MISSOURI GAS ENERGY

A division of Southern Union Company

Office of Public Counsel - Missouri

DATA INFORMATION REQUEST RESPONSE

Case Number: GU-2005-0095

Data Request No 0005

Requested From: Bolin

Date Requested: 10/13/2004

Information Requested:

RE: MPSC Data Request 384, Case No. GR-2004-0209:
Please provide a copy of all written communication from the Wichita law firm of Morris, Laing concerning the Kansas property tax on gas held in storage.

Requested By: Mike Noack

Information Provided:

Communications between MGE and the Wichita law firm of Morris, Laing are not subject to discovery pursuant to the attorney/client privilege. Attached are copies of court filings.

The information provided in response to the above data information request is accurate and complete, and contains no material misrepresentations or omissions, based upon present facts of which the undersigned has knowledge, information or belief. The undersigned agrees to promptly notify the requesting party if, during the pendency of Case No. GU-2005-0095 before the Commission, any matters are discovered which would materially affect the accuracy or completeness of the attached information.

Prepared By: Larry Kravitz

Approved by: [signature]
Director, Pricing and Regulatory Affairs

Date: 10/28/04

Date Response Received:_____

Exhibit No. 12
Case No(s). GU-2005-0095
Date 3-8-05 Rptr DT

0425200226

personal service by
special process server

DISTRICT COURT OF SHAWNEE COUNTY KANSAS
200 East 7th
Topeka, Kansas 66603
Division 09
Chapter 60

Case Number 04C 001229

MISSOURI GAS ENERGY A DIVISION OF SOUTHERN
Plaintiff 1

VS.

DEPARTMENT OF REVENUE STATE OF KANSAS
B/S ATTY GENERAL
120 SW 10TH STREET
TOPEKA, KS 66612
Defendant 2

SUMMONS

To the above named Defendant,
You are hereby notified that an action has been commenced against you in this court. If you wish to dispute the claim, you are required to file your answer to the Petition with the court and serve a copy upon:

RICHARD F HAYSE
MORRIS LAING EVANS BROCK
300 N MEAD STE 200
WICHITA, KS 67202-2722
Attorney for Plaintiff 1

Within twenty (20) days of service upon you. If you fail to do so, judgment by default will be taken against you for the relief demanded in the Petition. Any related claim which you may have against the plaintiff must be stated as a counter claim in your answer, or you will be barred from making such claim in any other action.

Dated 8 September, 2004

Official
Seal of the District Court
Shawnee County, Kansas
29 January MDCCCLXI

Angela M. Callahan
Clerk of the District Court

By HARSOTSLHT
Deputy Clerk

IN THE THIRD JUDICIAL DISTRICT
DISTRICT COURT, SHAWNEE COUNTY, KANSAS
DIVISION 9

MISSOURI GAS ENERGY, a division of SOUTHERN UNION COMPANY, CENTRAL ILLINOIS PUBLIC SERVICE COMPANY d/b/a, AmerenCIPS, UNION ELECTRIC COMPANY d/b/a AmerenUE, BP ENERGY COMPANY, PROLIANCE ENERGY, L.L.C.

Plaintiffs

vs.

JOAN WAGNON, as Secretary of Revenue, MARK BECK, as Director of Property Valuation Division, and DEPARTMENT OF REVENUE, DIVISION OF PROPERTY VALUATION, STATE OF KANSAS

Defendants.

CASE NO. 04C 001229

Petition Pursuant to K.S.A. Chapter 60

PETITION FOR DECLARATORY AND INJUNCTIVE RELIEF

For their causes of action against the above named Defendants, the Plaintiffs state and allege as follows:

1. Plaintiff Missouri Gas Energy is a division of Southern Union Company, a corporation organized under the laws of the State of Delaware. Missouri Gas Energy has a correct mailing address of 3420 Broadway, Kansas City Missouri, 64111.

2. Plaintiff Central Illinois Public Service Company, d/b/a AmerenCIPS, is a corporation organized under the laws of Illinois. It has a correct mailing address of PO Box 66149 (CODE 210) St. Louis, Missouri, 63166-6149.

3. Plaintiff Union Electric Company, d/b/a AmerenUE, is a corporation organized under the laws of Missouri. It has a correct mailing address of PO Box 66149 (CODE 210), St. Louis, Missouri, 63166-6149.

4. Plaintiff BP Energy Company is a corporation organized under the laws of the state of Delaware. It has a correct mailing address of P.O. Box 3092 Houston, Texas 77253-3092.

5. Plaintiff ProLiance Energy, L.L.C. is a limited liability company organized under the laws of the state of Indiana. It has a correct mailing address of 111 Monument Circle, Suite 2200, Indianapolis, Indiana 46204-5178.

6. The Defendants are the agency of the State of Kansas charged with the responsibility of valuing and assessing public utility property and apportioning the assessed value of such property to taxing units for ad valorem tax purposes, and the officials at that agency charged with applying the provisions of certain Kansas statutes related to property taxation. The Defendants have undertaken to enforce the provisions of House Substitute for Senate Bill 147 ("Senate Bill 147"), enacted by the 2004 Kansas Legislature against these Plaintiffs. Specifically, the Defendants have commenced a process of valuing and assessing natural gas owned by the Plaintiffs, which gas has been allocated to the Plaintiffs by interstate underground natural gas storage facility operators which operate natural gas storage facilities within the state of Kansas. Pursuant to K.S.A. 60-304(d), the state agency can be served by serving the Attorney General of the State of Kansas. Pursuant to K.S.A. 60-1712, because the action alleges that a statute is unconstitutional, the Attorney General or an Assistant Attorney General should be served with a copy as well.

SUMMARY OF THE ACTION

7. This action is brought pursuant to 42 U.S.C. § 1982. Plaintiffs seek injunctive relief preliminarily and permanently enjoining the Defendants and all persons subject to their direction and

control from depriving Plaintiffs of their rights guaranteed by the United States Constitution. Plaintiffs further seek declaratory relief pursuant to K.S.A. 60-1701, *et seq.* Plaintiffs also request the Court to determine that an actual controversy exists between the parties, and to award reasonable attorneys' fees and costs pursuant to 42 U.S.C. § 1988.

8. This action also seeks injunctive and declaratory relief to protect these Plaintiffs from any efforts by the Defendants to construe and enforce the terms of Senate Bill 147 in such a manner as to treat Plaintiffs as public utilities doing business in Kansas for ad valorem tax purposes in violation of the Kansas Constitution.

9. This action also seeks injunctive and declaratory relief to establish that the natural gas the Defendants are seeking to tax is exempt from the taxation under applicable statutory provisions exempting certain property from ad valorem taxation.

10. This action also seeks injunctive and declaratory relief finding Senate Bill 147 to have been enacted in violation of the one-subject rule contained in Article 2, § 16 of the Kansas Constitution.

BACKGROUND

11. On October 31, 2003, the Kansas Supreme Court entered an opinion in *In re Application of Central Illinois Public Services Company,* 276 Kan. 612 (2003). That case was brought by the Plaintiffs identified in paragraphs 1 through 3 herein. In that case, the Supreme Court concluded that an attempt to deny the merchants' and manufacturers' inventory property tax exemption to those Plaintiffs failed because the Plaintiffs were not "public utilities" within the terms of Article 11, § 1 of the Kansas Constitution.

12. In upholding the determination by the Board of Tax Appeals ("BOTA") that these Plaintiffs were not "public utilities" under the Kansas Constitution, the Court discussed the authority

of the Legislature to define terms used in the Constitution. The Court stated: "The legislature had the power to define 'public utilities' as used in Article 11, § 1 of the Kansas Constitution (2002 Supp.) and did so in a manner which neither enlarged nor lessened the constitutional provision and had a reasonable and recognizable similarity to generally accepted definitions and the common understanding of the term by the people of Kansas." 276 Kan. 612, Syl. ¶ 9. While explaining that the Legislature does have some authority to define what constitutes "public utility tangible personal property," the Court also cautioned that "the legislature's definition must conform to the commonly understood meaning of the term." *Id.* at 619

13. Until the 2004 legislative session, the statutory definition of "public utilities" was consistent with the commonly understood meaning of the term. It neither attempted to enlarge or lessen the scope of the constitutional provision classifying public utility property for ad valorem tax purposes. K.S.A. 2003 Supp. 79-5a01. In relevant part, the statutory definition required that, to be a public utility, a company must be engaged in the business of transporting or distributing natural gas to, from, or within the state of Kansas, or that it be engaged in the business of storing natural gas in an underground formation. In the *Central Illinois* case, the Supreme Court held that the Plaintiffs therein did not fit within that definition – they had simply contracted with a company to store and transport their natural gas, but did not engage in the natural gas storage, transportation or distribution business in Kansas. None of the Plaintiffs herein are engaged in the business of storing, transporting or distributing natural gas in Kansas, nor are they certificated by the Kansas Corporation Commission to operate as natural gas public utilities in this state.

