

**STATE OF MISSOURI  
PUBLIC SERVICE COMMISSION  
JEFFERSON CITY  
May 21, 2002**

**CASE NO: GR-96-450**

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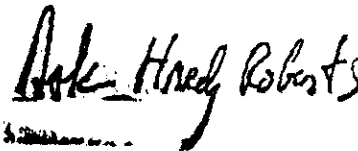
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**Enclosed find certified copy of an ORDER in the above-numbered case(s).**

**Sincerely,**



**Dale Hardy Roberts**  
**Secretary/Chief Regulatory Law Judge**

**STATE OF MISSOURI  
PUBLIC SERVICE COMMISSION**

At a Session of the Public Service  
Commission held at its office in  
Jefferson City on the 21st day of  
May, 2002.

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

**ORDER DENYING APPLICATION FOR REHEARING**

On March 12, 2002, the Commission issued a Report and Order with an effective date of March 22. On March 21, Riverside Pipeline Company, L.P. and Mid-Kansas Partnership (Riverside/Mid-Kansas) filed a timely Application for Rehearing. No other party has requested rehearing, although, on April 3, the Staff of the Commission filed suggestions supporting Riverside/Mid-Kansas' Application for Rehearing. Oral arguments regarding the Application for Rehearing were conducted on May 6, 2002.

Section 386.500, RSMo (2000), provides that the Commission shall grant an application for rehearing if "in its judgment sufficient reason therefor be made to appear." Riverside/Mid-Kansas argues that rehearing is necessary so that the Commission may determine the meaning of the 1996 stipulation and agreement that Riverside/Mid-Kansas contends bars the Staff's proposed disallowance in this and future PGA/ACA cases. Staff also suggests that the Commission is required to make a final determination of the meaning of the disputed stipulation and agreement.

Riverside/Mid-Kansas and Staff base their arguments for rehearing on orders from the Circuit Court of Cole County that direct the Commission to interpret the 1996 stipulation and agreement. On December 2, 1998, the Circuit Court of Cole County issued a Judgment and Order in Case No. CV198-1505cc. That case involved an action brought by Riverside/Mid-Kansas against the Commission seeking a writ of prohibition to stop the Commission from proceeding further in this case. In quashing the preliminary writ and dismissing Riverside/Mid-Kansas' petition, the Circuit Court stated that certain provisions of the stipulation and agreement are ambiguous and indicated that the Commission should "determine if it has jurisdiction of the cause after hearing the evidence and arguments of the parties before it." In addition, Riverside/Mid-Kansas relies on a similar order issued by the Circuit Court on July 26, 1999, in case number CV-199-53cc. Riverside/Mid-Kansas and Staff argue that these orders require the Commission to make a finding of fact or conclusion of law regarding the proper interpretation of the stipulation and agreement.

The July 26, 1999 order that Riverside/Mid-Kansas and Staff rely upon was issued by the Circuit Court regarding an interlocutory order issued by the Commission earlier in this case. In a previous appeal, the Court of Appeal held that the Circuit Court does not have jurisdiction to review the Commission's interlocutory orders and directed that this matter be remanded to the Commission for further proceedings.<sup>1</sup> If the Circuit Court did not have jurisdiction when it entered its order, then the Commission is not obligated to make a finding of fact or conclusion of law beyond what is required to support its decision.

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<sup>1</sup> *State ex rel. Riverside Pipeline Company, L.P. v. Pub. Serv. Com'n*, 26 S.W.2d 396 (Mo. App. W.D. 2000)

The order issued by the Circuit Court on December 2, 1998, in the writ of prohibition action, was not appealed. It may be presumed that the Circuit Court had jurisdiction to consider the request for a writ of prohibition. However, the holding of that order is simply to deny the requested writ of prohibition. The Circuit Court's finding of ambiguity in the contract is merely an explanation of the basis for the Circuit Court's decision. It is not an order to the Commission to do anything.

Neither does the Circuit Court's findings in its December 2, 1998 order constitute the law of the case so as to require the Commission to reach a decision regarding interpretation of the stipulation and agreement. Missouri's courts generally state the doctrine of law of the case as follows:

The rule of the law of the case is that, in general, the decision of the appellate court is the law of the case on all points presented and decided and remains the law of the case throughout all subsequent proceedings, both in the trial and appellate courts, and no questions involved and decided on the first appeal will be considered on a second appeal.<sup>2</sup>

That doctrine does not apply in this case because MGE was not a party to Mid-Kansas Riverside's case seeking a writ of prohibition in which the Circuit Court issued the order in question. The Missouri Supreme Court, in the case of *Shahan v. Shahan*,<sup>3</sup> held that the doctrine of law of the case does not apply to bind a party that was not a party to the previous case. Therefore, MGE, a party that has not sought rehearing, is not bound by the Circuit Court's ruling and the Circuit Court's findings cannot become the law of case.

