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STATE OF MISSOURI
PUBLIC SERVICE COMMISSION

TRANSCRIPT OF PROCEEDINGS

Hearing

September 21, 2001
Jefferson City, Missouri
Volume 7

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

SHELLY A. REGISTER, Presiding,
REGULATORY LAW JUDGE.

KELVIN SIMMONS, Chair,
SHEILA LUMPE
CONNIE MURRAY,
STEVE GAW,
COMMISSIONERS.

REPORTED BY:

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P R O C E E D I N G S

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JUDGE REGISTER: We're back on the record.

3 We're reconvening this morning. It's Friday, September 21,

4 2001, and we still have Mr. Shaw on the stand sworn in, and

5 we were taking questions from Commissioner Gaw as we stopped

6 yesterday afternoon, and I have -- he's asked me to follow

7 up on those this morning.

8 THOMAS SHAW testified as follows:

9 QUESTIONS BY JUDGE REGISTER:

10 Q. He was looking for the draft agreement.

11 Mr. Shaw, let me ask you to go to Exhibit No. 16, the

12 rebuttal of David Sommerer, and it is Schedule 5, beginning

13 on page 5-5. Let me ask you to look at, in this draft, the

14 first paragraph or the first sentence there, As a result of

15 this Stipulation & Agreement, the parties agree.

16 A. Yes.

17 Q. And on that third line it goes -- let me ask

18 you to read that first sentence there to yourself.

19 A. Okay.

20 Q. And as I understand this sentence, the parties

21 agree that neither the execution of the Missouri agreements,

22 the rates charged pursuant thereto, nor the decisions

23 associated with the execution of the Missouri agreements

24 were proposed to be subject to any further agreement. There

25 would be no further prudence agreement -- prudence review

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1 rather on those Missouri agreements. Is that how that
2 sentence reads to you?

3 A. Until the audit period commencing with this
4 12-month ACA period under review.

5 Q. Okay. Can you explain to me what that -- how
6 the operation of this Stipulation -- of that sentence would
7 have been, then, in terms of the agreement in the further
8 prudence reviews?

9 A. Essentially with this case -- well, let me
10 back up.

11 There would be no disallowances for prudence
12 that would apply until this ACA period under review, and
13 then all of the decisions and execution of the Missouri
14 agreements would be open for further ACA prudence review.

15 Q. And the disallowances that would not be
16 recovered, would that include the docket numbers that are
17 listed there following in the second sentence of that
18 paragraph?

19 A. That's correct.

20 JUDGE REGISTER: Just a moment. Let me see if
21 Commissioner Gaw wants to continue.

22 BY JUDGE REGISTER:

23 Q. And let me ask you to move to the next draft.
24 Let me -- for the record, the Stipulation & Agreement that
25 is in Schedule 5 is a draft, is it not, Mr. Shaw?

1 A. Yes, it is.

2 Q. And do you know who wrote that draft?

3 A. Staff wrote this draft.

4 Q. Staff. All right. Can you take me to the
5 next draft that was produced?

6 A. I think that would be the one attached as
7 Schedule 8 to Mr. Sommerer's rebuttal, Exhibit 16.

8 Q. It's got a cover letter dated May 1, 1996?

9 A. Yes.

10 Q. Or cover memo. And let me ask you to go to
11 paragraph 5 again in that document. I believe it starts on
12 Schedule page 8-5, and did that sentence change from the
13 previous draft?

14 A. Yes, it did.

15 Q. Can you explain to me what the change was here
16 in this paragraph?

17 A. Essentially, the sentence changed to, I would
18 say, provide more of a limitation on what the ACA prudence
19 review could consist of, and parties agreed that execution
20 of the Western Resources agreements would not be subject to
21 further prudence review and then the decisions associated
22 with all of the Missouri agreements would not be subject to
23 further ACA prudence review.

24 But there is no language as far as execution
25 of the MGE-specific contracts not being reviewed. There was

1 an expectation that they would be reviewed.

2 MR. DUFFY: Your Honor, in his answer he again
3 said the parties agreed to something, and that's the same
4 problem I had and I raised yesterday with this witness
5 testifying to what the parties agreed to in a draft that
6 hasn't been executed.

7 MR. STEWART: We join in the objection.

8 JUDGE REGISTER: Thank you, Mr. Stewart.

9 THE WITNESS: I apologize, Judge, but this is
10 the sentence verbatim that got approved by the parties.
11 That's why I said the parties agreed, because this was the
12 sentence that was ultimately adopted.

13 BY JUDGE REGISTER:

14 Q. When you say the parties agreed, at this point
15 you're talking about the negotiations?

16 A. No. I'm talking that this sentence was
17 adopted in the final agreement. So I am of the opinion that
18 the parties did agree on this sentence.

19 MR. DUFFY: With that caveat, that's fine. I
20 don't have a problem with that if that's the limitation he
21 put on it.

22 JUDGE REGISTER: All right. That makes our
23 record clearer. Thank you, Mr. Duffy.

24 BY JUDGE REGISTER:

25 Q. In the first sentence there in paragraph 5,

1 Schedule 8-5, I notice that the execution of Missouri
2 agreements is not the words used. It's now MKP/WR sales
3 agreement and the Riverside/WR transportation agreement. Is
4 that the limitation that you were talking about?

5 A. Yes. Those contracts had or were known to be
6 expiring very soon. So Staff did not believe that it needed
7 to review the execution of the Western Resources agreements
8 for any further prudence review.

9 Q. And following the word "nor" there in that
10 sentence, the second line, at the end of the second line, it
11 says, Nor the decisions associated with the execution of the
12 Missouri agreements. Tell me what your understanding of
13 that phrase was.

14 A. Okay. Staff believed there was a finding of
15 imprudence on those Western Resources agreements that would
16 essentially carry forward, because essentially what Staff
17 thought was detrimental and imprudent about the Western
18 Resources contract had not changed, i.e., paying the maximum
19 reservation charges on all these affiliated pipelines.

20 So Staff did not feel like that concept had
21 been negated, but Staff was aware of some benefits that
22 would apply for the MGE agreements at least for some period
23 of time. There was a great deal of uncertainty how long
24 those benefits would apply or what the benefits may be in
25 the future. So Staff was not willing to just totally agree

1 to the MGE contracts themselves.

2 JUDGE REGISTER: Commissioner Gaw, did you
3 have any further questions?

4 COMMISSIONER GAW: Thank you very much, Judge.

5 QUESTIONS BY COMMISSIONER GAW:

6 Q. Looking at the first draft that is in
7 Schedule 5-5 of, I think it's Mr. Sommerer's schedule or
8 rebuttal testimony, are you there.

9 A. Yes.

10 Q. As you proceed along down that paragraph 5
11 again, there is in that first sentence again that reference
12 to the ACA prudence review at the end of that first
13 sentence. Do you see that?

14 A. Yes.

15 Q. Now, if you interpret that entire sentence for
16 me again, tell me what you thought that entire sentence
17 meant at that time.

18 A. That entire sentence meant that essentially
19 with this ACA period the parties would be looking at all of
20 the decisions going clear back to the beginning of the
21 Western Resources/KPL gas service contracts and the
22 execution of all of these agreements from the origination of
23 the contract forward, beginning in this ACA period.

24 Q. All right. And is that still your feeling
25 about the meaning of it?

1 A. Yes.

2 Q. If you compare that, then, to the first two
3 sentences in Schedule 8 on paragraph 5 of again in
4 Mr. Sommerer's rebuttal testimony, what is your
5 interpretation of the change, if any, in the meaning
6 comparing those two sentences to the first sentence in
7 paragraph 5 of Schedule 5?

8 A. Okay. In Schedule 8-5 it states that
9 execution of the Western Resources, both the sales and
10 transportation agreements, shall not be the subject of any
11 further ACA prudence review.

12 It also states that the decisions associated
13 with the execution of all of these agreements would not be
14 the subject of further ACA prudence review. It does not
15 talk about execution of the MGE-specific contracts.

16 Q. But it would include it by default, would it
17 not, because all of those -- those MGE-specific contracts
18 would be within the category of Missouri agreements?

19 A. Yes. That would include part of the decision
20 process. The MGE contracts would be part of the decision
21 process of the Missouri agreements.

22 Q. All right. And then tell me how that -- how
23 you believe that compares in scope to the first two
24 sentences in the Schedule 8-5 of paragraph 5.

25 A. I'm sorry. Could you repeat the question?

1 Q. Let me see if I can ask this another way. I
2 want to know whether or not Staff's prudence review
3 authority, in your opinion, was narrowed or broadened by the
4 change in language in the draft in Schedule 5-5 and the
5 draft in Schedule 8-5 again referring to paragraph 5?

6 A. I believe the first sentence in Schedule 8-5
7 narrows Staff's review to not encompass going back and
8 obtaining all of the information related to the
9 decision-making process of Western Resources or decisions
10 associated with what ended up coming out of the federal
11 litigation between MGE, Western Resources and
12 Mid-Kansas/Riverside.

13 Q. And can you point to the language that causes
14 you to have that opinion?

15 A. Well, we agreed not to look at the execution
16 of the Western Resources agreements.

17 Q. Excuse me. Go ahead.

18 A. And then we also agreed not to look at the
19 decisions associated with the execution of the Missouri
20 agreements, which includes the MGE contracts.

21 Q. But did you not agree to that -- would you not
22 have agreed to that had that earlier draft been signed in
23 Schedule 5-5 since Missouri agreements includes both
24 MKP/Western Resources sales agreement and Riverside/Western
25 Resources transportation agreement No. 1 by definition?

1 A. Well, in the previous draft on Schedule 5, it
2 talks about any ACA prudence review until this audit period,
3 and then later version in Schedule 8.5 I believe it puts
4 this limitation on what will be reviewed, but then it also
5 says in the next sentence on Schedule 8-5 that the
6 signatories agreed that the rates charged pursuant to the
7 Missouri agreements would be the subject of further ACA
8 prudence review beginning with this audit period.

9 Q. And you believe that that narrow -- that that
10 provision narrowed the scope of Staff's prudence review from
11 the previous draft in Schedule 5?

12 A. Yes. I believe that it narrowed that to
13 essentially limit Staff to some ability going back and
14 looking at the previous decision-making process that went
15 into these agreements, but it also allowed the full prudence
16 review, I believe, beginning with this ACA period.

17 Q. And you believe that that was the case with
18 the first -- with the earlier draft in 5-5, too, do you not,
19 as far as the prudence review capability of Staff subsequent
20 to July 1st of '96?

21 A. Yes. As of July 1st, '96, the decisions and
22 execution of all of the Missouri agreements would be open
23 for prudence review.

24 Q. That's your interpretation?

25 A. That's my interpretation, yes.

1 Q. So if we then compare the draft in
2 Schedule 8 --

3 COMMISSIONER GAW: Now I'm going to have to
4 ask the Judge for assistance for a moment. The one that was
5 actually executed. Judge, could you give me a reference to
6 the final executed Stip and the schedule that I can refer to
7 for the record?

8 JUDGE REGISTER: In the exhibit you have, 16,
9 Schedule 4.

10 BY COMMISSIONER GAW:

11 Q. All right. Turn to Schedule 4 in
12 Mr. Sommerer's rebuttal testimony, and continue to keep your
13 finger on Schedule 8, if you would.

14 A. Okay.

15 Q. Look at paragraph 5 there, and if you would,
16 tell me, what is the difference in those first two sentences
17 of paragraph 5 in those two drafts?

18 A. The difference between the sentences in
19 Schedule 4 and Schedule 8?

20 Q. Yes, in the first two sentences.

21 A. I think that's the language that was
22 ultimately adopted by the parties and filed with the
23 Commission for approval.

24 Q. I understand that, but if you compare
25 Schedule 8 in Sommerer's rebuttal in paragraph 5, first two

1 sentences, to paragraph 5 of Schedule 4, is there not a
2 difference in the second sentence regarding review, prudence
3 review? And if you'd like, I'll be more specific.

4 A. Okay. There is a slight difference. Thank
5 you.

6 Q. Yes.

7 A. In the version that was ultimately signed by
8 the parties, the signatories agreed that the transportation
9 rates and gas costs charged; whereas, in the previous
10 version they agreed that the rates charged pursuant to the
11 Missouri agreements. So essentially we broke apart the term
12 rates to recognize the difference between transportation and
13 commodity costs.

14 Q. And who would have been responsible, if you
15 recall, for that change in language?

16 A. I don't recall.

17 Q. And is there a difference in the meaning of
18 that sentence because of the change in that language, in
19 your opinion?

20 A. Yes, there is. I think the parties -- Staff
21 recognized that there was a difference between what would be
22 allowed under a prudence review between transportation rates
23 and gas costs because Staff recognized that MGE's EGCIM was
24 on the horizon, would be in place, and unless gas costs,
25 meaning commodity costs, exceeded this threshold for a

1 prudence review under the EGCIM, Staff could not review that
2 specific area.

3 Q. And is that relevant also to the third
4 sentence or not with the footnote under paragraph 5?

5 A. Yes, I think it is, and the parties also
6 recognize there could be compliance and operational issues,
7 I'll call it accounting-type issues that would continue to
8 be looked at every year.

9 Q. All right. So you believe that transportation
10 rates and gas costs charged is different than the rates
11 charged; is that correct?

12 A. Yes, I do. I think we were being more
13 specific to recognize there is a difference between
14 transportation charges and commodity charges rather than
15 lumping everything together.

16 Q. If I were to ask you what is the difference,
17 if I were to try to figure out what is contained in the
18 rates that might not be contained in transportation rates
19 and gas costs charged or vice versa, what am I missing in
20 that? What is it specifically that's left out of one that's
21 in the other one, if you know, or if there is anything?

22 A. I'm not sure there is anything, but I guess
23 there could be some disagreements when you're -- when you're
24 looking at rates charged. There could be disagreements
25 about classifying some types of costs, I suppose.

1 Q. So you believe you were trying to be more
2 specific and clear with that change?

3 A. Yes, I think so.

4 COMMISSIONER GAW: I think that's all I have,
5 Judge. Thank you.

6 JUDGE REGISTER: Thank you, Commissioner Gaw.
7 Commissioner Lumpe had some questions. I'll
8 turn to her next.

9 QUESTIONS BY COMMISSIONER LUMPE:

10 Q. Good morning, Mr. Shaw.

11 A. Good morning.

12 Q. I had a couple of questions. Were you here or
13 have you read Mr. Adger's testimony? I think it was his
14 testimony.

15 A. I was here and I read his testimony.

16 Q. I believe he made the comment that MGE would
17 still have to pay Williams the taker pay or transition
18 charges even if they were to shift to the Mid-Kansas
19 pipeline. Do you agree with that?

20 A. Yes, I do.

21 Q. And the other, I think, statement he may have
22 made, or it was in somebody's testimony, that it was simply
23 a matter of time until Williams' rates, I'm assuming,
24 overtook Mid-Kansas. Do you recall that?

25 A. I do recall that.

1 Q. Do you agree with that and, if so, what would
2 be the amount of time, one year, five years?

3 A. First off, I don't agree with that premise.
4 There is a difference in rates. I think the -- I think
5 Mr. Adger uses a rate on Williams of \$9.56 or something like
6 that, and with the rate increases pending before the KCC and
7 the FERC for Mid-Kansas/Riverside, the rates exceeded \$20.

8 So although Williams did have a history of
9 rate increases, they're subject to FERC regulation, the rate
10 increases would have taken a number of years, in my opinion,
11 before, if ever, before they would get to the magnitude of
12 Mid-Kansas/Riverside's rates.

13 Q. So that matter of time could have been a
14 fairly significant period of time, maybe five years, even
15 longer possibly? You don't want to speculate?

16 A. I think it would be even longer because if you
17 think about it, Williams' rates would have to increase more
18 than twofold over some period of time to --

19 Q. To match --

20 A. -- to match.

21 Q. -- the rates that were --

22 A. Yes.

23 Q. Thank you. And on page 9 of your testimony,
24 line 9 where you say regardless -- surrebuttal, and if any
25 of this is stricken, just tell me. So page 9, line 9, Staff

1 was never, and state that with emphasis, persuaded to even
2 consider approving the Mid-Kansas/Riverside contract, and
3 then you have in parentheses yes. Which contracts,
4 contract/contracts were you referencing?

5 A. Certainly referencing Mid-Kansas II, which
6 covers this ACA period.

7 Q. Okay.

8 A. Riverside I is also included in the
9 Stipulation & Agreement filed with the Commission, and at
10 one point there was draft language trying to include the
11 Riverside II contract in the Stipulation & Agreement. That
12 ultimately was not incorporated into the Stipulation &
13 Agreement, but it was discussed at some point in time, and
14 it wasn't a desire on at least one party to include such
15 language.

16 Q. But it wasn't?

17 A. It was not.

18 Q. Mr. Shaw, snippets of your deposition were
19 included in various parties' testimony, a page here, a page
20 there, and one of those pages you referenced that when
21 Ms. Baker went on maternity leave Mr. Keevil took over.
22 What was Mr. Keevil's role, if you recollect?

23 A. As I recall, Mr. Keevil was handling Case
24 No. GR-93-140 on appeal for the Commission, and one of the
25 threshold issues in this case was how could we incorporate

1 settlement of Case No. GR-93-140 on appeal with settlement
2 of the Case No. GR-94-101 and 228 because those are on two
3 different sets of court review.

4 And our discussions with Mr. Keevil, I think,
5 included would it be permissible, how would we go about
6 incorporating settlement of Case No. GR-93-140 with any
7 potential settlement of ACA cases.

8 Q. So the involvement was actually in both cases
9 or how to incorporate them on appeal. You're telling me he
10 was handling the appeal at the court for the Commission on
11 the one case, and the discussion was how do we incorporate
12 both of them together?

13 A. Or could we incorporate.

14 Q. Or could we incorporate.

15 A. I don't want to leave you with the impression
16 that he was part of the negotiations in 94-101 and 228
17 because I don't believe that he was, but we did have --
18 Staff had a concern about could we settle GR-93-140 that was
19 on appeal, and we needed guidance on that issue.

20 COMMISSIONER LUMPE: Okay. Thank you. That's
21 all I have, Mr. Shaw.

22 JUDGE REGISTER: Okay. If there are no other
23 questions from the Commissioners, I think I have just a few.

24 FURTHER QUESTIONS BY JUDGE REGISTER:

25 Q. Mr. Shaw, let me make sure I understand your

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1 role and your testimony. If I were to ask you in this PGA
2 ACA case if the reasoning given by MGE for the decision to
3 enter into their Mid-Kansas II contract, if that explanation
4 of why they believed it was prudent were accepted, would you
5 be able to render an opinion as to whether the Staff
6 believed that was an acceptable prudence -- explanation of
7 their prudence?

8 A. As I recall Mr. Langston's testimony, he
9 essentially said MGE could look at the commodity savings and
10 realized it would offset the 1.3 million proposed
11 disallowance in Case No. GR-93-140, and MGE thought that
12 that would alleviate Staff's concerns.

13 I believe Staff would be of the opinion MGE
14 should have also recognized that there was a significant
15 rate increase pending that could possibly offset any
16 commodity savings available. So if that is all that MGE
17 did, I don't believe they did near enough of a review in
18 deciding to renegotiate that contract.

19 Q. So if I understand, then, the additional cost
20 that is included in the proposed adjustment for the
21 transportation rates here could have been lower if MGE had
22 done more work before it entered into the Mid-Kansas II
23 contract?

24 A. I can't say that they could have negotiated
25 any kind of discount from the maximum transportation rates.

1 I think that would be the question, and then I think Staff
2 would be of the opinion that MGE should have tried to obtain
3 some level of discounts or should have tried to incorporate
4 some kind of mechanism to ensure that costs were reasonable.