14. In 1992, Article 11, § 1 of the Kansas Constitution was amended to exclude inventories of public utilities from the property tax exemption for merchants' and manufacturers' inventories contained in the Constitution. At that time, public utilities were defined by the enabling

statute by reference to the definition contained in K.S.A. 79-5a01, as interpreted by the Kansas Supreme Court in the *Central Illinois* case. Thus, when the Kansas Constitution was amended, both the Legislature and the citizens of Kansas reasonably would have believed that they were authorizing the removal of the merchants' and manufacturers' inventory exemption from only those entities that were commonly understood to be public utilities, as then defined by K.S.A. 79-5a01.

15. In the wake of the Supreme Court's holding, the Kansas Legislature in 2004 undertook to attempt to change the traditional meaning of a "public utility." Senate Bill 147 purported to expand the definition of "public utility" in K.S.A. 79-5a01 to include "every individual, company, corporation, association of persons, brokers, lessees or receivers that now or hereafter own, control and hold for resale stored natural gas in an underground formation in this state . . . ."

16. The Legislature provided that, although the act would take effect and be in force after its publication in the statute book, i.e., July 1, 2004, the redefinition of "public utility" purportedly was to be "applicable to all taxable years commencing after December 31, 2003." Senate Bill 147, Section 4(c). As a result of this timing, none of the administrative remedies typically available to centrally assessed taxpayers clearly are available to the Plaintiffs, although the Defendants have attempted to fashion some administrative mechanism for enforcement of this section of the statute.

17. The Plaintiffs have contracted with certain interstate underground storage operators to receive natural gas storage services. On January 1, 2004, the Plaintiffs owned rights to natural gas that had been delivered for storage and transportation to the Panhandle Eastern Pipe Line system. Missouri Gas Energy also owned rights to natural gas that had been delivered for storage to the Southern Star Central Gas Pipeline. In connection with the prior challenge to the attempt to tax stored gas, BOTA found:

> When Panhandle Eastern Pipe Line Co. "allocates" gas in storage to this and other applicants it essentially means that an applicant has a right to get gas from the

pipeline, *not* a right to get any *specific* gas from any *specific* location. Due to the nature of the industry, there can be no gas identified as Applicant's gas within any particular storage facility at any particular times; it's rather a system based on accounting entries, not tangible, physical property transactions.

18. On July 2, 2004, John H. Hughes, Bureau Chief, State Appraised Property Bureau of the Kansas Department of Revenue, Division of Property Valuation, contacted Plaintiffs, indicating that "[t]he Division has information indicating that your company has gas in a Kansas storage field as of January 1, 2004." Mr. Hughes included Annual Rendition forms in his communication with Plaintiffs, and indicated that those forms were to be completed August 1, 2004. True and correct copies of the communications from the Kansas Department of Revenue are attached as Exhibits "A" and "B".

19. The purported retroactive imposition of the tax may have deprived the Plaintiffs of an adequate administrative remedy.

COUNT I

VIOLATION OF THE UNITED STATES CONSTITUTION COMMERCE CLAUSE

20. In purporting to impose an ad valorem property tax on gas temporarily stored in underground reservoirs, the Kansas Legislature attempted to tax goods of public utilities moving in interstate commerce. Prior to the passage of Senate Bill 147, K.S.A. 79-201f(a) exempted: "[p]ersonal property which is moving in interstate commerce through or over the territory of the state of Kansas." Senate Bill 147 added the following exception to this provision: "except public utility inventories subject to taxation pursuant to K.S.A. 79-5a01 et seq., and amendments thereto."

21. State ad valorem property taxation of goods moving in interstate commerce is prohibited by the Commerce Clause and the Import Export clause.

22. Plaintiffs are entitled to a declaration that Senate Bill 147 is unconstitutional and in violation of the Plaintiffs' rights to the free flow of goods in interstate commerce. Plaintiffs are entitled to injunctive relief preventing the enforcement of Senate Bill 147 against them, for damages sustained, and to such other and further relief as may be available to the Plaintiffs under 42 U.S.C. § 1983.

COUNT II

VIOLATION OF THE KANSAS CONSTITUTION

23. The Kansas Constitution granted merchants and manufacturers an exemption from ad valorem property taxation for inventories they held. An exception to that exemption created in 1992 was for "public utility inventory."

24. The term "public utility" was commonly understood to be as it was defined in K.S.A. 79-5a01 prior to the 2004 amendment. Specifically a "public utility" was understood to be a company or other entity that engaged in the specified activities that the statute listed as activities commonly and traditionally understood to be characteristic of a "public utility."

25. The 2004 amendment sought to redefine "public utility" to include entities that would not be commonly thought of as "public utilities." For example, "natural gas marketers and brokers" are not "public utilities." Now, however, pursuant to Senate Bill 147, if "marketers and brokers" own and control rights to gas stored in a Kansas gas storage field and hold that gas for resale, they would be defined legislatively to be "public utilities," although they are not engaged in any traditional public utility activity in Kansas.

26. Imposing an unexpected and uncommon definition on the term "public utility" brings this statute directly in conflict with the 1992 amendment to the Kansas Constitution, in which the Legislature and the citizens of Kansas excluded from the inventory exemption only inventory held

by "public utilities." Redefining "public utility" in this manner violates the rights of the Plaintiffs secured by the Kansas Constitution's extension of the inventory exemption to merchants other than "public utilities."

27. Plaintiffs are entitled to a declaration that to the extent Senate Bill 147 purports to redefine "public utility" in this uncommon manner, it is void as violating the Kansas Constitution. Plaintiffs are entitled to injunctive relief barring the Defendants from taking any action to enforce the new definition of "public utility" found in Senate Bill 147.

COUNT III

PLAINTIFFS ARE NOT WITHIN THE PROVISIONS OF K.S.A. 79-5a01 AS AMENDED

28. To be considered "public utilities" within the terms of Senate Bill 147, an entity must "own, control and hold for resale" gas within an underground storage facility in Kansas.

29. Plaintiffs are entitled to a declaration that they do not "own, control and hold for resale" gas that has been allocated to them in a storage facility. Upon plaintiffs' delivery of gas to a storage operator, the gas is held by and control passes to the storage operator. Plaintiffs retain ownership rights to receive equivalent volumes of gas back from a storage operator. They do not, however, "control and hold" gas stored in underground formations. Consequently, they are not "public utilities" as defined by Senate Bill 147. Gas owned by plaintiffs qualifies for exemption from ad valorem taxation as merchants' inventory.

COUNT IV

PLAINTIFFS' GAS IS EXEMPT UNDER K.S.A. 79-201f

30. K.S.A. 79-201f exempts goods that are moving in interstate commerce through or over the territory of the State of Kansas.

31. Senate Bill 147 purports to amend this provision so as to exclude from the exemption property held by "public utilities" as that bill redefines the term. Although Senate Bill 147 makes the definition of "public utility" retroactive, that bill does not make the amendment to K.S.A. 79-201f retroactive.

32. For Tax Year 2004, Plaintiffs are entitled to a declaration that their gas in storage is moving in interstate commerce so as to be entitled to exemption under K.S.A. 79-201f.

COUNT V

DUE PROCESS VIOLATIONS

33. Senate Bill 147 purported to remove an exemption for Plaintiffs' stored natural gas retroactively. The retroactive removal of this exemption violated the Plaintiffs' right to due process, in that it denied the Plaintiffs any opportunity to shape their affairs so that they could choose to minimize or avoid incurring this taxation. The *Central Illinois* case, finding that stored natural gas owned by Plaintiffs was exempt from personal property taxation as merchants' inventory, was handed down just two months prior to January 1, 2004, the date on which the taxes at issue herein are based. The Plaintiffs reasonably could and did rely upon the fact that this gas was not going to be taxed in determining the extent to which they would store gas in interstate underground storage facilities located in Kansas.

