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BEFORE THE PUBLIC SERVICE COMMISSION

STATE OF MISSOURI

TRANSCRIPT OF PROCEEDINGS

ORAL ARGUMENT

May 6, 2002

Jefferson City, Missouri

Volume 8

In the Matter of Missouri Gas Energy's Gas)
Cost Adjustment Tariff Revisions to be Reviewed)Case No.
In its 1996-1997 Annual Reconciliation)GR-96-450
Adjustment Account.)

BEFORE:

MORRIS WOODRUFF, Presiding,
SENIOR REGULATORY LAW JUDGE.
KELVIN SIMMONS, Chair
CONNIE MURRAY,
SHEILA LUMPE,
STEVE GAW,
BRYAN FORBIS,
COMMISSIONERS.

REPORTED BY:
TRACY L. CAVE, CSR
ASSOCIATED COURT REPORTERS

1120
ASSOCIATED COURT REPORTERS
573-636-7551 JEFFERSON CITY, MO
573-442-3600 COLUMBIA, MO

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A P P E A R A N C E S

CHARLES BRENT STEWART, Attorney at Law
1001 Cherry Street, Suite 302
Columbia, Missouri 65201
573-499-0635
FOR: Riverside Pipeline Company, L.P.
and Mid-Kansas Partnership

GARY W. DUFFY, Attorney at Law
P.O. Box 456
Jefferson City, Missouri 65102
573-635-7166
FOR: Missouri Gas Energy

DOUGLAS E. MICHEEL, Senior Public Counsel
P.O. Box 7800
Jefferson City, Missouri 65102
573-751-5559
FOR: Office of Public Counsel and the Public

TIM SCHWARZ, Deputy General Counsel
CLIFF SNODGRASS, Senior General Counsel
P.O. Box 360
Jefferson City, Missouri 65102
573-751-5239
FOR: Staff of the Missouri Public Service Commission

1 JUDGE WOODRUFF: We're here for oral argument
2 in Case No. GR-96-450, which is in the matter of Missouri
3 Gas Energy's gas cost adjustment tariff revisions to be
4 reviewed in its 1996-1997 annual reconciliation adjustment
5 account is the title on that. And we're actually going to
6 be taking oral arguments on the request for rehearing that
7 was filed by Riverside Mid-Kansas Pipeline Companies.

8 And we'll begin by taking entries of
9 appearance beginning with Riverside Mid-Kansas.

10 MR. STEWART: Charles Brent Stewart, the law
11 firm of Stewart and Keevil, LLC, 1001 Cherry Street,
12 Suite 302, Columbia, Missouri 65201 appearing on behalf of
13 Riverside Pipeline Company L.P. and Mid-Kansas Partnership.

14 JUDGE WOODRUFF: Thank you.

15 And for MGE?

16 MR. DUFFY: Gary Duffy, Brydon, Swearengen and
17 England, PC, P.O. Box 456, Jefferson City, Missouri 65102
18 appearing for Missouri Gas Energy.

19 JUDGE WOODRUFF: For Staff?

20 MR. SCHWARZ: Tim Schwarz and Cliff Snodgrass,
21 P.O. Box 360, Jefferson City, Missouri 65102 appearing for
22 Staff of the Commission.

23 JUDGE WOODRUFF: Thank you.

24 For Public Counsel?

25 MR. MICHEEL: Douglas E. Micheel appearing on

1 behalf of the Office of Public Counsel and the public,
2 P.O. Box 7800, Jefferson City, Missouri 65102-7800.

3 JUDGE WOODRUFF: Thank you.

4 There are several other parties that had
5 become part of this case. Mark Comley is representing City
6 of Kansas City and he called me this morning indicating he
7 would not be here and I gave him permission for that.

8 Midwest Gas Users is also a party. Stu Conrad
9 contacted me through Mr. Micheel indicating also that he
10 would not be here, and he has permission to do that.

11 Williams Pipeline was also a party. I don't
12 believe anyone here is for Williams Pipeline and they,
13 again, have not participated in the later portions of this
14 case. They are excused also.

15 As far as argument today, as the order
16 indicated that established this argument, Riverside
17 Mid-Kansas will go first. Thereafter, Staff, Public Counsel
18 and MGE will be given a chance to respond, and Riverside
19 Mid-Kansas finally given a chance to reply to that.

20 There were certain times announced in the
21 order that were taken directly from the regulation that
22 creates the ability to have these oral arguments. I'm not
23 going to try and hold the parties directly to that. If you
24 find you're running out of time and you want more time, just
25 request more time and leave will be freely granted. And I

1 just want to make sure everyone has a chance to present
2 their arguments as they wish.

3 And I anticipate the Commissioners will be
4 down here in a few minutes. They may be asking questions
5 during the process of the argument. But let's go ahead and
6 get started with Riverside Mid-Kansas.

7 MR. STEWART: Do you want me up here?

8 JUDGE WOODRUFF: Yes.

9 MR. STEWART: I guess this is for the cameras,
10 not for the Commissioners.

11 JUDGE WOODRUFF: Yes. And we're not even
12 using the cameras today, so --

13 MR. STEWART: Okay. May it please the
14 Commission.

15 Good morning. My name's Brent Stewart. I'm
16 appearing today pursuant to the Commission's April 18th
17 order on behalf of Riverside Pipeline Company, LP, and
18 Mid-Kansas Partnership.

19 I'd like to start by a brief chronology. The
20 Commission issued its Report and Order in this case on
21 March the 12th. Six days later, on March 18th, the Staff
22 filed its monthly status update in Case No. GR-99-304, which
23 is the MGE ACA rate case in which the Commission had
24 requested monthly updates from Staff as to the status of all
25 of the pending ACA cases.

1 In that March 18th Staff filing, the Staff
2 once again indicated its intent to challenge the Mid-Kansas
3 2basically on the same basis, that it had unsuccessfully
4 proposed such an adjustment in this most recently concluded
5 proceeding.

6 A few days later, on March 21st, Mid-Kansas
7 Riverside filed its Application for rehearing in this case
8 on the limited issue of the interpretation of the 1996
9 stipulation and agreement.

10 On April 3rd, Staff filed its suggestions on
11 rehearing, which were, at least in part, directly responsive
12 to the limited issues raised by Mid-Kansas Riverside in its
13 Application for rehearing.

14 I'd like to, I guess, start by addressing a
15 threshold question, and that is why does the Commission have
16 to decide this issue. There are several reasons for that.

17 The first is that the Cole County Circuit
18 Court has ordered the Commission to do so and they did so in
19 the prohibition proceeding. I believe the record in the
20 case has that particular order as Exhibit 20, if I'm not
21 correct.

22 MR. SCHWARZ: I think it is.

23 MR. STEWART: And I suspect, talking with
24 Mr. Schwarz, I think a copy of that is going to be provided

25

1 to the Commission when he steps up here.

2 In that order, the circuit court found that
3 the stipulation was ambiguous as a matter of law. And we
4 will abide, of course, by that decision of the court. It is
5 ambiguous, that was the law of the case. We did not appeal
6 that particular issue.

7 There's a second reason though that the
8 Commission needs to --

9 JUDGE WOODRUFF: Let me interrupt you for a
10 moment, Mr. Stewart. That circuit court decision you're
11 talking about, it wasn't directly appealed, but there was a
12 subsequent appeal --

13 MR. STEWART: Correct.

14 JUDGE WOODRUFF: -- from a case, went to Court
15 of Appeals. And did the Court of Appeals not say at the
16 time that the circuit court entered that order, it did not
17 have jurisdiction?

18 MR. STEWART: No. That is not correct.

19 JUDGE WOODRUFF: Can you explain that to me?

20 MR. STEWART: There were two separate court
21 proceedings rising out of this case. Initially, when -- I
22 believe Staff had filed its direct testimony, Mid-Kansas
23 Riverside at some point -- it was in the summer of '98, we
24 filed a Motion to Dismiss before the Commission. And we
25 argued in those motions that the stipulation precluded the

1 adjustment proposed by the Staff.

2 The Commission at that time denied our motion.
3 Our first avenue was an extraordinary writ because of the
4 pending procedural schedule in the case. And, frankly, we
5 didn't want to go to hearing if we didn't have to. We took
6 an extraordinary writ to the Cole County Circuit Court.

7 The court issued a preliminary writ, but after
8 the brilliant arguments of Counselor Schwarz, the Cole
9 County Circuit Court ultimately quashed the writ, but in so
10 doing, when it issued its order quashing the writ and
11 basically coming back to -- sending the matter back to the
12 Commission, it found that, in fact, the stipulation was
13 ambiguous at that point. We did not appeal the motion -- or
14 the order quashing our writ.

15 Shortly -- and it was just within a few days
16 after the court issued its order in the prohibition case,
17 the Commission issued -- we had subsequently then filed an
18 application for rehearing, which we had pending here at the
19 Commission on the Commission's original order. And I
20 apologize it gets kind of confusing, but it -- believe me,
21 it was confusing.

22 We had filed after -- immediately after the
23 Commission denied our Motion to Dismiss, before the
24 Commission, an Application for rehearing, which that was
25 done also while we were in circuit court on the prohibition

1 case. The Commission did not rule on our Application for
2 rehearing until after the Cole County Circuit Court had
3 issued its order in the prohibition case.

4 Once the Commission had denied our Application
5 for rehearing, we then sought a writ of review on that
6 order, on the denial of the Application for rehearing under
7 the Commission's writ of review appeal provisions.

8 It was in that case that Judge Brown -- I
9 think we alleged two points. One had to do with the Staff's
10 Direct Testimony and what we claimed to be insufficiency of
11 the evidence. Judge Brown ruled against us in that.

12 He did grant, however, and issued an order
13 reversing and remanding the issue of the stip -- denial of
14 the stip. And he told -- basically in his order he said,
15 Commission, you need to come back and you need to take
16 evidence on this issue.

17 The Commission appealed that decision to the
18 Western District Court of Appeals on the basis that the
19 Commission's order denying a rehearing was an interlocutory
20 order, it was not a final order. And therefore, in the
21 Commission's mind, that order was not final, that the
22 Commission could still change its mind on the issue and that
23 our appeal was premature. That was what was argued to the
24 circuit court -- or the Western District Court of Appeals.

25 The Western District Court of Appeals

1 ultimately agreed with the Commission. It found that the
2 circuit court had no jurisdiction to entertain our writ of
3 review and directed that the circuit court remand the order
4 back to the Commission.

5 And that's a good point, because I was going
6 to at this point anyway read to -- this is my second point
7 about why the Commission needs to address this now. This is
8 what the Commission told the Western District Court of
9 Appeals and the circuit court. And I'm reading from the
10 Commission's own brief.

11 The Commission understands that it must take
12 evidence from which a finding on the stipulation's meaning
13 can be made. The parties have pre-filed with the Commission
14 substantial testimony on the subject, will file surrebuttal
15 testimony when the case is remanded and will cross-examine
16 the witnesses at hearing. The Commission has not and will
17 not refuse to execute its duties as prescribed by law.

18 A little later in the brief it states, Because
19 the matter has not been heard by the Commission, the
20 Commission concedes that it must conduct a hearing to obtain
21 evidence prior to finding as fact the meaning of the
22 ambiguous stipulation.

23 That's what the Commission told the Western
24 District and, of course, the Western District agreed.

25 Prior to going to the Western District, the

1 Commission made similar arguments in front of Judge Brown --

2 JUDGE WOODRUFF: Now, when you say the Western

3 District, I don't think there was anything in their written

4 decision saying that the Commission had to make these

5 findings, was there?

6 MR. STEWART: No. I'm getting to that.

7 They found that the Cole County Circuit Court

8 did not have jurisdiction. In that case, however, the

9 Commission, again, through Mr. Schwarz argued that -- and

10 frankly at this stage, I agree with him -- the law of the

11 case at that point was the fact that a court had found the

12 con-- or the stipulation to be ambiguous and because that

13 decision of the court, which was not challenged --

14 JUDGE WOODRUFF: Okay. Let me back up again

15 to that earlier decision. If I recall, MGE was not a party

16 in that case; is that correct?

17 MR. STEWART: That is correct.

18 JUDGE WOODRUFF: They were not a party to

19 that. My reading of law of the case indicates that all

20 parties have to be the same for law of the case to apply.

21 Do you disagree with that?

22 MR. STEWART: With the court's finding, if I'm

23 understanding -- would the -- would Judge Brown's finding in

24 the prohibition case be binding --

25 JUDGE WOODRUFF: On MGE.

1 MR. STEWART: -- on MGE since MGE was not a
2 party in that case? Hadn't really thought about that. In
3 fact, I think I'd refer you to Mr. Duffy, if he'd like to
4 respond. I don't know.

5 JUDGE WOODRUFF: He'll have an opportunity.

6 MR. STEWART: I don't know. As far as we were
7 concerned, the -- and what I mean by the Commission, by
8 Mid-Kansas Riverside. And certainly that's what the
9 Commission argued itself at the Western District, was that
10 the law of the case was the contract was ambiguous and it
11 was up to the Commission to get me back out of court, back
12 here in front of the Commission and let's litigate this
13 thing and we'd come up with a conclusion.

14 And, again, that's consistent with what the
15 Commission also had told Judge Brown just prior to going up
16 to the Western District. The Commission has not considered
17 any evidence on the record in the underlying case. What we
18 were doing was premature. And, again, that's how that case
19 was resolved.

20 There was a remand order from the Western
21 District and I think we cited this in our Application for
22 Rehearing. I don't know. I think that's in the record as
23 well, possibly as Exhibit 20. The order on remand came
24 out -- came out of the writ of review case under the
25 direction of the Western District where Judge Brown then

1 remanded the matter back to the Commission for -- and I'll
2 quote the -- I have it in here -- in the order of remand
3 dated October 26th, the circuit court remanded the case to
4 the Commission, quote, for further proceedings not
5 inconsistent with the opinion of the Court of Appeals and
6 the orders of this court, which we believe includes the
7 original order and prohibition. And that's on page 2 of our
8 Application for Rehearing.

9 JUDGE WOODRUFF: The order and prohibition is
10 a separate case with a separate case number?

11 MR. STEWART: Yes, it was a separate case
12 number. You had the prohibition here and you had the writ
13 of review here. Went up. We're back to the Commission.

14 And it's because -- the second reason that the
15 Commission needs to decide this now is because of the
16 representations made by the Commission to the courts and to
17 us as party litigants that, in fact, that decision would be
18 made here.

19 Finally, there's a practical consideration.
20 And I alluded to this earlier. We have several ACA cases
21 docketed and pending. The effect that not deciding has on
22 the parties, the effect that not deciding has on this
23 Commission's caseload, this Commission's resource commitment
24 and, frankly, our resource commitment in litigation, we've
25 been at this issue for a long time and the Commission's

1 decision, one way or the other, even not deciding, has a
2 definite impact on the parties.