5 Q. And despite the fact that -- if I understand,
6 Mr. Langston's testimony was that if they put the lateral in
7 that was covered by the Riverside II contract and they were
8 able to drive, get some leverage with Williams and Panhandle
9 and drive down the costs, that overall in the long run that
10 that did not drive down the costs that are being at issue
11 here under the adjustment, is that -- do I understand that
12 correctly? Do I need to --

13 A. Well, Mid-Kansas/Riverside had a desire to
14 build or somehow develop a large piece of the Kansas City
15 market for a long period of time, and when MGE renegotiated
16 the agreements, there was no certainty that this
17 Riverside II would come into place. If it did come into
18 place, it essentially was -- the rate was specified in that
19 contract was for this -- the transportation charge on this
20 lateral.

21 There were no arrangements for transportation
22 to get to the lateral, and Staff didn't know what those
23 arrangements would be. So the Staff was willing to make no
24 representations at all on the Mid-Kansas II contract.

25 Q. Okay. Let me take this in smaller pieces,

1 then, so I make sure I understand it. I understand whether
2 entering into the contract that would allow for the
3 installation of the lateral was something of a gamble on
4 MGE's part; is that what I understand?

5 A. I don't know that it was a gamble, but
6 depending on what other interested suppliers were out there,
7 there might be somebody interested in providing that level
8 of service other than Mid-Kansas/Riverside. MGE took the
9 first step in executing the contract to hopefully get this
10 project rolling or to at least make some kind of commitment.

11 Q. And opening up those markets by getting
12 greater access was not necessarily an imprudent decision; is
13 that correct?

14 A. No, I would not say that it's not. It was not
15 an imprudent decision to enter into that contract. To
16 ultimately execute the agreement to bring that gas supply
17 into the market would have been a different decision-making
18 process because, like I said, there was -- there was not
19 firm transportation committed to that project. There was
20 just this lateral that was to be built.

21 So there was a lot of uncertainty during the
22 time we negotiated this Stipulation & Agreement.

23 Q. Would you in your testimony be able to tell us
24 whether Staff's position in regard to the prudence of
25 entering into the Mid-Kansas II contract would change in any

1 way based upon any of Mr. Langston's testimony or the
2 testimony in this hearing?

3 A. Mid-Kansas -- or I mean Riverside II agreement
4 was not flowing gas supplies for --

5 Q. I'm sorry. Mid-Kansas II is what we're
6 talking about, right, the transportation costs?

7 A. I thought we were talking about Riverside II.

8 Q. I shifted back. I'm sorry.

9 A. Okay. Riverside II was not in effect or I
10 should say not flowing volumes during this ACA period under
11 review. So I think Staff's position would be to -- when
12 volumes or when charges under that agreement are flowed
13 through an ACA period, I think that is when Staff believes
14 would be the appropriate time to look at the competitive
15 effect of that agreement.

16 So I can't speak on behalf of Staff, but I
17 don't know that a great deal of effort has been put into
18 that review to this point in time.

19 JUDGE REGISTER: Thank you, Mr. Shaw. I think
20 that's all I have.

21 Commissioner Murray, did you have anything
22 else?

23 QUESTIONS BY COMMISSIONER MURRAY:

24 Q. Good morning.

25 A. Good morning.

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1 Q. And this may have been asked, too, excuse me
2 if it was, while I was not in the hearing room. But if we
3 should find in this proceeding that MGE was imprudent in the
4 execution of the Mid-Kansas II agreement, will that
5 automatically result in some disallowance for every ACA
6 period through 2009?

7 A. I don't believe that necessarily it would. I
8 think the Commission could make the finding of imprudence
9 and ultimately, as ACA periods come along, look at any
10 perceived benefits from executing these contracts to offset,
11 essentially would the benefits at any point ever remove the
12 detriment associated with the imprudent decision.

13 Q. Okay. And what I'm struggling with is if
14 there are benefits during the entire time period up through
15 2009 that offset some of the what you're calling detriments
16 during this ACA period and at any -- during any ACA period,
17 those benefits would simply result in no disallowance
18 because the benefits outweigh the detriments during that
19 period in time, then it seems like it would be unfair to
20 separate a period in which the costs were higher in order to
21 make the costs lower during a later period. Do you see what
22 I mean?

23 A. I understand where you're coming from, and I
24 think that's one of the difficulties that the Commission
25 faces with ACA prudence reviews being a 12-month snapshot.

1 Essentially assume a contract was entered into for a 15-year
2 period of time. It does not appear to be a prudent process,
3 but maybe 10 years down the road it possibly could.

4 And I think that's possibly a situation we're
5 facing here, but how can the Commission or the other parties
6 really put itself in a position to value the years 10
7 through 15 with any level of certainty at all when the
8 contract was executed.

9 Q. Okay. But when we're looking at when the
10 contract was executed, we're trying to look at that snapshot
11 in time to determine the prudence of actually executing the
12 contract, correct?

13 A. Yes. And I think that goes back to the
14 decision-making process when the contract was executed.
15 That's -- that's when you have to make your determination,
16 was it prudent at that point in time when the contract was
17 executed.

18 Q. Okay. So if at the time when the contract was
19 executed it appeared that in the long run, although there
20 might be higher costs during a portion of the period, it
21 would result in more benefit during other portions of the
22 period and the benefits in totality outweigh the detriments
23 in totality, would that not be the prudence that we were
24 looking at versus looking at how it actually turned out
25 dollar-wise during each ACA period?

1 A. Yes, and I think that's the challenge that
2 Staff has to consider when it proposes a prudence adjustment
3 also.

4 Q. And is Staff's position that in the long run,
5 considering every ACA period covered, that the detriment
6 outweigh the benefits?

7 A. I believe that would be Staff's position, yes.

8 Q. And that that was determinable at the time
9 that the contract was executed?

10 A. Certainly Staff believes the detriments were
11 determinable. Again, the difficulty is in how do you value
12 the perceived benefits from negotiation of those contracts?
13 Staff attempted to do that prior to us entering into the
14 Stipulation & Agreement.

15 I think Schedule 3 to my rebuttal testimony
16 discusses the detriment Staff believed was occurring at that
17 time, recognized there could be a gas cost offset and, in
18 fact, incorporated that into its calculation of the
19 detriment for the remaining term of this contract, and Staff
20 still believed there was significant detriment associated
21 with the execution of these agreements.

22 Q. Okay. And there's -- in the comparisons that
23 Staff has made it has been claimed that Staff has made an
24 apples to oranges comparison as to what the companies simply
25 could have gotten under the Williams -- under a Williams

1 contract; is that correct?

2 A. There has been that allegation, yes.

3 Q. And is it accurate to say that Staff did leave
4 out of the calculation some of the costs that would have
5 been incurred through Williams?

6 A. I don't believe that's a fair statement, and
7 why I say that is, these contracts originated back around
8 FERC Order 436, and KPL made the decision to utilize
9 reduction rights on Williams, which meant it was going to
10 transfer a portion of its load to another pipeline.

11 Once that decision was made, Western
12 Resources/KPL never had the ability to transfer that load to
13 what's called the TSS service, which is a more superior
14 service, because they had essentially given away that part
15 of their load.

16 TSS service is also more favorable from a rate
17 design perspective because you only pay one-third of the
18 reservation charges in the market area and two-thirds of the
19 reservation charge -- or one-third of the reservation charge
20 in production area and two-thirds in the market area. So
21 there's a rate design differential related to utilization of
22 storage is essentially what it amounts to.

23 So my opinion would be, when KPL made that
24 decision at the very beginning, they gave away the right to
25 utilize this more favorable service in the future and they

1 were stuck with firm transportation from that point forward.

2 Q. And when did KPL make that decision?

3 A. I think the initial contracts were entered
4 into in 1990.

5 Q. And you're saying that relates to the prudence
6 issue of MGE under the contract because they were aware of
7 that?

8 A. Well, I don't know that it affects the
9 prudence of MGE to any extent at all, only to the extent
10 that they were now not able to get the TSS service and they
11 had to remain on the FTS rate schedule, which there is a
12 difference in that quality of service.

13 Q. Was it possible to negotiate out of that
14 requirement to remain on the -- was it FTS, is that what you
15 call it?

16 A. FTS stands for firm transportation service.
17 TSS is transportation storage service.

18 Q. Was it possible to negotiate -- when they
19 entered into the Mid-Kansas II agreement, when they
20 renegotiated Mid-Kansas I, was that a negotiable point?

21 A. I don't think that was. I think Mr. Wallis
22 testified that Staff was of the opinion there was not any
23 TSS service available on Williams at that point. Had there
24 been, Staff might have utilized that as an alternative
25 pipeline supplier rather than the FTS agreement that it did.

1 Q. Is the fact that there was only firm
2 transportation service available a part of Staff's analysis
3 that MGE's execution of the Mid-Kansas II agreement was
4 imprudent?

5 A. No. Again, I think that goes back to Western
6 Resources' execution of the original agreements, and Staff
7 recognized that that what we believed was an imprudent
8 decision would carry forward over the life of the contract.

9 Q. And MGE had no choice as to that part of it;
10 is that correct?

11 A. That is our understanding, yes.

12 Q. So it cannot be a part of their prudence
13 decision?

14 A. It was -- I don't believe it was a part of
15 MGE's -- a decision that can be evaluated in MGE's
16 renegotiation because that decision had been made prior.

17 Q. Now, if in this proceeding we were to
18 determine that the decision to execute the Mid-Kansas II
19 agreement was not imprudent, would that automatically result
20 in no prudence review through 2009?

21 A. I think it would. I think at least during the
22 period of time I was in the procurement analysis decision,
23 once a finding of prudence is made, Staff would have a very
24 difficult road, and I don't know that they would want to
25 pursue a prudence challenge after a contract had been found

1 prudent. I think that would be a great deal of time not
2 worthwhile.

3 COMMISSIONER MURRAY: Thank you. That's all
4 the questions I have.

5 JUDGE REGISTER: Thank you, Commissioner
6 Murray.

7 Commissioner Gaw.

8 COMMISSIONER GAW: Thank you, Judge.

9 FURTHER QUESTIONS BY COMMISSIONER GAW:

10 Q. Commissioner Murray actually covered quite a
11 bit of ground that I had thought about covering, but I would
12 like to know this, Mr. Shaw. You may have already testified
13 to this, but what should MGE have done in its
14 decision-making process to avoid this finding of imprudence
15 by Staff during this ACA period?

16 A. I think the finding of imprudence in GR-93-140
17 essentially attached itself to the life of the contract, and
18 MGE when it renegotiated the contract could have attempted
19 to get discounted rates on Mid-Kansas/Riverside affiliates
20 similar to the original contract which tied
21 Mid-Kansas/Riverside's rates to a comparable Williams
22 service or somehow obtained other benefits that would offset
23 the detrimental impact of the reservation charges.

24 Q. All right. So that would have been one way,
25 and how -- and you say they should have been -- the rates

1 should have been similar to those charged on the Williams
2 line or find some other benefit that would have offset the
3 detriments that you previously testified to. Did I
4 understand that correctly?

5 A. Yes.

6 Q. If that -- if the company KPL and Riverside,
7 whoever they were dealing with at that time, on those
8 contracts that were at issue here, if they would have said
9 no, then what?

10 A. If they would have said no, essentially there
11 are provisions in the Mid-Kansas I contract that also roll
12 into the Mid-Kansas II contract that, if there's a
13 disallowance, Mid-Kansas/Riverside will fund that
14 disallowance and/or retroactively reduce their rates to a
15 level allowed for recovery.

16 So one option would be for MGE just to wait
17 and find out what the Commission decision would be and wait
18 on the rates to be adjusted if the imprudence decision was
19 found.

20 Q. Well, I guess what I'm asking you is, if
21 during the contract negotiation that you referred to that
22 they should have gotten a better deal on transportation
23 rates that the companies that MGE was negotiating with would
24 have said, We're not going to give you a lower rate, what
25 should they have done? Should they have walked away from

1 the contract and could they, from the contract negotiation,
2 and if so, what would have been their alternative as far as
3 gas supply is concerned?

4 A. I initially want to say, I don't believe Staff
5 is interested in trying to micromanage the business
6 decisions of a company. That's a corporate philosophy on
7 what they could do, and ultimately they're responsible for
8 their decisions.

9 But again, one option would be just to wait
10 and see what the Commission would find, and if a finding of
11 imprudence was made, the rates were going to be adjusted.
12 Mid-Kansas/Riverside's responsible for funding the
13 disallowance over the life of the contract. So to the
14 extent MGE did not think that was -- let me strike that last
15 part.

16 To the extent MGE could not negotiate
17 discounts, essentially the financial responsibility for the
18 other parties making their business decision would be that
19 they would have the exposure for millions and millions of
20 dollars of disallowance.

21 Q. Are you saying that they should have done
22 exactly what they have done so that we can have this hearing
23 to decide that the decision was imprudent so that they won't
24 be responsible but the people they contracted with will be?

25 A. They also have another option. They were

1 alleging breach of contract and fraudulent
2 misrepresentation, a number of charges against Western
3 Resources and Mid-Kansas, which were to the level of
4 magnitude where they believe MGE at least filed in Federal
5 District Court that the contracts should be abrogated.

6 Not knowing the representations and everything
7 that was going on at that period of time, it's difficult to
8 say whether they could have walked away from the contract,
9 what the consequences would have been. MGE, there's no
10 dispute, certainly did negotiate some benefits from this
11 renegotiation.

12 Q. Would the -- were the contracts that are
13 listed in the final Stipulation & Agreement under
14 paragraph 4A and B, those were the Western Resources
15 contracts that we've referred to earlier, were those
16 contracts replaced by the Mid-Kansas II agreement?

17 A. Yes, they were.

18 Q. And did they end because of that new contract
19 or did they -- were they terminated -- terminating because
20 they were expiring?

21 A. They ended because of the renegotiation and a
22 new agreement would be in place. They were not to expire
23 until 2009, which is the same time period Mid-Kansas II
24 runs.

25 Q. So if that's the case, then, it would not have

1 been possible without a breach of contract or renegotiation
2 for them to have simply said, We don't want to take any more
3 gas from -- I'm talking about MGE, taking any more gas from
4 Mid-Kansas Pipeline subsequent to -- well, during this ACA
5 period. If there had been no renegotiation, they still
6 couldn't have walked away and purchased the additional gas
7 from Williams without breaching that contract; is that
8 correct?

9 A. I'm not an attorney, but I would agree with
10 you. I think they would have that continuing obligation.

11 Q. All right. So if I understand you correctly,
12 then, the idea that additional -- that they could have
13 walked away instead of renegotiating Mid-Kansas and entering
14 into Mid-Kansas II, they could have walked away and simply
15 purchased the additional gas they needed from Williams is
16 more problematic than just saying they could have walked
17 away and purchased the extra gas?

18 A. Yes. I think that would have taken a lot of
19 litigation. It would have taken a court decision before
20 that would have happened.

21 COMMISSIONER GAW: I think that's all I have.
22 Thank you very much, Mr. Shaw.

23 JUDGE REGISTER: I don't have anything
24 further. I'm sorry.

25 Commissioner Murray, go right ahead.

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1 FURTHER QUESTIONS BY COMMISSIONER MURRAY:

2 Q. Under the agreements that were renegotiated,
3 if there had been a disallowance then, would the pipelines
4 have been responsible to make up the difference --

5 A. Yes.

6 Q. -- that was disallowed?

7 A. Yes.

8 Q. And I'm talking about the first contract.

9 A. Under either contract, Mid-Kansas/Riverside
10 agreed to a regulatory reimbursement for any disallowed
11 cost.

12 Q. So that if MGE had chosen to try to negotiate
13 a better deal and they were not able to get it and if they
14 had said, We'll just continue under the same arrangement
15 that we have, there could have been the same kind of
16 challenge that exists here today; is that right?

17 A. Oh, there most definitely would have been the
18 same challenge that exists today.

19 Q. And --

20 A. There would -- and why I say that, there would
21 not be the benefit of the gas cost savings offset which
22 Staff has recognized in this case.

23 Q. So there, in fact, would have been a greater
24 challenge today?

25 A. Yes, there would.

1 Q. And the challenge that Staff is making right
2 now is based upon the fact that Staff thinks that MGE should
3 have renegotiated more benefits than they were able to
4 renegotiate, more than they, in fact, did renegotiate; is
5 that accurate?

6 A. I think Staff's position would be similar to
7 what it was in GR-93-140, the decision to pay the maximum
8 transportation charge on the Mid-Kansas/Riverside affiliates
9 is excessive, and there needs to be some kind of discount
10 negotiated or other benefits that would offset the level of
11 reservation charges paid.

12 Q. And the benefits that were negotiated, did
13 they not offset it to some degree?

14 A. To some degree, yes.

15 COMMISSIONER MURRAY: All right. Thank you.

16 THE WITNESS: You're welcome.

17 JUDGE REGISTER: Thank you, Mr. Shaw. All
18 right. So that takes us to recross. Mr. Micheel?

19 RECROSS-EXAMINATION BY MR. MICHEEL:

20 Q. Mr. Shaw, Commissioner Murray's been talking
21 to you about the benefits and detriments of the
22 Mid-Kansas II contract. Do you recall those questions?

23 A. Yes.

24 Q. And I think in response you referred to
25 Schedule 3 to your rebuttal testimony?

1 A. Yes, I did.

2 Q. And is that -- I guess I'm just trying to
3 understand this whole benefit/detriment part. Could you
4 explain the analysis Staff did with respect to the alleged
5 benefits and detriments in your Schedule 3 there to me?

6 A. Essentially, Staff recognized in Case
7 No. GR-93-140 there was a disallowance of \$1.3 million due
8 to the imprudent decision to remove the price cap which tied
9 these rates to a Williams service and paying the maximum
10 reservation charges.

11 In GR-94-101 and 228 we calculated the
12 difference between the reservation charges to a comparable
13 type of service, and we were looking at \$3.2 million
14 disallowance. Although Staff recommendation had not been
15 filed in GR-94, a similar calculation was looking at a
16 \$3 million disallowance.

17 And then for the remainder of the contract
18 what we tried to do was look at the difference in
19 reservation charges between the alternative pipeline
20 suppliers, and in the third paragraph we believe that would
21 result in approximately \$8 million per year in excess
22 charges beginning with GR-96-78.

23 We did recognize that there could be some gas
24 cost savings during this period based on a more favorable
25 index and a premium. Based on the differential between that

1 more favorable index, we tried to calculate what the gas
2 cost savings would be, and we estimated that to be
3 \$4 million, assuming the contract could be what I call,
4 quote, fully base loaded.

5 And when I say fully base loaded, we need to
6 understand that, with this being the most favorable index,
7 they needed to transport as much gas as they possibly could
8 to offset the reservation charges. We believe that number
9 would be approximately \$4 million, which would result in
10 what Staff believes is \$4 million of detriment per year.

11 So that's the background for the calculation,
12 and the second page essentially goes through the
13 disallowances that had been filed and sums the disallowance
14 of \$4 million for the remaining life of the contract. Comes
15 up with 63-and-a-half-million dollars.

16 Q. So if I understand your testimony, Mr. Shaw,
17 and correct me if I'm wrong, the Staff looked at the total
18 benefits and the total detriments over the life of the
19 Mid-Kansas contracts at issue?

20 A. That's what we were attempting to do, yes.

21 Q. And the Staff's analysis indicated, even
22 taking into account the benefits of the lower commodity
23 cost, that on balance over the life of that contract there
24 was -- if I understand your testimony correctly, there was
25 an approximate \$4 million detriment each year?

1 A. Yes, there was. And I would also point out
2 that we assumed that that more favorable index would also
3 apply for the life of the contract, which testimony that's
4 occurred in this case leads me to believe that favorable
5 index will not continue for the life of the contract.

6 Q. So that was a generous savings estimate, is
7 that what I --

8 A. I don't want to say that it was a generous
9 estimate. It was based on the best information we had
10 available at the time the decision was made. There was no
11 certainty, I don't think, at least from Staff's perspective,
12 how long this favorable index would last or when it would
13 end and they would go to the Riverside I transportation
14 agreement.

15 MR. MICHEEL: Thank you very much.

16 THE WITNESS: You're welcome.

17 JUDGE REGISTER: Thank you, Mr. Micheel.

18 Midwest Gas, Mr. Conrad. Okay. Mr. Conrad
19 has waived his cross-examination. City of Kansas City,
20 Missouri and Williams Gas have waived their cross here.