34. It was late in the legislative session, months after the taxation date, that the Kansas Legislature undertook to purport to strip the exemption from the Plaintiffs. Senate Bill 147, which became law on July 1, 2004, denied the Plaintiffs any opportunity to adjust their actions in light of the changed taxation rules.

35. The retroactive elimination of this exemption in this manner constitutes a violation of the due process rights secured by the 14th Amendment to the United States Constitution, and by the Kansas Bill of Rights.

COUNT VI

VIOLATION OF CONSTITUTIONAL ONE-SUBJECT RULE

36. Article 2, § 16 of the Kansas Constitution provides that "no bill shall contain more than one subject. . . ." Senate Bill 147 is a 45-page bill described in the title as "An ACT concerning taxation. . . ." The bill not only amends K.S.A. Chapter 79 ad valorem tax statutes, its scope embraces amendments to the individual income tax, the retailers' sales tax, the clean drinking water fee imposed under K.S.A. Chapter 82 and multiple franchise fees administered by the Secretary of State under K.S.A. Chapter 17. The diverse and unrelated nature of the subject matter contained in Senate Bill 147 is illustrated by New Section 40 that permits retailers to use origin-based rather than destination-based sourcing provisions for calculating sales tax liability during a transition period extending to January 1, 2005. New Section 40 is wholly unrelated to the redefinition of "public utility" for ad valorem tax purposes that is also included in Senate Bill 147.

37. Article 2, § 16 is intended to prevent legislators from combining unrelated proposals and presenting them as separate provisions of a single bill. Senate Bill 147 directly conflicts with this constitutional restriction on legislative power and should be declared invalid in its entirety.

WHEREFORE, Plaintiffs pray judgment be entered in their favor and against the Defendants (1) declaring that Senate Bill 147 is unconstitutional and in violation of the United States and Kansas Constitutions; (2) declaring that the gas owned by Plaintiffs is exempt from ad valorem taxation under the terms of the Senate Bill 147; (3) enjoining the Defendants, and all those acting in concert with the Defendants, from taking action to enforce Senate Bill 147 against the Defendants; (4) for attorneys fees, as permitted by 42 U.S.C. § 1988; (5) and for such other and further relief as the court deems proper.

Respectfully Submitted,

By: _____

C. Michael Lennen, SC#08505
Robert W. Coykendall, SC#10137
Richard F. Hayse SC#07010
MORRIS, LAING, EVANS, BROCK & KENNEDY, Chartered
300 N. Mead, Suite 200
Wichita, Kansas 67202-2722
(316) 262-2671; Telephone
(316) 262-6226; Fax

IN THE THIRD JUDICIAL DISTRICT
DISTRICT COURT, SHAWNEE COUNTY, KANSAS
DIVISION 9

MISSOURI GAS ENERGY, a division of SOUTHERN UNION COMPANY, CENTRAL ILLINOIS PUBLIC SERVICE COMPANYd/b/a, AmerenCIPS, UNION ELECTRIC COMPANY d/b/a AmerenUE, BP ENERGY COMPANY, PROLIANCE ENERGY, L.L.C.

Plaintiffs

vs.

JOAN WAGNON, as Secretary of Revenue, MARK BECK, as Director of Property Valuation Division, and DEPARTMENT OF REVENUE, DIVISION OF PROPERTY VALUATION, STATE OF KANSAS

Defendants.

CASE NO. 04C 001229

Petition Pursuant to K.S.A. Chapter 60

PRAECIPE FOR SUMMONS

The Clerk of the Court will issue a Summons and Petition in the above entitled action to:

State of Kansas
Attorney General, Phil Kline
Memorial Hall
120 SW 10th, 2nd Floor
Topeka, KS 66612

Service of said Summons and Petition is directed to the undersigned attorney for personal service upon the Attorney General and return of service should be made according to Kansas law.

Respectfully Submitted,

By: _____

C. Michael Lennen, SC#08505
Robert W. Coykendall, SC#10137
Richard F. Hayse SC#07010
MORRIS, LAING, EVANS, BROCK & KENNEDY, Chartered
300 N. Mead, Suite 200
Wichita, Kansas 67202-2722
(316) 262-2671; Telephone
(316) 262-6226; Fax

FILED BY CLERK
K.S. DISTRICT COURT
THIRD JUDICIAL DIST.
TOPEKA, KS.

2004 SEP -8 P 2:30

IN THE THIRD JUDICIAL DISTRICT
DISTRICT COURT, SHAWNEE COUNTY, KANSAS
DIVISION 9

MISSOURI GAS ENERGY, a division of SOUTHERN UNION COMPANY, CENTRAL ILLINOIS PUBLIC SERVICE COMPANYd/b/a, AmerenCIPS, UNION ELECTRIC COMPANY d/b/a AmerenUE, BP ENERGY COMPANY, PROLIANCE ENERGY, L.L.C.

Plaintiffs

vs.

JOAN WAGNON, as Secretary of Revenue, MARK BECK, as Director of Property Valuation Division, and DEPARTMENT OF REVENUE, DIVISION OF PROPERTY VALUATION, STATE OF KANSAS

Defendants.

CASE NO 04C 001229

Petition Pursuant to K.S.A. Chapter 60

ENTRY OF APPEARANCE

COMES NOW William E. Waters and waives service of Summons and voluntarily enters his appearance as counsel of record for Joan Wagnon, Secretary of Revenue, Mark Beck, Director of Property Valuation Division, and the Department of Revenue, Division of Property Valuation, State of Kansas.

Dated this 8th day of September, 2004.

Respectfully Submitted,

By: William E. Waters

William E. Waters (12639)
Division of Property Valuation
Kansas Department of Revenue
915 S.W. Harrison Street
Docking State Office Building, 4th Floor
Topeka, Kansas 66612-1585
Telephone: (785) 296-4035

Larry Kravitz

From: KOHALLORAN@morrislaing.com

Sent: Thursday, September 09, 2004 3:05 PM

To: TByrne@ameren.com; bhouse@proliance.com; jlarch@proliance.com; jmeyer@ameren.com; jlopez@panhandleenergy.com; lkravitz@mgemail.com; rhack@mgemail.com; Scott.Pollock@bp.com; smcgregor@southernunionco.com

Cc: MLENNEN@morrislaing.com

Subject: MGE et al. v. Wagnon et al

Please find attached for your files file-stamped copies of the Petition, Summons, Entry of Appearance and Praecipe for Summons in the referenced matter.

IN THE THIRD JUDICIAL DISTRICT
DISTRICT COURT, SHAWNEE COUNTY, KANSAS
DIVISION NINE

MISSOURI GAS ENERGY, a division of SOUTHERN UNION COMPANY, CENTRAL ILLINOIS PUBLIC SERVICE COMPANY d/b/a AmerenCIPS, UNION ELECTRIC COMPANY d/b/a AmerenUE, BP ENERGY COMPANY, PROLIANCE ENERGY, L.L.C. Plaintiffs, vs. JOAN WAGNON, as Secretary of Revenue, MARK BECK, as Director of Property Valuation Division, and DEPARTMENT OF REVENUE, DIVISION OF PROPERTY VALUATION, STATE OF KANSAS Defendants.	CASE NO. 04 C 1229

ANSWER AND AFFIRMATIVE DEFENSE

COMES NOW Joan Wagnon, Secretary of Revenue, Mark S. Beck, Director of Property Valuation, and the Division of Property Valuation of the Kansas Department of Revenue and for their answer[1] state as follows:

1. Paragraphs 1, 2, 3, 4, 5, 6, 8, 9, 10, 18, 23 and 31 are admitted.
2. Paragraphs 19, 20, 21, 22, 24, 25, 26, 27, 28, 29, 32, 33, 34, 35, 36 and 37 are denied.

3. Defendants admit that plaintiffs state in paragraph 7 that they are bringing this action pursuant to 42 U.S.C. § 1982, but deny that the court has jurisdiction pursuant to 42 U.S.C. § 1982[2]. Defendants further deny that plaintiffs are entitled to attorneys' fees and costs.

4. Paragraph 11 is admitted in part and denied in part. That part of paragraph 11 where plaintiffs state that the Supreme Court concluded that plaintiffs were not "public utilities" within the terms of article 11, section 1 of the Kansas Constitution is denied. The remainder of paragraph 11 is admitted.