3 And for all of those reasons, that's why I
4 would suggest to the Commission that the Commission has to
5 decide that issue now. It's properly before you. You've
6 had the evidence on the record, and I'll get into the
7 problems with that in a minute, but it is now finally
8 properly before you and is requiring decision for those
9 reasons.

10 My second point would -- how should the
11 Commission go about resolving this ambiguity? We have an
12 order from the court saying the contract was ambiguous. The
13 Commission found it was ambiguous in its Report and Order.
14 What do you do?

15 It might surprise you, but I'm going to agree
16 with the Staff that the parties have presented the
17 Commission with sufficient evidence to resolve the issue and
18 it's, frankly, highly unlikely that any additional evidence
19 can be found, produced and brought forward in a subsequent
20 proceeding. It's just not there. If it was there, frankly,
21 we would have brought it in on our end and I'm sure the
22 Staff would have done so as well.

23 There's only two possible exceptions to that.
24 One does not require the Commission to engage in any further
25 evidentiary proceedings. We alluded -- we mentioned this in

1 our Application for rehearing and I believe that's at
2 paragraph 3.

3 The previous ALJ, Judge Register, late in the
4 hearing issued a ruling or an evidentiary decision on the
5 admissibility of certain evidence which would -- which was
6 at the time uncontested and unobjected to by any of the
7 parties. None of the parties sought to seek this
8 particular -- keep this particular piece of evidence out.

9 And I want to be careful what I say here
10 because it's not -- the evidence I'm talking about is not
11 the pre-filed testimony of Mr. Hack. Mr. Hack didn't
12 testify, there was no way that that testimony could be
13 brought forward. That's not what we're talking about.

14 What Judge Register did, over Mr. Duffy's
15 objection and our objection, was she struck portions of
16 Mr. Langley's testimony and Mr. Langston's testimony, which
17 referenced a data request response issued by the Staff to
18 MGE which was responded to by Rob Hack. This was a Staff
19 data request response and that data request response asked
20 for Mr. Hack's interpretation of what the language meant.

21 I'm not sure why Judge Register ruled the way
22 she did. We objected to it, we both -- Mr. Duffy and
23 Mr. Keevil at the time mentioned that we thought that was
24 inappropriate. We took exception to it and our -- what we
25 did do in the record of the transcript, I believe you'll

1 find it at pages 736 to 741, if you want to see how the
2 record was handled, we invoked what I call the offer of
3 proof provision under Section 536.070 to have that stricken
4 testimony regarding the one data request preserved in the
5 record.

6 And I guess what I'm getting at is the
7 Commission, if it so desired, without taking any additional
8 evidence, could re-examine Judge Register's decision from
9 the Bench on striking that portion of the testimony and
10 receive it into the record.

11 Again, it was not objected to at the time. I
12 don't believe it's objected to now, I could be wrong. But
13 that is one opportunity.

14 The other opportunity -- and, frankly, I'm not
15 advocating this at this point and I'm not sure the Staff
16 would want to do this -- we don't want to do it simply
17 because it would involve additional proceedings, evidentiary
18 proceedings, but on cross-examination of Tom Shaw it came
19 out in the record that we were talking about who on the
20 Staff was responsible for drafting the stipulation, who had
21 input into the stipulation. You'll find this under the
22 cross-examination of Tom Shaw. I'm sorry. I don't have the
23 exact transcript cite.

24 But it was elicited both through myself and
25 Mr. Duffy that there were two other Staff members, potential

1 Staff members who might have had knowledge, might have been
2 involved. And I believe Tom Shaw testified prob-- were
3 involved, at least with one of them, and that was the then
4 division director, Ken Rodman and his boss, David Ralk
5 (phonetic spelling).

6 I don't know if that would provide the
7 Commission with any useful information. I don't remember
8 the extent to which either one of them were involved. I
9 would suspect, just based on my involvement, that Mr. Ralk
10 probably was not that involved.

11 Mr. Ralk succeeded me as executive secretary
12 and he did not take -- as a general rule, he did not take as
13 an active of role in the Staff's case preparations and Staff
14 policy development and those sort of things as I did. So I
15 would be kind of surprised if Mr. Ralk would even remember
16 that.

17 On the other hand, Mr. Rodman was actively
18 involved, as a general rule, in those types of matters. But
19 again, I'm not -- I'll let the Staff speak to this, but I
20 know there have been problems in the past in trying to bring
21 Mr. Rodman in to discuss things such as that and I'm not
22 advocating that.

23 I believe it's correct to say that the Staff
24 has not and, of course, we are not requesting that the
25 Commission in this proceeding take any additional evidence

1 or hold any further proceedings. I guess we're basically
2 telling you you've got the difficult job of going back
3 through the record and reviewing the record evidence, try to
4 find competent and substantial evidence on the record as a
5 whole and then apply the principles of contract
6 interpretation as we've laid out in our Application for
7 Rehearing. And, frankly, I would be more than happy to also
8 cite you to the case Mr. Schwarz cited in his -- the
9 medical -- whatever that --

10 MR. SCHWARZ: Blue Cross/Blue Shield.

11 MR. STEWART: Blue Cross/Blue Shield. I think
12 two of the cases that were cited were very instructive. One
13 is the Transit Casualty case because it talks about the
14 various options available as the Commission goes into the
15 record -- the parole evidence.

16 And let me back up just a second. Before you
17 find -- before, as a matter of law, you find the contract
18 ambiguous -- and, again, the court's already found that, the
19 Commission's found that -- you can try to go to the intent
20 of the parties and go within the document itself.

21 Once it's ambiguous, you have to go outside
22 the document. You take parole evidence. I think the cases
23 are pretty clear on that. That's what the Commission has
24 done.

25 And in taking that parole evidence -- and, for

1 example, and I'll agree with Mr. Schwarz on this point, in
2 weighing the -- in looking at the evidence adduced by
3 Mr. Langley, who was directly involved in the negotiations
4 and his testimony, and then looking at what the Staff
5 witness -- and I believe that was Mr. Shaw, what he
6 testified as to his -- what he remembered, Mr. Langston's
7 interpretation of what he, through the correspondence -- and
8 I forget the exhibit number -- with Mr. Duffy on the various
9 drafts, when you are engaging in looking at that, you're
10 engaging in fact-finding.

11 When you apply a principle of contract
12 interpretation such as, for example -- and, again, I'll just
13 go to the Transit Casualty case -- construing the contract
14 as a whole not to render any piece of it meaningless, when
15 you apply that to the facts that you have found, I believe
16 you are engaged in a legal question.

17 Have you properly applied that principle of
18 law to the facts that you have found? And that would go all
19 the way through the various contract interpretation
20 provisions that are set forth in the cases provided by both
21 us and the Staff.

22 What the Commission -- reading the order, I
23 think the one item -- and, again, I'll make this suggestion,
24 this is a way you can comply with the order of the circuit
25 court, you can reach a conclusion on what the -- how to

1 resolve the ambiguity after you've looked at all the
2 testimony in the record, it has to be on the record.

3 And, by the way what I say today, what
4 Mr. Schwarz says today, this isn't evidence. This cannot
5 form the basis of your opinion on the written decision of
6 this issue. It has to be from the record. And I'm sure the
7 Commission understands that, but that's what you work from
8 is that record.

9 As you're doing that and you go through, I
10 could not tell from the order if you applied the principle
11 of contract interpretation. And I suspect I understand why
12 the Commission or some of you were reluctant to do that.

13 But if, after you've gone through everything
14 else -- and, again, this is -- the Missouri healthcare case
15 says the same thing cited by Mr. Schwarz, if you can't get
16 to the conclusion using everything else in Transit Casualty
17 and these other cases we've cited, there is one more rule of
18 contract interpretation that lawfully you can, and I would
19 argue, are required under the Missouri healthcare case to
20 apply.

21 And that is you have to construe the contract
22 against the drafter. And that is a matter of law if all
23 else fails. And when you get to that point, if the record
24 clearly shows who drafted this, it was the Staff -- it was
25 not Mid-Kansas Riverside, it was not MGE. If you get to

1 that point where you throw your hands up and say, We can't
2 figure it out, the next step is construe it against the
3 drafter and you have complied with the case law as I
4 understand it.

5 I will make one final point and I hope I'm not
6 going over time. If I am, I'll be happy to save that.

7 JUDGE WOODRUFF: Go ahead.

8 MR. STEWART: In going back over the
9 transcript, I recognize the Commission's difficulty in
10 trying to figure out -- answer the simple question of why in
11 the world would the Staff give up a prudence review for
12 14 years through 2009?

13 And when I reread the transcript, I reread the
14 cross, I reread the testimony, to me it was different
15 because I've been messing with this for a long time, but I
16 could see where other people could get confused.

17 And I just wanted to suggest this, that
18 nowhere in the stipulation does it even purport to limit the
19 Commission from challenging the FERC-approved rates of
20 Riverside.

21 Now, remember at the time that the Mid-Kansas
22 2 and Riverside 1 contracts were executed, February of '95,
23 the FERC had not asserted jurisdiction yet over the
24 Mid-Kansas Pipelines. We were in a big fight about that, in
25 fact.

1 The record would show that Williams Natural
2 Gas had filed a complaint against that group saying that
3 these pipelines ought to be FERC regulated and we were
4 fighting that at the time.

5 However, we also knew at the time about
6 unbundling. We also knew that the way the industry was
7 moving was that unbundling, the merchant function, the gas
8 piece -- buying the gas from the transportation piece was
9 the direction everybody was going, including the FERC.

10 So we provided in '95 at some point in time
11 for Mid-Kansas 2 to expire and Riverside 1 to take its
12 place. And there is nothing -- the parties -- I think the
13 record reflects this. The parties -- the contracts
14 themselves reflect this.

15 At some point during these 14 years we weren't
16 sure exactly when, but at some point the FERC was going to
17 take jurisdiction over those rates. And we can dance around
18 this and we will, I'm sure, later today as to the basis of
19 the Staff's disallowance.

20 But the bottom line -- and if you go back and
21 look at their position statements, look at their testimony,
22 it all comes down to basically the rates are too high
23 according to the Staff. And we did not -- it's not in
24 the -- we have never suggested to this Commission that --
25 even with all of our court appeals down here in front of

1 Brown and the Western District, that the Commission could
2 not challenge the level of the Riverside rates.

3 And, in fact, this Commission has. It
4 challenged the interim rates when the FERC -- we finally
5 acquiesced and the FERC assumed jurisdiction over the Kansas
6 Pipeline Group. That was, I believe the record will show,
7 on October 3rd, 1997 when the FERC finally asserted
8 jurisdiction.

9 I believe the Riverside record shows that the
10 Riverside 1 contract, the transportation only contract,
11 commenced and the Mid-Kansas 2 contract terminated on
12 June 1st, 1998. And I think there were -- as part of that,
13 there were some interim rates set. This Commission
14 participated vigorously in that case.

15 And, again, I'm not as familiar with the FERC
16 proceedings as I probably should be, but I was not hired to
17 do that. I do know the Commission, through Carmen Morrissey
18 and a few other Staff members along with your hired outside
19 counsel who, frankly, the same outside counsel we used when
20 I was down here, had been vigorously active in that interim
21 rate case.

22 They also have been -- as the Commission
23 knows, you've been vigorously active in the permanent rate
24 case before the FERC. And that order is expected any time
25 now.

1 So to think that somehow this stipulation
2 document precluded the -- it was our position that it
3 precluded the Commission from going after our rates at the
4 FERC is wrong. We never challenged your ability to do that.
5 You've done that, you're doing that, you will continue to do
6 that through 2009 and beyond. And I don't want this
7 Commission to have the impression that that stipulation
8 somehow purported to give that away.

9 I will say this. Mr. Shaw had a letter from
10 me in his testimony where early on in the process before we
11 ever got to settling the old contract case on appeal and the
12 rest of this, I was trying, and my client was trying, to do
13 what I call a global settlement. We wanted to put
14 everything that was out on the table into one document and
15 settle it.

16 That included the -- us acquiescing to FERC
17 jurisdiction, what our rate levels would be at the FERC. We
18 were asking the Commission -- and I think this came out in
19 my cross of Mr. Shaw, we were asking the Commission if we
20 could agree on those rates, you'll at least give us some
21 time and not challenge us for a few more years. All of
22 those things.

23 None of that come about. We could not reach
24 an agreement. Part of the problem was, frankly, it's
25 institutional and that is how do you deal with the

1 Commission as a party at the federal level or in another
2 state proceeding versus dealing with the Staff at the
3 Missouri state level where the Commission has to take the
4 role of the decision maker. And for a variety of reasons,
5 that didn't the work.

6 But having said that, the bottom line is still
7 the same. The Commission -- and we've never asked the
8 Commission and the stipulation certainly doesn't prohibit
9 this Commission from challenging those FERC rates and you've
10 done so.

11 I have no idea what the FERC is going to
12 order. I do know that our position was -- the Missouri
13 Commission's rate proposals were very low and I'm sure the
14 Missouri Commission thought our rates were very high.

15 But that forum is for that purpose. And it's
16 not something that we created, it's not something the
17 Missouri Commission created or MGE created or anybody else.
18 The federal jurisdiction over interstate pipeline line rates
19 is set at the FERC.

20 And we were -- back in '95 we were in a period
21 of transition and we contemplated at least that rates would
22 be out there at some point at the FERC. And perhaps maybe
23 that helps the Commission understand why there's not
24 language purporting to limit the ability to challenge rates
25 after '96. The question might be in what forum.

1 JUDGE WOODRUFF: Commissioner Murray, do you
2 have any questions for Mr. Stewart?

3 COMMISSIONER MURRAY: I don't believe so at
4 this time. Thank you.

5 JUDGE WOODRUFF: Okay. Commissioner Gaw?

6 COMMISSIONER GAW: I'm going to, but I want to
7 reserve that until we've had some more opening.

8 MR. STEWART: Thank you.

9 JUDGE WOODRUFF: Thank you.
10 Then for Staff?

11 MR. SCHWARZ: May it please the Commission.
12 I have copies here of a number of documents
13 that I think might help the Commission follow the arguments.
14 What I've handed Judge Morris -- Judge Woodruff for
15 distribution is a copy of an earlier order of the Commission
16 in this case, which was the subject of the litigation
17 described by Mr. Stewart. And I would call the Commission's
18 attention to page 6.

19 I screwed up the copying machine and it's got
20 a blank page between every page, but on page 6 I've
21 highlighted two sentences and those are the specific
22 sentences that the circuit court looked at in both the
23 prohibition and the purported review.

24 And it looked at those and said the Commission
25 has made a finding -- these are findings of fact that the

1 Commission has made, but it hasn't taken any evidence on the
2 issues. And that's the language that was the basis of the
3 reviews.