21 Mr. Duffy, MGE.

22 RE-CROSS-EXAMINATION BY MR. DUFFY:

23 Q. You were asked several questions about the
24 various drafts of the settlement agreement. I believe we
25 looked at Schedule 5 and Schedule 8.

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1 My question to you, Mr. Shaw, is, did the
2 identity of the four documents that were called the Missouri
3 agreements change in any of the drafts? In other words,
4 were we talking about the same four contracts in all of the
5 drafts?

6 A. I think we were, yes.

7 Q. And they were identified as the Missouri
8 agreements in all of the drafts, were they not?

9 A. Yes, I believe so.

10 Q. There may have been some additional
11 amplification of the identification process, but the
12 underlying agreements were the same in all of the drafts?

13 A. Yes, I think so.

14 Q. Were you the Staff person in, I guess, 1996
15 that authorized Mr. Hack to sign the Stipulation & Agreement
16 on behalf of the Staff?

17 A. I think that would have been myself and
18 Mr. Sommerer.

19 Q. Did Mr. Rademan have anything to do with that
20 process? In other words, who was the highest ranking Staff
21 person that would have been able to authorize Mr. Hack to
22 sign that agreement?

23 A. Mr. Rademan certainly was following the case
24 and was involved to some extent with the negotiations. I'm
25 not sure if he -- how detailed his knowledge would be on the

1 actual settlement documents themselves. He had an
2 understanding of what Staff expected out of those documents,
3 but I think if myself and Mr. Sommerer had a problem with
4 anything in the Stipulation & Agreement, we could have went
5 to Mr. Rademan and he would have supported us and not
6 authorized the settlement to be executed.

7 MR. DUFFY: Your Honor, I don't think that
8 answer was responsive to my question and I move that it be
9 stricken.

10 MR. STEWART: Moreover, it's quite
11 speculative.

12 MR. SCHWARZ: I disagree. I think he asked
13 specifically who was the highest ranking Staff person who
14 authorized this settlement, and I think that he's indicated
15 that Mr. Rademan -- and I'd ask the Commission to take
16 notice that Mr. Rademan was a division director at that
17 time -- was aware and indicated the level of Mr. Rademan's
18 participation in the actual decision. That's what his
19 answer -- his question elicited, and that's the answer that
20 he got.

21 MR. STEWART: Judge, I may have misheard what
22 Mr. Shaw said, but that last part of his answer, I believe
23 he was speculating as to what Mr. Rademan might or might not
24 have done if hypothetically, I suppose, Mr. Shaw and
25 Mr. Sommerer had had a problem with the Stipulation, and I

1 don't think there's any evidence as to anything Mr. Rademan
2 might or might not have done that's been presented. That's
3 the part I have an objection to.

4 JUDGE REGISTER: Okay. The question was on my
5 record, my looking at the transcript, Who was the highest
6 ranking Staff person that would have been able to authorize
7 Mr. Hack to sign that agreement? And I thought that
8 Mr. Shaw was trying to explain who would have -- what the
9 process, would have been involved in that.

10 If you want to ask him another question,
11 Mr. Duffy, to further clarify the authority issue, I'll let
12 you, but I'm going to overrule the objection and deny your
13 motion to strike.

14 BY MR. DUFFY:

15 Q. Okay. I just want a name in response to this
16 question. Who was the highest ranking Staff person that
17 would have been able to authorize Mr. Hack to sign the
18 Stipulation & Agreement?

19 A. That would have had to have been Mr. Rademan.

20 Q. And for this question, I want a yes or a no
21 answer. Did you --

22 JUDGE REGISTER: If that answers the question.

23 BY MR. DUFFY:

24 Q. Did you authorize Mr. Hack to sign the
25 Stipulation & Agreement?

1 A. I don't think I could have. I don't recall
2 that I did. I'm sorry. It's not a yes or a no answer.

3 JUDGE REGISTER: I have some questions to
4 clarify. Who was the executive director at the time that
5 this Stipulation & Agreement was entered into?

6 THE WITNESS: I'm pretty sure that would have
7 been David Rauch.

8 JUDGE REGISTER: And who did Mr. Rademan reply
9 to or who was his immediate superior?

10 THE WITNESS: That would have been Mr. Rauch.

11 JUDGE REGISTER: And underneath the
12 Commissioners, in terms of authorizing the entering into a
13 Stipulation & Agreement, who's directly under the
14 Commissioners?

15 THE WITNESS: Well, my understanding, that
16 would be the secretary to the Commission or whatever title
17 that might be.

18 JUDGE REGISTER: Does Mr. Rauch as the
19 executive director respond to the Commission?

20 THE WITNESS: I think so.

21 JUDGE REGISTER: Are you ever delegated the
22 authority to authorize Staff or General Counsel to enter
23 into a Stipulation & Agreement?

24 MR. DUFFY: Judge, when you say are you ever
25 authorized, are you using you in the term of the Staff or

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1 are you talking Mr. Shaw in particular?

2 JUDGE REGISTER: I'll clarify my question,
3 Mr. Duffy. Thank you.

4 In your position you were in in May of 1996,
5 that was when the Stipulation & Agreement was entered into;
6 is that correct?

7 MR. DUFFY: Mr. Shaw can confirm, but that's
8 my understanding, May of 1996.

9 THE WITNESS: Yes.

10 JUDGE REGISTER: At that time, were you ever
11 delegated to authorize General Counsel to enter into a
12 Stipulation & Agreement?

13 THE WITNESS: I'll have to say I think the
14 division directors and executive director would have to be
15 aware in concept of what the settlement would be, would have
16 to be supportive of that, and I think it was the
17 responsibility of Staff and its General Counsel to draft a
18 Stipulation & Agreement that would incorporate that
19 understanding.

20 I don't know that Mr. Rademan or the executive
21 director would review the Stipulations making sure that
22 conveyance and understanding was put into writing. I don't
23 know that they would be involved with that process.

24 JUDGE REGISTER: In your initial response to
25 Mr. Duffy's question, who would be able to -- the highest

1 ranking person who would be able to authorize the
2 Stipulation & Agreement, your explanation of how that
3 process worked during this period in May of 1996 was your
4 understanding of how that worked, is that -- did I
5 understand that correctly?

6 THE WITNESS: I think so, yes.

7 JUDGE REGISTER: Would it be fair to say,
8 then, the highest ranking individual who can, who could,
9 which would be able to authorize a Stipulation & Agreement
10 is the executive director?

11 THE WITNESS: I think that's fair, yes.

12 JUDGE REGISTER: I'm going to return it to
13 Mr. Duffy. If you want to ask him who actually did
14 authorize this one, go right ahead, but I think that I've
15 clarified that.

16 MR. DUFFY: Are you suggesting that I need to
17 ask that or that you're going ask it if I don't?

18 JUDGE REGISTER: No. If you want to ask that,
19 I'm going to turn it back to you. I've clarified the
20 structure of who can and who could authorize Stipulation &
21 Agreements.

22 BY MR. DUFFY:

23 Q. Well, I believe you told me earlier that you
24 thought Mr. Rademan was the highest ranking Staff person
25 capable of authorizing Mr. Hack to sign the Stipulation &

1 Agreement; is that right?

2 A. That may have been my testimony, yes.

3 Q. Are you now saying that it wasn't Mr. Rademan
4 and it was instead Mr. Rauch?

5 A. Well, I think the clarifying questions from
6 the Judge has further explained my understanding of the
7 question and my understanding of trying to explain the
8 process involved.

9 But given those clarifying questions, I think
10 any settlement would ultimately have to go through the
11 executive director. I think that's a very fair
12 representation. Now, actually who authorizes that, I don't
13 know. That would have been at some level above me.

14 Q. So you don't know who on the Staff authorized
15 Mr. Hack to sign this Stipulation & Agreement, is that your
16 ultimate testimony now?

17 A. I suppose it would be. I don't know who
18 officially went to Mr. Hack and said, I authorize you to
19 file this document with the Commission. I don't know who
20 that would be.

21 MR. DUFFY: That's all I have.

22 JUDGE REGISTER: Mr. Stewart, are you taking
23 today?

24 MR. STEWART: I'm going to spell Mr. Keevil if
25 I might. I suppose it's just as well timing-wise, too, on

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1 this executive director piece.

2 JUDGE REGISTER: Actually, before we get
3 started, I'm going to -- it's now approaching ten o'clock.
4 We started at 8:30 this morning. Let's take a moment, go
5 off the record and take a break before you get started with
6 your cross.

7 (A BREAK WAS TAKEN.)

8 JUDGE REGISTER: Let's go back on the record.

9 Mr. Stewart, before I allow you to continue
10 with your -- or proceed with your cross-examination, let me
11 do two housekeeping things.

12 One, I just want to make a note on the record
13 that yesterday evening after we went off the record I was
14 reminded that we needed to release Mr. Langston as he needed
15 to return home for a funeral, and he was released and has
16 not been in court here today, but no further questions are
17 going to be required of him.

18 The other was, there was the document that
19 Commissioner Murray had referred to. Mr. Schwarz had
20 provided a copy of it, and I reserved it as Exhibit No. 25.
21 Mr. Schwarz is going to provide us a copy of the relevant
22 portion of that transcript. Do you have that all ready?

23 MR. SCHWARZ: Still warm.

24 JUDGE REGISTER: And I have already
25 predesignated that document to be Exhibit 25.

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1 MR. SCHWARZ: I think I copied everything up
2 to the opening statements and the actual contested issues.

3 JUDGE REGISTER: Because the issue we were
4 talking about was the presentation and any statements made
5 by the parties about the Stipulation & Agreement that was
6 offered in this case.

7 (EXHIBIT NO. 25 WAS MARKED FOR
8 IDENTIFICATION.)

9 JUDGE REGISTER: Are there any other
10 housekeeping matters that I haven't dealt with yet this
11 morning?

12 All right. Then I believe that we are ready
13 to proceed, and I will turn it over to you, Mr. Stewart, and
14 let you proceed with your cross-examination.

15 MR. STEWART: Thank you.

16 JUDGE REGISTER: Or recross rather.

17 RECROSS-EXAMINATION BY MR. STEWART:

18 Q. Good morning, Mr. Shaw.

19 A. Good morning.

20 Q. Before the break, Mr. Duffy was asking you
21 questions about the executive director's role in
22 Stipulations & Agreements entered into by the Staff.
23 Mr. Shaw, were you employed by the Missouri Public Service
24 Commission during my tenure as executive secretary of the
25 Commission?

1 A. Yes.

2 Q. And do you recall that during that time the
3 Staff did, in fact, execute a number of Stipulations &
4 Agreements in a variety of cases?

5 A. I'm sure they would have.

6 Q. Are you aware of any instance that any of
7 those Stipulation & Agreements would not have come across my
8 desk for my approval?

9 A. I don't know. Again, that would be at a level
10 above me.

11 Q. Okay. You've reviewed the Mid-Kansas II
12 contracts, have you not?

13 A. Yes.

14 Q. When did you do that?

15 A. The initial time would have been in Case
16 No. GR-94-101 and 228, and since that time I've reviewed it
17 various times throughout this proceeding.

18 Q. And I take it from your testimony in response
19 to questions from the Bench that you are also -- you've also
20 reviewed the Stipulation & Agreement that was filed on
21 May 2nd, 1996?

22 A. Yes, I have.

23 Q. Mr. Shaw, are there any provisions in the
24 Mid-Kansas II contracts or the Stipulation & Agreement filed
25 on May 2nd, 1996 that would in any way preclude the Missouri

1 Public Service Commission from challenging Mid-Kansas'
2 transportation rates before the FERC during the term of the
3 contract?

4 A. No, I don't believe so.

5 Q. In fact, the Missouri Public Service
6 Commission has done so, have they not?

7 A. That's my understanding, yes.

8 Q. You spoke, I believe, yesterday about
9 Riverside/Mid-Kansas' attempts to reach a global settlement
10 which was, I guess, prior to the negotiations on the
11 May 2nd, 1996 settlement of the ACA proceeding.

12 That global settlement, would that -- that
13 would have included a proposed settlement in a FERC
14 proceeding; is that correct?

15 A. Yes, it would have.

16 Q. Do you recall which FERC proceeding that was?

17 A. I don't recall, but I could refresh my memory
18 by looking at one of my schedules.

19 Q. Let me just ask you this: Would you have any
20 reason to disagree that that was the FERC proceeding that
21 involved the complaint by Williams Natural Gas filed against
22 Mid-Kansas/Riverside over FERC jurisdiction over the
23 pipelines?

24 A. I'm not sure.

25 Q. Are you familiar with the various drafts of

1 what I think you referred to as the global Stipulation &
2 Agreements that have been discussed in this proceeding?

3 A. Yes. I would have reviewed at least some of
4 those, if not all.

5 Q. To your knowledge, are there any provisions in
6 any of the global Stipulations & Agreements that would have
7 precluded the Missouri Public Service Commission from
8 challenging Mid-Kansas/Riverside's transportation rates
9 before the FERC?

10 A. Yes, I think there would have been.

11 Q. Where might that be?

12 A. There was certainly an agreement to not
13 challenge the rates during a rate moratorium. I'll have to
14 refer to --

15 Q. Just for clarification, there was never any
16 final agreement on the FERC stipulation, though?

17 A. No, there was not.

18 Q. But there was a proposal -- do I understand
19 your testimony to be there was a proposal for rate
20 moratorium that was floating around during the negotiations?

21 A. That was at least one option, and I think
22 there was also provisions in those stipulations that the
23 Commission would preapprove certain costs or agree not to
24 challenge certain costs.

25 Q. I'm just talking about the FERC proceeding.

1 A. Yes. I understand.

2 Q. Well, let me direct your attention to your
3 Schedule 10-4, if I might.

4 A. Okay.

5 Q. That would be Exhibit 15, Schedule 10-4. I'd
6 like to direct your -- have you look at Item No. 5 on
7 Schedule 10-4. Could you read that, please?

8 A. MoPSC can actively participate at FERC in
9 future KPOC rate cases.

10 Q. I believe you testified in response to some
11 questions from Commissioner Gaw that you believed that the
12 Commission found the Mid-Kansas I contracts imprudent in
13 Case No. GR-93-140; is that correct?

14 A. Yes.

15 Q. Have you reviewed the Commission's Report and
16 Order in GR-93-140 recently?

17 A. Recently within the last month, yes.

18 Q. And just for the record, if someone was
19 interested in taking a look at the Commission's Order, that
20 has been attached, has it not, to Mr. Sommerer's rebuttal
21 testimony, Schedule 2, which I think would be Exhibit 16?

22 A. Yes, it is.

23 Q. Well, is it a fair characterization that -- of
24 that Order that the Commission found that it was the removal
25 of the price cap provision in the old contracts that was

1 imprudent?

2 A. Yes, the Commission did make that finding.

3 Q. And in any event, the Report and Order will

4 speak for itself, will it not?

5 A. Yes, it will.

6 Q. You spoke about -- and I'm going to try to use

7 your word if I wrote this down correctly. You spoke about

8 some sort of a continuum between the old Mid-Kansas I

9 contracts and the new Mid-Kansas II contracts. Was that

10 your testimony?

11 A. Yes.

12 Q. Now, in saying that, you're not trying to

13 testify there are no differences between the Mid-Kansas I

14 contracts and the Mid-Kansas II contracts, are you?

15 A. No, I'm not.

16 Q. In fact, you would agree with me that the

17 parties to those contracts are different parties?

18 A. Yes, they are.

19 Q. And that would be who? Western is the party

20 on the Mid-Kansas I, and MGE is the party on Mid-Kansas II?

21 A. Yes.

22 Q. Would you agree with me that MGE had

23 absolutely no role in negotiating or executing the

24 Mid-Kansas I contract?

25 A. I'd say that's fair, yes.

1 Q. And just for clarification, we mentioned
2 several Missouri PSC ACA cases, the first being GR-93-140,
3 which is the Report and Order we just spoke about, and then
4 the second, the next case, ACA case was GR-94-101 and 228;
5 is that correct?

6 A. Yes, it is.

7 Q. And which contract, Mid-Kansas I or
8 Mid-Kansas II, was involved in those proceedings?

9 A. That would have been the Mid-Kansas I in those
10 proceedings also.

11 Q. Thank you. I'd like to refer you back.
12 Again, you were talking, I believe in response to
13 Commissioner Gaw, in the context of the negotiation process
14 and the global settlement that eventually wound up with the
15 May 2nd Stipulation. Could I refer you to your Schedule 3
16 of your rebuttal, Exhibit 14?

17 A. Okay.

18 Q. Okay. This memorandum, tell me if this is
19 correct, that this is a memorandum from you and David
20 Sommerer to Carmen Morrissey that has been routed through Ken
21 Rademan?

22 A. Yes, it is.

23 Q. And the reason that you routed it through Ken
24 Rademan, isn't that, that he was Mr. Sommerer's immediate
25 supervisor?

1 A. He was aware of the ongoing negotiations, and
2 we would have routed it through him, one, he was
3 Mr. Sommerer's supervisor; two, as an informational process
4 about the value of the negotiations.

5 Q. I appreciate your answer. What is the date of
6 that memorandum?

7 A. March 29, 1996.

8 Q. And I take it from reading this that
9 Ms. Morrissey had requested information about what you call
10 the value of the Riverside issue in the MoPSC ACA cases. Is
11 that why you responded to her?

12 A. Yes, I think so.

13 Q. And why was she interested in that
14 information?

15 A. Because we were talking about a global
16 settlement of FERC matters that also encompassed ACA cases.

17 Q. But her primary focus would have been the FERC
18 piece?

19 A. Yes, it would have been.

20 Q. Well, let me ask you this: Given that the
21 memo was dated March 29, '96, and that the Stipulation &
22 Agreement was filed over a month later on May 2nd, 1996, the
23 numbers that you cite on page 2 of Schedule 3, they don't
24 really take into account the effect of the Stipulation &
25 Agreement and settlement, do they?

1 A. I'm not sure I understand your question.

2 Q. I'll just --

3 A. I mean, they certainly would have affected

4 Staff's decision about what the value of the settlement

5 would be and what we could agree to on a going-forward

6 basis.

7 Q. That wasn't my question. I apologize if I was

8 unclear.

9 The numbers -- let me try it again. The

10 numbers that you have listed on page 2 titled attachment to

11 Schedule 3, none of those numbers show, for example, a

12 \$4 million payment by Mid-Kansas/Riverside and Western as a

13 result of that May 2nd settlement, do they?

14 A. No, they don't.

15 Q. And likewise, same attachment, under the

16 second line, year ended June 30th, 1994, would that have

17 been the ACA case period we were talking about, 94-101 and

18 228?

19 A. Yes.

20 Q. And the Commission in that case did not, in

21 fact, order a \$3.2 million disallowance, did they?

22 A. No. That was Staff's proposed disallowance.

23 Q. Thank you. I appreciate that clarification.

24 I believe in your testimony, your surrebuttal

25 testimony -- again, this is related to Commissioner Gaw's

1 question about the settlement negotiation process that we
2 all engaged in. I believe if you'll turn to page 5 of your
3 surrebuttal, specifically at lines 3 to 7, I take it that
4 you're criticizing Riverside/Mid-Kansas for seeking to
5 negotiate initially only with the Staff without and to the
6 exclusion of MGE's and Western's participation. Is that a
7 fair characterization of that testimony?

8 A. I think so.

9 Q. Isn't it common practice for the Staff to meet
10 or communicate privately with one party to the exclusion of
11 other parties at various points in time during proceedings?

12 A. Yes, that does occur.

13 Q. In fact, if we wanted an example of that, in
14 this case couldn't we look at your surrebuttal Schedule 3
15 and Schedule 7 that represent private communications between
16 the Staff and a representative of Western and a
17 representative of MGE?

18 A. I think so, yes.

19 Q. I mean, in Schedule 7, which I believe is the
20 letter from MGE's outside counsel, that doesn't show that
21 anyone from Riverside was copied on that letter, was it --
22 or were they? Excuse me.