5. Paragraph 12 is admitted in part and denied in part. That part of paragraph 12 where plaintiffs state that the Supreme Court concluded that plaintiffs were not "public utilities" under the Kansas Constitution is denied. The remainder of paragraph 11 is admitted.

6. Paragraph 13 is admitted in part and denied in part. The first sentence of paragraph 13 ("Until the 2004 legislative session, the statutory definition of "public utilities" was consistent with the commonly understood meaning of the term.") is denied. Defendants affirmatively state that the statutory definition of "public utilities," as set forth in K.S.A. 79-5a01, as amended by L. 2004, ch. 171, § 4, is consistent with the commonly understood meaning of the term. The second, third and fourth sentences

[1] Defendants' answers correspond to the paragraphs set forth in plaintiffs' FIRST AMENDED PETITION FOR DECLARATORY AND INJUNCTIVE RELIEF.

[2] Defendants also deny that the court has jurisdiction pursuant to 42 U.S.C. § 1983.

of paragraph 13 are admitted. Defendants are without sufficient knowledge to either admit or deny the last sentence of paragraph 13; therefore, it is denied.

7. Paragraph 14 is admitted in part and denied in part. The first and second sentences of paragraph 14 are admitted. Defendants are without sufficient knowledge to either admit or deny the last sentence of paragraph 14; therefore, it is denied.

8. Paragraph 15 is admitted in part and denied in part. Defendants admit that the 2004 Kansas Legislature amended K.S.A. 79-5a01. L. 2004, ch. 171, § 4. However, defendants deny that the 2004 Kansas Legislature "undertook to attempt to change the traditional meaning of a 'public utility.' "

9. Paragraph 16 is admitted in part and denied in part. The first sentence of paragraph 16 is admitted. The second sentence of paragraph 16 is denied. The administrative appeal remedies afforded by K.S.A. 79-5a05 and K.S.A. 74-2438 remain available to plaintiffs.

10. Paragraph 17 is admitted in part and denied in part. Sentences one, two and three are admitted. Defendants admit that one party in *In re Tax Exemption Application of Illinois Public Services Co.*, 276 Kan. 612, 78 P.3d 419 (2003) admitted before the Board of Tax Appeals ("BOTA") that the stored natural gas held in Panhandle Eastern Pipe Line Company's storage

facility is fungible. Defendants admit that BOTA adopted the stipulated fact set forth in paragraph 17.

11. Defendants admit, as stated in paragraph 30, that K.S.A. 79-201f exempts personal property that is moving in interstate commerce through or over the territory of the state of Kansas, but deny that it applies to public utility inventories, which are required to be taxed pursuant to art. 11, § 1 of the Kansas Constitution.

AFFIRMATIVE DEFENSE

THE COURT LACKS SUBJECT MATTER JURISDICTION BECAUSE PLAINTIFFS HAVE NOT EXHAUSTED ADMINISTRATIVE REMEDIES.

Plaintiffs challenge agency action, *i.e.*, they assert that defendants have undertaken to value and assess their stored natural gas and they challenge the legality of such action. See FIRST AMENDED PETITON FOR DECLARATORY AND INJUNCTIVE RELIEF, ¶¶ 6 & 18. Plaintiffs seek an injunction to enjoin defendants from valuing and assessing their stored natural gas and a declaratory judgment that they are not "public utilities," as defined by K.S.A. 79-5a01, as amended by L. 2004, ch. 171, § 4. See FIRST AMENDED PETITON FOR DECLARATORY AND INJUNCTIVE RELIEF, ¶¶ 8, 22, 27, 29 & 32. Plaintiffs seek the exemption of their property from taxation in Kansas. See FIRST AMENDED PETITON FOR DECLARATORY AND INJUNCTIVE RELIEF, ¶ 9.

K.S.A. 77-606 provides:

> In accordance with K.S.A. 77-603 and amendments thereto, [the Act for Judicial Review and Civil Enforcement of Agency Actions, K.S.A. 77-601 *et*

seq. ("KJRA")] establishes the exclusive means of judicial review of agency action.

K.S.A. 77-612 of the KJRA provides:

> A person may file a petition for judicial review under this act only after exhausting all administrative remedies available within the agency whose action is being challenged and within any other agency authorized to exercise administrative review[.]

Full and adequate administrative remedies exist to address plaintiffs' claimed exemption; in fact, several of the plaintiffs have availed themselves to these remedies in the past[3]. K.S.A. 79-5a05 establishes an informal conference procedure before the director of property valuation where these plaintiffs may challenge the valuation and assessment of their property. K.S.A. 74-2438 establishes the right to appeal the informal conference decision to the board of tax appeals pursuant to K.S.A. 74-2438[4].

In *Junction City Education Ass'n v. U.S.D. No. 475,* 264 Kan. 212, 224, 955 P.2d 1266 (1998), the Supreme Court held that a district court lacks independent equitable jurisdiction to grant declaratory relief when the matter may be appealed under the KJRA. K.S.A. 77-622 of KJRA provides that on judicial review, the reviewing "court may grant other appropriate relief, whether mandatory, injunctive or declaratory; preliminary or final; temporary or

[3] Note that several of the plaintiffs, *i.e.,* Missouri Gas Energy, Central Illinois Public Service Company and Union Electric Company, in fact, exhausted administrative remedies in *In re Tax Exemption Application of Central Illinois Public Services Co.*, 276 Kan. 612, 78 P.3d 419 (2003).

[4] Likewise, plaintiffs are precluded from challenging state taxation in state court pursuant to 42 U.S.C. § 1983 without exhausting administrative remedies. *Zarda v. State*, 250 Kan. 364, 372-73, 826 P.2d 1365, *cert. denied* 504 U.S. 973, 119 L. Ed 2d 566, 112 S. Ct. 2941 (1992); *Dean v. State*, 250 Kan. 417, 423-25, 826 P.2d 1372, *cert. denied* 504 U.S. 973, 119 L. Ed 2d 566, 112 S. Ct. 2941 (1992).

permanent; equitable or legal." Therefore, the relief sought by plaintiffs in this action may be sought on judicial review under KJRA and, for that reason, the exhaustion of administrative remedies is required.

The Supreme Court in *J. Enterprises, Inc. v. Board of Harvey County Comm'rs*, 253 Kan. 552, 857 P.2d 666 (1993) addressed the contention that a taxpayer is not required to exhaust administrative remedies to enjoin the assessment of a tax on inventory claimed to be illegal. The Supreme Court stated:

> If a party may confer jurisdiction upon the courts . . . by claiming that the actions of the taxing authority are illegal, concurrent jurisdiction would exist in nearly every case with the district court and BOTA. In all cases where a taxpayer claimed an exemption, the taxpayer would need only claim that the tax assessed was illegal in order to confer jurisdiction upon the district court and bypass BOTA completely. The present remedy for a taxpayer claiming exemption from ad valorem taxes is exclusive, conferring no original jurisdiction on the district court, but requiring the taxpayer to exhaust remedies before BOTA prior to applying to the district court for relief.
>
> 253 Kan. at 556.

In *J. Enterprises*, the Supreme Court cited *State ex rel. Smith v. Miller*, 239 Kan. 187, 718 P.2d 1298 (1986), wherein it had stated:

> A party aggrieved by an administrative ruling is not free to pick and choose a procedure in an action in the district court in order to avoid the necessity of pursuing his remedy through administrative channels. Since the adoption of the act for judicial review and civil enforcement of agency actions (K.S.A. 77-601 *et seq.*), it would appear that relief such as is sought here [a ruling on the constitutionality of statutes] should be

> raised as new issues in the district court on appeal from the BOTA. See K.S.A. 77-617.
>
> 239 Kan. at 190.

Also, in *J. Enterprises*, the Supreme Court cited *Tri-County Public Airport Authority v. Board of Morris County Comm'rs*, 233 Kan. 960, 666 P.2d 698 (1983), wherein it had stated:

> [T]he owner of [the] property claimed to be tax exempt under the Kansas law, has a full and adequate administrative remedy provided by statute for determination of its tax-exempt status. It made no attempt to avail itself of the administrative remedy; it had no right to resort to the courts in an independent action. It follows that the district court had no jurisdiction to determine the case and this court does not acquire jurisdiction of the subject matter upon appeal.
>
> 233 Kan. at 967.