4 I also have for the Commission a copy of the
5 judgment and order in the prohibition case. And, again, I
6 have highlighted language on the second page for your
7 convenience. I have provided copies with the highlighted
8 portions to the counsel present today.

9 And, finally, I have copies of the circuit
10 court's order in the purported direct review. And I have
11 highlighted language in paragraph 10 on page 7.

12 I would like to start by reminding the
13 Commission that on rehearing it should enter the order that
14 is proper and appropriate in the case, the order that should
15 have been entered in the first instance. I think that
16 Section 386.500, sub 4, indicates that.

17 And I would refer the Commission to State ex
18 rel. Capital City Water Company versus the Public Service
19 Commission, 850 S.W. 2d, 903 and State ex rel. County of
20 Jackson versus Public Service Commission 14 S.W. 3d at 99.
21 I think that on rehearing the Commission addresses all
22 issues that it feels are necessary to get the appropriate
23 decision.

24 Secondly, I think that jurisdiction is a
25 threshold issue. I think, however, that construction of the

1 Stipulation and Agreement in this case is not necessarily
2 jurisdictional; that is, the Commission clearly has
3 jurisdiction to consider an ACA case of Missouri Gas Energy
4 and to set rates in that case.

5 Rather, I think that construction of the
6 Stipulation and Agreement is a threshold question. And I
7 think that it's extremely important because if the
8 Commission construes the statute as proposed by Mid-Kansas
9 Riverside and MGE, what evidence would it have before it in
10 order to make the decision?

11 That is, if Staff is, in fact, precluded from
12 proposing an adjustment in this case, it has no right to
13 present any evidence at all. And then the record that the
14 Commission is considering in this case is remarkably
15 different than the record that you actually have in front of
16 you, which has been produced based on the proposition that
17 Staff does have the right to make an adjustment and present
18 evidence in the contested case.

19 I certainly think that the circuit court
20 understood that clearly in the prohibition proceeding, which
21 is the two-page order that I provided you. I do not
22 necessarily -- that's an order in prohibition. It is not a
23 writ of review.

24 That is, the court did not remand the case
25 with directions to the Commission. Rather, the court said

1 the Commission has an ambiguous contract that it needs to
2 construe and, basically, I think indicates that it considers
3 the Commission could construe it.

4 I think as well, the order on the purported
5 review of the order denying the Motion to Dismiss is
6 instructive. It is clearly not binding. I mean, the
7 circuit court never had jurisdiction to enter that order.
8 Obviously such an order can't be binding on the Commission.

9 On the other hand, I certainly think that it
10 is instructive for the Commission to understand what the
11 reviewing court's expectations will be should the matter
12 ever appear before the court again. And I think that
13 although the prohibition case may not be binding on Missouri
14 Gas Energy, it is certainly binding on the Commission and is
15 certainly binding on Mid-Kansas.

16 JUDGE WOODRUFF: In what way is it binding on
17 the Commission?

18 MR. SCHWARZ: Well, the Commission was a party
19 to this case.

20 JUDGE WOODRUFF: They were a party to the
21 case, but the language you're talking about where it says
22 that there's ambiguity in the settlement agreement is not
23 part of the order of the court. It's a description of why
24 it made its finding that the previously entered was
25 improvidently granted.

1 In what way is this order telling the
2 Commission to do anything other than the court is saying
3 what it wanted?

4 MR. SCHWARZ: Well, the court made a
5 conclusion of law that the contract -- the Stipulation and
6 Agreement was ambiguous. If the Commission concluded that
7 the court was incorrect, the Commission had the opportunity
8 to appeal the court's --

9 JUDGE WOODRUFF: Well, wait a minute. What
10 would the Commission appeal? The preliminary writ was
11 quashed. Why would the Commission appeal that?

12 MR. SCHWARZ: Well, if it -- if it felt that
13 the basis was incorrect and that the court was unduly
14 restricting the Commission's ambit of activity, that is the
15 court would -- the court --

16 JUDGE WOODRUFF: Go ahead.

17 MR. SCHWARZ: I mean --

18 JUDGE WOODRUFF: I'll follow-up.

19 MR. SCHWARZ: Why don't you go ahead and
20 follow-up?

21 JUDGE WOODRUFF: Well, what you're saying is
22 the Commission didn't like the basis for the Commission --
23 for the circuit court's decision, but agreed with the
24 result. Then how is the Commission aggrieved?

25 MR. SCHWARZ: The Commission would be

1 aggrieved to the extent that the circuit court purported to
2 limit the Commission's action in considering the case. That
3 is, the court said this document is ambiguous. Okay?

4 The Commission had found in the language as
5 cited in the order that the Stipulation and Agreement was
6 not ambiguous and, in fact, construed it in a particular
7 manner. If the Commission continued to hue to that
8 position, I think that it had the opportunity and the
9 obligation to take that matter up. That is --

10 JUDGE WOODRUFF: And, in fact, the Commission
11 did. Once the case went up for -- once the Commission
12 entered its order following this -- where it denied the
13 request for rehearing and went on up to circuit court, that
14 case went up and went down, found the circuit court didn't
15 have jurisdiction.

16 MR. SCHWARZ: Didn't have jurisdiction on a
17 writ of review of an interlocutory order.

18 JUDGE WOODRUFF: But you're saying it did have
19 jurisdiction to order the Commission to do something on the
20 writ of prohibition it denied?

21 MR. SCHWARZ: I think that as --

22 JUDGE WOODRUFF: I mean, it had jurisdiction
23 on the writ of prohibition, but, frankly, it seems to me
24 this is just dicta explaining why the court made its
25 decision. It's not ordering the Commission to do anything.

1 MR. SCHWARZ: Well, but it's certainly a
2 holding in the case.

3 JUDGE WOODRUFF: In what way is it a holding?
4 It looks to me like the holding is the last paragraph where
5 it says the writ previously ordered was improvidently
6 granted and, therefore, it's the judgment of the court that
7 the preliminary writ is quashed and the petition dismissed.
8 That looks like the order.

9 MR. SCHWARZ: That's the order, but I think
10 clearly the basis for the order is that the Stipulation and
11 Agreement, and specifically the first and second sentences
12 of paragraph 5 of the Stipulation and Agreement, render the
13 Stipulation and Agreement, yes, ambiguous.

14 Now, if the Commission, once the petition for
15 prohibition is quashed, declined to take evidence on the
16 Stipulation and Agreement, I think that the court would have
17 entered a writ of mandamus. I mean, I -- and prohibition
18 and mandamus, although separate, are certainly related.

19 I think that the court would have, from the
20 indications we have, issued mandamus saying that, yes, this
21 is an ambiguous agreement and, yes, you must take evidence
22 in order to construe it.

23 In any event, I think that even if you don't
24 concede -- if it not be conceded that the circuit court
25 order is binding on the Commission, I certainly think that

1 from the proceedings in front of the Commission, it would
2 certainly appear to be ambiguous.

3 And I'd like to turn now to the stipulation --
4 the construction of the Stipulation and Agreement. I think
5 that it's certainly the opinion of the circuit court,
6 whether binding or not, that the first two sentences of
7 paragraph 5 cannot be read together without creating an
8 ambiguity, as a matter of law.

9 And I would point out that the second sentence
10 of that paragraph, which was inserted later into the process
11 according to the evidence that we've seen, was drafted by
12 Missouri Gas Energy, not by the Staff.

13 So if you're going to construe any language of
14 the Stipulation and Agreement against the party that drafted
15 it, I think that certainly the odd man out is the second
16 sentence of paragraph 5 and not the balance of the
17 Stipulation and Agreement.

18 If you look at the other portions of the
19 stipula-- the other parts of the Stipulation and Agreement,
20 none of those changed after the insertion of that second
21 sentence. That is, paragraph 6 of the Stipulation and
22 Agreement still recited that there was \$4 million of
23 consideration to settle Case No. GR-93-140, which was then
24 on appeal; Case 94-101; 94-227; 94-228; 95-82; and 96-78.
25 None of that language changed.

1 The fourth sentence of paragraph 5 itself
2 still lists the specific cases of the parties intended to
3 settle. Paragraphs 1 through 3 still set out the periods,
4 parties and cases settled by the Stipulation and Agreement.

5 The value of the consideration \$4 million is
6 consistent with the settlement of the cases that were
7 repeatedly listed in the Stipulation and Agreement. That
8 is, you can use as a rough benchmark the Commission's
9 holding in Case No. GR-93-140. And the settlement of those
10 recited cases for \$4 million is consistent with the
11 settlement of a limited number of periods.

12 Outside of the document, MKP's own outside
13 auditors suggest that the settlement was only for the period
14 through June of 1996. And that's Exhibit 22-HC.

15 And, finally, you have the Commission's own
16 order approving the Stipulation and Agreement, which again,
17 sets out the recitation that the Stipulation and Agreement
18 settled these specific cases.

19 I think that there is almost no likelihood
20 that the Commission will ever consider any additional
21 evidence on the construction of the Stipulation and
22 Agreement short of going out to the state of Kansas and
23 turning over rocks to look for loose pieces of paper.

24 I think the parties have presented the
25 Commission with all of the evidence that either of them or

1 any of them had at their disposal to bring to bear on this
2 issue. I think that it is extremely important for the
3 Commission to actually reach a decision one way or the other
4 on this issue, because I think that it is a condition
5 precedent for the Commission considering the evidence that
6 is brought to bear on the merits, that is, again, I
7 reiterate that there is -- should the Staff not -- be
8 precluded -- should the Staff be precluded from making an
9 adjustment and presenting evidence, then the record in this
10 case is clearly different than if the adjustment is
11 permitted.

12 I think that -- and I certainly apologize to
13 the Commission for finally arriving at a statement of the
14 case so late in the day, but I think that the framing of the
15 issue as to the matter of damages is probably critical.

16 That is I think that the issue in this case
17 needs to be framed as follows. By mitigating in a
18 subsequent period a portion of the damages of an imprudent
19 decision in a prior period, can a utility avoid all
20 consequences of the initial imprudent act and shift any
21 remaining detriment to the ratepayer?

22 The posturing of the case otherwise puts Staff
23 and the Office of Public Counsel in the position of proving
24 a negative; that is, MGE should have done better in the '95
25 contract renegotiations. If MGE in 1995 achieved any

1 benefits for the ratepayers, how can you say that that new
2 contract extension is imprudent?

3 On the other hand, how can you say that by
4 saving a million dollars a year, that MGE should be relieved
5 of the consequences of the \$7 million detriment of the
6 contract that this Commission found to be imprudent in
7 Case GR-93-140? That is the predicate finding that cannot
8 be avoided.

9 The decision that even MGE's predecessor in
10 its internal memos in 1991 when they decided not to use the
11 Williams rates as a cap on the rates with Mid-Kansas
12 Riverside, that decision and that finding of this Commission
13 is the overwhelming and controlling precedent.

14 Plainly, both MGE's predecessor and MGE
15 continue to have a duty to mitigate the damages from that
16 imprudent decision. But the mere fact that they were able
17 to mitigate some but not all of those damages is a far cry
18 from saying that the ratepayers should, therefore, be
19 responsible for the rest of the damages occurring as a
20 result of that imprudent decision. It's fundamentally
21 unfair to do so.

22 Staff continues to believe that the Williams
23 rates are the appropriate basis of comparison; that is
24 Williams is a dominant marketer in the Kansas City market.
25 Williams has a dominant share. It's Williams rates that the

1 original contract with Mid-Kansas were tied to.

2 There are some differences in the services
3 offered by Mid-Kansas and Williams, but as the questions
4 of -- I think of Mr. Conrad to Mr. Wallace indicated, the
5 Williams service has characteristics that bring those
6 comparisons closer.

7 I would be glad to entertain any questions
8 from the Commissioners or from the Bench.

9 JUDGE WOODRUFF: Commissioner Simmons, do you
10 have any questions?

11 CHAIR SIMMONS: I don't.

12 JUDGE WOODRUFF: Commissioner Murray?

13 COMMISSIONER MURRAY: Thank you, Judge. I
14 have a couple of questions.

15 Mr. Schwarz, in the argument that you made
16 about interpreting a contract against the drafter actually
17 was made earlier, but you pointed out a sentence that was
18 drafted by MGE, I believe you said.

19 But in the legal interpretation of the
20 contract when all else fails and the body interpreting the
21 contract or charged with interpreting it has to rely on the
22 last resort of finding against the drafter, interpreting it
23 against the drafter, doesn't it behove that body to
24 determine that there is a drafter? Because in all contracts
25 isn't there a give and take where there is some input by

1 each party and the body -- or the contract itself though is
2 basically drafted by one party?

3 MR. SCHWARZ: Well, I think that certainly the
4 evidence in this case indicates that there were drafts first
5 proposed by Riverside and later drafts proposed by the
6 Staff.

7 I think that in situations where you have
8 negotiating positions or negotiating stances or power -- and
9 this is certainly not a contract of adhesion where one party
10 says to the other, This is the language, take it or leave
11 it. I think the evidence clearly suggests that there was a
12 fair exchange of ideas initiating with the company and
13 ultimately a draft produced by the Staff.

14 But I would suggest to you just as well that
15 the sentence that -- the single sentence that's really
16 causing the problem was not one that was drafted by the
17 Staff. If you look at the -- at the time that sentence was
18 interjected, my recollection is April 29th, but the record
19 is clear, very late in the process, they did not change the
20 language in paragraphs 1 through 3. They did not change the
21 language in paragraph 6.

22 If MGE -- not even Mid-Kansas Riverside, if
23 MGE had really wanted to change the nature of that
24 settlement, they had an obligation to change it consistently
25 and throughout. And they did not do that because, I

1 contend, they knew that it wouldn't sell. They knew that
2 the agreement that had basically been reached and hammered
3 out was to settle specific cases for specific consideration
4 and no more.

5 And to the extent that there was a -- I mean,
6 the cover letter containing that language says it's for
7 purposes of clarification, not change. I think that to
8 suggest that by inserting the one sentence they were
9 silently changing all of the other terms of the agreement
10 without making any attempt to do so, I don't think that that
11 is a practice that should be approved or encouraged.

12 COMMISSIONER MURRAY: Let me ask you this.
13 Are you saying then it's only contracts of adhesion where --

14 MR. SCHWARZ: No.

15 COMMISSIONER MURRAY: -- that principle of
16 contract construction should apply?

17 MR. SCHWARZ: No. But I think that it's fair
18 to say that -- I mean, I don't think anyone has said --
19 well, Mr. Langley did, but I think that the other evidence
20 suggests otherwise.

21 I think that there's every evidence here that
22 the parties had a free -- a give and take. And I think that
23 to suggest that because of a sentence that Staff did not
24 draft that the balance of the provisions in the Stipulation
25 and Agreement should be abandoned is simply not a -- I mean,

1 that's taking the principle far beyond what it's intended to
2 do.