23 A. No, I don't think they would have been.

24 Q. Could you turn to page 7 of your surrebuttal.
25 I have to do this. And again, following up on the global

1 settlement process, Exhibit 15, page 7, line 1, you
2 reference my scathing attack on the settlement negotiation
3 process.

4 Could you please turn to your Schedule 8-3,
5 which I believe is my letter to Mr. Hack. I direct your
6 attention to the first line of the second paragraph. Would
7 you please read that line into the record.

8 A. Please understand that my criticisms are
9 directed more at the process than they are directed toward
10 any individual member of the Staff.

11 Q. Thank you, Mr. Shaw. I appreciate it.

12 MR. STEWART: That's all the questions.

13 JUDGE REGISTER: Thank you very much. Okay.
14 That completes recross, and that takes us to Mr. Schwarz for
15 redirect.

16 REDIRECT EXAMINATION BY MR. SCHWARZ:

17 Q. You recall that Mr. Duffy asked you some
18 questions pertaining to the merger in -- or excuse me --
19 well, the merger case, GM --

20 MR. DUFFY: Mr. Schwarz, it wasn't a merger.

21 MR. SCHWARZ: It's a GM docket, though.

22 MR. DUFFY: That's right, but it was not a
23 merger.

24 MR. SCHWARZ: It was not a merger. I
25 understand. I started to correct myself.

1 BY MR. SCHWARZ:

2 Q. The sale, the case which approved the sale and
3 transfer from WRI to Southern Union, he asked you a series
4 of questions about that?

5 A. Yes.

6 Q. Do you know if that case which occurred or at
7 least began in August of 1993 predated the formation of the
8 Procurement Analysis Department?

9 A. Yes, it did.

10 Q. So there was no separate staff existing at the
11 time that case was filed to review the gas purchasing and
12 contracting practices of Missouri LDCs; is that correct?

13 A. That's right. Procurement Analysis Department
14 was created, I believe, in October of '93.

15 Q. You recall, I believe it was Commissioner Gaw,
16 in reference to the change in paragraph 5 between
17 Schedule 8-5, which was a draft of the May agreement, and
18 the final draft, asked you about the distinction between
19 transport-- the addition of the words transportation and gas
20 cost to that paragraph. You recall that?

21 A. Yes.

22 Q. If you hadn't added those words, it might have
23 been possible that the Stipulation & Agreement somehow
24 conflicted with the EGCIM which had at that time been
25 approved by the Commission?

1 A. Yes, that's right.

2 Q. I hand you the Stipulation that the parties
3 entered in Case GM-94-40, which was the sale of assets
4 affecting the transfer from WRI to Southern Union, and I've
5 marked a paragraph in that. Would you read that into the
6 record, please.

7 A. The first sentence of paragraph 11 states, The
8 parties reserve the right to propose adjustments in any
9 future proceedings for all alleged detrimental aspects
10 relating to the acquisition other than those specifically
11 addressed in this Unanimous Stipulation & Agreement.

12 Q. Thank you.

13 Do you have Mr. Sommerer's rebuttal testimony
14 there?

15 A. Yes, I do.

16 Q. Well, never mind. Strike that.

17 You have referred to provisions of the
18 Mid-Kansas II and I think Riverside I as well, but certainly
19 Mid-Kansas II, that referenced rate cases pending at the
20 FERC and KCC?

21 A. Yes.

22 Q. To your knowledge, at the time the February
23 '95 contracts were executed by MGE, would they have been
24 aware of the rates that were proposed under the KCC
25 proceedings?

1 A. I believe so. If they didn't necessarily know
2 the specific rates, they would have known at least the
3 dollar magnitude of the requested rate increases.

4 Q. Is it your understanding or do you know if the
5 rates by pipelines proposed at the KCC go into effect
6 interim subject to refund?

7 A. I'm not sure that they do. I know at the FERC
8 rates are -- proposed rate increases are allowed to be
9 implemented interim subject to refund. Whether that applies
10 at the KCC, I'm not sure, but it's very common for pipeline
11 rates to be approved interim subject to refund.

12 Q. You're familiar with the payment provision in
13 the May '96 Stipulation & Agreement of \$4 million?

14 A. Yes.

15 Q. Was that a one-time payment or a continuing
16 payment?

17 A. It was a one-time payment.

18 MR. SCHWARZ: I think that's all I have.

19 JUDGE REGISTER: With the completion of
20 redirect, Mr. Shaw may step down, and I'll ask Mr. Schwarz
21 to call his next witness.

22 Thank you, Mr. Shaw. Does Mr. Shaw need to be
23 released?

24 THE WITNESS: No.

25 MR. SCHWARZ: Call Mr. Sommerer.

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1 (Witness sworn.)

2 JUDGE REGISTER: Thank you. Please be seated.

3 Mr. Schwarz, when you're ready. For my

4 refreshment, we're talking about we have rebuttal and

5 surrebuttal testimony for Mr. Sommerer; is that correct?

6 MR. SCHWARZ: That is correct.

7 JUDGE REGISTER: Please proceed, Mr. Schwarz,

8 when you're ready.

9 DAVID SOMMERER testified as follows:

10 DIRECT EXAMINATION BY MR. SCHWARZ:

11 Q. Would you state your name for the record,

12 please.

13 A. My name is David Sommerer.

14 Q. By whom are you employed?

15 A. The Missouri Public Service Commission.

16 Q. And in what capacity?

17 A. I'm the manager of the Procurement Analysis

18 Department.

19 Q. And are you the same David Sommerer who has

20 caused to be filed in this case rebuttal testimony that has

21 been marked as Exhibit 16 and surrebuttal testimony which

22 has been marked 16HC and 16NP?

23 A. That's correct.

24 Q. Do you have any corrections to make to that

25 testimony?

1 A. Just one. In my rebuttal testimony,
2 Schedule 9-1, the rate that I have recorded for Panhandle
3 Eastern Pipeline Company is \$12.43. I would like to change
4 that rate to \$12.27. those are the only changes I have.

5 Q. Were you here yesterday when -- strike that.
6 Would you take a look at your Schedule 5,
7 please.

8 A. Yes.

9 Q. There are some handwritten notes, I believe,
10 on that schedule. Would you identify -- maybe not. Yes, on
11 Schedule 5-5.

12 A. Yes. I'm uncertain as to the source of those
13 numbers.

14 Q. Whose are they?

15 A. I am uncertain.

16 Q. Oh, uncertain. I'm sorry. Thank you.
17 On Schedule 6, would you identify the
18 handwritten notes on that schedule, please.

19 A. On Schedule 6-1, I do not know who made those
20 notations or the handwritten page numbers.

21 On Schedule 6-2, the source for the
22 handwritten comments and marks made were made by me on or
23 around the date of the document.

24 Schedule 6-3, the source for the handwritten
25 comments and marks were made by me on or around the date of

1 the document.

2 Schedule 6-4, the source for the handwritten
3 comments and marks were made by me on or around the date of
4 the document.

5 JUDGE REGISTER: When you say the date of the
6 document, the date that you received the document?

7 THE WITNESS: That's correct.

8 JUDGE REGISTER: Thank you.

9 BY MR. SCHWARZ:

10 Q. And again with Schedule 8, please.

11 A. On Schedule 6-5, one last item, I do not know
12 the source for that handwritten page number.

13 Q. Okay.

14 A. On Schedule 8-3, I do not know the source for
15 that underline.

16 Schedule 8-6, the source for the handwritten
17 comment and marks were made by me on or around the date of
18 the document.

19 Schedule 8-7, I do not recall the source for
20 the underlines.

21 Schedule 8-8, the handwritten comments are
22 mine. I do not recall the source of the underline.

23 Q. Thank you. To the best of your information
24 and belief, are the answers that you give in your prefiled
25 testimony true and correct?

1 A. Yes.

2 Q. If I ask you the same questions today, would
3 your answers be the same?

4 A. Yes.

5 MR. SCHWARZ: I would offer Exhibits 16 and
6 17NP and HC into the record and tender the witness for
7 cross-examination.

8 JUDGE REGISTER: Thank you Mr. Schwarz.

9 COMMISSIONER MURRAY: Your Honor, just for
10 clarification, Mr. Schwarz earlier referred to Exhibit 17HC
11 and Exhibit 17NP as 16HC and 16NP, just to clarify the
12 record.

13 MR. SCHWARZ: Thank you.

14 JUDGE REGISTER: We have Exhibits 16 and
15 Exhibit 17HC and 17NP offered. Are there any objections?

16 MR. STEWART: Yes, your Honor. And based on
17 yesterday, I think we have come up with an approach that
18 will help expedite the objections. We have prepared for
19 all -- for the Bench and for the parties a list of the
20 specific objections, and what I'd like to do is go down that
21 list in that order and read the objections into the record
22 and then have the ruling.

23 JUDGE REGISTER: That would be fine. Thank
24 you very much. I appreciate that.

25 MR. STEWART: I might also add that perhaps

1 not all of my objections that I will make on the record are
2 contained on that list, but this is a pretty good guide.

3 JUDGE REGISTER: That's fine. It'll make it
4 much easier. Okay. Proceed.

5 MR. STEWART: Regarding Mr. Sommerer's
6 rebuttal testimony, Exhibit 16, at the outset we would move
7 to strike as being a violation of the Commission's direct
8 testimony Rule 4 CSR 240-2.130, sub 7, the following pages
9 and lines: Beginning on page 14, line 19, through page 15,
10 line 17.

11 JUDGE REGISTER: All right.

12 MR. STEWART: That would be followed, same
13 objection, page 3, lines 19 through 21.

14 JUDGE REGISTER: All right.

15 MR. STEWART: Followed by page 4, line 1,
16 through page 5, line 16. And those testimony cites are
17 being objected to on the basis of the Commission's direct
18 testimony rule.

19 JUDGE REGISTER: Are there any other
20 objections on those portions of the testimony?

21 MR. DUFFY: MGE would join in that objection.

22 JUDGE REGISTER: Thank you, Mr. Duffy.

23 Mr. Schwarz?

24 MR. SCHWARZ: I would incorporate by reference
25 the response I made when the similar objection was made to

1 Mr. Wallis'. I think that's -- my understanding is the
2 basis for the objection is the same as stated for
3 Mr. Wallis.

4 JUDGE REGISTER: The objections -- the motion
5 to strike on the basis of the violation of
6 4 CSR 240-2.130(7) is denied and the objection is overruled.
7 Your next objection?

8 MR. STEWART: Thank you, your Honor. The next
9 would be Schedule 3, which purports to be an unsigned court
10 document between Southern Union vs. the Bishop Group. I
11 believe it's titled a Complaint. The objections to
12 Schedule 3 are that it is hearsay, there has been
13 insufficient foundation by this witness for its
14 introduction, the document itself is unsigned and
15 uncertified, and there is no court case number on the
16 document.

17 And related to that on Schedule 3 would be the
18 references to that document in Mr. Sommerer's rebuttal
19 testimony, page 5, lines 12 through 16, beginning with the
20 words "in a pleading."

21 JUDGE REGISTER: Other objections as to that
22 text?

23 MR. DUFFY: MGE is not going to join in that
24 motion.

25 JUDGE REGISTER: And Mr. Schwarz?

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1 MR. SCHWARZ: It's MGE's pleading. If MGE is
2 not challenging the authenticity of it, I would make that my
3 first observation.

4 Secondly, I think that Mr. Langston in his
5 cross-examination identified at least paragraph, I think,
6 127 -- the record will reflect the numbers -- as being
7 representative of the position, and if there is further need
8 I could inquire of Mr. Sommerer as to the source of this
9 document.

10 I would further point out that that -- and I
11 don't -- the clerical people know what that little thing
12 down at the left DLMAIN Doc, whatever. There's a term for
13 that, but I have no idea what it is, but that same kind of
14 reference is peppered, for instance, through the schedules
15 that are attached to Mr. Putman's.

16 I would simply make that observation as a
17 further verification of the voracity of the document
18 provided, but I would ask, with your permission,
19 Mr. Sommerer to explain the source of that document if you
20 think it's necessary.

21 JUDGE REGISTER: Mr. Sommerer can be
22 cross-examined as to that document and his reference to it
23 in his testimony, and the Commission will deny the motion to
24 strike and overrule the objection and ask Mr. Stewart for
25 his next objection.

1 MR. STEWART: Thank you, your Honor. In my
2 effort to try to move this along, and I know the objection
3 had already been made and overruled, but my first objection,
4 you can see on the sheet I've handed out, I forgot to
5 mention the other two grounds. That would be due process
6 and unfair surprise. I think that was discussed yesterday.
7 But just so the record is clear that we're following the
8 sheet, I did have that on sheet and misspoke and did not
9 include that.

10 JUDGE REGISTER: As to your first motion to
11 strike?

12 MR. STEWART: As to the first motion.

13 JUDGE REGISTER: We'll recognize the due
14 process and unfair surprise objection that was included in
15 your mirrored objection yesterday to Mr. Shaw's --

16 MR. SCHWARZ: And Wallis.

17 JUDGE REGISTER: -- and Wallis', excuse me,
18 thank you, testimony will be recognized and admitted into
19 this record.

20 MR. STEWART: Thank you. Moving now to
21 Sommerer rebuttal Schedule 8, it's a Draft Stipulation.
22 Purports to be a Draft Stipulation with a cover letter from
23 Mr. Rob Hack dated May 1st, '96. We object to the
24 introduction of Schedule 8 on the basis that it contains
25 hearsay, insufficient foundation as this witness did not --

1 was not involved in the actual drafting of the document.
2 The document itself contains handwritten notes. And in
3 addition to that, the document is stamped draft and
4 confidential, and under the Commission's rules
5 4 CSR 240-2.090 sub 7 it says, Facts disclosed in the course
6 of a prehearing conference and settlement offers are
7 privileged and, except by agreement, shall not be used
8 against participating parties unless fully substantiated by
9 other evidence.

10 So for all of those reasons, we would move
11 that Schedule 8 be stricken along with the related text in
12 Mr. Sommerer's rebuttal testimony, page 12, lines 11 through
13 16.

14 JUDGE REGISTER: Any other objections to be
15 noted for that schedule, Mr. Duffy?

16 MR. DUFFY: While I'm very concerned about the
17 use of privileged settlement documents, we are not going to
18 join in this particular motion under these circumstances.

19 JUDGE REGISTER: Thank you very much,
20 Mr. Duffy.

21 Mr. Schwarz?

22 MR. SCHWARZ: Well, certainly I concur with
23 Mr. Duffy that under typical circumstances, normal practice,
24 you don't go submitting drafts and so forth, but certainly
25 in the circumstances of this case the actual document, the

1 Stipulation of May 2nd, 1996 has been found to be ambiguous,
2 and I think this is perfectly appropriate as parol evidence
3 to be considered in the case.

4 I'm not quite clear about the hearsay
5 objection. I mean, Mr. Sommerer here is a representative of
6 Staff. I think it's beyond cavil at this stage that
7 Mr. Hack represented Staff in these proceedings. While he
8 may not have drafted the document himself, he was a member
9 of the Staff participating in the negotiations. He would
10 certainly have been familiar with it.

11 I'm trying to think if -- I think I've
12 addressed the objections.

13 JUDGE REGISTER: All right. Thank you,
14 Mr. Schwarz.

15 MR. STEWART: Your Honor, if I just might add
16 one thing related to the Commission's rule that I cited,
17 just so the record is clear, there's a clause in that
18 section that says except by agreement, and just so the
19 record is clear, Mid-Kansas/Riverside does not agree. Thank
20 you.

21 JUDGE REGISTER: Thank you very much,
22 Mr. Stewart. I believe that such a rule is waived when the
23 issue is -- when the Stipulation & Agreement that is at
24 issue is what is being interpreted, and I don't believe that
25 in normal circumstances, as some of the other counsel said,

1 we would normally take those kind of things, but when parol
2 evidence is being taken on the intention or the construction
3 of the Stipulation & Agreement, then those documents are
4 necessary for the Commission to review.

5 We will give them the due weight and
6 appropriate consideration in the decision-making process,
7 but the motion to strike is denied and the objection's
8 overruled.

9 MR. STEWART: Thank you, your Honor. I just
10 have one more under Sommerer rebuttal. Referencing page 15,
11 lines 8 through 14, we object to this proffered testimony as
12 being hearsay, irrelevant in this because what happens in
13 Kansas is not relevant -- in a 1977 case is not relevant to
14 the proceeding here today, nor the decision of MGE to enter
15 into the contracts on February 24th, 1995.

16 And, frankly, we also object on the basis of
17 the best evidence rule, that the Stipulation & Agreement
18 itself would be the best evidence.

19 MR. DUFFY: MGE joins in that objection, your
20 Honor.

21 JUDGE REGISTER: Mr. Schwarz, response?

22 MR. SCHWARZ: I will concede to the best
23 evidence rule and agree that those lines can be struck.

24 JUDGE REGISTER: And Exhibit 16, lines 8
25 through 14 will be stricken by the agreement of the parties.

1 Motion to strike on pages 15, lines 8 through 14 is granted
2 by agreement of the parties, and there's no need to rule on
3 the objection then.

4 MR. STEWART: Thank you, your Honor.

5 Moving now to Exhibit 17, which there's a
6 highly confidential version and a nonproprietary version.
7 My objections would go to both, of course.

8 First, we'd move to strike as a violation of
9 the Commission's direct testimony rule previously cited and
10 on the basis of lack of due process and unfair surprise
11 page 2, lines 6 through 7.

12 JUDGE REGISTER: The entire line there?

13 MR. STEWART: Yes. Page 2, lines 18 through
14 23.

15 JUDGE REGISTER: Okay.

16 MR. STEWART: Page 4, line 19, through page 8,
17 line 7; and, finally, page 8, line 21 through page 11,
18 line 15.

19 JUDGE REGISTER: Okay. Any other objections
20 based on those texts?

21 MR. DUFFY: MGE joins in that objection, your
22 Honor.

23 JUDGE REGISTER: Thank you, Mr. Duffy.

24 Mr. Schwarz?

25 MR. SCHWARZ: And again, I would just

1 incorporate by reference the arguments I made when this type
2 of motion to strike was first raised with Mr. Wallis'
3 testimony.

4 JUDGE REGISTER: Based on the violation of 4
5 CSR 240-2.130(7)?

6 MR. SCHWARZ: Right. Just as a little
7 additional comment here, I would observe that the question
8 that begins on page 8 at 21 line says, Do you agree with
9 Mr. Langston's conclusion on page 13 of his rebuttal
10 testimony. How Staff could have addressed that in its
11 direct I'm not quite sure.

12 JUDGE REGISTER: Okay. The motion to strike
13 the text cited here in this objection is denied, and the
14 objection is overruled. Please proceed.

15 MR. STEWART: Thank you, your Honor.

16 Moving to Schedule 1 of Mr. Sommerer's
17 surrebuttal, we'd move to strike Schedule 1 based on hearsay
18 objections, insufficient foundation and relevancy and lack
19 thereof, along with the accompanying text in the testimony
20 on page 4, lines 5 through 14, beginning with the words
21 "Mr. Hack."

22 JUDGE REGISTER: Okay. Any other objections
23 as to this text?

24 MR. DUFFY: MGE is not going to join in that
25 objection.

1 JUDGE REGISTER: And Mr. Schwarz, response?

2 MR. SCHWARZ: Well, I would draw the
3 Commission's attention to the -- to its own file stamp
4 contained on Schedule 1 and suggest that it can certainly
5 take official notice of its own records. So I think that
6 that should certainly deal with the insufficient foundation.

7 I don't think the letter's being offered for
8 the truth of the matter suggested, but I would ask the
9 Commission to take note that the Stipulation & Agreement,
10 which is the May 2nd, 1996 agreement, which is contained in
11 the record in any number of places, I believe, does
12 reference those same case numbers in addition to the case in
13 which this was filed 94-101/228. I think it's sufficient.

14 I would also point out that hearsay can be
15 admitted for whatever it's worth.

16 JUDGE REGISTER: Okay. The motion to strike
17 Schedule 1 and the accompanying text on page 4 is denied.
18 We'll give the document its due weight. It is filed and is
19 a public business document with the Commission, and the
20 objection will be overruled.