In *J. Enterprises*, the Supreme Court noted that the exhaustion of administrative remedies does not mean the forfeiture of the right to have tax matters finally resolved in the courts. Once administrative remedies are exhausted, the aggrieved party has the right to judicial review of the agency action. 253 Kan. at 566. See discussion in *Kansas Sunset Assocs. v. Kansas Dept. of Health and Environment*, 16 Kan. 1, 3, 818 P.2d 797 (1991):

> Sunset further argues the KJRA should not be construed to deprive it of its substantive rights under the Declaratory Judgment Act, K.S.A. 60-1701 *et seq.* Sunset bases this argument on K.S.A. 77-603(b), which states: "This act creates only procedural rights and

> impose only procedural duties. They are in addition to those created and imposed by other statutes."
>
> It is correct that the KJRA does not deprive a party of the right to declaratory relief. K.S.A. 77-622. However, in order to obtain this relief, the procedural requirements set forth in KJRA must be followed. A petition for review must be filed within 30 days after an agency action. K.S.A. 77-613. Sunset did not lose its right to a declaratory judgment because of the KJRA supplanting K.S.A. 601701 *et seq.*; it lost it right to a declaratory judgment because of its failure to follow the procedural rules set forth in the KJRA.

16 Kan. App. 2d at 3.

Prior to *J. Enterprises*, in *Zarda v. State*, 250 Kan. 364, 826 P.2d 1365, *cert. denied* 504 U.S. 973 (1992), the Supreme Court stated in *dicta* that the exhaustion of administrative remedies is not required where an injunction and declaratory judgment are sought without a claim for tax refunds. Specifically, the Court stated:

> [T]he plaintiffs could have sought a declaratory judgment as to the constitutionality of the regulations and injunctive relief in the district court without first presenting these two issues to BOTA.
>
> . . .
>
> However, plaintiffs also prayed for recovery of taxes collected and paid pursuant to the [regulation].

In *Dean v. State*, 250 Kan. 417, 826 P.2d 1372, *cert. denied* 504 U.S. 973 (1992), decided the same day as *Zarda*, the Court added:

> [T]he district court does have jurisdiction to hear claims for declaratory judgment and injunctive

> relief without plaintiffs' first [exhausting administrative remedies]. . . . This is a claim brought pursuant to K.S.A. 60-1701 and, if considered separately from the claims for recovery of taxes paid, would not be subject to the requirement of exhaustion of administrative remedies.
>
> 250 Kan. at 427.

Shortly after *Zarda* and *Dean*, the Supreme Court decided *First Page, Inc. v. Cunningham*, 252 Kan. 593, 847 P.2d 1238 (1993). The issue in *First Page* was whether a taxpayer was a public utility pursuant to K.S.A. 79-5a01. The district court dismissed the taxpayer's claim for injunctive and declaratory relief for failure to exhaust administrative remedies, but nonetheless decided the case on the merits. On appeal, the Supreme Court, without analysis of the exhaustion issue[5], did, in fact, review of the district court's decision on the merits. 252 Kan. at 595.

Zarda, Dean and *First Page* each preceded *J. Enterprises*. In *Boeing Co. v. Oaklawn Improvement Dist.*, 255 Kan. 848, 877 P.2d 967 (1994), the Supreme Court made it clear that it was adhering to the legal rules expressed in *J. Enterprises* and summarized those rules as follows:

> (1) the interpretation of a statute involving taxation is, in the first instance, an administrative function entrusted to the appropriate administrative authorities, and . . . jurisdiction does not vest merely because a party claims that a statutory construction issue is present; (2) an erroneous interpretation of a statute by administrative taxing

[5] On appeal, the parties urged the court to decide the issue even though the district court had dismissed the action for lack of subject matter jurisdiction. 252 Kan. at 595.

> authorities does not, alone, render a tax arbitrary, capricious, and unreasonable so as to vest a court with jurisdiction; (3) ***the mere fact that no refund relief is sought and the taxpayers seek only prospective relief does not defeat BOTA's initial jurisdiction;*** and (4) for a tax to be illegal so as to vest jurisdiction in the courts . . . the action of administrative officials must be without valid legislative authority, amount to fraud or corruption, or be so oppressive, arbitrary, or capricious as to amount to fraud. (Emphasis added.)
>
> 255 Kan. at 857-58.

The fact that these plaintiffs do not seek tax refunds does not vest jurisdiction in this court to grant injunctive and declaratory relief without the exhaustion of administrative remedies. Plaintiffs have not exhausted administrative remedies; therefore, the court does not have subject matter jurisdiction.

Another reason the court does not have subject matter jurisdiction is the primary relief sought by the plaintiffs is the exemption of their inventory (stored natural gas) from taxation. BOTA is the administrative agency vested special expertise to determine whether property is exempt from taxation. See K.S.A. 79-213[6].

Judicial review of BOTA's orders on the exemption of property is in the court of appeals, not the district court. See K.S.A. 74-24269(c)(3). Plaintiffs need to present this exemption matter to BOTA and either party, if aggrieved by BOTA's ruling, may seek judicial review, not in the district court, but in the court

of appeals. Plaintiffs' attempt to interject the district court in a tax exemption matter is contrary to the scheme established by the legislature for the determination of exemption matters.

Recently, in *Westboro Baptist Church, Inc. v.* Patton, 32 Kan. App. 2d 941, 93 P.3d 718, (2004), *petition for review filed* August 5, 2004, the Court of Appeals summarized why the district court lacks jurisdiction to grant declaratory or injunctive relief without the exhaustion of administrative remedies in a tax exemption case:

> In matters concerning a tax exemption, a party must exhaust its administrative remedies before resorting to the courts in an independent action. *Tri-County Public Airport Authority v. Board of Morris County Comm'rs*, 233 Kan. 960, 967, 666 P.2d 698 (1983). Whether a party is required to or has failed to exhaust its administrative remedies is a question of law over which the appellate court's review is unlimited. *Miller v. Kansas Dept. of SRS*, 275 Kan. 349, 353, 64 P.3d 395 (2003).
>
> This matter was filed as a Chapter 60 petition for mandamus, or declaratory or injunctive relief against BOTA. By filing the petition, WBC was attempting to appeal the BOTA orders denying WBC's motion to have the board members respond to voir dire questions. The orders are interlocutory in nature. WBC recognizes that, in matters relating to tax exemptions, a party is required to exhaust administrative remedies by taking the matter before BOTA and, from there, timely seeking review of the ruling on the tax matter to this court.
>
> K.S.A. 74-2426 provides two routes for review of BOTA orders – a KJRA appeal to this court or to

[6] For a discussion of BOTA's authority in exemption matters see *In re Tax Exemption Application of Abbott Aluminum, Inc.*, 269 Kan. 689, 8 P.3d 729 (2000) at 694-96.

the district court, depending on the type of case. The above statute does not provide for a collateral action under Chapter 60 such as WBC filed in this case. Because K.S.A. 74-2426(c) specifies a means of review of BOTA orders, no other means of review can be taken.

The KJRA is the exclusive remedy for review of agency actions unless the agency is specifically exempted by statute. K.S.A. 77-603(a); K.S.A. 77-606. BOTA has not been specifically exempted. In *Kansas Sunset Assocs. v. Kansas Dept. of Health & Environment*, 16 Kan. App. 2d 1, 3, 818 P.2d 797 (1991), this court affirmed a district court's dismissal of a Chapter 60 declaratory judgment action against the Kansas Department of Health and Environment as barred by the plaintiff's failure to comply with the procedural requirements of the KJRA. Similarly, in *Farmers Banshares of Abilene, Inc. v. Graves*, 250 Kan. 520, 522-23, 826 P.2d 1363 (1992), our Supreme Court affirmed the district court's dismissal of a Chapter 60 action seeking mandamus and injunctive relief against the Secretary of State. The court held that the plaintiff's exclusive remedy was through the KJRA. 250 Kan. at 523. Mandatory, injunctive, and declaratory relief are available through the KJRA when properly invoked. K.S.A. 77-622(b).

Our Supreme Court continues to recognize the KJRA as the exclusive means of review of an agency action. *Schall v. Wichita State University*, 269 Kan. 456, Syl. ¶ 15, 7 P.3d 1144 (2000). Because K.S.A. 74-2426 provides a process for review of BOTA's orders, either to this court or a district court in the context of a KJRA action, a separate action or claim for declaratory or injunctive relief is not available.