3 COMMISSIONER MURRAY: Don't you have to
4 interpret the contract without rendering any part of it
5 meaningless?

6 MR. SCHWARZ: If you can.

7 COMMISSIONER MURRAY: Okay. I've got another
8 question for you. In framing the issue -- re-framing the
9 issue that you said was critical, you said -- and I'm
10 definitely paraphrasing -- that an initial imprudent act --
11 a company shouldn't be shielded from an initial imprudent
12 act and allowed to impose a detriment to the ratepayers in
13 such cases, something to that nature. Is that pretty
14 accurate?

15 MR. SCHWARZ: Well, I -- that's --

16 COMMISSIONER MURRAY: Well, don't expound on
17 it. If that's accurate, I'll go ahead and ask my other
18 question.

19 MR. SCHWARZ: It's close.

20 COMMISSIONER MURRAY: If that is the case,
21 wouldn't that render any Stipulation and Agreement between
22 the Staff and any regulated utility related to prudence
23 unenforceable?

24 MR. SCHWARZ: I don't see how, no.

25 COMMISSIONER MURRAY: How would it be

1 enforceable?

2 MR. SCHWARZ: Well, the Staff would simply not
3 be permitted to make adjustments for the period that they
4 agreed. The -- we're settled.

5 COMMISSIONER MURRAY: And if they agreed to a
6 period of 10 years, for example, are you saying that they
7 should be allowed to make those adjustments because it would
8 be a detriment to the ratepayers and it has a fundamental, I
9 believe you said, unfairness about it?

10 MR. SCHWARZ: I think if Staff settled -- and
11 I would -- if Staff settled a period of 10 years, I think
12 that Staff would only do so if they felt that they were
13 getting sufficient value at the time of the settlement to
14 reasonably mitigate the damages of the imprudent act or
15 decision.

16 So that I think that the -- the premise for
17 that is that in settling any litigation for a given period
18 of time, the Staff weighs any number of elements and comes
19 to the conclusion that the consideration being paid by the
20 utility is adequate for the forbearance from further
21 adjustments for the given period of time.

22 COMMISSIONER MURRAY: And then if it doesn't
23 work out, as Staff thought that it would work out when Staff
24 agreed to it, and there is, in fact, some detriment that
25 Staff interprets resulting to the ratepayers, then is the

1 contract unenforceable?

2 MR. SCHWARZ: No, I don't -- I don't think so.
3 I mean, I think you'd have to -- it would have to be a total
4 failure of consideration for an agreement to be
5 unenforceable.

6 COMMISSIONER MURRAY: Okay. Thank you. I
7 think that's all the questions I have right now.

8 JUDGE WOODRUFF: Commissioner Gaw?

9 COMMISSIONER GAW: I'm not sure I want to go
10 in depth yet, but I do have sort of a question that
11 Commissioner Murray sort of brought up in my mind.

12 Mr. Schwarz, forgive me, but if two farmers
13 had an agreement that they signed for the sale of a pig and
14 the description of the pig was it's to be found in the
15 farmer's front lot and Farmer A, who is buying the pig,
16 thought that this grand champion pig was kept in the lot and
17 indeed Farmer B had kept that pig in that lot on a regular
18 basis, but Farmer B believed that he was selling this other
19 pig that was not so prized and they entered into this
20 contract and both of them had different ideas about what was
21 being bought and sold, my question is, did Farmer A buy a
22 pig in the poke?

23 MR. SCHWARZ: Well, that -- well, he didn't
24 buy it in a poke. He thought he bought it in a pen. Well,
25 that question will be resolved under the uniform commercial

1 code. And I think you will -- you know, again, you're
2 talking about a question of fact, that was there a failure
3 of identification of the property to be sold.

4 Now I have not boned up on the UCC, because I
5 don't believe it's implicated in this case, but I think
6 that, yes, there are times when the courts or those
7 construing contracts will find as fact that there was no
8 meeting of the minds and that there was no enforceable
9 contract from the outset. I don't believe that's the case
10 here.

11 COMMISSIONER GAW: Well, I was assuming that
12 you didn't believe that from your argument, but it indeed is
13 one of the possibilities here, is it not?

14 MR. SCHWARZ: Yes, it is.

15 COMMISSIONER GAW: I think I want to save most
16 of what I want to ask for a little later and allow the
17 parties to go ahead and make their presentation, because I
18 do have some very detailed questioning I want to do, but I'd
19 like to save that and allow the parties to present their --

20 JUDGE WOODRUFF: Commissioner Forbis?

21 I have a couple of questions on this. I'm
22 looking at the paragraph of the Stipulation and Agreement
23 that's causes all the problems and I'm quoting from it here.
24 It says, The finding and conclusions regarding the prudence
25 of the execution of the Missouri agreements made by the

1 Commission in -- I'll start again.

2 That the findings and conclusions regarding
3 the prudence of the execution of the Missouri agreements
4 made by the Commission in Case No. GR-93-140 shall be
5 compromised and settled as provided for herein.

6 And then the next paragraph it mentions that
7 the MKP WR sales agreement and the Riverside WR
8 transportation agreement 1 are finally settled by this
9 Stipulation and Agreement. What do you interpret that to
10 mean?

11 MR. SCHWARZ: My view is that that indicates
12 only that -- well, I don't know.

13 JUDGE WOODRUFF: You don't know?

14 MR. SCHWARZ: I don't have the language in
15 front of me, Judge. If it --

16 JUDGE WOODRUFF: It's right here. This is out
17 of the Report and Order.

18 MR. SCHWARZ: Understood. I think that
19 they're compromised and settled as provided herein. In the
20 entire document I think it's six cases, four years.

21 JUDGE WOODRUFF: And for that the parties gave
22 up their appeal of the 93-140 decision; is that correct?

23 MR. SCHWARZ: That's correct.

24 JUDGE WOODRUFF: And they paid \$4 million?

25 MR. SCHWARZ: They paid -- the Commission

1 had -- and I can't remember the exact number, but it was
2 like 1.3, 1.4 million dollar adjustment in Case GR-93-140.
3 And I think if you extend that, yes, I think that \$4 million
4 is not an unreasonable consideration to be paid for
5 resolution of those cases.

6 JUDGE WOODRUFF: So you're telling me that
7 they agreed to forego their appeal which they might have
8 won?

9 MR. SCHWARZ: They might have, but
10 understand --

11 JUDGE WOODRUFF: Nobody knows.

12 MR. SCHWARZ: That's true. But understand
13 that in that case there is an internal memo to what was then
14 I think -- I can't remember what they were calling
15 themselves, Kansas Gas Service --

16 JUDGE WOODRUFF: The pipeline company?

17 MR. SCHWARZ: No, no, no. MGE's predecessor
18 in interest. There's an internal memo saying, If you make
19 this contract change and abandon the Williams price caps, it
20 is imprudent -- used the word imprudent to --

21 JUDGE WOODRUFF: But that was before 93-140
22 was decided. Right? I think I saw that.

23 MR. SCHWARZ: It was evidence in the case.
24 So, yes, they had a right to appeal, but they were looking
25 at as close to a smoking gun as I've ever seen in 20 years

1 of practice in law. So, yes, they gave up their right to
2 appeal. How much value do you put on that? And that -- you
3 know, that's a --

4 JUDGE WOODRUFF: Apparently \$4 million.

5 MR. SCHWARZ: No. Not \$4 million, because
6 they settled not only that case but three other years with
7 at least similar if not larger -- the adjustment has grown
8 larger over time, so --

9 JUDGE WOODRUFF: But doesn't it say that the
10 prudence of entering into the MKP WR sales agreement and the
11 Riverside WR transportation agreement is finally settled by
12 the stipulation?

13 MR. SCHWARZ: As set forth here. Now, does
14 that sentence read out the provisions of paragraph 1 through
15 3? Does it read out the provisions of paragraph 6? Does it
16 read out sentence 4 of paragraph 5? I don't think. I think
17 if you look at the document as a whole, this sentence that
18 had added at the eleventh hour is -- is clearly --

19 JUDGE WOODRUFF: This sentence wasn't added in
20 the eleventh hour. You're talking about the second
21 sentence?

22 MR. SCHWARZ: Yes.

23 JUDGE WOODRUFF: This is back in the body
24 which Staff drafted. There's no dispute about that, is
25 there?

1 MR. SCHWARZ: Staff was the scrivener. I will
2 concede to that, yes. Now, I -- no. I think that -- I
3 think that the sentence -- second sentence of paragraph 5 is
4 an anomaly. It was added at the last minute, it is not
5 particularly consistent with the other terms of the
6 agreement.

7 There was nothing provided at the same time to
8 alter any of balancing of the agreement and the agreement
9 everywhere else is very specific as to parties settling,
10 times that were settled and the amounts that were
11 compromised.

12 So, yes, I think that -- I mean, ultimately I
13 think that if you're going to construe things against the
14 party that drafted them, whoever drafted that second
15 sentence of paragraph 5 certainly had a duty to do far more
16 than they did if they were purporting to --

17 JUDGE WOODRUFF: Let's look at that second
18 sentence, make sure we're talking about the same thing.
19 What I believe is the second sentence is, In addition, the
20 signatories agree that the transportation rates and gas
21 costs charge pursuant to the Missouri agreements shall not
22 be the subject of any further ACA prudence review until the
23 case associated with the audit period commencing July 1,
24 1996 and ending June 30, 1997.

25 Is that the sentence we're talking about?

1 MR. SCHWARZ: I -- I did not -- well, I didn't
2 review --
3 JUDGE WOODRUFF: That's my copy.
4 MR. SCHWARZ: Do we have the first paragraph?
5 MR. STEWART: I've got a complete copy here.
6 JUDGE WOODRUFF: If you'd like to review it,
7 go ahead.
8 MR. SCHWARZ: I'm sorry. It's the first
9 sentence that was added, I think.
10 JUDGE WOODRUFF: Okay. The first sentence, As
11 a result of this Stipulation and Agreement?
12 MR. SCHWARZ: Yes. And I defer that. I will
13 be honest. I did not review this area prior to this morning
14 and I would need to go back and see.
15 JUDGE WOODRUFF: I just want to make sure
16 we're talking about the same things.
17 MR. SCHWARZ: There was a sentence -- the
18 sentence that created the ambiguity was added at the end.
19 JUDGE WOODRUFF: And that's in the record, I
20 believe.
21 MR. SCHWARZ: That's in the record. I think
22 that's clear. It was added by MGE. And none of the other
23 substantive portions talking about periods and parties and
24 so forth was altered at the same time.
25 JUDGE WOODRUFF: Okay. Any other questions

1 for Mr. Schwarz at this time?

2 You may step down then.

3 MR. SCHWARZ: Thank you.

4 JUDGE WOODRUFF: And I believe Public Counsel

5 will be next.

6 MR. MICHEEL: May it please the Commission.

7 I'll be brief. I thought that the purpose of

8 today was to determine whether or not this Commission needs

9 to resolve that ambiguity and look at that stipulation and

10 finally decide one way or another.

11 And my simple answer to you is, yes, please do

12 it. We have numerous other ACA cases out there. The

13 parties came to you -- and I'm going to set aside everything

14 that happened in the circuit court and at the Court of

15 Appeals. I mean, that's all in the record.

16 But as a matter of good regulatory policy, the

17 parties have come to this Commission, they have a legitimate

18 disagreement about what the meaning of the 1996 Stipulation

19 and Agreement is. They've presented much evidence on it and

20 I think both Mr. Schwarz and Mr. Stewart have said they've

21 presented as much evidence as they think they can find.

22 I think we all have limited resources, that

23 the parties have requested that the Commission make this

24 decision and I think it would be good regulatory policy to

25 do it.

1 And, quite frankly, you know, we can run from
2 this issue, but we can't hide from the issue. Because in
3 the end, in the next ACA period, this issue is going to be
4 brought up, and in the next ACA period and for nine years
5 out unless we know from this Commission initially -- and I'm
6 assuming people will appeal, but from this Commission
7 initially, what did that Stipulation and Agreement mean.

8 Now, the Office of the Public Counsel believes
9 that that Stipulation and Agreement meant specific cases for
10 specific consideration for a specific time period. When you
11 talk about ACA cases, I like to think of ACA cases as a
12 snapshot picture. Each year we take a snapshot.

13 And my view of the settlement is we took a
14 snapshot of three periods and for those three periods we
15 were all willing to settle for \$4 million.

16 Now, I recognize that Mid-Kansas and MGE have
17 a different view of that and they say that period that was
18 covered was the entire contract period, many more snapshots
19 out through 2009. But this Commission has the evidence, the
20 parties are asking you, please decide this.

21 Let us know, because then we can all go about
22 our business knowing one way or another whether or not the
23 Stipulation and Agreement only settled those specific ACA
24 snapshots as the Staff and Public Counsel contend, or
25 whether or not it's -- to use another analogy, whether it

1 took care of the whole motion picture all the way through
2 2009.

3 And if you don't do it in this case, you're
4 going to have the same contentious arguments in the next
5 case and if you sidestep it in that case, on and on and on,
6 so --

7 JUDGE WOODRUFF: Any questions for
8 Mr. Micheel?

9 COMMISSIONER MURRAY: I just want to make a
10 comment. And I just want to thank you for getting us back
11 on to the track of what I think this oral argument was set
12 up to do, to determine whether or not we need to make that
13 decision in this case. And I appreciate your comments.

14 MR. MICHEEL: And I'd be happy to argue about
15 all the other stuff at another time, but --

16 JUDGE WOODRUFF: Thank you.

17 For MGE?

18 MR. DUFFY: Good morning. I'm Gary Duffy for
19 MGE.

20 When we started this morning, it was going to
21 be my intention not to say anything, because I would remind
22 the Commission that we did not file for an Application for
23 Rehearing. We did not file a response to the Application
24 for Rehearing.

25 I think you can logically deduce from that

1 that we were satisfied with your order and we didn't want
2 you to do anything else. And I think that's the impression
3 I want to leave you with, is that we were satisfied with
4 your order and we don't see the need to do anything else.

5 I believe -- I am disturbed by a couple of
6 things that I've heard in the oral argument this morning and
7 I will just give you a very brief reaction to them for
8 whatever it's worth.

9 I'm disturbed by the notion that because MGE
10 suggested or offered one sentence, that the Staff attorney
11 decided he would incorporate in the stipulation that somehow
12 that sentence has to be construed against MGE. I would
13 suggest that because the Staff attorney determined to take
14 that sentence out of MGE's suggestion and put it in the
15 stipulation, that that was the Staff who did that, because
16 there were several other things the Staff didn't take and
17 put in that stipulation.

