or private. The pattern of the Public Service Commission Act shows the legislative intention was that the state, through its Commission, should hear and decide both sides of the controversy, not that the Attorney General should appear and champion one side.

McKittrick, 175 S.W.2d at 862-863.

The Court's observations echo two important points. First, the sweeping power the PSC seeks to intervene in every FERC matter involving MoGas has become the very "officious intermeddling" the Court sought to avoid in *McKittrick*, albeit in another context. More importantly, the Court's emphasis that the PSC is intended to "hear and decide both sides of the controversy" exactly parallels MoGas' argument the PSC should not be using its (that is, the public's) resources to advocate positions before FERC. It is obligated to advance the best interests of both the ratepayers and the utility, not to "champion one side."

Finally, the PSC's contention that its expertise and prior involvement in FERC matters make it "sensible" for it to have the power to intervene is conclusively answered by the admonition in *Oneok* that the PSC's powers are only defined by statute, not by what it thinks is sensible.

II. CONCLUSION

The PSC's abandonment of the bases set forth in the Order for the authority to intervene before FERC is, at a minimum, a concession that the Order as it stands is unlawful. The new arguments presented in its Brief fare no better. The simple truth is that there is no provision of Missouri law that specifically grants the PSC the power to intervene before FERC. Regardless of how convinced the PSC is that it should have the right to intervene or that its interventions have accomplished beneficial results, the courts "must administer the law as it is, not as the [PSC] wishes it to be." *Oneok*, 318 S.W.3d 134, 138 (Mo. App. 2009).

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 – Facsimile
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 - Facsimile
lcurtis@lawfirmemail.com

Attorneys for Respondent MoGas Pipeline LLC

Dated: January 20, 2012

RULE 84.06 CERTIFICATION

I hereby certify, pursuant to Rule 84.06(c) of the Missouri Rules of Civil Procedure, that Respondent's Substitute Reply Brief was prepared using Microsoft Word, in 13-point Times New Roman font and that it contains 3,935 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 Reply Brief was served on the counsel identified below by the e-filing system on January 20, 2012:

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

Attorney for Respondent

/s/ Gerard T. Carmody