WBC improperly sought injunctive relief through the Chapter 60 action. BOTA is a quasi-judicial agency. *In re Appeal of News Publishing Co.*, 12 Kan. App. 328, 334, 743 P.2d 559 (1987). A party's right to obtain review of decisions of a quasi-judicial body, even in those cases when a district court may have what is in effect appellate jurisdiction, is limited.

Even where the courts have jurisdiction to review the quasi-judicial body's action in some form, the courts do not have jurisdiction to review alleged errors in an independent action such as the present one requesting declaratory and injunctive relief against BOTA. *Ratley v. Sheriff's Civil Service Board*, 7 Kan. App. 2d 638, 641, 646 P.2d 1133 (1982); *Thompson v. Amis*, 208 Kan. 658, Syl. ¶ 5, 493 P.2d 1259, *cert. denied* 409 U.S. 847 (1972). The courts will generally refuse to entertain an action for declaratory relief as to issues which are determinable in a pending action or proceeding between the same parties. 7 Kan. App. 2d at 640.

In *Ratley*, a county employee requested a hearing on his dismissal before the Sheriff's Civil Service Board. The Board's hearing began with preliminary discussion on who would bear the burden of proof and whether the hearings should be open to the public. Before the Board reached a substantive decision on whether to uphold the employee's dismissal, the employee filed a declaratory judgment action in the district court to obtain a determination as to the preliminary issues regarding the burden of proof and the public nature of the meetings. The district court granted the request for declaratory relief and entered a judgment. 7 Kan. App. 2d at 639. On appeal, this court reversed the district court's judgment granting declaratory relief, remanding with directions to dismiss for lack of jurisdiction, concluding that the district court erred in accepting a declaratory judgment action. 7 Kan. App. 2d at 643. We concluded that declaratory judgment actions are not appropriate when avenues of direct appeal from agency decisions are available. 7 Kan. App. 2d at 640-42.

WBC relies on a line of cases that generally hold that BOTA cannot decide due process issues; rather, it is limited to tax issues within its unique expertise. See *J. Enterprises, Inc. v. Board of Harvey County Comm'rs*, 253 Kan. 552, 565-66, 857 P.2d 666 (1993). However, the administrative process would be inefficient if BOTA was restricted to only the tax-

related issues. Due process issues and procedural questions come up in many cases. If the parties sought a declaratory judgment for every procedural issue that arose, the process would be inefficient. An appeal to the district court should occur only after all issues related to the tax appeal have been addressed, including procedural issues.

Likewise, in *Zarda v. State*, 250 Kan. 364, 826 P.2d 1365, *cert. denied* 504 U.S. 973 (1992), which was relied on by WBC, the taxpayers attempted to bring a declaratory judgment action arguing that the alphabetically staggered registration system for cars was unconstitutional. The *Zarda* court, concluding that BOTA had the power to resolve administrative issues but had no power to resolve constitutional issues, upheld the district court's dismissal. The *Zarda* court held the challenge was to the Department of Revenue's regulations, which is an administrative function. 250 Kan. at 369. BOTA can resolve administrative issues.

By filing the declaratory judgment action, WBC is attempting to bypass the exhaustion requirement. The KJRA expressly requires exhaustion. K.S.A. 77-612. According to the exhaustion doctrine, no one is entitled to judicial relief until the prescribed administrative remedy has been exhausted. *Jarvis v. Kansas Commission on Civil Rights*, 215 Kan. 902, 905, 528 P.2d 1232 (1974). Reasons for requiring the exhaustion of administrative remedies are comity, convenience, administrative efficiency, and the recognition of the separation of powers. *Mattox v. Department of Transportation*, 12 Kan. App. 2d 403, 404-05, 747 P.2d 174 (1987), *rev. denied* 242 Kan. 903 (1988). The primary purpose of the exhaustion of administrative remedies is the avoidance of premature interruption of the administrative process. *Junction City Education Ass'n v. U.S.D. No. 475*, 264 Kan. 212, Syl. ¶ 3, 955 P.2d 1266 (1998).

An instructive case on why exhaustion of administrative remedies is important is *In re Tax Appeal of Colorado Interstate Gas Co.*, 270 Kan. 303, 14

P.3d 1099 (2000), which involved a proper KJRA appeal from a BOTA decision. The court ruled that two of the constitutional issues raised on appeal were not ripe for determination:

> "We recognize that BOTA has no authority to rule on these constitutional issues. See *Zarda v. State*, 250 Kan. 364, 370, 826 P.2d 1365, *cert. denied* 504 U.S. 973 (1992). However, we have no way of knowing whether, after further proceedings before BOTA applying the correct standard of review, a case or controversy will remain. 'It is the duty of the courts to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles which cannot affect the matters in issue before the court.' *Miller v. Sloan, Listrom, Eisenbarth & Glassman*, 267 Kan. 245, 262, 978 P.2d 922 [(1999.)]" 270 Kan. at 305.
>
> 32 Kan. App.2d at 943-46.

It might be argued that it is "practical" to have this case decided by the district court. However, the words of the Supreme Court in *Dillon Stores v. Board of Sedgwick County Comm'rs*, 259 Kan. 295, 912 P.2d 170 (1996) are worth noting:

> We have no quarrel with the practicality of the Court of Appeals in deciding the case, despite having determined neither it nor the trial court had jurisdiction to do so. The problem is simply that if "a district court had no jurisdiction, an appellate court does not acquire jurisdiction over the subject matter upon appeal." *J. Enterprises*, 253 522, Syl. ¶ 2. It sounds appealing to say that eventually the identical issue will be before us, so we should go ahead and decide it now. However, an appellate court can never be certain that the exact issue will be presented to it with the same facts and procedural history. In any event, the legislature has not given us the jurisdiction to address the issue presented. We have

> no authority to assume jurisdiction on the theory that it is the practical thing to do.
>
> 259 Kan. 303-04.

It is possible that plaintiffs could obtain from BOTA a ruling that they are not public utilities and that their property is exempt from taxation. In that event there would be nothing to enjoin and a declaratory judgment would be unnecessary.

For these reasons, the court lacks subject matter jurisdiction and, therefore, is required to dismiss this action pursuant to K.S.A. 60-212(b)(1).

Respectfully submitted,

William E. Waters

William E. Waters, #12639
Division of Property Valuation
Kansas Department of Revenue
Docking State Office Building, 4th Floor
915 S.W. Harrison Street
Topeka, Kansas 66612-1585
Telephone No. (785) 296-4035
Facsimile No. (785) 296-2320

ATTORNEY FOR:
JOAN WAGNON
SECRETARY OF REVENUE;
MARK S. BECK,
DIRECTOR OF PROPERTY VALUATION; &
THE KANSAS DEPARTMENT OF REVENUE

CERTIFICATE OF SERVICE

I, William E. Waters, hereby certify that on this 22nd day of September, 2004, a true and accurate copy of the above and foregoing **ANSWER AND AFFIRMATIVE DEFENSE** was placed in the United States mail, first class postage prepaid and properly addressed to:

C. Michael Lennen
Robert W. Coykendall
Richard F. Hayse
MORRIS, LAING, EVANS, BROCK
& KENNEDY, Chtd.
300 N. Mead, Suite 200
Wichita, Kansas 67202-2722

William E. Waters

William E. Waters

IN THE THIRD JUDICIAL DISTRICT
DISTRICT COURT, SHAWNEE COUNTY, KANSAS 2004 OCT 22 A 11: 11
DIVISION 9

MISSOURI GAS ENERGY, a division of SOUTHERN UNION COMPANY, and CENTRAL ILLINOIS PUBLIC SERVICE COMPANY d/b/a/ AmerenCIPS, UNION ELECTRIC COMPANY, d/b/a AMEREN UE, BP ENERGY COMPANY, PROLIANCE ENERGY, L.L.C.,	
Plaintiffs	CASE NO. 04 C 1229
vs.	
JOAN WAGNON, as Secretary of Revenue, MARK BECK, as Director of Property Valuation Division, and DEPARTMENT OF REVENUE, DIVISION OF PROPERTY VALUATION, STATE OF KANSAS,	
Defendants.	