18 And so I think it's unfair to say that because
19 the text was originally suggested by MGE, that it has to be
20 construed against MGE. The Staff, the evidence showed, was
21 in full control of what went into that stipulation. Not
22 MGE, not Mid-Kansas, not Public Counsel, not anybody else.
23 So I think that that distinction needs to be made.

24 I'm also very disturbed by the notion that the
25 Staff is arguing that in this fact situation, a company

1 should be -- and I'm the last person in the world to
2 understand much about the Bible, but I remember something
3 from Bible school about the sins of the fathers being
4 visited on the sons or something like that.

5 I'm very disturbed that something that Western
6 Resources did in the early 1990s, before MGE was a gleam in
7 anybody's eye, should be branded on MGE later on. You know,
8 under the fact circumstances in this case where MGE didn't
9 even exist until 1993 and you all didn't make a decision in
10 GR-93-140 until I think --

11 MR. SCHWARZ: Late '95.

12 MR. DUFFY: -- late 1995, that somehow, you
13 know, when MGE come in and finds itself in this situation
14 and it does what it can to better the situation, and the
15 record reflects that, that because we weren't able to
16 completely eradicate the dollar effect of the imprudence you
17 found that Western Resources did four years before that MGE
18 should be responsible for that or MGE shareholders should be
19 responsible for that. I just think that's outrageous.

20 You've got a unique fact situation here where
21 the company's changed. We bought these assets. And we had
22 no notice that there was any taint at that point on that.
23 There was another case where they said, oh, you know, the
24 removal of the price cap -- and we dealt with that.

25 But I just think that we're going off on the

1 deep end here if the Commission's going to rule that, you
2 know, even though there is a change of assets and a change
3 of company here, that the new company has -- you know, did
4 what they could, it has to be responsible for the actions of
5 the previous company.

6 Now, if it were the same company all along
7 and, you know, the same company then tried to better itself
8 or better the situation, I think you could reach a totally
9 different result, but not where the buyer and seller came to
10 you and said, okay, we want to buy these assets and you
11 were -- you more than anyone else and the Commission was
12 fully cognizant of what was going on and you said, okay,
13 that's fine and then to go with what the Staff's suggesting
14 here, I just think that's outrageous.

15 I think that Judge Woodruff was very
16 perceptive when he started talking about aggrieved parties a
17 while ago. I think the courts will ultimately tell us
18 whether Mid-Kansas Riverside is an aggrieved party or not in
19 this situation.

20 Mr. Micheel said the parties are asking you to
21 please decide this. I hope he wasn't including MGE when he
22 said the parties were asking you to decide this. We have
23 not asked you to decide this. We're happy with the order
24 that you issued.

25 So we don't really have a dog in this fight.

1 We didn't file for anything, we didn't ask for anything
2 after you reached your decision. That's all I have.

3 JUDGE WOODRUFF: Questions? Go ahead.

4 COMMISSIONER MURRAY: If we don't decide that
5 issue in this case though, isn't it true that it will be
6 re-litigated year after year after year and is that
7 efficient use of Commission and parties' time and resources?

8 MR. DUFFY: If the Staff doesn't get the
9 message that you're tired of listening to that and they
10 bring it up, then the parties will be forced to defend it.
11 And, yes, you're absolutely right it will get litigated
12 until somebody finally blinks and says, okay, I've had
13 enough.

14 COMMISSIONER MURRAY: And do you agree that
15 all of the evidence that is ever likely to be presented on
16 this issue has already been presented?

17 MR. DUFFY: We tried to do that. I'm not
18 aware of anything -- I'm not aware of anything else out
19 there that would -- that could come to light that would give
20 you some different perspective that we haven't already given
21 you.

22 COMMISSIONER MURRAY: And I understand a
23 party's reluctance to open up an order they're pleased
24 with --

25 MR. DUFFY: Yeah. We thought we won.

1 COMMISSIONER MURRAY: -- but other than the
2 fact that -- similar to going to the legislature and opening
3 up a statute and reluctance to do that for fear of changing
4 the statute in a way that you don't want it to be changed,
5 is there any other reason that you think we should not
6 decide that issue once and for all in this case?

7 MR. DUFFY: Let me see if I understand your
8 question.

9 COMMISSIONER MURRAY: I'm sorry. That was a
10 very convoluted question.

11 MR. DUFFY: Maybe you can rephrase it.

12 COMMISSIONER MURRAY: Is there any other
13 reason other than the fear of the outcome -- that the
14 outcome might change in other ways, that you think we should
15 not grant the motions for rehearing and decide that issue?

16 MR. DUFFY: I don't know how to answer that
17 question. I can tell you that we struggled with the Report
18 and Order. We were aware of the things that have been
19 discussed that if you did not decide it now, that it would
20 likely come up again.

21 And without revealing any kind of
22 attorney/client communications, obviously the result was
23 that we decided that it was prudent for us to accept the
24 order that was issued. I don't know how else to answer that
25 question.

1 COMMISSIONER MURRAY: All right. Thank you.

2 JUDGE WOODRUFF: Any other questions for

3 Mr. Duffy?

4 COMMISSIONER GAW: Just briefly. Mr. Duffy,

5 help me out here with the potential harm to the shareholders

6 of MGE. Does MGE have anything at risk with this decision?

7 Isn't there a hold harmless involved?

8 MR. DUFFY: There is a provision, as I

9 understand it, for a contractual indemnity contracts.

10 COMMISSIONER GAW: Of course, I know that

11 there are always risks with hold harmless --

12 MR. DUFFY: That's right.

13 COMMISSIONER GAW: -- agreements. I'm just

14 wanting to understand whether that protection exists in this

15 case.

16 MR. DUFFY: I would say that, based on my

17 understanding, the contractual provision is there. Whether

18 it will ultimately work or not, as you point out, that's a

19 risk. MGE also has the risk of the expense of litigation,

20 which is not insignificant in this.

21 MGE's interest is getting some finality on

22 this, because the Staff appears to want to re-litigate what

23 Western Resources did in 1991 every year from now until

24 2009. So I would be, you know, less than candid if I told

25 you that we want to continue litigating this. We don't.

1 It's expensive, it's time consuming, we don't
2 have a big staff of people designed to deal with litigation.
3 We're trying to manage a gas system to the best of our
4 abilities. And so our interests are not only monetary, but
5 from a staff standpoint that we want some finality in this.
6 We want it to go away.

7 COMMISSIONER GAW: You seem to be arguing
8 against yourself at the moment about us resolving the issue.
9 Am I misinterpreting that?

10 MR. DUFFY: Well, we didn't ask for rehearing,
11 so that implies that we don't see any reason for you to make
12 any further rulings in this case.

13 COMMISSIONER GAW: Yes.

14 MR. DUFFY: If we were the only ones that had
15 acted, then we wouldn't be having this argument today.

16 COMMISSIONER GAW: Yeah. That's fine. Thank
17 you, Mr. Duffy.

18 JUDGE WOODRUFF: All right. Did you have
19 anything else?

20 Now, we'll go back to Riverside for an
21 opportunity to reply.

22 MR. STEWART: I'm going to have to be careful
23 how I say this, but I'm going to try. Riverside, when we
24 received the order, thought long and hard about asking for
25 rehearing. And I believe, as I indicated, one of the things

1 that happened from the time the Commission issued its order
2 until the time we filed our Application for Rehearing, it
3 was the Staff's filing of its usual update in the 304 case,
4 a few days after the order was issued, where they clearly
5 stated they intended to keep litigating this question at
6 least until the end of the term of the contract. And,
7 frankly, that weighed heavy on our decision to seek
8 rehearing.

9 I tried to imply -- I don't know if I did a
10 very good job -- but a way that the Commission could limit.
11 We tried to file a very limited rehearing and I tried to
12 suggest several options for the Commission to keep its
13 current Report and Order as is with a simple exception of
14 taking that evidence that was rejected and then resolving,
15 if you will, reaching a different bottom line conclusion
16 also.

17 It's not our intent to have the Commission
18 obviously completely go in and redo its order, especially
19 re-litigate the case separately.

20 Mr. Schwarz used the phrase fundamentally
21 unfair. And I don't want to belabor this point, but when
22 the Staff filed its response to our limited Application for
23 Rehearing -- and this has been going on since the beginning
24 that this started -- and we raised a lot of issues about
25 that in regard to what was the Staff's case in the Direct

1 Testimony, then was it in the rebuttal, was it in
2 surrebuttal?

3 The point was not an academic exercise on our
4 part to say they -- shake our finger, they didn't comply
5 with Commission rules. That was not the point. The point
6 was this has been a moving target.

7 And finally today he says, late in the day,
8 that's an understatement of the year, he's now figured out
9 on page 4 of his Application of Rehearing how to frame the
10 issue for the Commission.

11 I look at his item 2 -- and I would just
12 suggest that if Mr. Duffy or I or anybody else had come to
13 this Commission with a late-filed Application for Rehearing,
14 assuming we had the right to file an Application for
15 Rehearing in the first place, which Staff I don't believe
16 does in and of itself, but if we had come in late and we had
17 tried to do this, I suspect it would not only be summarily
18 denied, but summarily denied with a little bit of kick to it
19 and rightly so.

20 So I don't want to belabor this point. I
21 think the Commission should simply ignore point 2 in this
22 response. It goes far beyond what we raised and, frankly,
23 it's just yet one more chance for them to re-litigate an
24 issue that they've already lost.

25 I'm like Mr. Duffy too and this I have to

1 respond to. The way they have phrased this that we won --
2 and basically I'm going to paraphrase the Staff's position.
3 We won a prudent disallowance based on a removal of a price
4 cap in a contract that actually goes back to pre-date the
5 old Mid-Kansas 1 contracts, which aren't at issue in this
6 proceeding. We tried that case, we won it, we don't have to
7 re-litigate the fact whether or not that was an imprudent
8 act.

9 Well, the fundamental problem with that -- and
10 it's very clever, but the fundamental problem with that is
11 we are talking about two different contracts. We are
12 talking about two different contracts with different
13 provisions in the contracts. We are talking about contracts
14 with different parties to the contract.

15 And to bootstrap that old prudence decision
16 into the Mid-Kansas 2 -- I mean, what they should have done,
17 and I'm not going to try to manufacture the rope to hang
18 myself, but what they should have done -- and I think they
19 tried to do in this case, I think they certainly presented
20 all the evidence they can on that issue -- they should have
21 said we don't like the Mid-Kansas 2 contract because A, B,
22 C, whatever it was.

23 Well, it didn't contain a Williams price cap.
24 I don't know if they -- I think they suggested that was one
25 of the reasons that it was imprudent. They litigated it.

1 They had the opportunity to make that argument. And if they
2 had done so in testimony where we would have had an
3 opportunity to respond, we might have said -- there might
4 have been some evidence presented to this Commission that
5 that type of a price cap, a bundled Williams price cap,
6 which was at issue in the old case, was no longer applicable
7 after unbundling. Simple factual question. But they didn't
8 present that fully in their testimony. We didn't have a
9 chance to respond it.

10 Anyway, they're all over the board on this.
11 And I think the simple way to deal with these arguments the
12 Staff has made today is rely on the Commission's traditional
13 rule on rehearings and say it's out of time, thank you very
14 much, but no, thank you.

15 I don't think we've ever stated that Staff
16 does not have the right to make ACA adjustments as a general
17 rule. And as inartful as it was and as convoluted as it may
18 have been, a lot of that language that's in the Stipulation
19 and Agreement I think could be read to be designed to ensure
20 that the Staff retained the right to make certain types of
21 ACA prudence adjustments in the future cases if the
22 circumstances so warranted.

23 What it clearly did say they could not do was
24 attack the decision to execute the Missouri agreements.
25 Now, that included -- because we were dealing with two

1 different contracts, we were dealing with several periods
2 where the old contracts were in play and the new contracts
3 were in play. Again, I didn't draft it. That's the
4 happiest thing I can think of today. I didn't draft it.

5 But the one thing that is clear is that the
6 decision -- the prudence decision from the Western contract,
7 from the old case, that's settled. The decision surrounding
8 the execution of the new contracts, the prudence of those,
9 that sentence one, I believe, settled. And perhaps we got
10 into the problem trying to carve out what the Staff could
11 do. I don't know.

12 I think the record speaks for itself on those
13 issues. I know the Commission is going to ask me some
14 questions about it. I hope -- having tried to go back
15 through all of the transcripts and everything, I hope I can
16 answer them, but I want to as strongly as possible make the
17 distinction between the old contract and the new contract.
18 They're not the same.

19 A prudence disallowance in a case involving
20 different parties and a different contract is not
21 automatically a -- qualifies as a prudence disallowance in
22 the future. I mean, I understand Staff's point. In their
23 view, because the new contract did not have the price cap
24 provision, it's therefore imprudent.

25 Well, guess what? They had Direct Testimony,

1 they had Rebuttal Testimony, they had Surrebuttal Testimony,
2 they had opportunity on cross, over our objections, I might
3 add, even to come to hearing on this. They had plenty of
4 opportunity to argue that point and they didn't.

5 And if the shoe was on the other foot and I
6 came to you and I said my client should have said this at
7 hearing, I know what your answer would have been. And
8 whatever the Commission decides, I would hope that the rules
9 would apply to all parties, including the Staff.

10 I think I'm just going to leave it at that,
11 other than to refer the Commission back to the briefs in
12 this case filed by the various parties. I think they were
13 detailed. I know ours was with cites to the record.
14 Hopefully, that will be helpful in your analysis.

15 The Staff has filed their briefs. Again,
16 they've had two opportunities in briefing to point you to
17 the transcript, to the record, to legal citations. And I
18 think as you go through the process, if you choose to go
19 through the process to -- on our request on the rehearing
20 issue, the record is there, the briefs are there, the road
21 maps are there as best as we can give you.

22 And, again, what I say today is not evidence,
23 so I hope in drafting a decision it will be based on the
24 record as a whole. And that's really all I had.

25 JUDGE WOODRUFF: Chair Simmons, do you have

1 any questions?

2 CHAIR SIMMONS: No, I do not.

3 JUDGE WOODRUFF: Commissioner Murray?

4 COMMISSIONER MURRAY: I do.

5 Mr. Stewart, as I've been sitting here
6 listening today, I have tried to think of what position we
7 are leaving the parties in depending on what we do. And
8 tell me if I'm correct in this analysis, that if we don't
9 interpret the meaning of that Stipulation and Agreement in
10 this case, wouldn't the bottom line be that we were leaving
11 the parties -- all parties in a worse position than any
12 party would be in even if we interpreted that decision to
13 say that the Staff could bring those prudence disallowances
14 every year?

15 Because, one, if we don't decide it, that
16 entire issue gets re-litigated every year as to how you
17 interpret that Stipulation and Agreement. Plus, the Staff
18 may bring prudence disallowances every year based on their
19 interpretation of the prudence of entering into those
20 Missouri agreements. So isn't it worse for everyone if we
21 don't make a decision one way or the other?