21 Mr. Stewart.

22 MR. STEWART: Thank you, your Honor. The next
23 item we are very concerned about. Schedule 2 to
24 Mr. Sommerer's surrebuttal purports to be testimony prepared
25 by someone named Glen D. Smith with the State Corporation

1 Commission. I'm assuming that is Kansas. This document
2 apparently was obtained by Mr. Sommerer. We have a Staff DR
3 to this effect, response, that Mr. Sommerer obtained this
4 document from the Internet.

5 We would object to its introduction today as
6 being hearsay. It's an out-of-court statement being offered
7 for the truth of the matter asserted.

8 There's insufficient foundation to accept this
9 into evidence. What happened in Kansas is irrelevant. It
10 violates 4 CSR 240-2.130 sub 7. It violates our rights to
11 have this document introduced when we have no opportunity
12 whatsoever to test the voracity of Mr. Smith.

13 And for all of those reasons, we would move to
14 have Schedule 2 stricken in its entirety, along with the
15 relating text in Mr. Sommerer's testimony, page 9, lines 1
16 through 22. That would be beginning with the words "the
17 Kansas" and ending with the number 1997, period.

18 MR. DUFFY: Your Honor, MGE would join in that
19 objection, and we'd offer as an additional basis the fact
20 that if you look at the contents of Schedule 2, on many
21 pages there are omissions of portions of the answers.
22 Apparently Kansas has the same type of protective order
23 regimen that the Missouri Commission does, and it appears
24 this would be the functional equivalent of what the Missouri
25 Commission would call an NP version, as opposed to an HC

1 version.

2 It's my understanding from representations
3 made earlier by Staff counsel that the Staff does not even
4 possess the HC portions of this document and, therefore,
5 could not provide them to us even had we asked for them.

6 So my additional basis for objection to add to
7 what Mr. Stewart has made is that this is an incomplete
8 document. We have no concept of what things were not talked
9 about, and so I think it goes to the reliability that can
10 even be assumed for this document. So we would join very
11 strongly in his motion to strike.

12 JUDGE REGISTER: Mr. Schwarz?

13 MR. SCHWARZ: Well, I would call the
14 Commission's attention to the testimony of Mr. Sommerer.
15 This testimony has been obtained and produced in order to
16 illustrate that the Kansas staff, the only other staff that
17 is looking at, possibly, at the particular contracts that
18 are at issue or the series of contracts at issue today, had
19 concerns similar to the Staff's.

20 It is not used for the purposes and should not
21 be understood to mean that the Staff endorses the voracity
22 of the Kansas Staff's positions, nor that the Kansas
23 Corporation Commission supported those. Its only purpose
24 here is to illustrate that Staff's concerns are not isolated
25 and not somehow sui generis.

1 I would point out that in considering I
2 believe it was Mr. Langley's reference to the fact that
3 make-whole provisions are common in the industry, that the
4 Commission permitted that kind of reference with respect to
5 Mr. Langley. I think Staff's entitled to the same kind of
6 latitude.

7 I think that -- I've just checked the data
8 response that Mr. Stewart indicated, and it does, in fact,
9 suggest that the document was obtained from the KCC website,
10 and I think that I can ask the Commission to take official
11 notice of the postings on the KCC website.

12 So I think -- and it should be understood that
13 the purpose is limited to establishing that other agencies
14 are also concerned with these same kinds of problems. And
15 with that, and for that limited purpose, I think it's
16 perfectly admissible.

17 MR. STEWART: May I make a brief response?

18 COMMISSIONER LUMPE: Please, Mr. Stewart, go
19 ahead.

20 MR. STEWART: First of all, as to
21 Mr. Langley's testimony, there's a very big difference
22 having Mr. Langley here sitting on the stand where
23 Mr. Schwarz can cross-examine Mr. Langley and not having
24 Mr. Smith here where he can be cross-examined.

25 Secondly, I may be totally out in left field

1 on this, but it was my understanding that the Kansas
2 Corporation Commission was reviewing contracts not by --
3 entered into by MGE, but contracts that were entered into
4 supposedly by Western. I don't believe as a matter of law
5 the Kansas Corporation Commission has any say over MGE's
6 contracts in Missouri. I would be very surprised if they
7 did. And for those reasons, I renew the objection.

8 MR. DUFFY: I would just join in that in that
9 I understood Mr. Stewart's original, the original basis as
10 to relevancy to encompass what he just said, that we are not
11 talking about the Kansas Corporation Commission reviewing
12 any kind of MGE actions at all in this document. A cursory
13 reading seems to indicate it's reviewing Western Resources
14 documents.

15 My understanding is this Commission settled
16 the issues involving the Western Resources contracts that
17 may or may not have been similar to what's going on here. I
18 can't tell from this what they were doing, but it doesn't
19 look to me like this document addresses what MGE should or
20 should not have done in February of 1995. It deals with
21 totally different parties and a totally different subject
22 matter.

23 JUDGE REGISTER: Did you have any other
24 response, Mr. Schwarz?

25 MR. SCHWARZ: Yes. I think that it's a little

1 late in the day for the parties to suggest that the
2 Missouri -- the contracts with Western with respect to
3 Mid-Kansas/Riverside weren't part and parcel of the
4 assignment of contracts to the Missouri properties. That
5 is, the record in this case is replete with references to
6 the fact that Missouri got allocated a portion of contracts
7 between Western and Mid-Kansas/Riverside.

8 And as to the observation that Mr. Langley was
9 available for cross-examination, that's quite true, but the
10 problem and the objection I made was that the documents that
11 Mr. Langley was referring to were not available, and the
12 Commission said that they would take Mr. Langley's
13 representations for what they were worth.

14 If you strike -- if you strike the document,
15 Mr. Sommerer's testimony is still perfect-- I mean, if you
16 strike the quotes, his testimony is still perfectly valid
17 under the ruling that was made for Mr. Langley, and at least
18 here you have some reference to the actual document so that
19 you can judge Mr. Sommerer's limited representation that the
20 concerns expressed were similar to the concerns that the
21 Missouri Staff has expressed.

22 JUDGE REGISTER: I'm going to start with the
23 text on 9, on page 9 of the surrebuttal. I'm going to
24 permit Mr. Sommerer to testify as to his understanding of
25 the Kansas Corporation issues. I'm going to strike the

1 testimony beginning with "Mr. Glen Smith" on line 5 of 9.

2 I'm going to grant the motion to strike in this limited
3 manner. I will strike the quotations down through line 18,
4 and I will grant the motion to strike as to Schedule 2.

5 MR. STEWART: Thank you, your Honor.

6 Moving along now to Exhibit 17, Sommerer
7 surrebuttal, Schedule 3, it's a document that purports to be
8 the prepared direct testimony of William G. Eliason -- I'm
9 not pronouncing that right I'm sure -- on behalf of a
10 company called the Kansas Gas Service Company in a docket
11 before the Federal Energy Regulatory Commission.

12 Similar to our objection to Schedule 2, we
13 object to this document being hearsay. We do not have any
14 opportunity to cross-examine Mr. Eliason. There has been
15 insufficient foundation made to introduce his testimony
16 before the FERC.

17 Frankly, the subject matter contained therein
18 is irrelevant to this proceeding, and it violates our due
19 process in not being able to cross-examine the witness along
20 with the Commission's own rule 4 CSR 240-2.130 sub 7.

21 And along with the objection to Schedule 3's
22 introduction, we'd also move to strike Mr. Sommerer's
23 testimony on page 9, line 22, through page 11, line 7. I
24 believe the wording begins "I am attaching," and would end
25 with the abbreviation of the word Missouri, period.

1 MR. DUFFY: MGE would strongly support that
2 motion to strike and for essentially the same reasons that
3 we raised with regard to Schedule 2, same problem as there.

4 JUDGE REGISTER: I don't mean to rush anything
5 here, Mr. Stewart, but this testimony on page 9 at line 25
6 also refers to Schedule 5, and I notice that's your next --

7 MR. STEWART: Yes, your Honor. We will
8 also -- I think for ease I'll go ahead and make that
9 objection as well. Schedule 5 purports to be the FERC rate
10 case transcript. We would move to have it stricken on the
11 basis that it, too, is hearsay, insufficient foundation. It
12 is irrelevant to any issue in this -- the fundamental issues
13 in this proceeding certainly, and it violates
14 4 CSR 240-2.130 sub 7 and our due process rights to
15 cross-examine the individuals that are testifying in that
16 transcript.

17 MR. DUFFY: Your Honor, we would join in that.

18 JUDGE REGISTER: Thank you, Mr. Duffy.

19 Mr. Schwarz?

20 MR. SCHWARZ: Well, Exhibit 5 is, in fact,
21 Kansas Pipeline's cross-examination of Mr. Eliason in the
22 same docket and over the same document that is provided as
23 Schedule 3.1. There is an exception to the hearsay rule
24 which provides that prior testimony can be used if the
25 witness is unavailable, and I would point out that on

1 Schedule 3.1 Mr. Eliason notes that his address is in
2 Topeka, Kansas, which is beyond the jurisdiction of this
3 Commission's subpoena powers which run to the full extent of
4 this state.

5 They certainly had -- and I would ask the
6 Commission to take official notice that MGE was a party to
7 this hearing as well. It is -- I believe that the source of
8 the documents is this Commission's own records from its
9 participation in that case. So I think that those
10 objections are adequately addressed.

11 As to the relevancy, I think that that's
12 adequately explained in Mr. Sommerer's prefiled testimony.

13 MR. STEWART: Your Honor, if I could briefly
14 respond?

15 JUDGE REGISTER: Please, Mr. Stewart, go right
16 ahead.

17 MR. STEWART: While it may be true that a
18 counsel for Mid-Kansas/Riverside may have participated in
19 that FERC proceeding and cross-examined, the issues
20 presented in the FERC proceeding and the questions that
21 would have been asked are quite a bit different than the
22 questions facing this Commission in this case.

23 And I don't see how any -- the issue, for
24 example, I'll give you an example. MGE's prudence of
25 entering into the February 25th, 1995 contracts is nowhere

1 in that transcript. Again, they are two separate forums,
2 two separate proceedings, two totally different sets of
3 issues, and I would renew any objection.

4 MR. SCHWARZ: If I may, much of Mr. Eliason's
5 testimony goes to the quality of service provided by
6 Riverside/Mid-Kansas, and there has certainly been a fair
7 amount of inquiry in this case along those lines, whether,
8 for instance, Williams' service and Riverside/Mid-Kansas is
9 similar and coequal.

10 If the Commission wishes to limit the use of
11 the testimony to those portions, I'd be willing to stipulate
12 to that as well.

13 JUDGE REGISTER: Okay. I'm going to deny the
14 motion to strike on the basis that there's a limited use for
15 this document. There's been a lot of discussion about the
16 filed rate doctrines and the KCC decision, quality of
17 service, and that these are official documents we can take
18 official notice of from the proceedings that they're in, and
19 cross-examination was had in that proceeding.

20 Therefore, I'm going to deny the motion to
21 strike and overrule the objections.

22 MR. STEWART: May I have just one moment?

23 JUDGE REGISTER: Go right ahead.

24 MR. STEWART: I'd like the record to reflect,
25 and I'm certainly not questioning your ruling, but I would

1 just like to put on the record that the Schedule 5 that was
2 just admitted for the limited purpose, I believe the case
3 there involved a party known as Kansas Pipeline. The party
4 here today is Riverside/Mid-Kansas. And so I just want the
5 record to reflect that we do not -- they're not the same
6 exact parties.

7 I just have one more.

8 MR. SCHWARZ: I'd like a clarification of
9 that. Is he suggesting that Kansas Pipeline Company is not
10 a successor in interest to Mid-Kansas/Riverside? Is he
11 suggesting that there is a distinction of that nature to be
12 made? Because I understood from --

13 JUDGE REGISTER: Wait a minute. Let me just
14 ask, Mr. Schwarz, is it your position that Mid-Kansas is a
15 successor in interest to Kansas Pipeline?

16 MR. SCHWARZ: I think that the testimony of
17 Mr. Langley would support such an understanding. It's my
18 understanding, and I think at least Mr. Langley's testimony
19 in this case supports that.

20 JUDGE REGISTER: Okay. All comments are noted
21 for the record, and we'll move on to the next objection.

22 MR. STEWART: Okay. Finally, again
23 Exhibit 17, Sommerer surrebuttal, there is a quote from, I
24 guess, some KCC testimony, page 7, line 10, through page 8,
25 line 7. I'm trying to get to that myself here. Page 7,

1 line 10, through page 8, line 7.

2 We would move to strike those provisions
3 contained in the testimony on the basis of hearsay,
4 insufficient foundation, the fact that it is irrelevant to
5 this proceeding, it violates our due process rights in not
6 being able to cross-examine, and finally 4 CSR 24-2.130
7 sub 7.

8 MR. DUFFY: MGE joins in that objection, your
9 Honor.

10 JUDGE REGISTER: Mr. Schwarz?

11 MR. SCHWARZ: Staff will consent to the
12 striking of that portion of the testimony without conceding
13 necessarily the validity of any particular objection.

14 JUDGE REGISTER: Okay.

15 MR. STEWART: Your Honor, I was making a note.
16 I apologize.

17 JUDGE REGISTER: Is that something new or is
18 this an objection?

19 MR. STEWART: It's just a clarification of
20 something that happened earlier.

21 JUDGE REGISTER: Let me finish on this
22 objection and then I'll let you go back. The motion to
23 strike page 7, line 10, through page 8, line 7, is conceded
24 by Staff without objection; therefore, on that basis
25 granted, and, therefore, those portions will be stricken

1 from the record.

2 All right. Now, Mr. Stewart, you had a matter
3 to clarify?

4 MR. STEWART: Clarification. We took my
5 objections to Schedule 3 and Schedule 5 together. Did your
6 ruling encompass allowing the Eliason FERC testimony in as
7 well as the transcript?

8 JUDGE REGISTER: Yes. Both schedules were --
9 the motion to strike both schedules was denied.

10 MR. STEWART: Thank you.

11 JUDGE REGISTER: Thank you. Okay. Any
12 further objections to these two documents?

13 (No response.)

14 Okay. Hearing no further objections,
15 Exhibit 16 -- I'm going to take 16 first -- with the
16 portions stricken as identified in the objections shall be
17 admitted into evidence with those portions that are attached
18 given the appropriate and due weight and consideration by
19 the Commission.

20 (EXHIBIT NO. 16 WAS RECEIVED INTO EVIDENCE.)

21 JUDGE REGISTER: And Exhibit No. 17HP and NC
22 will be admitted into the record.

23 MR. DUFFY: You said NP and NC.

24 JUDGE REGISTER: Thank you. It's Friday. The
25 Exhibits 17HC and NP shall be admitted into the record as

1 amended by the portions that have been stricken by virtue of
2 the motions to strike that have been granted, and the
3 Commission shall give the due and proper weight to all the
4 attachments and references in that testimony in its
5 consideration of the evidence.

6 (EXHIBIT NOS. 17NP AND 17HC WERE RECEIVED INTO
7 EVIDENCE.)

8 JUDGE REGISTER: With that, I believe that
9 we -- before I move on, I wanted to make sure. We had
10 identified Exhibit 25 earlier, and everyone got a copy
11 earlier, but I'm not sure that I ever admitted it into
12 evidence or took official notice of it. So I wanted to go
13 ahead and do that at this time.

14 I didn't hear any objections earlier when we
15 circulated it, but I wanted to make sure. This was
16 testimony or the transcript of the volume of the hearing
17 involving the Stipulation & Agreement in GR-94-101 and
18 GR-94-228 that referred to the presentation of the
19 Stipulation & Agreement.

20 MR. DUFFY: Your Honor, on the assumption that
21 it's what it is purported to be, and I have not had the
22 opportunity to try to determine whether or it is or not, I
23 don't doubt that it is, but I guess if I have some problem
24 with it I would like to be able to raise that after
25 comparing it to the original simply because I haven't had

1 that opportunity. On the face of it, it appears to be what
2 it is purported to be. I guess I would just like that
3 reservation noted for the record.

4 JUDGE REGISTER: If you find any problem with
5 the authenticity or problems with copying, those kinds of
6 things, of course, you may notify us of those problems
7 later.

8 Mr. Stewart?

9 MR. STEWART: I'd just like the record to
10 reflect we have the same concern and we'd like to make the
11 same reservation.

12 JUDGE REGISTER: If you could take a look at
13 those documents, can you let me know if there's a problem by
14 the end of the day?

15 MR. DUFFY: That's unlikely since I'm going to
16 be here probably through. I would commit to -- how about if
17 I commit to let you know in -- if I don't file something in
18 writing by close of business on Tuesday of next week, the
19 Commission can assume I don't have a problem with it. Would
20 that be all right?

21 JUDGE REGISTER: That's acceptable.
22 Mr. Stewart?

23 MR. STEWART: That's acceptable to us.

24 JUDGE REGISTER: And subject to those
25 reservations, this Exhibit 25 will be admitted into the

1 record.

2 (EXHIBIT NO. 25 WAS RECEIVED INTO EVIDENCE.)

3 JUDGE REGISTER: Okay. Then for Mr. Sommerer,
4 he has been tendered for cross-examination, and
5 cross-examination begins with Public Counsel. Mr. Micheel?

6 MR. MICHEEL: No questions for Mr. Sommerer at
7 this time, your Honor.

8 JUDGE REGISTER: Thank you very much. Okay.
9 And Mr. Conrad is waiving by his absence cross-examination.
10 He did indicate to me after we were on our way out the door
11 last night that he was thinking about leaving the remainder
12 of the proceeding. So just so I don't leave this record as
13 implying that he's just vanished, it's my understanding he
14 might not have returned today.

15 MR. SCHWARZ: An option not available to the
16 rest of us.

17 JUDGE REGISTER: Okay. Kansas City, Missouri
18 and Williams waived their cross-examination, and that takes
19 us to Mr. Duffy. Mr. Duffy, we're at 11:35. Do you want to
20 get started on your cross-examination?

21 MR. DUFFY: I have a suggestion. If I'm
22 allowed to absent myself for about two minutes from the
23 hearing room, I would be able to finish my cross-examination
24 before noon.

25 JUDGE REGISTER: Okay. We need to take just a

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1 short break right now then.

2 MR. DUFFY: That would be great.

3 JUDGE REGISTER: We'll go off the record, just
4 take a short break.

5 (A BREAK WAS TAKEN.)

6 JUDGE REGISTER: We will go back on the
7 record, and we are ready for Mr. Duffy to begin his
8 cross-examination.

9 MR. DUFFY: Thank you, your Honor.

10 CROSS-EXAMINATION BY MR. DUFFY:

11 Q. Good morning, Mr. Sommerer.

12 A. Good morning.

13 Q. I want to direct your attention first to your
14 rebuttal testimony, Exhibit 16, page 8.

15 A. I'm there.

16 Q. Beginning on about line 15 and continuing
17 through the next page on line 6, I believe you indicate
18 there that Missouri Gas Energy sought clarifications to the
19 Draft Stipulation & Agreement.

20 My question is, isn't it possible that these
21 clarifications were to clarify the understanding of the
22 intent of the Stipulation as MGE understood it, not as the
23 Staff may have understood it?

24 A. That's possible.

25 Q. On page 14 of your rebuttal, starting on about

1 line 20, I believe your argument there is that, and you say
2 it expressly on lines 21 and 22, that the excessive gas cost
3 is primarily attributable to the high fixed reservation
4 charges on Kansas Pipeline Company as opposed to the
5 Williams system.

6 My question to you is, were those fixed
7 reservation charges established in Orders of the Kansas
8 Corporation Commission and the FERC?

9 A. Yes, they were.

10 Q. Let's turn to your surrebuttal testimony now,
11 Exhibit 17, and I don't believe I'm going to ask you
12 anything that's HC. So I don't think it matters which
13 version we look at.

14 I'm on page 3 of your surrebuttal at lines 7
15 and 8, and I read your testimony there to say that MGE
16 replaced a Kansas Power & Light gas service contract that
17 the Commission has found imprudent with a contract that
18 contains the same imprudent terms and conditions.

