Summary of SC91968, *State of Missouri ex rel. MoGas Pipeline LLC v. Missouri Public Service Commission*

Appeal from the Cole County circuit court, Judge Gael D. Wood
Argued and submitted Feb. 15, 2012; opinion issued April 17, 2012

Attorneys: The commission was represented by Jennifer Leigh Heintz of the commission in Jefferson City, (573) 751-8701. MoGas was represented by Gerard T. Carmody, David H. Luce and Teresa Dale Pupillo of Carmody MacDonald PC in St. Louis, (314) 854-8600; and Leland B. Curtis and Carl Lumley of Curtis, Heinz, Garrett & O'Keefe PC in St. Louis, (314) 725-8788.

This summary is not part of the opinion of the Court. It has been prepared by the communications counsel for the convenience of the reader. It neither has been reviewed nor approved by the Supreme Court and should not be quoted or cited.

Overview: The operator of an interstate natural gas pipeline seeks review of the Missouri Public Service Commission's order denying its request that the PSC terminate its intervention in matters pending before the Federal Energy Regulatory Commission. The trial court reversed the order and remanded (sent back) the cause to the PSC for further action after finding that the PSC has no authority to intervene in FERC proceedings. In a 4-3 opinion written by Judge Laura Denvir Stith, the Supreme Court of Missouri affirms the trial court's holding but, because no remand to the PSC is necessary, modifies the judgment to eliminate that requirement. The PSC currently has no authority to intervene in matters pending before the FERC.

Judge Karl A. DeMarce, an associate circuit judge from Scotland County who sat by special designation in place of Judge Mary R. Russell, dissents. He would affirm the PSC's order, permitting it to continue to intervene in matters before the FERC so it may present evidence enabling the FERC to make a more informed decision about rates and related matters. The statutory language is broad enough to allow such communication, and the dictionary definitions of "communicate" include intervention in a case.

Judge Lisa K. Page, presiding judge of the 23rd Judicial Circuit (Jefferson County), sat by special designation in place of Judge William Ray Price Jr.

Facts: Pursuant to federal legislation, the FERC maintains exclusive jurisdiction over the transportation and sale of natural gas in interstate commerce for resale. MoGas Pipeline LLC operates an interstate natural gas pipeline delivering natural gas to customers in Missouri. Because its operations are of an interstate nature, MoGas' pipeline system is subject to FERC jurisdiction. Accordingly, MoGas submitted petitions to the FERC for approval to construct new facilities and modify its gas tariffs. The PSC intervened as a party in the related FERC proceedings to protest MoGas' proposals. MoGas subsequently filed a petition with the PSC alleging that it did not have authority to intervene in FERC matters and, therefore, requesting that the PSC terminate its intervention. The PSC issued an order denying MoGas' petition. MoGas sought review of the PSC order in circuit court, which reversed the order as unlawful and remanded the cause to the PSC for further action. The PSC now appeals the circuit court's judgment.

AFFIRMED AS MODIFIED.

Court en banc holds: The PSC's order was unlawful. As a creature of statute, the PSC's authority is limited to that granted it by the legislature in the commission's enabling statutes. Though section 386.250, RSMo, extends the PSC's jurisdiction to various issues pertaining to natural gas operations *within the state*, section 386.030 explicitly recognizes that the powers granted to the PSC are limited by the doctrine of preemption as to matters affecting *interstate* commerce. Because Congress preempted regulation of interstate gas pipelines with the natural gas act, in order to intervene in FERC proceedings, the PSC must demonstrate both that the Missouri legislature has vested it with authority to do so and that federal laws or regulation so permit.

While the PSC established that federal regulations would permit it to intervene in FERC actions, the Missouri legislature has not authorized formal intervention by the PSC as a party in FERC actions. The PSC's governing statutes merely permit it to "confer" with the FERC, to conduct "joint investigations" with it, and to direct the PSC's general counsel to "prosecute in the name of the state" when authorized to do so by law. The plain meaning of "confer," however, carries none of the connotations of power and control associated with the process of intervening as a party. Likewise, the statutory authorization permitting the PSC to conduct "joint" investigations denotes collaborative and adjudicatory conduct as a regulator rather than the adversarial and interested conduct as a party through intervention. Finally, while the PSC can direct its general counsel to intervene in actions concerning utilities subject to the commission's jurisdiction, the general counsel's authority can extend no further than the PSC's own power. Because the legislature has not authorized the PSC to intervene in FERC proceedings, the PSC necessarily is unable to direct its general counsel to do so.

Dissenting opinion by Judge DeMarce: The author would affirm the PSC's order, permitting the PSC to continue to intervene in matters before the FERC relating to MoGas and others so as to provide evidence to enable the FERC to make a more informed decision regarding rates and related matters. The language of section 386.210 is broad enough to allow the PSC to communicate with the FERC in any way about any matter related to the performance of its duties. In analyzing the dictionary definitions of the term "communication" used in section 386.210, the principal opinion confuses the purpose of communication with the forms that communication may take. The various activities associated with intervention all are designed and calculated to impart information, data and opinions to the adjudicator, which goes to the very heart of the dictionary definitions of "communication" on which the principal opinion relies. Moreover, intervention is the precise form of "communication" that the FERC expects and invites from a state utility regulator such as the PSC with regard to a formal contested proceeding. Further, intervention falls squarely within the definition of "confer" cited in the principal opinion. While section 386.210.1 does not grant the PSC explicit authority to assume the position of a party to a hearing before a commission such as the FERC, such authority is implied. The PSC's participation in the action would be the most expedient way for the PSC to communicate its concerns to the FERC. Further, having concluded the PSC's order was reasonable, the author likewise would find the order was reasonable. The PSC is delegated much discretion, and many of its decisions rely on such discretion.