22 MR. STEWART: I suspect I might disagree with
23 Mr. Duffy on this. I often disagree with Mr. Duffy on a lot
24 of things. But the short answer is yes. I think that's why
25 we asked.

1 The continuing threat of having to come in
2 here case after case after case, even if we continued to
3 prevail on the merits, is a significant problem for
4 Riverside. I don't know -- one of the issues that came up
5 as a possible settlement in settlement discussions at the
6 FERC where the Commission was a party, if we can agree on
7 the FERC rate here at the FERC -- and I understand from what
8 I've been told by my people that they were close to a number
9 to set on a going-forward basis to avoid future appeals, but
10 the problem remained with these ACA cases in Missouri.

11 And it's a continuing financial risk to our
12 company to have to -- to not know whether we're going to
13 have to re-litigate time and time again.

14 I don't want to leave the Commission with the
15 impression that had the Staff not said what it said in its
16 filing that we would have automatically not filed our
17 Application for Rehearing on this issue. I know my client
18 feels pretty strongly about it.

19 Had the Commission's order sent a signal to
20 the Staff -- a stronger signal to the Staff that maybe,
21 guys, drop it until you come up with something better, would
22 we be filing rehearing? I don't know. We obviously, like
23 Mr. Duffy, we would like finality. This is an expensive
24 process and -- at least we would know, let me put it that
25 way.

1 I don't know -- the grass is always greener,
2 but at least we would have finality, we would know if that
3 would send us to circuit court, for example, if the
4 Commission ruled against us and we would go up there, I hope
5 Mr. Schwarz at that point wouldn't argue that the order
6 wasn't final or something, but we don't know. But we'd
7 prefer not to have to do that obviously.

8 But, yes, finality is a good thing in
9 regulatory proceedings. And, frankly, as a matter of
10 regulatory policy, I mean, we're looking back -- this is
11 what is so frustrating to me.

12 The Commission's facing now all kinds of new
13 issues in the gas purchasing area. There are issues about,
14 you know, diversifying your supply portfolio, how best to do
15 that. Are incentive mechanisms appropriate or are they not
16 appropriate?

17 We look back and we see the results of the
18 last winter and we've seen issues involving the -- like we
19 have in telecommunications where we have a low income fund
20 or universal service fund type of mechanism. Why aren't we
21 working on that?

22 We're working on a case that dates back to
23 February of '95 and is going to -- I mean, to me the
24 resource issue is significant -- is a significant one. And
25 again, like I said, if the real issue here -- if the bottom

1 line issue is those Riverside transportation rates, again, I
2 would suggest to the Commission that there is a forum that
3 the Commission has actively participated in and will
4 continue to do so and this stipulation certainly doesn't bar
5 that.

6 COMMISSIONER MURRAY: Thank you. I think
7 that's all.

8 JUDGE WOODRUFF: Commissioner Gaw?

9 COMMISSIONER GAW: I want to wait.

10 JUDGE WOODRUFF: Thank you. You may step
11 down.

12 At this point since it appears the
13 Commissioners do have a few more questions, I'm going to
14 allow them to ask questions of which counsel they wish. At
15 the end, after they've asked their questions, I'll again
16 Riverside Mid-Kansas an opportunity to give final response,
17 if they wish.

18 Commissioner Simmons, do you have any
19 questions for any of the attorneys?

20 CHAIR SIMMONS: I'll pass. Thanks.

21 JUDGE WOODRUFF: Commissioner Murray?

22 COMMISSIONER MURRAY: I would like the other
23 counsel to respond to my question about -- or my analysis
24 that all parties would be worse off if we don't decide that
25 issue in this case.

1 JUDGE WOODRUFF: You can reply from there, if
2 you wish.

3 MR. SCHWARZ: I think certainly Staff concurs
4 in that opinion. I think the sooner this issue is resolved,
5 the better.

6 I think that -- and I can't remember the exact
7 numbers that have been filed of record in the
8 recommendations in the cases that are lined up in the que as
9 it were, but it's my impression that it's on the order of
10 \$6 million a year and there's every indication that the
11 contract runs through the year 2009.

12 So I think that there -- absent resolution of
13 this issue, there's simply too much ratepayer interest at
14 stake for -- if the Commission suggests that Staff simply
15 failed to meet its evidentiary burden, that Staff would not
16 undertake, albeit reluctantly, to bolster that evidentiary
17 record, at least present it again for the Commission's
18 consideration.

19 So, yes, I think that to the extent that the
20 issue has been fully and fairly presented to the Commission
21 in this case, that the parties and the Commission are best
22 served by its resolution in this case.

23 MR. MICHEEL: I think I said yes in my initial
24 comments, Commissioner.

25 JUDGE WOODRUFF: Anything further?

1 COMMISSIONER MURRAY: I guess Mr. Duffy
2 doesn't want to respond.

3 JUDGE WOODRUFF: Mr. Duffy, did you want to
4 respond to that?

5 MR. DUFFY: I thought I had earlier.

6 JUDGE WOODRUFF: Commissioner Gaw?

7 COMMISSIONER GAW: All right. Mr. Schwarz, I
8 would like for you to briefly tell me where it is that you
9 believe at this point in time that MGE acted imprudently,
10 what it was that you believe that they did that was
11 imprudent that is the subject of this case. Because I have
12 heard lots of different things and I'm trying to see if I
13 understand what the case is today.

14 MR. SCHWARZ: MGE took assignment of a
15 contract executed by Western Resources and Mid-Kansas in
16 1991. MGE freely and voluntarily took assignment of that
17 contract. It is that contract that the Staff believes --
18 well, the Commission found to be imprudent.

19 I think that how you judge MGE's actions can
20 be based on or at least illuminated by the fact that they
21 argue vociferously that they simply couldn't walk away from
22 that contract. That contract was binding on them. They
23 took that contract as they found it. And they certainly
24 had -- I mean, they were the ones that were obliged to do
25 due diligence on it and they did. And they took that

1 contract as they found it.

2 And certainly they didn't necessarily
3 anticipate that there would be a disallowance made by the
4 Commission with reference to that contract, but that was
5 certainly a possibility, certainly something that they could
6 have known.

7 And I think that certainly part of the problem
8 that I have had in this case is the articulation of exactly
9 what positions the parties were in. MGE has a contract that
10 the Commission found subsequently was imprudent in some of
11 its terms. MGE then took steps in February of '95 to
12 mitigate some of the damages from that contract. And they
13 did so. And Staff has given them every credit for the
14 mitigation of the damages that they achieved.

15 But at the same time, the fact that MGE had
16 this contract -- I mean, that's something that -- if you
17 recall the evidentiary hearing, they were saying we can't
18 just walk away from it, it's binding, it's our contract, we
19 have obligations under it.

20 Well, that's true. They do have obligations
21 under it and they assumed those obligations freely. And to
22 the extent that they assumed that bargain with Mid-Kansas,
23 they assumed all of that bargain with Mid-Kansas. And
24 vis-a-vis Western Resources or Mid-Kansas or MGE, certainly
25 the ratepayers had no part whatsoever in the negotiation or

1 assumption of that contract.

2 So I think that the fact of the matter is that
3 the contracts at issue were negotiated in 1995. Staff has
4 always said that there were aspects of these contracts that
5 were beneficial to the ratepayers. Staff has given in its
6 adjustment full credit for the benefit that was achieved and
7 the remainder of that contract, I think, fairly remains with
8 the parties who negotiated it.

9 COMMISSIONER GAW: All right. Help me out
10 with this date time line. Are you suggesting that MGE's
11 imprudence occurred because of the assumption of the
12 contracts that Western Resources had in existence when
13 that sale occurred? That would have been in July of '93; is
14 that correct?

15 MR. STEWART: Commissioner, I believe the
16 record shows that MGE acquired the Missouri properties
17 January 31st, '94.

18 MR. SCHWARZ: The contracts were executed in
19 June or July of '93, is my recollection, and finally closed
20 in conjunction with a Western Resources rate case in front
21 of this Commission and was finally consummated in
22 January 31st or February 1st of '94. Yeah. Well --

23 COMMISSIONER GAW: Of '94? The sale was
24 approved in -- the Commission approved the sale of the
25 properties in December of '93; is that correct?

1 MR. MICHEEL: Yes.

2 MR. SCHWARZ: Yes.

3 COMMISSIONER GAW: And then there was an ACA
4 over the '92/'93 period with a 1.3 million disallowance.
5 Was that in April of '94 when that occurred?

6 MR. DUFFY: Your Honor, the time line in the
7 opening pages of our initial brief has all those dates. It
8 says the Staff issues recommendation for disallowance in
9 GR-93-140 on April 29, 1994.

10 COMMISSIONER GAW: Yeah. So, Mr. Schwarz, at
11 the time that the Commission approved this sale of the
12 transfer of assets, do you believe the Commission at that
13 point in time would have been approving or disapproving of
14 the prudence of the contracts that were the subject of the
15 assignment?

16 MR. SCHWARZ: No.

17 COMMISSIONER GAW: And why do you say that?

18 MR. SCHWARZ: Because that process takes place
19 not in a merger application, but rather in the ACA process.
20 That's the opportunity for the Commission to examine the gas
21 purchasing practices of the local distribution companies.

22 In the merger, the Commission is simply
23 approving the transfer of assets from -- in this case,
24 Western Resources to Southern Union. And certainly the
25 parties were aware that the contracts that were assigned

1 were subject to review in the ACA dockets. I don't think
2 that it can fairly be said that the transfer from Western
3 Resources to MGE was intended to pass on the prudence of any
4 of those contracts.

5 COMMISSIONER GAW: Is there evidence in the
6 record that would allow the Commission to conclude that
7 there was imprudence by MGE in the assumption of those
8 contracts?

9 MR. SCHWARZ: I don't know that it's a matter
10 of prudence or imprudence. MGE agreed to pay Western
11 Resources consideration for the transfer of the Missouri
12 properties and the operating contracts. MGE has the
13 obligation to investigate, you know, what it's buying and
14 gauge the risk that it's taking and adjust its purchase
15 price accordingly.

16 I don't think it's the function of the Staff
17 or the Commission to tell MGE if it's paying too much or
18 paying too little necessarily for the properties, as long as
19 the transfer of those properties is not detrimental to the
20 public interest, which -- and I haven't looked at that
21 statute recently either, but my understanding is that that's
22 the standard in a merger, that if the transfer of assets is
23 not detrimental to the public interest, then the sale or
24 merger proceeds.

25 COMMISSIONER GAW: Okay. Are you saying that

1 it would not have been a part of the Commission's review to
2 determine whether or not those contracts that were being
3 assigned were -- that the assumption of those contracts was
4 a prudent act?

5 MR. SCHWARZ: I don't believe it was the job
6 of the Commission to do that.

7 COMMISSIONER GAW: And those are the -- the
8 contracts that we're looking at here, are they the ones that
9 are subject to the hold harmless provision between Southern
10 Union and Western Resources in the event that there's a
11 determination from a regulatory body that the charges are
12 too high?

13 MR. SCHWARZ: It is my understanding that the
14 change that was initiated in 1991 between Western Resources
15 and Mid-Kansas removed the Williams cap and instead
16 substituted the indemnification in case of a regulatory
17 disallowance.

18 If my recollection of the record is correct,
19 there is a similar provision in the contracts that were
20 executed in February of 1995. And I'm just -- I'm not --

21 COMMISSIONER GAW: Is there anything in the
22 contract for the sale of the assets in the assumption of the
23 contracts that dealt with that issue --

24 MR. SCHWARZ: Not --

25 COMMISSIONER GAW: -- between Southern Union

1 and Western Resources?

2 MR. SCHWARZ: I'm not aware of anything other
3 than the contracts, but my recollection is that's in the
4 record as well, but I don't believe that that was
5 specifically addressed.

6 COMMISSIONER GAW: Mr. Schwarz, if we are to
7 make a determination here and construe this stipulation, is
8 it now the Staff's position that this Commission should find
9 that the contract as entered into by Western Resources --
10 the contracts that are called the Missouri agreements and
11 those that were assumed and then later renegotiated by MGE,
12 that those contracts are imprudent for that ACA period in
13 front of us and for all periods subsequent?

14 MR. SCHWARZ: I think that Staff's position is
15 that the imprudent act at issue was the abandonment of rates
16 capped at Williams, which I think the record indicates is
17 \$9 or \$10 reservation charges and so forth.

18 COMMISSIONER GAW: Which occurred when?

19 MR. SCHWARZ: In 1991. And at the same time,
20 taking on contracts which are now priced at approximately
21 \$20 per MCF and in exchange for that, taking a regulatory --
22 an agreement that if there is a regulatory disallowance of
23 the difference in those prices, that the payee -- the
24 transporter, Mid-Kansas, will indemnify the LDC.

25 We continue to think that that is the heart of

1 the problem. MGE freely agreed to assume a portion of that
2 contract and that's the Missouri issues here. And that by
3 executing the February '95 agreement MGE improved the
4 situation a little bit, but they did not mitigate the entire
5 harm to the ratepayers and, therefore, they should not get
6 credit for more than they have done.

7 The crux of the issue still remains the
8 imprudent decision to abandon the Williams rates as capped
9 in 1991 and the subsequent actions of MGE to make that
10 situation better are laudatory, but they're not enough to
11 exculpate that original bad decision.

12 And I would suggest to you that the evidence
13 in the case is fully supportive of that. The articulation
14 of exactly how all of these myriad facts fits together
15 only -- I mean, I think I've finally come up with a concise
16 statement of it. And I apologize that it's past the
17 eleventh hour.

18 But I think that the Commission upon
19 rehearing, as I stated earlier, should issue -- and I think
20 it's clear that the Commission can issue the order that was
21 appropriate in the first instance. And, you know, I'm
22 perfectly willing to accept all the contumely that needs to
23 be heaped on Staff for articulating things so late in the
24 process, but I still think that the Commission needs to do
25 the right thing now that it has the opportunity to do so.

1 COMMISSIONER GAW: Mr. Schwarz, I guess I'm
2 not sure you answered my question. I'm trying to understand
3 if the Commission were to agree with Staff and conclude that
4 MGE was -- that this contract would allow Staff to review
5 the ACA period and review it as Staff has attempted to do
6 and would further agree that Staff is correct and that there
7 should be some disallowance on a prudence basis, would we
8 not then be re-litigating the exact same issues for ACA
9 periods into the future on the very same factual and legal
10 argument as you have maintained in this particular ACA
11 period?

12 I'm trying to understand how agreeing with
13 Staff brings finality, other than -- unless it is about the
14 prudence of entering into the contracts and unless that is
15 the issue that we are resolving here.