The Commission must, of course, make sufficient findings to support its decision. The Commission has done so. Section 536.090, RSMo 2000, requires that a decision by

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<sup>2</sup> *Manzer v. Sanchez*, 29 S.W.3d 380, 383 (Mo. App. E.D. 2000)

<sup>3</sup> 988 S.W.2d 529 (Mo banc 1999)

an administrative agency in a contested case contain findings of fact and conclusions of law. The statute specifies that the agency's findings of fact shall "include a concise statement of the findings on which the agency bases its order." In interpreting this section of the statute, Missouri's Court of Appeals has indicated that "to present a subject for appellate review, the written decision of the administrative agency must show how the controlling issues have been decided."<sup>4</sup> However, "an administrative agency need not make findings on every conceivable issue, but only basic or essential findings required to support its order."<sup>5</sup>

In its Report and Order, the Commission found that it was unable to determine the meaning of the stipulation and agreement. However, the Commission did not rely on the meaning of the stipulation and agreement in reaching its decision to reject Staff's proposed disallowance of \$3,490,082.81 in natural gas costs incurred by Missouri Gas Energy. Since the Commission did not rely on the provisions of the stipulation and agreement in making its determination, the interpretation of the stipulation and agreement is not essential to the Commission's decision. Therefore, the Commission does not need to make a finding regarding the interpretation of the stipulation and agreement.

While the Commission does not need to grant rehearing to determine the meaning of the stipulation and agreement, it shares Riverside/Mid-Kansas' concern that this case will be re-litigated for each ensuing PGA/ACA period through the remaining life of the contracts. However, the burden of such re-litigation can be substantially decreased if the pending cases are consolidated for hearing. The Commission has found that the evidence

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<sup>4</sup> *Heinen v. Police Personnel Bd. of Jefferson City*, 976 S.W.2d 534, 539 (Mo. App. W.D. 1998)

<sup>5</sup> *Raye & Co. Transports v. U.S.*, 314 F. Supp. 1036, 1043 (D.C. Mo. 1970)

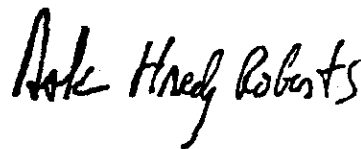
for imprudence that Staff presented was not persuasive. Staff would need to present more substantial and persuasive evidence.

In the judgment of the Commission, Riverside/Mid-Kansas has failed to establish sufficient reason to grant its Application for Rehearing.

**IT IS THEREFORE ORDERED:**

1. That the Application for Rehearing filed by Riverside Pipeline Company, L.P. and Mid-Kansas Partnership is denied.
2. That this order shall become effective on May 21, 2002.

**BY THE COMMISSION**



**Dale Hardy Roberts**  
**Secretary/Chief Regulatory Law Judge**

( S E A L )

Simmons, Ch., Lumpe, Gaw and Forbis, CC., concur  
Murray, C., dissents, dissenting opinion attached

Woodruff, Senior Regulatory Law Judge

**BEFORE THE PUBLIC SERVICE COMMISSION**  
**OF THE STATE OF MISSOURI**

In the Matter of Missouri Gas Energy's Gas	)	
Cost Adjustment Tariff Revisions to be	)	
Reviewed in its 1996-1997 Annual Recon-	)	<b><u>Case No. GR-96-450</u></b>
ciliation Adjustment Account.	)	

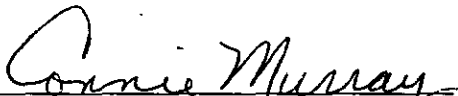
**DISSENTING OPINION OF COMMISSIONER CONNIE MURRAY**

I would grant the Application for Rehearing because I agree with Riverside/Mid-Kansas that we erred in not expressly finding that the 1996 Stipulation and Agreement bars the staff's proposed disallowance in this case and precludes any further ACA prudence review of the decisions associated with the execution of the "Missouri Agreements." While I wanted to make that express finding in the Report and Order, I voted with the majority because I support the ultimate decision to reject Staff's proposed disallowance for this ACA period.

The Staff and Office of the Public Counsel agree with Riverside/Mid-Kansas that the Commission was obligated on remand to construe the meaning of the 1996 Stipulation and Agreement. Furthermore, it became clear at the oral arguments regarding the Application for Rehearing that to do otherwise would leave the parties in the untenable position of having to relitigate the issue year after year. All parties agreed that it is very unlikely that any evidence would ever exist that has not already been presented as to the meaning of the 1996 Stipulation and Agreement. Therefore, the Commission should grant the

rehearing for the limited purpose of compliance with the circuit-court remand to interpret the 1996 Stipulation and Agreement in accordance with the rules of contract construction.

**Respectfully submitted,**

  
**Connie Murray, Commissioner**

Dated at Jefferson City, Missouri,  
on this 21st day of May, 2002.



ALJ/Secretary: Woodruff/Boyer  
Date Circulated 5-17 CR-96-450  
CASE NO.  
CSX  
Simmons, Chair  
Con - NO - Dissent Attached  
Murray, Commissioner  
Lumpke, Commissioner  
Gaw, Commissioner  
Forbis, Commissioner  
Agenda Date 5-21  
Action taken: 4-1 AA  
Must Vote Not Later Than

STATE OF MISSOURI

OFFICE OF THE PUBLIC SERVICE COMMISSION

I have compared the preceding copy with the original on file in this office and  
I do hereby certify the same to be a true copy therefrom and the whole thereof.

WITNESS my hand and seal of the Public Service Commission, at Jefferson City,  
Missouri, this 21<sup>st</sup> day of May 2002 .

Dale Hardy Roberts  
Dale Hardy Roberts  
Secretary/Chief Regulatory Law Judge