RESPONSE TO DEFENDANTS' AFFIRMATIVE DEFENSE

The Plaintiffs present this response to the suggestion of the defendants that this Court lacks subject matter jurisdiction to consider the Petition for declaratory and injunctive relief. Kansas law does support the proposition that "[w]here a full and adequate administrative remedy is provided in tax matters, such remedy must ordinarily be exhausted before a litigant may resort to the courts." *J. Enterprises, Inc. v. Board of Harvey County Comm'rs*, 253 Kan. 558, Syl. 5, 857 P.2d 666 (1993). When there is an established, applicable procedure for an administrative agency to consider tax issues, then failure to follow that procedure may prevent a court from considering the issue in the first instance. In the present case, however, it appears that the administrative remedy the defendants

would require the plaintiffs to exhaust is a procedure that the defendants literally are making up as events unfold.

Exhaustion is not required in the present case because there are no established procedures for considering the claims raised by the plaintiffs. The special legislation aimed directly at this group of taxpayers was made retroactive, and so deprived both the taxpayers of the ability to meaningfully assert their positions before any administrative body, and it deprived the Director of Property Valuation of any authority to grant meaningful relief. Indeed, the administrative steps taken by the defendants are wholly without precedent or direct statutory authority – in certain respects they directly conflict with the governing statutes. In these circumstances, it is recognized that K.S.A. 60-907 provides a remedy that permits a court to enjoin the assessment of a tax when the imposition of that tax "is without authority * * *." *Id.*, Syl. 3.

Moreover, some of the issues raised in this case involve the question of the constitutionality of the retroactive amendment. Neither the Secretary of Revenue nor the Board of Tax Appeals has authority to decide the constitutionality of the statute. *E.g., In re Appeal of Colorado Interstate Gas Co.*, 270 Kan. 303, 305, 14 P.3d 1099 (2000). In these circumstances, there can be no relief for the plaintiffs by exhausting an administrative remedy – the administrative remedy is not available.

In order to understand the problem created by the present situation, it is important to understand the dates that control the statutory administrative process of public utility assessment. In the table below, the "Public Utility Calendar" is taken from the Kansas Department of Revenue's website (http://www.ksrevenue.org/pvdpubucalendar.htm)(Exhibit "A"):

Statutory Procedure	Taxpayers' Circumstances
January 1 - The valuation date (K.S.A. 79-5a04) **March 20 - Filing deadline** (K.S.A. 79-5a02) **Filing Extensions** - No filing extensions are available under the law. **Informal Valuation Appeal Conference** - Must be requested in writing, stating objections, within 15 days of the mailing date of the "notice of value indicators". A "notice of value indicators" can be mailed between March 21 and June 14. The mailing of an amended "notice of value indicators" follows all informal conferences and restarts the clock on appeals to the State Board of Tax Appeals (BOTA). All informal valuation conferences must be completed before June 15. Failure to request an informal valuation conference does not preclude an appeal under K.S.A. 74-2438 (BOTA). **Appeal Valuation** to State Board of Tax Appeals - Must be requested within 30 days of the mailing date of the "notice of value indicators".	**May 20** – Senate Bill 147 finally approved
June 15 - Certification of the assessed valuations determined by the department is sent to County Clerks. The division can affect no change in value after certification without action of the State Board of Tax Appeals. **December 15 or before** - The county treasurer mails tax statements to the taxpayers, which indicate the tax due, and other information required by statute (K.S.A. 79-2001). **December 20 or before** - Full or first half taxes must be paid to the county treasurer in order to avoid penalties. (K.S.A. 79-2004a).	**June 15** – Valuations certified to counties without Plaintiffs' property included. **July 1** – Senate Bill 147 takes effect. Change in definition of "public utility" purports to be retroactive to December 31, 2003. **July 2** – Administrative letter sent by Property Valuation Division, requesting Rendition to be submitted by **August 1.** **Later date** – Other purported public utilities are receiving notices from Property Valuation Division requesting Renditions to be submitted by **still later dates**

Even the tax protest procedure set out in K.S.A. 79-2005 is not available to the Taxpayers. K.S.A. 79-2005(o) states that the protest process "shall not apply to the valuation and assessment of property assessed by the director of property valuation * * *."

I. **There is No Full and Adequate Administrative Remedy.**

The defendants argue:

> Full and adequate administrative remedies exist to address plaintiffs' claimed exemption; in fact, several of the plaintiffs have availed themselves to these remedies in the past. K.S.A. 79-5a05 establishes an informal conference procedure before the director of property valuation where these plaintiffs may challenge the valuation and assessment of their property. K.S.A. 74-2438 establishes the right to appeal the informal conference decision to the board of tax appeals pursuant to K.S.A. 74-2438.

Answer and Affirmative Defense, at p. 5.

Given the statutory time line it is manifest that no administrative remedy exists for the claims asserted in this action. K.S.A. 79-5a02 requires that public utilities file rendition statements before March 20 of each year. That was impossible for the plaintiffs in this case, since on March 20, there was no taxable property to render. On March 20, these taxpayers had absolutely no obligation to render property – as of that date, the taxpayers were not "public utilities" under K.S.A. 79-5a01, *et seq.*, and the property now sought to be taxed had been held exempt. Because the act purporting to tax these taxpayers for this property then exempt from taxation took effect July 1, 2004, the initiation of any administrative remedy departs from the statutory procedure for assessing public utilities.

The step in the process highlighted by the defendants in K.S.A. 79-5a05 is the informal conference with the director of property valuation. The governing statutes, however, require that the informal conference occur prior to June 15. Even the Department acknowledges in its Public Utility Calendar: "All informal valuation conferences must be completed before June 15."

This limitation on when informal conferences can occur was legislated in the governing statutes. K.S.A. 79-5a27 requires that on or before June 15 of each year, "the director of property valuation shall certify to the county clerk of each county the amount of assessed valuation apportioned to each taxing unit therein for properties valued and assessed under K.S.A. 79-5a01 *et seq.*, and amendments thereto." The Kansas statutes give some discretion to change values before certification. As stated in K.S.A. 79-5a05: "At any time **before certification of the assessed valuation to the counties**, the director may correct any valuation that will make it more just and equal." (Emphasis added.) After the values have been certified – and for this tax year, that certification has occurred – the Director has no power to change values. That fact is acknowledged in the "Public Utility Calendar" published by the Department of Revenue: "The division can affect no change in value after certification without action of the State Board of Tax Appeals."

The administrative process for the assessment of public utility property is thus pegged to a firm date of June 15, by which time the counties are told the value of public utility property that is subject to taxation, and can proceed with the budgeting process on that basis. By June 15 of any tax year, all final decisions of the Director of Property Valuation are issued, and, nothing further remains for the Director of Property Valuation to do, except implement any changes that result from action by the Board of Tax Appeals based upon appeals of a decision by the Director of Property Valuation made prior to June 15. Because the statute at issue in this case was effective on July 1, 2004, with some provisions purportedly retroactive to December 31, 2003, this administrative process is completely inapplicable.

One of the claims made in this action involves the application of the "moving in interstate commerce" exemption, K.S.A. 79-201f(a). In the new act, the change to the definition of public

utility was ostensibly made retroactive to December 31, 2003. The change to the interstate commerce exemption was not retroactive, rather it went into effect on July 1, 2004. Thus, the natural gas that the state is attempting to tax was statutorily exempt from taxation. The problem is that there may be no statutory way in which this exemption can be claimed. In *J. Enterprises, Inc. v. Board of Harvey County Comm'rs*, 253 Kan. 552, 857 P.2d 666 (1993), the Court confronted a case in which a taxpayer brought an action claiming that certain property it held was exempt from taxation by virtue of the merchants and manufacturer's inventory exemption. In that case, the Court held that the taxpayer "was provided with a full and adequate administrative remedy under the provision of K.S.A. 1992 Supp. 79-2005, K.S.A. 74-2426, and K.S.A. 1992 Supp. 79-213 for the determination of whether its rent-to-own property was tax-exempt under the provisions of K.S.A. 1992 Supp. 79-201m." 253 Kan. at 565. In sharp contrast to that situation, these statutes do not provide these plaintiffs with any remedy.

One remedy provided most taxpayers is the ability to pay taxes under protest, and then pursue an administrative remedy for the return of that tax money. That process is set out in K.S.A. 79-2005. K.S.A. 79-2005(o), however, provides that the tax protest process "shall not apply to the valuation and assessment of property assessed by the director of property valuation * * *."