16 MR. SCHWARZ: I think that resolution of the
17 threshold issue, that is, the meaning of the Stipulation and
18 Agreement, and assuming that that issue -- that decision of
19 the Commission will become final, that will be binding. And
20 if you say, no, Staff is precluded -- Staff agreed to settle
21 the contracts through 2009 for \$4 million, that ends it.

22 If, on the other hand, you say, no, it was for
23 a period of years and that's taken up and finally reviewed
24 and affirmed by the court on appeal, that ends it. I think
25 that will be finally resolved.

1 If the Commission finds that, for instance,
2 the 1995 amendments were not enough to fully mitigate the
3 results of the imprudent 1991 contract, and that is fully
4 litigated, I think that ends the issue.

5 I think that as to the matter of damages, that
6 is going to be something that has to be reviewed annually.
7 I think once that decision is made, however, that you come
8 very much closer to having a mathematical computation.

9 COMMISSIONER GAW: Mr. Schwarz, if we are to
10 do a prudence review based upon a prospective analysis and
11 we would agree with Staff that this what we are doing is
12 continuing to analyze this pipeline price issue versus the
13 Williams price, then there would just be -- there would have
14 to be a retrospective calculation of the mathematical
15 difference between those prices for every ACA period into
16 the future, would there not?

17 In essence, if I'm understanding you
18 correctly, you're saying that we would each ACA period look
19 at the difference -- and this is very overly simplistic, I
20 realize -- but look at the difference between the Williams
21 price and the price that you can get on the pipeline that's
22 in question and determine how much you could have gotten
23 over the Williams line. That's always in a retrospective
24 fashion, that mathematical calculation.

25 MR. SCHWARZ: The ACA computation is done

1 after the particular ACA period. So that, for instance, in
2 the 2005, 2006 ACA period, the Staff would do its audit,
3 compare what were then Williams prices to what was then the
4 contract price for Riverside, which, as Mr. Stewart has
5 indicated, may change as a result of FERC activity, so those
6 numbers would need to be calculated for each ACA period,
7 yes.

8 COMMISSIONER GAW: So what would happen if in
9 the year 2006 the price on Williams is actually more than
10 the other pipeline?

11 MR. SCHWARZ: Then there would be -- there
12 would no longer be any harm.

13 COMMISSIONER GAW: So is that a harm question
14 or a prudence question or is it the same thing?

15 MR. SCHWARZ: It's a measure of damages. And
16 it's different.

17 COMMISSIONER GAW: If I could, Mr. Stewart, if
18 you wouldn't mind following up on the questions that I
19 just -- and I'm sorry. I didn't write them specifically
20 down for you, but if you would like to respond to what
21 Mr. Schwarz just stated, that would be helpful to me.

22 MR. STEWART: I'm sure I missed a few, but I
23 think your first question was along the lines of, as of
24 today, what is Staff alleging the imprudence to be? What is
25 the Staff's position?

1 And I guess my comment there would be, yes,
2 you know, in an ACA prudence review scenario the question of
3 what constitutes the imprudence is something that the
4 proponent needs to put forth at some point early on in the
5 proceeding, so that not only the Commission but the other
6 parties have the opportunity to know what evidence they need
7 to bring in to rebut, refute, argue with, whatever.

8 That's been a problem in this case, but as of
9 today -- and, again, I thought it -- I wrote down his answer
10 was it was the Western contract that the Commission found
11 imprudent and that MGE took assignment of that freely.

12 I think the record would show that -- and I'm
13 sure Mr. Duffy will want to comment on this too since it was
14 his company, but I remember specifically stating in my
15 opening statement at the beginning of this case and then I
16 also recall the testimony of Mr. Langston and I believe
17 Mr. Langley that once MGE took assignment of the KPL
18 properties, Western properties, that occurred after the --
19 again, the time lines I believe are in Mr. Duffy's brief,
20 but if you'll look, one of the things that struck me, there
21 were one, two, three -- almost three ACA -- Missouri
22 Commission ACA periods that were affected under the old
23 contract, the old Western contract.

24 GR-93-140, which was the case of the '92/'93
25 time frame ACA period, was the case where the Staff

1 challenged the removal of the price cap successfully. I
2 don't have all the dates in front of me, but as soon as that
3 happened, that issue -- I remember Mr. Langley specifically
4 was here for that case.

5 There was a lot of testimony, there was a lot
6 of issues procedurally there in that case. That was not
7 easy case. Dr. Proctor of the Commission Staff, I believe,
8 was brought in to talk about how the Commission should
9 conduct a prudence review, something about looking at the
10 process of the decision making.

11 I think he used an analogy you can have a
12 lousy decision-making process and five years later still end
13 up hitting the jackpot and it turns out well. You can have
14 a good decision-making process and still have a bad result
15 six years down the road.

16 That's the sort of testimony -- that was the
17 sort of issue that the Commission was grappling with in that
18 case, but it involved that contract. That case went up on
19 appeal and immediately at about the same time frame --
20 because the ACA cases don't have a period of time in between
21 them.

22 The next case, the combined case, they had
23 101-228, that's where Western had part of the year, MGE took
24 the next part of the year. That case was going to hearing.
25 And the record will reflect what happened and what MGE did

1 at any given time, what they knew, what they didn't know,
2 what Staff knew, that's all in the record. But MGE
3 acquired -- actually acquired Missouri properties on
4 January 31, '94, which would have been inside of
5 the GR-94-101-228 ACA period.

6 The Mid-Kansas 2 contract -- MGE acted quickly
7 once it determined -- I believe the record shows this --
8 acted very quickly once it determined that that old contract
9 had problems. And they immediately -- they went through all
10 kinds of things to -- and the record's clear as to what
11 actions they took, but they ended up executing the new
12 contract, the Mid-Kansas 2/Riverside 1 contract February 24,
13 '95.

14 Well, that meant that in the next subsequent
15 ACA period where no testimony was filed, nothing was
16 resolved, GR-95-82, the Mid-Kansas 2 contract already kicked
17 in. The first full ACA period under Mid-Kansas 2/Riverside
18 1 was Case No. GR-96-78 for the '95/'96 period. The
19 stipulation was signed May 2nd, '96 and approved in
20 June '96.

21 So what you had -- that old contract had a
22 potential period of two and a little bit more ACA periods.
23 They cut it off. They cut it off. They put in place a new
24 contract. And up to this point, up to GR-96-78, those were
25 the cases that were known to the parties when they executed

1 the stip. The very next case was this one and it wasn't
2 docketed at the time. And the testimony from Mr. Langley, I
3 believe, on cross from the Bench, if I recall, said that's
4 why we didn't list the other cases specifically.

5 But you're dealing with -- the issue there --
6 I'm getting a little off track here I guess, but what is it
7 that's imprudent is very important. Because if we are still
8 litigating the question of the prudence of the original
9 Western contract, I need to know where to go apply to get my
10 money back.

11 We settled that case. I hope it's not
12 contested that the prudence -- the imprudence allegation,
13 the Commission finding in that case that would have gone
14 through June 30th of '95, I believe -- no, excuse me,
15 May 31st of '95, I hope we're not -- that's not still on the
16 table. Because if that's the case, we've got a bigger
17 problem here than the rest of it.

18 That litigation was I thought, everybody
19 thought, I think the stip clearly says that's settled. The
20 Commission's order says that. And so if the basis of the
21 Staff's disallowance is the re-litigation over and over and
22 over again of that old contract, then we've got a bigger
23 problem here than I anticipated.

24 The next question --

25 (HEARING INTERRUPTED.)

1 COMMISSIONER GAW: Let me stop you since we
2 had a break, if I could ask you to -- at this stage, don't
3 you think that Staff is making the argument that the
4 settlement of those cases that are decided in the
5 stipulation were settled just for those cases and that
6 that's what Staff is arguing?

7 So when you suggest that it may be bigger than
8 what you thought it was, I'm a little confused because it
9 seems to me that is what they're arguing, that that is the
10 only thing that that was resolving.

11 MR. STEWART: The Staff's position, that
12 hasn't changed as far as I know. The Staff's position
13 hasn't changed that the stipulation covered everything up
14 until this case. I think that's been their position, that
15 they haven't changed.

16 My point was that if you go back and look at
17 the ACA periods that Staff says are covered, there are two
18 things covered. One is the final conclusion, the final nail
19 in the coffin of that old Western contract. And, two, at
20 least one full year for some reason under the new Mid-Kansas
21 contract.

22 And, frankly, if Mr. Schwarz is right, if it
23 wasn't -- it was okay to -- if it wasn't imprudent in
24 GR-96-78, the first full hearing of Mid-Kansas, but now all
25 of a sudden it is the next ACA period and presumably the

1 next and the next and the next, I'm not sure that
2 supports -- that theory holds up based on his view of where
3 they draw the line as to the coverage of the stip. I
4 don't -- I hope that answers it.

5 COMMISSIONER GAW: No. That's fine. Go
6 ahead.

7 MR. STEWART: I think the next question I had
8 about -- it was imprudent due to MGE's assumption of the
9 contract. Again, I'll defer to Mr. Duffy and the record on
10 that.

11 Should the PSC have dealt with that question
12 in the order approving merger along the lines of an
13 additional condition, I think they could have. They
14 obviously chose not to. Again, I can't go back and
15 second-guess why they did or did not.

16 As to the hold harmless provision, I think
17 there was some testimony, and I believe it was Mr. Langley,
18 along with maybe Mr. Putnam, it was not uncommon in the -- I
19 believe the records shows that it was not uncommon during
20 the period of time that the Mid-Kansas 2/Riverside 1
21 contracts were being negotiated, not renegotiated, that a
22 hold harmless provision was coming into use as a
23 transitional way of dealing with the uncertainties facing an
24 unbundled market where everybody before had been -- Williams
25 had been bundled service, they had the merchant function.

1 There were a lot of regulatory risks out there
2 because no one knew how the various state and federal
3 commissions would deal with some of these issues.

4 And I think the evidence is also in the
5 record, in the testimony and also elicited a little bit on
6 cross as to why Riverside insisted that the -- how that risk
7 was going to be dealt with. And part of it had to do with,
8 frankly, the way the Riverside companies had been structured
9 as a new market entrant. They were highly -- highly in
10 debt. They had to get approval from their lenders.

11 Anything they would have agreed to -- their
12 lenders had approved the old contracts. The lenders needed
13 to be able to approve the new contracts. And one way to do
14 this was a give and take contained in the contract.

15 And, of course, with regard to the hold
16 harmless clause and I don't mean to sound glib, it is
17 tempting to say, well, a jurisdictional utility like -- or a
18 pipeline who we don't regulate, they're going to bear all
19 the risk anyway, let's just cut the rates.

20 Well, okay. I don't think that's sound
21 regulatory policy. And I think this Commission historically
22 has always based its decisions on what the record evidence
23 was in front of it and has tried to do the right thing.

24 And I don't think the Staff is arguing or
25 suggesting that the Commission ignore the evidence and

1 simply stick it to the pipeline because we're not part of
2 your regulatory family. But there's an implication of that
3 in a lot of questions that the Public Counsel and the Staff
4 during cross had raised on the hold harmless issue.

5 The next question I think you asked
6 Mr. Schwarz is it the Staff's position PSC should find the
7 Missouri agreements -- should they find that the Missouri
8 agreements are imprudent for this particular ACA period,
9 should you also find that it's imprudent for all subsequent
10 periods.

11 I'm not sure what I -- my notes aren't very
12 good on what Mr. Schwarz responded, but again, he says the
13 evidence supports it even if -- whatever the position is,
14 the evidence supports it even if it's not well articulated.

15 I think it's clear that even though the
16 Commission's record and order in this case said, Staff, you
17 didn't prove your case, that's not enough for the Staff to
18 say, well, we're going to continue to pursue in every ACA
19 period this same type of adjustment.

20 And, frankly, I think if the Commission had
21 ruled that way or for some reason decides now to go back and
22 change that, which we obviously would have some real
23 problems with, the record evidence -- it would seem to me
24 the Commission's going to have a fairly difficult time doing
25 that, but I think the answer was to your question, yes, he

1 would love to have that finding and he would continue
2 until -- and I don't know what would happen in that
3 scenario.

4 There would obviously -- I'm almost certain
5 there would be court action from us. How that would -- I
6 don't know how that would play out.

7 How can you bring finality if the Commission
8 now reverses itself on its Report and Order to agree with
9 the Staff? He went through several scenarios. To me that's
10 speculation. I like the question. I'd like to get to some
11 finality.

12 I think -- I hate to even mention this, but we
13 had attempted throughout all of the court proceedings
14 through avenues at the FERC to try to settle this matter. I
15 hate to use that word in context of this hearing this
16 morning. But we're told, no, there is no reason to settle.
17 No settlement.

18 So we have not been able to come up with a
19 settlement, but that is another possibility to bring
20 finality. I would suggest if we go there, I'm not going to
21 draft the agreement.

22 I think Mr. Schwarz is correct about how the
23 Commission does a calculation looking backward at an ACA
24 period. The numbers have to be in before they can do what
25 they do in an ACA period. I think that's the nature of the

1 beast.

2 The ACA PGA process, there have been a lot of
3 criticisms of the fundamental nature of it. And I think I
4 mentioned in the opening statement when this all started
5 back in September, you have an inherent problem trying to
6 use what Mr. Micheel calls the annual snapshot approach to
7 review when you're dealing with multi-year contracts.

8 And I would just suggest to the Commission
9 that if the Commission is looking to encourage LDCs to mix
10 up their portfolio a little bit and have some longer term
11 contracts, this is only going to get worse as a matter of
12 policy.

13 And I'm afraid, Commissioner Gaw, my notes
14 faded off after that. I know there were a --

15 COMMISSIONER GAW: That's all right. I just
16 wanted to give you an opportunity to address the comments.

17 And, Mr. Duffy, would you --

18 MR. DUFFY: Yeah. I'm going to try to be real
19 brief. I want to focus on Mr. Schwarz' comment that MGE
20 freely and voluntarily took assignment of that 1991
21 contract.

22 That part of the statement is true. We freely
23 and voluntarily took assignment of that contract and we
24 freely and voluntarily entered into a contract with Western
25 Resources. But then we came to the Commission and on

1 August 5th, 1993, that entire contract was presented to the
2 Commission. And we said, here, we want to do this deal.

3 And I also disagree with Mr. Schwarz where he
4 says -- and my notes reflect he said, I don't think it's the
5 Staff's position to tell the Commission what's not
6 detrimental to the public interest.

7 I violently disagree with that. Just look at
8 the facts in that case. I was in that case and my
9 recollection is Staff came up with a couple dozen things
10 they said were detrimental to the public interest in this
11 deal.

12 And what shocks me to no end is that, okay,
13 they found all these things that were detrimental, but not
14 one word was said about this Mid-Kansas contract. And the
15 Staff is the only party who would have had the idea that
16 there was something detrimental about it, because they were
17 the ones doing the ACA audits.