19 My question to you is, when exactly did the
20 Commission make its imprudence finding in Case
21 No. GR-93-140? What's the date of that Order, in other
22 words?

23 MR. SCHWARZ: Staff will stipulate that it was
24 July of 1995, if that's helpful.

25 JUDGE REGISTER: Is that acceptable to you,

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1 Mr. Duffy?

2 MR. DUFFY: It is to me. I'd like know if
3 it's acceptable to the witness, because it looked like he
4 was scurrying through documents trying to find it.

5 THE WITNESS: I have a copy of that Order.
6 It's Schedule 2-1 to my rebuttal testimony. The issue date
7 was July the 14th, 1995, the effective date July the 25th,
8 1995.

9 BY MR. DUFFY:

10 Q. And the contract that you're talking about or
11 the contract we're talking about here was entered into by
12 MGE on February 24th, 1995; isn't that right?

13 A. That's right.

14 Q. So the Commission made these findings of
15 imprudence that you're talking about five months after MGE
16 negotiated and executed the Mid-Kansas II contract, correct?

17 A. That's correct.

18 Q. Let's turn to page 8 of your surrebuttal. I
19 want to ask you about the volumes that are shown on lines 16
20 and 17 of your testimony there. Do you see that?

21 A. Yes.

22 Q. Is it possible that the volume reductions on
23 Mid-Kansas/Riverside that are reflected in lines 16 and 17
24 were replaced with volumes taken by Missouri Gas Energy via
25 the Pony Express Pipeline from Wyoming?

1 A. That is possible.

2 Q. Do you know whether that's true one way or the
3 other?

4 A. No, I do not.

5 Q. On that same page, lines 18 and 20, you say
6 that the rates paid to Mid-Kansas/Riverside are based on
7 straight fixed variable rate design which collects the
8 majority of the costs through the reservation charge
9 regardless of consumption.

10 My question to you is, isn't it true that the
11 straight fixed variable rate design is the result of a
12 regulatory agency's ruling as opposed to a contract
13 provision?

14 A. That's correct.

15 Q. And which regulatory agency or agencies would
16 that be in this instance?

17 A. It would have been the Federal Energy
18 Regulatory Commission and the Kansas Corporation Commission,
19 although I would like to clarify that I am not aware
20 specifically of the rate design principles established by
21 the Kansas Corporation Commission.

22 MR. DUFFY: That's all the questions I have,
23 your Honor.

24 JUDGE REGISTER: Thank you very much,
25 Mr. Duffy. It's 10 minutes to 12.

1 MR. STEWART: I have one quick question.

2 JUDGE REGISTER: Mr. Stewart, you may

3 cross-examine, then.

4 CROSS-EXAMINATION BY MR. STEWART:

5 Q. Good morning, Mr. Sommerer.

6 A. Good morning.

7 MR. STEWART: May I approach the witness,

8 please?

9 JUDGE REGISTER: Go right ahead.

10 BY MR. STEWART:

11 Q. I'm showing you what purports to be a letter

12 from Mr. Schwarz providing Staff Data Request responses to

13 Mid-Kansas/Riverside. What I'd like for you to do, please,

14 is, could you read -- do you recognize DMS-5 as a Data

15 Request that you would have responded to?

16 A. Yes.

17 Q. Could I have you read DMS-5, paragraph F, the

18 question and then your response?

19 A. DMS-5. On pages 5-12 you discuss Staff's

20 interpretation of the May 2nd, 1996 Stipulation & Agreement.

21 Please respond to the following: Section F, the response,

22 is Staff challenging -- actually, it looks like it's an

23 additional question. That's right.

24 Section F, the question is, Is Staff

25 challenging the decisions associated with the execution of

1 the Mid-Kansas II agreement or is Staff challenging the
2 transportation rates and gas costs charged pursuant to the
3 Mid-Kansas II agreement or is Staff challenging something
4 else associated with the Mid-Kansas II agreement? If Staff
5 is challenging something else associated with the
6 Mid-Kansas II agreement, please specifically identify what
7 Staff is challenging.

8 And the response is, The Staff is challenging
9 the transportation rates and gas costs charged pursuant to
10 the Mid-Kansas II agreement. Staff asserts that incurring
11 such above market costs was imprudent.

12 Q. Mr. Sommerer, could you tell us the date that
13 your response was submitted to us?

14 A. The cover letter says January the 13th, 1999.

15 MR. STEWART: Thank you, your Honor. That's
16 all I have.

17 JUDGE REGISTER: All right. Thank you very
18 much. That completes cross-examination, and we will break
19 at this time for lunch and come back at one o'clock and
20 reconvene. We're off the record.

21 (A BREAK WAS TAKEN.)

22 JUDGE REGISTER: I think we are ready to go on
23 the record. Is there any preliminary matter that we need to
24 resolve before we proceed with examination from the Bench?

25 Hearing none, I will ask Commissioner Murray

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1 if she would like to begin.

2 COMMISSIONER MURRAY: Thank you, Judge.

3 QUESTIONS BY COMMISSIONER MURRAY:

4 Q. Good afternoon, Mr. Sommerer.

5 A. Good afternoon, Commissioner.

6 Q. In your testimony, your surrebuttal, page 9,
7 line 1, you indicate there that the Kansas experience is
8 illustrative. Do you see that?

9 A. You're in my surrebuttal testimony, page 9?

10 Q. Yes.

11 A. I'm there.

12 Q. And I think what you're saying is that it is
13 illustrative that MGE could have negotiated rates on the
14 Mid-Kansas/Riverside system down to levels comparable to the
15 Williams system; is that correct?

16 A. That's correct.

17 Q. And then you go on a little bit later to speak
18 of a settlement agreement that the parties made and that was
19 approved by the Kansas Corporation Commission on July 29,
20 1997; is that correct?

21 A. That's correct.

22 Q. And you cite some testimony that was filed by
23 William G. Eliason on behalf of KGSC in the FERC Docket
24 No. RP-99-485000; is that right?

25 A. That's right.

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1 Q. And that testimony is attached as your
2 Schedule 3?

3 A. Yes.

4 Q. And in that schedule, on page 18, the
5 testimony states, beginning about line 10, Among the
6 highlights of the settlement agreement are that. Do you see
7 that?

8 A. Yes.

9 Q. And that's the highlights of the settlement
10 agreement that the Kansas Corporation Commission approved on
11 July 29, 1997; is that right?

12 A. That's correct. Excuse me. That's correct.

13 Q. And I'd just like to go through some of those
14 with you to see if I understand what it is that you're
15 trying to do by bringing in the Kansas experience.

16 There were rates that were agreed to for a
17 period of four years beginning in August '97 through
18 July 31, 2001; is that right?

19 A. Yes.

20 Q. And then it was agreed that KPC would refund
21 approximately seven and a half million dollars to Western?

22 A. That's correct.

23 Q. Would cease its merchant function immediately,
24 correct?

25 A. Yes.

1 Q. And then on the date of August 1st, '98 there
2 would be a slight step-down in the Zone 3 reservation rate,
3 and I'm assuming that was a fairly minor step-down. Is that
4 your understanding?

5 A. That's my understanding, yes.

6 Q. But then what I'm really trying to get to here
7 is Item No. 5, Beginning August 1, 2001, KPC would decrease
8 its rates to competitive rates which the parties agreed
9 would be the WGPC firm rates for deliveries into Kansas City
10 and Wichita.

11 And is that the portion of that settlement
12 agreement that you think is relevant here to show that there
13 should have been better terms negotiated in Missouri?

14 A. Yes.

15 Q. And is it not true that any benefit, any
16 real -- any substantial benefit resulting from the
17 negotiations in the Kansas agreement didn't begin until
18 August 1, were not set to begin until August 1, 2001?

19 A. That's my understanding of the agreement, yes.

20 Q. So if the Missouri agreement had been
21 renegotiated similarly to the negotiations that took place
22 in Kansas, even assuming that the facts were extremely
23 similar and that the negotiation could have been almost
24 parallel, it appears that the benefits would not have
25 applied to the ACA period that we are now looking at here in

1 Missouri; is that right?

2 A. I believe that's correct, yes.

3 Q. And then I'd like to ask you, No. 6 there,
4 which goes on to page 19 of Schedule 3-19 -- of Schedule 3
5 rather, on August 1, 2004, the settlement agreement allowed
6 KPC to file for an increase in rates up to a cost of service
7 of \$27.9 million.

8 Now, is there anything in the Missouri
9 agreement, the Mid-Kansas II agreement, that allows a filing
10 for an increase in rates at any period in time?

11 A. No.

12 Q. And then on No. 8, I don't understand No. 8.
13 Can you explain that to me? That's at line 5.

14 A. Yes. It appears that Western Resources, which
15 is the predecessor of Missouri Gas Energy, in this
16 particular instance as part of the settlement agreement made
17 a payment to Kansas Pipeline Company, which is the successor
18 of Mid-Kansas/Riverside, for \$7.5 million.

19 Q. And back at No. 2, KPC would refund
20 approximately seven and one half million dollars to Western.
21 It seems like that's a direct opposite. Is that --

22 A. It looks like they're offsetting payments.
23 They appear to be for different issues, but they are for the
24 same amount.

25 Q. So that really in the Kansas agreement, KPC --

1 there was no net monetary payment to Western; is that right?

2 A. I believe that's correct, yes.

3 Q. And then No. 10, the Staff of the Kansas
4 Corporation Commission agreed not to challenge Western's
5 prudence during the remaining term of Western's contracts
6 with KPC. Do you see that?

7 A. Yes.

8 Q. Okay. And I started out in asking you about
9 this because I wanted to make sure that the reason you're
10 including the Kansas experience in your testimony is to
11 illustrate Staff's belief that MGE could have negotiated
12 rates on the Mid-Kansas/Riverside system down to levels
13 comparable to the Williams system, and you said that was
14 correct; is that right?

15 A. That's correct.

16 Q. And yet if you compare the terms that were
17 given in Kansas to the terms that MGE renegotiated in
18 Missouri, it seems that there were a lot of terms in the
19 Kansas agreement that would have been what Staff would
20 consider detrimental, were there not?

21 A. I would agree with that assessment, yes.

22 Q. And that any benefit that was included in the
23 Kansas agreement in terms of rates did not begin, was not
24 scheduled to begin until August 1, 2001?

25 A. Yes, I believe that's correct.

1 COMMISSIONER MURRAY: I believe that's all I
2 have, your Honor. Thank you.

3 JUDGE REGISTER: Thank you, Commissioner
4 Murray.

5 Commissioner Lumpe, would you like to examine?

6 QUESTIONS BY COMMISSIONER LUMPE:

7 Q. Just briefly, Mr. Sommerer.

8 Looking on page 2 of your surrebuttal, and if
9 anything is stricken, just let me know. And on page -- on
10 line 5 where you start to answer no, what time frame are we
11 in in this discussion? Am I in the '96 time frame or am I
12 in today's time frame?

13 A. My response is worded to address
14 Mr. Langston's rebuttal testimony.

15 Q. Okay. So it specifically goes to his
16 testimony; is that correct?

17 A. That's correct.

18 Q. Okay. I'm assuming -- well, the time frame of
19 his testimony is what?

20 A. I think rebuttal testimony in this case was
21 filed in December of 1998.

22 Q. Okay. Page 6 of your surrebuttal, and there
23 you're giving us a sequence of what occurred and the times
24 when they occurred; is that correct?

25 A. Yes.

1 Q. And on line 12 where you say that on
2 February 24th, just after the hearing on the prudence of the
3 '91 contract, MGE executed two new agreements, would you
4 tell me which the two new ones that we're talking about
5 there are? It says subject of this proceeding, and I
6 thought this proceeding was the MK-II. What is the other
7 one?

8 A. Yes. That was referring to the MK-II
9 agreement and the Riverside I agreement. Actually, the
10 costs that are associated with this particular ACA period
11 only relate to the Mid-Kansas II agreement. The
12 Riverside II -- or the Riverside I agreement is a
13 continuation or the newer contract of the two.

14 Q. And then on page 11, line 13, One of the many
15 common threads between Kansas and Missouri is the pattern of
16 signing Stipulations & Agreements that ultimately end up in
17 court because of differences in opinion on the meaning of
18 key provisions. That hasn't changed, has it?

19 A. No, it has not.

20 Q. Is there any way to determine, other than what
21 we're going through now, what people meant at the time?

22 A. I'm convinced that you have to do what you are
23 doing right now and use your best judgment to look at the
24 terms of the May 2nd Stipulation & Agreement, and we would
25 hope that you would also consider some supplementary drafts

1 which I think provide some background to how we got to the
2 various portions or provisions of the Stipulation. I think
3 that might help and be of assistance, but I really can't
4 offer you anything other than that.

5 Q. Well, one other document you provided, I
6 believe, or someone did, was the Commission's Order, and
7 that would be another document to look at to determine
8 intent?

9 A. I think that lets you know for that particular
10 Commission that approved that Order, that developed the
11 Order, that was their understanding of the Stipulation &
12 Agreement, and I think that's useful as well. That should
13 be looked at.

14 Q. So other than -- and then calling the various
15 people that were there at the time to, assuming they're
16 still with us, to find out what their actual intent was
17 also, and that's the way we get to the intent?

18 A. Yes.

19 Q. All right. And one other one. As I
20 understand it, the '93 case, there was a disallowance in
21 that case and it went to court; is that correct?

22 A. Yeah. GR-93-140 had a disallowance of
23 approximately \$1.3 million, and that was appealed.

24 Q. All right. And then based on that, is that
25 where the assumption of Staff came from, knowing those

1 problems with that particular case, that in '94, '95, '96
2 the company would have addressed those concerns in new
3 contracts? Is that Staff's feeling?

4 A. The company wouldn't have known about the
5 Order in GR-93-140 because it signed the contracts in
6 February of '95, and the Order in GR-93-140 came out in July
7 of 1995.

8 Q. So they would not have known the specific
9 concerns that were addressed in the '93 case?

10 A. They would have known of Staff's concerns
11 because I believe the hearing was in early February of '95,
12 but they would not have known the Commission's decision.

13 Q. Decision, but they would have known Staff's
14 concerns about what issues you had concerns?

15 A. That's correct.

16 COMMISSIONER LUMPE: All right. Thank you.
17 That's all I have, Mr. Sommerer.

18 MR. DUFFY: Your Honor?

19 JUDGE REGISTER: Yes, Mr. Duffy.

20 MR. DUFFY: There was a remark made by
21 Commissioner Lumpe, and my memory may be bad and your
22 transcript may show it, but my recollection is she said
23 something about calling the people that were involved at the
24 time, and I don't know whether the Commissioner was
25 referring to calling those people as witnesses in this

1 proceeding or whether she was implying that the members of
2 the Bench could pick up the telephone and call people and
3 ask them about things.

4 COMMISSIONER LUMPE: Oh, absolutely not. I
5 meant as witnesses in the case.

6 MR. DUFFY: Okay. Great. That's fine.

7 COMMISSIONER LUMPE: I think I understand my
8 obligations as a Commissioner. I certainly hope so. I do
9 not -- I would certainly not pick up a phone and ask
10 somebody what were they doing back in '96.

11 MR. DUFFY: Okay. I didn't understand from
12 the use of the word calling exactly --

13 COMMISSIONER LUMPE: I meant calling them as
14 witnesses here. I'm sorry.

15 JUDGE REGISTER: Thank you, Mr. Duffy.

16 Commissioner Gaw, would you like to examine
17 the witness?

18 COMMISSIONER GAW: Thank you, Judge.

19 QUESTIONS BY COMMISSIONER GAW:

20 Q. Mr. Sommerer, good afternoon.

21 A. Good afternoon.

22 Q. You're familiar with this case for how long?
23 Let me strike that.

24 You're familiar with Western Resources for how
25 long?

1 A. Western Resources as a company?

2 Q. Yes, just approximately.

3 A. I would say approximately the late 1980s.

4 Q. All right. Are you familiar with the transfer

5 of assets from Western Resources to MGE, or Southern Union I

6 guess would be more appropriate?

7 A. Yes.

8 Q. And what kind of a transaction was that, if

9 you know?

10 A. I believe it was a purchase of assets. It was

11 the sale from Western Resources to Southern Union of most of

12 the Missouri natural gas properties of Western Resources.

13 Q. And are you familiar with the contract

14 involved in that transaction between those parties?

15 A. Not in great detail, no.

16 Q. That would have been a negotiated, contract,

17 though, I would assume, between those parties?

18 A. Yes.

19 Q. And was that contract a contract that would

20 have been approved by the Missouri Public Service

21 Commission?

22 A. I'm not sure when the Commission approves of

23 the application for the sale, which is what I believe the

24 application asked for, that it approves the contract.

25 Q. But do you believe the Commission would have

1 at some point in time had to have approved the sale of those
2 assets?

3 A. Yes.

4 Q. Were you involved or are you familiar with the
5 review that was done at that time, or have you become
6 familiar with it since?

7 A. I'm generally familiar with it, yes.

8 Q. Would it have been normal for Staff to have
9 looked at the obligations that might have gone along with
10 the transfer of assets in a case of that sort, and
11 specifically I'm talking about contractual obligations such
12 as the two contracts that were in effect and classified as
13 Missouri agreements under the Stipulation that was signed on
14 May 2nd, 1996?

15 A. I know that the Staff attempts to identify any
16 detriment to the public interest, which I believe that's the
17 standard, and in doing so I believe that the Staff would
18 have looked at any material transaction that was associated
19 with the sale. It would have attempted to identify what's
20 going to change before versus after the sale is completed.
21 Did it look at each contract that was attached to the sale
22 agreement? That I don't know.

23 Q. Would you suggest that that would have been an
24 appropriate time for the Staff to have looked at the
25 prudence of the assumption of the two contracts listed in

1 subparagraph 4 of the Stipulation signed on May 2nd, 1996?

2 A. No, I don't believe that would have been the
3 appropriate time.

4 Q. Do you believe that the decision that was made
5 by MGE to assume those contracts at the time that they
6 entered into the contract to purchase the assets of Western
7 Resources was a prudent one?

8 A. I don't believe so, no.

9 Q. And I'm going to let you explain that, if you
10 would, please.

11 A. I think it's typical when a company is in the
12 process of buying another company, there's a due diligence
13 process where they're trying to look at the underlying
14 obligations, liabilities, valuing the assets, and it's
15 supposed to be a fairly intense process to make sure you
16 know what you're buying.

17 And in that due diligence process, I believed
18 it would have been appropriate for Southern Union to closely
19 review the natural gas supply contracts because they were in
20 essence being assigned a certain portion of the gas supply
21 that served Missouri.

22 And in that process, Southern Union had the
23 ability to potentially negotiate a different price for the
24 sale or discuss an appropriate allocation of the contracts
25 to come over as part of the sale.

1 Q. Does that evaluation of your view of the
2 prudence assuming those contracts also impact your analysis
3 as to the prudence of the company in this ACA period even
4 though we're jumping a couple of contracts? Is it a
5 relevant factor in your mind in how we got to this point?

6 A. I think so. That's why I tried to give some
7 history and provide the time line, because I think that the
8 history of how Missouri Gas Energy ended up with these
9 agreements, the original agreements anyway, is important to
10 know. It's a critical part of the decision-making process.

11 Q. If you were analyzing simply the decision of
12 MGE and albeit Southern Union to negotiate a contract as
13 they did in, I guess it would be Mid-Kansas II; is that
14 correct?

15 A. That is the February 24th, 1995 agreement
16 that's at issue in this case.

17 Q. Yes. If you were just to analyze their
18 negotiation of that contract in comparison to the contract
19 that they were obligated under prior to that as a result of
20 assuming the contract from Western Resources, would you say
21 they got better deal than they had before?

22 A. Yes, they did.

23 Q. And so when you're rendering an opinion in
24 regard to prudence, you are really looking at a broader
25 spectrum than just that particular event of renegotiating

1 the contract, aren't you? If you need me to restate that, I
2 will.