18 So my simple proposition is if there was any
19 imprudence at all, it was on the Staff. The Staff was
20 imprudent in not telling the Public Service Commission in
21 1993 that there was a problem with these contracts.

22 Because if they had done that, then all the
23 parties would have had to face that at that point and the
24 Staff could have said, don't take assignment of those
25 contracts, Commission. Those are bad contracts. Make MGE

1 figure out another way to get gas to Kansas City then
2 through those contracts. Make Western Resources keep those
3 contracts.

4 And if that issue had come up in 1993, I don't
5 think we'd be here arguing about this today. I think it is
6 outrageous that by staying silent the Staff sandbagged
7 everybody in 1993. They knew about this, they were the only
8 one that could bring this up. They didn't say a word. They
9 sandbagged everybody because they apparently have this
10 notion that, well, it's okay, we don't have to bring it up
11 now because we'll be able to zap those companies for year
12 after year after year in the future. That's not the way the
13 regulation ought to be run.

14 The law says the Commission's supposed to look
15 at those contracts and say what's detrimental to the public
16 interest. If the Staff sat on their case and didn't bring
17 something forward that was not detrimental -- excuse me --
18 and didn't bring something forward that was detrimental to
19 the public interest, they ought not to be heard about it
20 now.

21 And I would agree that -- I think your
22 question was how does agreeing with the Staff bring
23 finality. I don't think it brings finality.

24 COMMISSIONER GAW: Mr. Micheel?

25 Thank you, Mr. Duffy.

1 MR. MICHEEL: I just want to weigh in on just
2 the last statements by Mr. Duffy regarding what transpired
3 in the sale of assets case. And I was also involved in
4 that.

5 And I think it's very clear that when you look
6 at the Commission's Report and Order in that case, it says
7 clearly that there isn't any rate-making treatments at all
8 that are going to be, you know, stated one way or another
9 when Southern Union purchased the assets of the Missouri
10 jurisdictional gas system from Western Resources. So I
11 don't know that I can fundamentally agree with that.

12 And earlier Mr. Duffy also referred to that
13 and I guess he used a biblical tone and I'm not going to
14 reply with a biblical tone, I'm going to keep church and
15 state separate.

16 But I would just say that the company has a
17 job to do due diligence when they look at this. And the
18 ratepayer in this case had nothing to do with it. They're
19 captive customers. This is where they get their gas from.
20 They don't have any choices.

21 So the fact that, you know, MGE maybe didn't
22 do enough due diligence or didn't ask the Staff, excuse me,
23 has there been some prudent disallowances, do you have any
24 problems with that, I don't think that should absolve the
25 company from doing their job.

1 And I guess I would just respond a little
2 bit -- I'm trying to avoid all this argument on things I
3 didn't think we were going to be arguing about today, but I
4 guess we are so I've got a little bit to say.

5 Mr. Stewart said that he resented the
6 implication from the Staff and the Public Counsel in cross
7 that we should stick it to the pipeline company because
8 there's a hold harmless agreement.

9 The adjustment that was recommended in this
10 case and what the Staff asked the Commission to find was
11 that MGE was imprudent in doing the acts that they did.
12 And, you know, if the fall-out from that imprudence is that
13 MGE enforces a contractual agreement that it had with
14 Mid-Kansas for a hold harmless, so be it. I mean, that's
15 not what we're concerned about.

16 What we're concerned about -- and I'll let
17 Mr. Schwarz speak to this, but what I'm concerned about when
18 I'm before this Commission is ensuring that the customers
19 are getting just and reasonable rates. And the adjustment
20 would be an adjustment to MGE.

21 Now, I guess in this case there are some
22 contractual agreements that I believe Mid-Kansas and the
23 Kansas Pipeline entered into freely with the companies to do
24 that. And so I just don't think that's -- you know, that
25 wasn't our thrust or my view when I was cross-examining,

1 so --

2 COMMISSIONER GAW: I don't know whether -- I
3 hesitate to go back to Mr. Schwarz to start this circle all
4 over again, but at the risk of doing that, Mr. Schwarz, did
5 you have anything?

6 MR. SCHWARZ: I do have a number of comments,
7 yes.

8 My understanding in the merger transaction was
9 the Staff was to look at the merger and see if the sale was
10 detrimental; that is, Staff was not required to have Western
11 Resources complete its service line replacement program
12 because, my Lord, you wouldn't want them transferring leaky
13 service lines.

14 That was something that was being addressed on
15 an ongoing basis. Everybody understood that this is
16 property that is subject to continuing Commission regulatory
17 approval.

18 The Staff did make specific adjustments
19 because the sale purported, for instance, to transfer
20 pension liabilities, but didn't purport or propose to
21 transfer all of the pension assets. And Staff said, whoa,
22 if you're going-- that has to do with the sale itself, what
23 property, what assets and what liabilities are being sold.

24 I find it unbelievable -- I'm just as
25 incredulous as Mr. Duffy that Mr. Duffy can say that MGE,

1 Southern Union when it bought the Missouri properties,
2 didn't realize that the contracts that it was assuming would
3 be subject to continuing regulatory review. That is an
4 astounding proposition.

5 If Missouri utilities, when they're bought and
6 sold, every aspect of continuing regulatory inquiry has to
7 be resolved at the time of the sale, it will take years to
8 consummate sales. And I don't believe that's the purpose of
9 the Staff's investigation in merger propositions and I don't
10 think it's fair to suggest now that it is.

11 And, again, like Mr. Micheel, my preparation
12 for this was relatively limited, but I think that if you
13 will recall the hearing, both MGE and Mid-Kansas Riverside
14 in describing the negotiations that led up to the '95 --
15 1995 February contracts that are at issue, their constant
16 reference is to the '91 contracts that were then in effect.

17 We can't just walk away. We have a binding
18 contract. This is still with us. Mid-Kansas repeatedly
19 says we weren't going to let them walk away from the
20 obligations under those agreements. And MGE is saying we
21 couldn't risk walking away from those agreements.

22 So the '91 contracts, which really started the
23 problems that need to be addressed here, were very much on
24 the minds of the parties and certainly it constituted the
25 basis or background for the '95 agreements.

1 And it's not so much that MGE was imprudent in
2 assuming the contracts. I mean, that transaction is viewed,
3 I think properly, did they get a good deal or did they get a
4 bad deal. If things turned out as MG -- Southern Union
5 anticipated, that's more good deal/bad deal. Did the
6 operating agreements actually provide what we thought they
7 did and did the costs that we incurred generate adequate
8 revenue to make it a good deal.

9 I don't think that it's -- from the
10 perspective of regulatory review of prudence that you gauge
11 MGE's and Western Resources deal in the sale of the Missouri
12 properties in terms of prudent or imprudent.

13 I think that the 1995 contracts, anything that
14 made the -- that bettered the terms of the '91 contract,
15 it's hard to say that they were imprudent to do so. But at
16 the same time, I don't think that by mitigating to a limited
17 extent the damages that were visited by that what is
18 unquestionably now -- has been finally resolved as being
19 imprudent agreement in '91 and which was clearly on the
20 minds and binding on the parties when they mitigated the
21 damages in '95, to say that they have eliminated all of the
22 harm that was generated by that '91 agreement.

23 And I think that's the crux, yeah. And we
24 signed a contract in '91 that ended up with \$20 reservation
25 rates and through means of a '95 agreement we bargained that

1 down to \$18 or \$17. Does that mean that all harm has been
2 mitigated? No.

3 And to say that because they were able to
4 mitigate \$3 or \$4 out of a -- and leave \$7 or \$8 remaining,
5 all the while saying this bad agreement was binding on us, I
6 think that's the focus that you need to keep and I think
7 that that's the real issue in this case. And I think that
8 the evidence that has been presented all along is consistent
9 with that.

10 JUDGE WOODRUFF: Anything further,
11 Commissioner Gaw?

12 COMMISSIONER GAW: No, that's it.

13 JUDGE WOODRUFF: Commissioner Forbis, do you
14 have any questions?

15 COMMISSIONER FORBIS: This has been real
16 helpful for the last two and a half hours. Thank you all
17 very much.

18 Mr. Stewart, I just want to make sure -- okay.
19 Asking for rehearing, but am I correct in making the
20 conclusion that -- getting the conclusion that you're here
21 because you want to fire a preemptive shot against future
22 actions?

23 MR. STEWART: No.

24 COMMISSIONER FORBIS: That's not fair?

25 MR. STEWART: I wouldn't characterize it that

1 way. The Commission procedures provide and the statute
2 provide -- it's 386.500 or something, I can't remember the
3 exact statute -- provide that if a party has a problem with
4 Commission's Report and Order, they can seek a rehearing,
5 they call it, before the Commission. That does not
6 necessarily mean another hearing. It just means that's the
7 procedure.

8 It's a little late in the game for us to be
9 accused of seeking a preemptive strike. I'll admit to that
10 when we filed our writ of prohibition case and I'll also
11 admit to it when we filed under the writ of review
12 proceeding, before the hearing and before we had to go
13 through all of the expense, time and trouble of going to
14 hearing.

15 Yes, that was a preemptive strike, if you
16 will, because we believed that the Stipulation and Agreement
17 said we wouldn't have to do this anymore and we were being
18 drug into it. Those were the -- to use your phrase, the
19 preemptive strikes.

20 But this is -- now that we've gone through the
21 process, now that we've litigated the process and we're back
22 to the question we started with. Does the stipulation
23 preclude the Staff from proposing these types of
24 disallowances in future proceedings, based on whatever it is
25 today the Staff may be basing its disallowance on.

1 COMMISSIONER FORBIS: That's what I meant by
2 preemptive strike, because in the Report and Order for the
3 cases that were at hand, they were decided totally apart
4 from the stipulation and based on the evidence in the case.
5 And I think our ruling was, you know, we didn't really have
6 to deal with this question. We were able to get at it other
7 ways. But you're then concerned that there will be future
8 cases filed?

9 MR. STEWART: I would direct your attention to
10 what the Staff filed on March 18th in GR-99-304. It clearly
11 stated -- this was after the Commission's Report and Order
12 came out -- that as the -- I can read it no other way.

13 As the order currently stands, the Staff feels
14 an obligation, desire, whatever you want to call it, to
15 continue in the next ACA case, 98-167, all the way through
16 coming back, coming back, coming back.

17 And because of that, had the Commission, for
18 example, in its Report and Order said not only, Staff, have
19 you not made your case, we find there's no evidence of
20 imprudence and we don't think you're likely to go find any
21 new evidence on imprudence, would we have to reach the
22 question of does the stipulation -- as a practical matter,
23 maybe not. I don't know.

24 Clearly, if the Commission reaches the
25 conclusion on the stipulation that it bars the proposed

1 adjustment on a going-forward basis, we've had, you know --
2 we've had the litigation already, we've heard the evidence,
3 maybe that gives a little more comfort level as to what you
4 might see down the road and helps you get there to say
5 Staff, stop it, no more. I don't know.

6 But I think I know where you're going. I
7 recognized in reading the order the interplay between the
8 stip issue and the prudence issue. I'm afraid,
9 unfortunately, my answer is I would have hoped that would
10 have done it. It didn't do it. We're faced again with the
11 potential of having to come back and re-litigate this in the
12 next case, 167, quite shortly, in fact.

13 COMMISSIONER FORBIS: And rather than wait for
14 that in case it would happen, you want to go ahead and try
15 to address that now?

16 MR. STEWART: The Commission still has that
17 jurisdiction over that order. Nobody's filed in court yet.
18 We can't until you would issue your ruling on the
19 Application for Rehearing.

20 I mean, one of the things you could do is tell
21 me rehearing denied. End of story.

22 What does that mean? Well, I would predict
23 that if the Commission does that, I've got a lot of legal
24 research to be doing, because I don't think that's going to
25 stop Mr. Schwarz and the boys from coming after us.

1 COMMISSIONER FORBIS: Thanks.

2 JUDGE WOODRUFF: All right. Then,
3 Mr. Stewart, I'll give you about five minutes to sum up, if
4 you wish to.

5 MR. STEWART: I will not need five minutes.
6 There was just two things I wanted to mention.

7 And I'll get back to where we started this
8 morning on the stipulation itself. On page 3 of the Staff's
9 suggestions, he lists four bullet points where he says that
10 the Staff suggests that parole evidence firmly establishes
11 that the Stipulation and Agreement does not preclude
12 adjustments, the evidence is overwhelming, colon.

13 I'm going to start from the bottom up as the
14 Commission evaluates the Staff's four bullet points. The
15 bottom one is that there was an outside auditor report
16 presented in the hearing. There was considerable discussion
17 about it. I can't remember who was on the stand when that
18 came up. I believe it was Mr. Langley.

19 We objected to that report as being hearsay.
20 The record will reflect the objection. I don't even recall
21 now how it was ruled on. But for the Commission, if we're
22 right that that is hearsay, and we believe it is, we
23 certainly -- whatever the auditors -- whoever those people
24 were, we don't know who they were, they were not here to be
25 cross-examined, we don't know what information they had to

1 make whatever conclusionary statement that was in that
2 report.

3 I would just ask you to go check the record on
4 the question of that outside auditor. I think it was
5 successfully compromised, far from being overwhelming as
6 Mr. Schwarz says.

7 As to the second item, I think we already
8 touched upon that about the -- it listed six ACA cases and
9 the consideration paid. Again, that was fully briefed in
10 our initial brief and I would direct the Commission there
11 and also to the reply brief.

12 To say that arbitrarily assumed that the
13 Commission in 93-140 was going to win that appeal, I think
14 is a bit presumptuous. It would be as presumptuous for me
15 to tell a client I think we're going to win this particular
16 case tomorrow.

17 I'd like to say that, but I'm not sure that's
18 correct. And there are risks and balances and weighing
19 benefits, detriments on any of those case -- any type of
20 scenario where you're looking at settlement.

21 Frankly, the Staff is being presumptuous to
22 assume, especially now after this case, that they're going
23 to get a \$4 million plus adjustment in each ACA period. And
24 there's some testimony in the record again as to why those
25 numbers -- that issue about the consideration not being

1 consistent with the stipulation, it's in the record.

2 And, finally, the last two, item No. 1, item

3 No. 3, again, that was addressed in the record. So I -- and

4 in our brief, our initial brief and reply brief.

5 So that's really the only thing left I would

6 say on that except if -- as you're trying to decipher maybe

7 what was the imprudent act or omission on MGE's part, if you

8 go back and look at the record, ask yourself what else could

9 MGE have done under the circumstances that they didn't do?

10 What was it? I think the record will reveal the answer to

11 that.

12 JUDGE WOODRUFF: All right. Thank you,

13 Mr. Stewart.

14 And with that, we are adjourned.

15 (ORAL ARGUMENTS ADJOURNED.)

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