3 A. I think I understand what you're saying, and
4 we certainly thought it was important to consider what
5 happened well prior to February of 1995 when the agreement
6 was being negotiated.

7 Q. If MGE not had not had the ability to make a
8 decision regarding the acceptance of that contract from
9 Western Resources, if they for some reason, and I don't know
10 what that might have been, but for some reason would have
11 been forced to assume that contract, would their
12 renegotiation under the terms of Mid-Kansas II have been an
13 imprudent decision under those circumstances?

14 A. A lot of the foundation for the Staff's case
15 goes back to the Mid-Kansas I agreement and the removal of
16 the price cap, and so we would have looked at Mid-Kansas II,
17 assuming that you couldn't possibly have done anything with
18 Mid-Kansas I, you were just stuck with it, more on a
19 stand-alone basis.

20 And if you disregard all the history, I think
21 it would have been much more difficult for the Staff to go
22 forward with a prudence disallowance.

23 I would really like to give it more
24 consideration, but I think if MGE was truly trapped, was
25 stuck with that agreement through no fault of its own and

1 then tried to improve a bad situation that it had no part
2 in, then it just makes the argument much more difficult to
3 make, and I'm not so sure we would have gone forward with a
4 prudence adjustment.

5 Q. Do you believe that MGE had sufficient
6 leverage with the parties signed onto Mid-Kansas II with
7 them to negotiate a better agreement than they did in
8 Mid-Kansas II?

9 A. I don't know. I believe they had a
10 substantial amount of leverage based upon the things that
11 we've brought up, withholding of the payment and the
12 District Court case civil litigation, but I really don't
13 know if they would have had enough leverage, given that they
14 were locked into a term through the year 2009, to bring the
15 rates down any lower.

16 COMMISSIONER GAW: I think that's all I have.
17 Thank you, Mr. Sommerer.

18 THE WITNESS: You're welcome.

19 JUDGE REGISTER: Commissioner Lumpe?

20 FURTHER QUESTIONS BY COMMISSIONER LUMPE:

21 Q. Just two more, Mr. Sommerer.

22 A. Certainly.

23 Q. The agreement went out to the year 2009; is
24 that correct?

25 A. That's the Mid-Kansas I agreement and --

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1 Q. And the negotiated one?

2 A. -- the negotiated, the Mid-Kansas II.

3 Q. Would it have been possible for the parties to

4 do another agreement that they could have extended without

5 coming to the Commission?

6 A. I'm not sure I follow your question.

7 Q. In other words, the agreement that now

8 currently would end in 2009, could the parties at some later

9 date, assuming they still existed and all that, could they

10 have done an additional negotiation and extend the terms of

11 the contract without going back to the Commission?

12 A. I think that's possible, that any two parties,

13 and those are the only two parties that I know of to the

14 agreement, could go in and attempt to renegotiate if both

15 were willing.

16 Q. So if the assumption is that there was no

17 prudence review at least until 2009, had they renegotiated

18 and extended that out to 2020, there conceivably would be no

19 prudence reviews ad infinitum?

20 A. That's my understanding of the company's

21 position in this case.

22 Q. And I have one more. On page 7 where you talk

23 about the, at the top of the page, MGE signed two contracts

24 on February 24, 1995, the one -- the first being the sales

25 contract that had favorable gas supply commodity rate, but

1 that favorable gas supply rate ended June '98. That's the
2 testimony, right?

3 A. Yes.

4 Q. So it wasn't a favorable supply up until 2009,
5 it had an ending date of for three years or was it in effect
6 three years or --

7 A. My understanding of the Mid-Kansas II
8 agreement was that the effective date was June 1st of 1995,
9 and that it expired and went over to the Riverside I
10 contract in June of 1998. It may have been actually
11 May 11th of 1998, is the date that has been quoted as the
12 date of FERC jurisdiction over the rates. And so that would
13 have been, it appears to be three years.

14 Q. Okay. And since it went to the FERC
15 jurisdiction, it didn't revert to whatever rates were in the
16 first contract, then, or what did you call it, the
17 Riverside I? The rates didn't revert back to original rates
18 when it went into FERC jurisdiction; is that correct?

19 A. Yes. And once it went into FERC jurisdiction,
20 it became a transportation-only contract, and so MGE would
21 have had to have gone out to the market and gotten whatever
22 the going rate was for that supply.

23 COMMISSIONER LUMPE: Thank you, Mr. Sommerer.

24 JUDGE REGISTER: Commissioners, any other
25 questions?

1 I just have a few questions for Mr. Sommerer,
2 and then we will be finished with the Bench questions.

3 QUESTIONS BY JUDGE REGISTER:

4 Q. On Exhibit 17 of your prefiled testimony,
5 page 2, I just wanted to clarify. I think Commissioner
6 Lumpe was asking about the time frame here, and I wasn't
7 sure about how that applied there. So I wanted to make sure
8 I was clear on that.

9 On line 5, you start with your response. The
10 question was, Mr. Langston criticizes what he calls Staff's
11 basis for the proposed disallowance on page 5, lines 3
12 through 5, and you say, No, first of all. You're referring
13 to his rebuttal testimony there, is what you said, I think?

14 A. Yes.

15 Q. But the time frame for the adjustment that is
16 involved there or that's referred to in that first sentence,
17 the adjustment is for the 1996-1997 ACA period?

18 A. That's correct.

19 Q. And the difference between the Williams
20 Pipeline Central and the rates and the Mid-Kansas/Riverside
21 rates, the approximate double rates there, when was that
22 difference in place?

23 A. That goes back to a graph that I had, I
24 believe, in my rebuttal testimony, Schedule 9-1.

25 Q. So the rates that are referred to on the graph

1 on 9-1 are for what period of time?

2 A. They relate to the '96-'97 period, In some
3 cases the rates changed because of a FERC change, possibly
4 because of a KCC change, and what I tried to do just for
5 illustrative purposes was to go in and look at '96-'97 for
6 the rates that were predominantly in effect. So these would
7 have been the rates that for most of the months during the
8 audit period of '96-'97 were in effect and invoiced to
9 Missouri Gas Energy.

10 Q. Okay. And I want to just make sure,
11 Exhibit 9-1 or Schedule 9-1 to Exhibit 16 is a document you
12 prepared?

13 A. That is correct.

14 Q. And then I'll ask you to go to Exhibit 17,
15 page 6, and the sentence that begins on line 13, "these
16 agreements." I'm sorry. 14 also has the line. It's 14,
17 These, going to line 15, agreements essentially continued
18 the high rates that resulted from the pancaking of several
19 Mid-Kansas/Riverside affiliated interstate pipelines in
20 Kansas.

21 What do you mean by pancaking? Can you define
22 that term for me?

23 A. Yes. Historically when the pipeline, the
24 Mid-Kansas/Riverside pipeline was under KCC regulation, it
25 was actually a group of pipelines. Some of the pipelines

1 were KCC regulated, Kansas Corporation Commission. They
2 were intrastate. A couple of the pipelines were actually
3 FERC regulated.

4 And so the Staff's point has been that perhaps
5 the reason why the reservation rates are so high is because
6 of the cost of service rates added altogether pancaked on
7 top of one another for these four or five pipelines.

8 Q. Now, I'm going to go through with you, I
9 think, what I have through the testimony and exhibits have,
10 I think, come to what my understanding of Staff's position
11 is here, and I just want to make sure I'm understanding. So
12 correct me if I misstate something here.

13 It's my understanding that KPL Gas Service
14 contracted with -- had a contract with Mid-Kansas Pipelines
15 that had already been challenged for imprudent in the
16 GR-93-140 case?

17 A. Yes.

18 Q. Okay. And Staff had made that challenge in
19 that case?

20 A. That is correct.

21 Q. And that challenge by Staff in GR-93-140 was
22 based upon KPL Gas Service's agreement to pay the maximum
23 transportation rates in part at least?

24 A. That was the Staff position in part, yes.

25 Q. And that's also been referred to, I think both

1 in the testimony and in prefiled testimony and he oral
2 testimony, as that there was no price cap or price cap was
3 removed?

4 A. Yes. The 1991 amendment, the price cap that
5 was originally contained in the 1990 contract was removed.

6 Q. And so my assumption is that the price cap
7 capped the -- was an agreement to limit the price underneath
8 the maximum for what KPL Gas paid Mid-Kansas for
9 transportation rates?

10 A. That is correct.

11 Q. Okay. And then when MGE or Southern Union,
12 d/b/a MGE, bought certain resources, which is KPL Gas
13 Service successor, MGE did try to renegotiate the contract
14 for the transportation rate, they included the
15 transportation rates?

16 A. At the time of sale?

17 Q. Well, after the sale sometime.

18 A. Yeah. I think most of the intense
19 negotiation, my understanding of it, happened in February of
20 1995.

21 Q. And when did MGE buy Western Resources?

22 A. I think it was approximately January or
23 February of 1994.

24 MR. DUFFY: We would stipulate that the
25 transfer, the closing was January 31st, 1994. MGE started

1 operations February 1, 1994.

2 BY JUDGE REGISTER:

3 Q. Okay. That's what I wondered. So it was the
4 year before. Okay. And as I understand it, then, MGE was
5 successful with Mid-Kansas II in renegotiating the contract
6 and making some savings with their new contract with
7 Mid-Kansas/Riverside?

8 A. There was some degree of success. They had a
9 cheaper commodity rate. They were enable to enhance their
10 flexibility in taking the gas off of the pipeline. Those
11 were the two of the major improvements.

12 Q. But the term that the Staff had challenged
13 before and subsequently the Commission had found imprudent,
14 the removal of the price cap and the agreement to pay the
15 transportation rates at the maximum allowable rate was still
16 in the Mid-Kansas II contract?

17 A. That's the Staff's contention, yes.

18 Q. And if I understood -- it may have been
19 Mr. Shaw's testimony and not yours, but tell me if this is
20 not correct, that MGE, even if they couldn't get Mid-Kansas
21 to lower the transportation rate and there was a clause in
22 the agreement that would -- if the Commission decided to
23 disallow some portion of transportation rates, Mid-Kansas
24 would have to pay it anyway?

25 A. That's the Staff's belief. There is another

1 term that extends the term of the agreement.

2 Q. Tell me what that is.

3 A. Okay. There's a provision in Mid-Kansas II
4 where if there is a disallowance and the rates are reduced,
5 there's an agreement by the parties that the length of the
6 contract will be extended to try and recover the moneys
7 associated with the disallowance by simply extending the
8 term of the contract past the year 2009.

9 Q. The theory then would apply, then, that the
10 Commission, the Missouri Public Service Commission as it
11 reviews the ACA cases filings that MGE filed, would decide
12 what the prudent rate was in each successive ACA case, and
13 even if there was a disallowance it would be extended out
14 and only prudent rates would be paid then?

15 A. I think that was the concept, yes.

16 Q. Would it be fair to say that it's Staff's
17 position that MGE knew that it was entering into the
18 Mid-Kansas II contract knowing that there was a question
19 about the prudence of the term regarding paying the maximum
20 transportation rate?

21 A. Yes, I think that's a fair assessment.

22 JUDGE REGISTER: I don't have anything
23 further.

24 Commissioner Murray? Commissioner Gaw? Okay.
25 That's all I have.

1 We need to take a short break at this time and
2 have at least until quarter after. We'll give you 20
3 minutes. We're going to take 20 minutes at this time. Go
4 off the record.

5 (A BREAK WAS TAKEN.)

6 JUDGE REGISTER: We're ready to go back on the
7 record. We have completed the examination from the Bench,
8 and we are ready for recross for Mr. Sommerer beginning with
9 Public Counsel. Mr. Micheel?

10 MR. MICHEEL: No questions for Mr. Sommerer,
11 your Honor.

12 JUDGE REGISTER: Thank you very much,
13 Mr. Micheel.

14 And Mr. Conrad is absent. The counsel for
15 Kansas City, Missouri and Williams Gas waived cross.

16 Mr. Duffy, MGE?

17 RECROSS-EXAMINATION BY MR. DUFFY:

18 Q. I just want to cover a couple things,
19 Mr. Sommerer. In response to a question from Commissioner
20 Lumpe, I thought I heard you say that -- well, let me back
21 up.

22 I thought she asked you sort of a
23 hypothetical, that if the parties to Mid-Kansas II went out
24 tomorrow and renegotiated that agreement and extended the
25 term to 2020, that your opinion was that the parties to this

1 case, Mid-Kansas, I guess, and MGE, would argue that the
2 Commission could not look at the prudence of that agreement
3 because it would all relate back to the original thing. Is
4 that what your testimony was?

5 A. I think I had interpreted the question, and
6 perhaps misinterpreted the question, to mean if they
7 extended the term of the Mid-Kansas II agreement. If it was
8 a different agreement, a new agreement, then my impression
9 would be that -- and this is my belief of MGE's position,
10 that you could look at the prudence of that new agreement.

11 Q. So you're trying to draw a distinction between
12 two hypotheticals, one hypothetical is all they do is extend
13 the term of the agreement, and the other is they do some
14 other things and extend the term of the agreement; is that
15 what you're saying?

16 A. I'm trying to draw a distinction between
17 getting into an entirely new agreement versus simply
18 extending the term of the old agreement.

19 Q. Well, did MGE or Mid-Kansas put on any
20 testimony in this case that dealt with either one of those
21 hypotheticals?

22 A. I'm really going back to the testimony of
23 Mr. Langley where he said he believed that the prudence
24 review was prohibited in perpetuity, and I thought from
25 that -- and this is my impression of his testimony -- that

1 he was saying to the extent the term is extended past 2009,
2 there could be no prudence review.

3 Q. But isn't he talking about the provision
4 that's in the document right now and not talking about some
5 new document that would take both parties' agreement to
6 execute no matter what it does?

7 A. That I don't recall.

8 Q. So the sole basis of your response to
9 Commissioner Lumpe's question was your interpretation of
10 what Mr. Langley was saying about the Mid-Kansas II
11 agreement?

12 A. That's correct.

13 Q. Has anybody from Mid-Kansas or MGE told you
14 that they felt like they could go out and extend the term of
15 Mid-Kansas II and have no -- have the assurance that there
16 would be no prudence review forever as a result of that
17 action?

18 A. No.

19 Q. Do you recall -- well, strike that.

20 You're familiar with Schedule 3 to Mr. Shaw's
21 rebuttal testimony, the one that's got the calculation of
22 63 and a half million dollars on it, aren't you?

23 A. Yes.

24 Q. Do you recall how much the stated sale price
25 was for all of the assets that constitute MGE in 1993?

1 MR. SCHWARZ: Could I have an explanation as
2 to how this relates to questions from the Bench?

3 MR. DUFFY: I'm going to talk about how this
4 63 million -- I'm going to get there, trust me.

5 JUDGE REGISTER: Okay. Mr. Duffy, we'll give
6 you a little latitude.

7 BY MR. DUFFY:

8 Q. Do you recall the purchase price? Would you
9 like me to show you a copy of the Order that's got it in
10 there?

11 A. If you want. I do not recall.

12 MR. SCHWARZ: If you read it out of the
13 Commission's Order, Staff will stipulate to it.

14 BY MR. DUFFY:

15 Q. I'm going to read from 2 MoPSC 3rd at page 600
16 where it says, The basic transaction as set out in the
17 contractual agreement between SU and WRI is as follows: And
18 then it has an excerpt from Section 3.02, purchase price for
19 assets, and it says, As consideration for the assets and
20 subject to the terms, conditions, the purchase price payable
21 by buyer to seller shall be an amount equal to \$327,940,490,
22 and then it says plus, and there are three or four things
23 that don't have any dollar amounts to them.

24 All I'm really trying to do is establish that
25 the value -- the purchase price was, in round numbers,

1 \$328 million plus a lot of offsets that may have gone one
2 way or the other. Would you accept that, Mr. Sommerer?

3 JUDGE REGISTER: Staff, were you going to
4 stipulate to that?

5 MR. SCHWARZ: Staff stipulates that the record
6 is as Mr. Duffy read.

7 JUDGE REGISTER: And Mr. Duffy, just for my
8 purposes, does the citation there show what case number,
9 Public Service case number?

10 MR. DUFFY: GM-94-40. This is the approval of
11 the sale.

12 JUDGE REGISTER: The M that's not a merger
13 case?

14 MR. DUFFY: That's exactly right. The M that
15 didn't mean merger.

16 BY MR. DUFFY:

17 Q. Okay. So the value of all of these properties
18 was roughly \$328 million, and the value that the Staff has
19 put on the detriment to this contract running out to June
20 2009 is 63-and-a-half-million dollars. Are you with me so
21 far?

22 A. Yes.

23 Q. And by my third-grade math, \$63 million is
24 about one-fifth of the amount of the sale price of these
25 assets. Would you agree with that?

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1 A. Yes.

2 Q. So is it your testimony that the Staff of the
3 Commission in 1993, when they'd already dealt with the
4 Mid-Kansas I contract, was under no obligation to tell the
5 Missouri Public Service Commission that there was something
6 north of \$60 million in detriment associated with the
7 Mid-Kansas II agreement, an amount that represents about a
8 fifth of the purchase price of the assets?

9 Is that what your testimony was to
10 Commissioner Gaw, that at the time of the sale that wasn't
11 the appropriate time to tell -- to deal with that?

12 A. My testimony to Commissioner Gaw was that I
13 believed as part of the due diligence Southern Union should
14 have been looking at aspects of those contracts. It was not
15 my testimony that MGE should have made a \$63 million
16 adjustment in the sales price unless they would have
17 calculated that to be the detriment at that time.

18 Q. So are you saying that it was totally MGE's
19 obligation to come in and say, We think that maybe the Staff
20 will calculate a \$60 million detriment to this sale price,
21 so, Commission, you need to -- you need to do something
22 about this?

23 MR. SCHWARZ: I think I'm going to object at
24 this stage. I think that mischaracterizes the --

25 MR. DUFFY: I'll withdraw the question.

1 JUDGE REGISTER: Thank you, Mr. Duffy. Thank
2 you, Mr. Schwarz. Please proceed, Mr. Duffy.

3 BY MR. DUFFY:

4 Q. Isn't it true that in that sale case,
5 GM-94-40, the Staff, and the Order will reflect it, had 11
6 concerns, some of which resulted in the transfer of
7 substantial amounts of money from one party to another?

8 Let me give you one example. Isn't it true
9 that as a part of the agreement Southern Union obtained
10 about \$9 million from Western Resources, and Southern Union
11 had to make an additional contribution of \$3 million with
12 regard to pension, a pension situation that the Staff was
13 concerned about; is that right?

14 A. Well, I would agree that the Order says what
15 it says. I don't have a copy of the Order in front of me.

16 Q. Well, do you recall that situation?

17 A. I recall that there were various issues that
18 were brought out by the Staff. I don't specifically recall
19 those individual items, no.

20 Q. But if the Order says what it says, then the
21 Staff got -- basically accomplished having Western Resources
22 pay \$9 million that Western Resources didn't intend to pay
23 when it signed the contract and Southern Union to pay
24 \$3 million that it didn't intend to pay when it signed the
25 contract to deal with pension issues; is that right?

1 MR. MICHEEL: I'm going to object at this
2 point to the testimony of Mr. Duffy. I think that this
3 witness has already said he doesn't know the particulars,
4 and the Report and Order says what it says.

5 JUDGE REGISTER: Before I let you respond,
6 Mr. Duffy, any other comments or objections?

7 MR. SCHWARZ: I think that we've already
8 established that at the time of this transaction the
9 Commission did not have a separate group to examine the
10 contracting practices of natural gas LDCs.

11 The quantification that Mr. Duffy is referring
12 to that's attached to Mr. Shaw's testimony is done many
13 years after the initial transaction, and I think that it's
14 certainly a stretch at this stage to impose the -- well,
15 enough said.

16 JUDGE REGISTER: Mr. Duffy?

17 MR. DUFFY: This is cross-examination. The
18 witness testified about what the Staff was doing in looking
19 at the contracts for the assignment of these gas sale
20 contracts at the time of the sale. I'm exploring what other
21 things were going on and what the Staff did look at at the
22 time of the sale.

23 It makes absolutely no relevance whether there
24 was something called the procurement analysis department or
25 whatever. There was a staff here in 1993, and the staff did

1 look at the contract. So I'm entitled to bring out the fact
2 that the Staff looked at things worth \$12 million but
3 apparently didn't look at things worth \$60 million.

4 JUDGE REGISTER: And that's related to the
5 cross from the Bench?

6 MR. DUFFY: That's right. Commissioner Gaw
7 was asking him about that.

8 JUDGE REGISTER: Well, I'll overrule the --

9 MR. DUFFY: Commissioner Gaw established that
10 he's been aware of Western Resources since the late 1980s,
11 that there was a transfer of assets, that he was familiar
12 with the contract for the sale of assets but not in great
13 detail, he was aware that the contract was approved by the
14 Commission, he was generally familiar with the review of the
15 contract by the Commission, and that it was normal for the
16 Staff to look at obligations, and the Staff did attempt to
17 identify detriments to the public interest and would have
18 looked at what would have changed as a result of the
19 approval of the contract that underlied -- lied under the
20 sale.

21 JUDGE REGISTER: Okay. I'll overrule the
22 objection and allow the examination in this area, but it is
23 limited to what he knows, because he did testify to a
24 limited degree. So I'll allow you to proceed with your
25 question. I've got that here. Do you want me to read it

1 back?

2 MR. DUFFY: Absolutely, because I don't recall
3 what it was.

4 JUDGE REGISTER: But if the Order says what it
5 says, then the Staff basically got accomplished having
6 Western Resources pay \$9 million that Western Resources
7 didn't intend to pay when it signed the contract and
8 Southern Union to pay \$3 million that it didn't intend to
9 pay when it signed the contract to deal with the pension
10 issues; isn't that right?

11 Can you answer that? Do you know?

12 THE WITNESS: I really don't know the
13 specifics of what Staff was able to achieve as part of the
14 conditions of the approval.

15 BY MR. DUFFY:

16 Q. Okay. But you knew that the Staff did raise
17 objections to the sale?

18 A. Yeah.

19 Q. And they said that those objections were a
20 detriment to the public interest, did they not?

21 A. I think that's correct, yes.

22 MR. DUFFY: That's all.

23 JUDGE REGISTER: Thank you, Mr. Duffy.

24 Mr. Stewart?

25 MR. STEWART: I don't believe I have any

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1 questions of this witness. Thank you.

2 JUDGE REGISTER: Thank you, Mr. Stewart. That
3 concludes recross.

4 Redirect, Mr. Schwarz?

5 REDIRECT EXAMINATION BY MR. SCHWARZ:

6 Q. I think that Judge Register asked you
7 questions that -- and in your answer you suggested that
8 Staff's problem in this case was that -- was the maximum
9 transportation rates under the contracts? Do you recall
10 that?

11 Well, whether you do or not, let me ask you
12 this.

13 MR. DUFFY: You objected when I did that.

14 JUDGE REGISTER: Would you like to withdraw
15 the beginning of that question and start again?

16 MR. SCHWARZ: Let's start over.

17 BY MR. SCHWARZ:

18 Q. Let me ask you this. If the maximum
19 transportation rates under the Mid-Kansas II contract were
20 \$8 -- the reservation charge was \$8 per Mcf, would Staff
21 have an objection or make an adjustment because they're
22 paying the maximum transportation rate?

23 A. No.

24 Q. If under that contract the maximum
25 transportation rate was \$30 per Mcf and they had managed to

1 arrange a discounted rate to the \$20.50 they're paying under
2 the contract according to your schedule, would Staff not
3 object to that because the \$20.50 was a discounted rate?

4 MR. DUFFY: I'm going to object. He's
5 leading. I don't remember any kind of questioning about
6 situations where there were \$30 maximum reservation charges
7 under any of the questions that have taken place with this
8 question. It's beyond the scope of the cross and questions
9 from the Bench, and he's leading the witness.

10 MR. STEWART: I join in the objection.

11 MR. SCHWARZ: Let me withdraw and try to
12 rephrase.

13 BY MR. SCHWARZ:

14 Q. If the actual rate in the Mid-Kansas II
15 contracts were described as discounted rates as opposed to
16 maximum rates, would that mean that Staff would not have
17 made an adjustment in this case?

18 A. No.

19 MR. SCHWARZ: Thank you. That's all I have.

20 JUDGE REGISTER: That concludes redirect for
21 this witness. You may step down, Mr. Sommerer.

22 (Witness excused.)

23 JUDGE REGISTER: And that concludes the list
24 of witnesses that I have, and so I believe that that
25 concludes the testimony to be taken.

1 Are there any other matters that need to be
2 addressed at this time?

3 MR. KEEVIL: Judge, what do you show on your
4 exhibit list as being received?

5 JUDGE REGISTER: Okay. I have received into
6 evidence Exhibits 1 through 3. 3 is subject to the portions
7 that were stricken. And then 4 is not offered. 5 is
8 admitted. 6 is admitted with the stricken sections that
9 were reserved. 7 through 17HC/NP, those are all admitted
10 into the record. 18 is not offered.

11 MR. KEEVIL: Judge, on the 14 through the 17,
12 some of those had portions stricken, correct?

13 JUDGE REGISTER: Yes. Yes. Those would have
14 been portions stricken as indicated through the objections,
15 yes. I'll make a note of that, too. And then 19 is
16 admitted, 20, 21, 22, 23, 24 and 25. Does that sound
17 accurate?

18 Okay. And Mr. Schwarz?

19 MR. SCHWARZ: I do have another matter. When
20 Mr. Langley testified, Mr. Hack was still scheduled as a
21 witness and scheduled to appear. That did not occur, and I
22 would now file motions to strike portions of Mr. Langley's
23 rebuttal and surrebuttal testimony.

24 And, although I do not have the transcripts
25 available to me, there were portions of his transcript which

1 I think need to be struck where he referred to conversations
2 between himself and Mr. Hack, which at the time I think the
3 parties anticipated would be subject to cross-examination of
4 Mr. Hack and which are, as it turns out, not the case.

5 MR. KEEVIL: Judge, I need to respond to that.
6 The portion of Mr. Langley's surrebuttal which referred to
7 what Mr. Hack had indicated after Mr. Hack left the
8 employment of the Commission is what you struck in his
9 surrebuttal on Exhibit, I think it's No. 6.

10 All other references of Mr. Langley to things
11 told him by Mr. Hack were things Mr. Hack told him back in
12 1996 when Mr. Langley and Mr. Hack were negotiating the
13 Stipulation at issue in this case.

14 Things told to Mr. Langley by Mr. Hack at that
15 time would not be subject to attorney/client privilege
16 because they were direct communications during the course of
17 the negotiation of the Stipulation between Mr. Hack and
18 Mr. Langley and are totally outside of -- they could have
19 asked him, Mr. Langley about what Hack told him during the
20 negotiations of the Stipulation.

21 JUDGE REGISTER: All right. Stop. Let's
22 stop, Mr. Keevil. First of all, let me go through and point
23 the parts of Mr. Langley's testimony that have already been
24 stricken, because there were portions that I reserved my
25 ruling on and I did strike, and that is Schedule DML-8.

1 MR. SCHWARZ: To which?

2 JUDGE REGISTER: He's got them marked

3 separately, I think.

4 MR. SCHWARZ: I do not have with me a copy of

5 Mr. Langley's testimony with the schedules attached.

6 MR. DUFFY: DML-8 is a copy of --

7 MR. SCHWARZ: This is on his surrebuttal?

8 Hang on. I do have that.

9 MR. DUFFY: It's the last thing on his

10 surrebuttal.

11 MR. SCHWARZ: Okay. So that's been stricken?

12 JUDGE REGISTER: Just a moment. Let me grab

13 mine. Okay. Yes, DML-8, and then I also have beginning on

14 page 2 at line 20 through --

15 MR. DUFFY: Are we in surrebuttal?

16 JUDGE REGISTER: I'm sorry. In surrebuttal,

17 yes. I believe all my strikes were made on -- were just

18 surrebuttal. This is Exhibit No. 6 we're referring to.

19 Page 2, line 20, through page 3, line 15.

20 Now, I did see one other reference on page 4

21 later that I had missed, but I didn't think it said all that

22 much so I didn't worry about it. Now, the only other

23 reference I see here is page 4, line 1, and as confirmed by

24 Mr. Hack. Now --

25 MR. SCHWARZ: Right.

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1 JUDGE REGISTER: That's a very vague,
2 innocuous kind of statement. So you don't have any
3 objection to leaving that one in there?

4 MR. SCHWARZ: My notes were defective. I
5 do -- let me take a look at --

6 JUDGE REGISTER: See, Mr. Keevil, you got all
7 worked up for nothing.

8 MR. SCHWARZ: Not yet. I'm not done.

9 MR. KEEVIL: He's not done yet.

10 MR. SCHWARZ: And I didn't make an objection
11 based on attorney/client privilege. I made an objection
12 based on hearsay.

13 JUDGE REGISTER: All right. What else do you
14 have, then, Mr. Schwarz? Are we still in Exhibit 6?

15 MR. SCHWARZ: That's it. I'm okay.

16 MR. KEEVIL: Is the motion withdrawn?

17 MR. SCHWARZ: Yeah.

18 MR. KEEVIL: Is your objection --

19 MR. SCHWARZ: Well, I never got a chance to
20 actually complete my objection and specify the portions of
21 the testimony that I wanted to strike, but what I wanted to
22 the strike has already been struck, so yeah.

23 MR. DUFFY: Let me see if I understand what
24 just happened. The stuff that was stricken by you remains
25 stricken, and the stuff that he wanted to be stricken he has

1 now withdrawn and so there's no other --

2 JUDGE REGISTER: It had already been stricken.

3 He didn't have it in his notes properly.

4 MR. DUFFY: But --

5 MR. KEEVIL: Mr. Duffy, may I, since this is

6 my witness?

7 JUDGE REGISTER: Wait a minute. Mr. Keevil,

8 it's my courtroom. Mr. Duffy was already speaking. We're

9 going to let Mr. Duffy finish.

10 MR. DUFFY: I just wanted to know if -- I

11 understood that Mr. Schwarz had then withdrawn his objection

12 to strike the portions of the transcript dealing with what

13 Mr. Langley was saying. I'm confused about what he's

14 withdrawn and what he hasn't withdrawn.

15 JUDGE REGISTER: It's my understanding that

16 Mr. Schwarz has withdrawn any concern he had that he might

17 have missed something and that everything is left before he

18 stood up there just a moment ago and started. Everything he

19 thought he had missed and that needed to be stricken has

20 already been struck.

21 MR. DUFFY: So there's no pending motion to

22 strike anything?

23 JUDGE REGISTER: No pending motion to strike

24 anything.

25 MR. DUFFY: Thank you for that clarification.

1 JUDGE REGISTER: Thank you, Mr. Duffy.

2 Mr. Keevil, it is your turn. Did you
3 understand what Mr. Duffy just --

4 MR. KEEVIL: I think I did, but I want to make
5 sure. What was stricken by you previously Tuesday or
6 Wednesday, whenever that was, remains stricken. Nothing
7 further is stricken?

8 JUDGE REGISTER: That's my understanding.

9 MR. SCHWARZ: And I currently have no pending
10 motion, but I want to remedy that. No. I think I'm
11 entitled to look at the transcript of Mr. Langley's
12 testimony from the stand to see if any of his references to
13 Mr. Hack would be hearsay, and not every reference to
14 Mr. Hack is going to be hearsay.

15 I would like the opportunity to look at the
16 transcript, because the circumstances have changed from the
17 understanding -- I mean, Mr. Hack was on the witness list,
18 was scheduled to testify. We were dancing around, and
19 ultimately he wasn't called.

20 And I would like a chance to review the
21 transcript of Mr. Langley's examination and file a motion
22 subsequently if I believe any of it is hearsay.

23 MR. KEEVIL: I believe the time to have raised
24 such a motion would have been at the time Mr. Langley was on
25 the witness stand, and --

1 MR. SCHWARZ: Well --

2 MR. KEEVIL: May I finish? And I also believe
3 that all of Mr. Langley's testimony on the witness stand
4 related to things Mr. Hack told him in 1996 during the
5 negotiations of the Stipulation between the parties.

6 And if Staff is now trying to strike our
7 testimony and evidence regarding what they told my client
8 during the negotiations of the Stipulation, then all of the
9 other things that Staff has talked about, the parties talked
10 about this, the parties talked about that, they exchanged
11 these drafts, we understood this, we understand they thought
12 that, all of that also needs to be stricken.

13 So my point here is Langley is free to talk
14 about anything that's occurred based on what everyone else
15 has been doing. He can talk about what the other parties
16 told him in 1996 during the Stipulation negotiations, and
17 that's what he's testified about and it's not hearsay. Even
18 if it was, the motion should have been raised when he was on
19 the witness stand.

20 MR. DUFFY: I would just add to that that I
21 don't think it's hearsay because it's a statement of a party
22 opponent. The testimony I heard was that Langley was
23 recounting what Mr. Hack in his capacity as General Counsel
24 representing the Staff was conveying to him about these
25 documents, and so there wouldn't be any hearsay basis for

1 objections because the Staff is a party opponent.

2 JUDGE REGISTER: I'm going to tell you now, I
3 think we're arguing about something that is not identified,
4 and I think that I've been very diligent in this hearing is
5 ensuring that nothing has been discussed or testified to
6 that I did not believe was appropriate on that basis of
7 attorney/client privilege or some other issue.

8 So I don't believe you're going to find
9 anything, Mr. Schwarz, but if you find something, then file
10 your motion at that time and all counsel will have an
11 opportunity to respond and we'll deal with it when it comes
12 up if it comes up. Okay. And then -- because I just don't
13 think you're going to find anything.

14 That was one of my concerns that you-all -- I
15 knew you-all were working on, and if I heard it come up I
16 raised the issue that this was not appropriate yet, and
17 so -- but if you do happen to find something that goes into
18 that area, then file a motion to strike at that time.

19 MR. SCHWARZ: And I would suggest that it be
20 done within two days of the transcript being made available.

21 JUDGE REGISTER: I don't have any objection to
22 that if you want to give yourself that --

23 MR. KEEVIL: Your motion you mean?

24 MR. SCHWARZ: Yeah. If I get two days to look
25 through the transcript to see if there's anything that I

1 think is hearsay, and I don't know if I'm going to find it
2 or not.

3 JUDGE REGISTER: There's actually a rule on
4 this one that all the parties upon receipt of the transcript
5 have an opportunity to make motions as to something that
6 might need to be changed in the transcript.

7 MR. DUFFY: There's one as to corrections to
8 the transcript, but it doesn't say anything about making
9 belated hearsay objections.

10 JUDGE REGISTER: Well, I think that the issue
11 for me here is that it sets a time frame by which everything
12 that you have an objection to in the transcript, so we'll
13 follow that time frame because any changes that might be
14 made to the transcript will be made in that time.

15 MR. SCHWARZ: And it -- my concern goes to the
16 fact that hearsay is an out-of-court statement that's made
17 by a declarant who's not available for examination, and at
18 the time Mr. Langley testified I thought Mr. Hack was going
19 to be available for examination.

20 MR. DUFFY: Well, as long as we're on that
21 point, Mr. Hack remained and Mr. Hack is still, as far as I
22 know, within the confines of the state of Missouri and you
23 could have subpoenaed him and called him as your witness if
24 you'd wanted to. So he was available to you. He was under
25 no physical restraints or did not absent himself from the

1 jurisdiction.

2 MR. KEEVIL: I mean, as far as this hearsay, I
3 mean, had it been, you know, Ken Rademan from the Staff,
4 I mean, if Mr. Langley was recounting what was told him by
5 the parties on the other side of negotiations, as Mr. Duffy
6 said, it's either a statement of a party opponent, an
7 admission against interest. It's not hearsay, what
8 Mr. Langley was told by the other parties in 1996 during the
9 negotiation.

10 I agree with what you said. You were,
11 especially with Mr. Langley, very careful making sure that
12 what Mr. Langley was talking about related back to '96 or
13 post Hack leaving Staff stuff. If they're now saying that
14 anything that Hack may have told Langley at any time is
15 subject to hearsay, that's ludicrous.

16 If they're trying to limit this to something
17 that Langley took out of Hack's responses to their Data
18 Requests which they submitted to Hack in this case, then
19 that's also ludicrous, but that's another matter. So I
20 assume what they're going at is the post-'96 stuff.

21 JUDGE REGISTER: Okay. Let's not get into all
22 of this. If something comes up, file your motion to strike.
23 The parties can respond. I can rule at that time on
24 something specific.

25 MR. DUFFY: Can we set -- or can we talk about

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1 times for the Briefs?

2 JUDGE REGISTER: Briefing. The transcripts
3 are supposed to be back in ten days, ten working days.
4 Following that time --

5 MR. DUFFY: By my count, that would be Friday,
6 the 12th of October. That would be the tenth working day
7 because there's -- no, because October the 8th is a holiday.
8 So it would be Monday the 15th by my calendar. Is today
9 the --

10 MR. SCHWARZ: Today's the 21st.

11 MR. DUFFY: I'm sorry. The tenth day would be
12 Friday, October the 5th, and Monday, October the 8th, is a
13 holiday. So does that mean the transcript will show up on
14 Tuesday, the 9th?

15 JUDGE REGISTER: I think that's where we
16 should start counting from.

17 MR. KEEVIL: The 9th is what, the transcript
18 day?

19 JUDGE REGISTER: Yeah. 20 days from the date?

20 MR. KEEVIL: Judge, I would request at least
21 days 30 days for Initial Briefs.

22 MR. DUFFY: I don't think that's unreasonable
23 under the circumstances, your Honor.

24 JUDGE REGISTER: Can you tell me, just tell
25 me -- give me an explanation why you think you need more

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1 than the 20 days, standard 20 days?

2 MR. KEEVIL: Complexity of the case, length of
3 the case, volume of testimony, importance, number of issues,
4 and the fact that this thing runs on, depending upon who you
5 believe, for several years.

6 JUDGE REGISTER: Okay. Anything you want to
7 add, Mr. Duffy?

8 MR. DUFFY: I would agree with that.

9 JUDGE REGISTER: Does anybody have any
10 objection to 30 days?

11 MR. SCHWARZ: No.

12 MR. KEEVIL: Do you want more, Mr. Schwarz?

13 MR. SCHWARZ: You know, the case is at least
14 three years old now. The depositions were taken three years
15 now. I'd say let's shoot for another --

16 JUDGE REGISTER: Let's go to 30 to start. If
17 you need more --

18 MR. DUFFY: By my count, which wasn't very
19 accurate before, that would Thursday, November the 8th.

20 JUDGE REGISTER: Did you have November 8th?
21 That's what I get. Okay.

22 MR. DUFFY: And I would suggest 20 days on
23 reply, which would put us at November 28th, which is the
24 Wednesday after Thanksgiving.

25 JUDGE REGISTER: You guys really want them due

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1 after Thanksgiving or do you want them due before
2 Thanksgiving?

3 MR. KEEVIL: How about the full -- maybe
4 Friday that week. November 30th, how's that?

5 JUDGE REGISTER: I think that's reasonable. I
6 don't like to make anything due right after a holiday.
7 Somebody ends up working on the holiday.

8 MR. DUFFY: What makes you think we don't do
9 that already?

10 JUDGE REGISTER: You might, but it won't be my
11 fault.

12 MR. DUFFY: I appreciate your flexibility,
13 your Honor, in giving us November the 8th and November 30th.

14 JUDGE REGISTER: That means shortly after that
15 you'll have a decision.

16 All right. Are there any other matters then?
17 We've got a briefing schedule. I'll issue a notice
18 establishing that. I'll issue a notice. They like us to do
19 that in writing now so everybody knows when to expect it.

20 MR. KEEVIL: That's all.

21 JUDGE REGISTER: Okay. Hearing nothing
22 further to resolve in this matter, we will conclude this
23 hearing. Thank you very much.

24 WHEREUPON, the hearing of this case was
25 concluded.

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