The typical exemption process may also be unavailable. K.S.A. 79-213 presently provides a process for obtaining exemption determinations for property that is assessed at the county level – on its face it does not appear to apply to property assessed by the Director of Property Valuation.[1] K.S.A. 74-2426 establishes the right to review certain orders of the Board of Tax Appeals, but it does

---

[1] It is our understanding that the Property Valuation Director has received and considered a limited number of exemption requests under this statute.

not establish any administrative mechanism to present this exemption question to that board. In short, the statutes that established a full and adequate administrative procedure for review of the exemption claim in *J. Enterprises, Inc. v. Board of Harvey County Comm'rs* may not be applicable in the present case.

The absence of any clear administrative remedy distinguishes this case from those cited by the defendants. In *In re Tax Exemption Application of Central Illinois Public Services Co.*, 276 Kan. 612, 78 P.3d 419 (2003), the tax exemption and tax grievance procedures were available. At that time the property was not directly assessed by the Director of Property Valuation. Because there is no applicable administrative remedy – much less a full and adequate one – this Court has the authority to rule on this case.

II. **Given the Constitutional Issues, the Administrative Remedy is Inadequate.**

One of the central issues raised in this case is the constitutionality of Senate Bill 147. The Plaintiffs are asserting that the bill violates the Commerce Clause of the United States Constitution, (Count I); that it violates the Kansas State Constitution, (Count II); that it violates due process protections under both the United States and the Kansas State Constitutions (Count V); and that it violates Article 2 § 16 of the Kansas Constitution (Count VI). These constitutional issues cannot be resolved by any administrative agency.

In *Zarda v. State*, 250 Kan. 364, 370, 826 P.2d 1365, *cert. denied* 504 U.S. 973 (1992), the Court made it manifest that administrative agencies are not authorized to rule on constitutional questions. That rule has been followed consistently: *See, e.g., In re Appeal of Colorado Interstate Gas Co.*, 270 Kan. 303, 305, 14 P.3d 1099 (2000) ("We recognize that BOTA has no authority to rule on these constitutional issues."); *Copeland v. Robinson*, 25 Kan.App.2d 717, 721, 970 P.2d 69

(1998)("Administrative boards and agencies may not rule on constitutional questions."); *In re Barton-Dobenin*, 269 Kan. 851, 854, 9 P.3d 9 (2000)("BOTA did not have jurisdiction to address the constitutionality of the statute.").

The clear result of the defendants' position is that the plaintiffs are left without an administrative forum in which to assert their constitutional claims. Under these circumstances, there is no requirement to exhaust remedies prior to bringing suit in court. "Exhaustion of administrative remedies is not required when administrative remedies are inadequate or would serve no purpose." *In re Pierpoint*, 271 Kan. 620, Syl. 2, 24 P.3d 128 (2001). Because in this case the constitutional issues cannot be decided by any administrative agency, and especially because there is no administrative remedy available to the plaintiffs, no exhaustion is required. Under these circumstances, Courts permit litigants to bring their suit without requiring that the claims first be brought before an administrative agency. *Morgan v. City of Wichita*, 32 Kan.App.2d 147, 80 P.3d 407 (2003). *Accord, In re Tax Application of Lietz Constr. Co.*, 273 Kan. 890, 906, 47 P.3d 1275 (2002).

Even in cases where there are administrative remedies that must be exhausted, Courts can and will decide underlying constitutional issues prior to requiring exhaustion. Such was the case in *Boeing Co. v. Oaklawn Improvement Dist.*, 255 Kan. 848, 877 P.2d 967 (1994). In that case, the Court reached and decided a constitutional due process attack on an underlying tax statute before ordering that the case proceed through the administrative process.

For this reason as well, exhaustion is not required.

III. K.S.A. 60-907 is Applicable Because the Supplemental Certification is Without Authority and Contrary to Statute.

K.S.A. 60-907 provides a remedy to taxpayers to seek injunctive relief "to enjoin the illegal levy of any tax, charge or assessment, the collection thereof, or any proceeding to enforce the same." In *Mobil Oil Corporation v. Reynolds*, 202 Kan. 179, Syl. 1, 446 P.2d 715 (1968), the Court clearly delineated the meaning of this statute:

> The expression "illegal levy of any tax, charge or assessment" as contained in K.S.A. 60-907(a) has reference to actions of an administrative official or board taken without statutory authority or contrary to statutory authority or to action taken by an administrative official or board which is permeated with fraud, corruption or conduct so oppressive, arbitrary or capricious as to amount to fraud in connection with the levy of a tax, charge or assessment.

Similarly, in *Boeing Company v. Oaklawn Improvement District*, 255 Kan. 848, Syl. 2, 877 P.2d 967 (1994), the Court interpreted K.S.A. 60-907 to refer to "an action of an administrative official or board taken without valid legislative authority * * *." When a tax official acts outside of the authority granted by statute, Courts do not hesitate to act: "The courts have no difficulty with their power and authority where taxing officials attempt to proceed without statutory authority or to proceed contrary to the statutes; such matters are within the province of the judiciary." *Misco Industries, Inc. v. Board of Sedgwick County Comm'rs*, 235 Kan. 958, 967, 685 P.2d 886 (1984).

The plaintiffs do not allege that the conduct of the defendants is fraudulent or corrupt in any way. Rather, the retroactive nature of the statute has caused the defendants to attempt to undertake actions that are "without statutory authority" and indeed are "contrary to statutory authority." It is this absolute lack of authority, and the undertaking to act against affirmative restrictions on the defendants' authority, that gives rise to jurisdiction under this statute.

The defendants are in the process of re-certifying values of utility property after the statutory deadline for doing so. As noted above, K.S.A. 79-5a27 requires that "on or before June 15" of any tax year, the director of property valuation shall certify values to counties. Standing alone, this date may be seen as one that is directory, rather than mandatory:

> Generally speaking, statutory provisions directing the mode of proceeding by public officers and intended to secure order, system and dispatch in proceedings, and by a disregard of which the rights of parties cannot be injuriously affected, are not regarded as mandatory, unless accompanied by negative words importing that the acts required shall not be done in any other manner or time than that designated. See discussion on mandatory and directory legislation in *Board of Education of City of Wichita v. Barrett*, 101 Kan. 568, 570, 167 P. 1068; *City of Hutchinson v. Ryan*, 154 Kan. 751, 121 P.2d 179, and *School District v. Board of County Com'rs of Clark County*, 155 Kan. 636, 638, 639, 127 P.2d 418.

Shriver v. Board of County Com'rs of Sedgwick Co. 189 Kan. 548, 556, 370 P.2d 124 (1962).

Whether or not that date is directory really is not a critical issue. Undoubtedly, the defendants duly certified values by that date to the various counties as required by this statute. Of more importance is K.S.A. 79-5a05, which provides in part:

> At any time **before certification of the assessed valuation to the counties**, the director may correct any valuation that will make it more just and equal.

(Emphasis added). By this restriction, the legislature has eliminated the authority of the defendants to change valuations after the certification has been issued to the counties.[2] The entire thrust of the

---

[2] "The maxim *expressio unius est exclusio alterius, i.e.*, the inclusion of one thing implies the exclusion of another, may be applied to assist in determining actual legislative intent which is not otherwise manifest, although the maxim should not be employed to override or defeat a clearly contrary legislative intention." *In re Marriage of Killman*, 264 Kan. 33, 42, 955 P.2d 1228 (1998).

present process that the defendants have initiated will lead to the Director violating this particular restriction – a change on assessed values **after** certification.

That restriction is consistent with other express limitations placed upon the power of the Director of Property Valuation. For example, when the statutory time lines are not complied with, the Director of Property valuation is given only a limited role. K.S.A. 79-5a02 provides that: "If any public utility shall fail to provide the information as required, the director of property valuation shall advise the attorney general of such noncompliance and the attorney general shall proceed against such utility to enforce compliance herewith." In light of this statute, it would appear that if property is not rendered as required by March 20 of a tax year, the only authority that the Director of Property Valuation may have with respect to a utility that has not timely filed a rendition is to refer the matter to the Attorney General. Nothing in the statute seems to grant the Director of Property Valuation the power to change the rendition date – a fact that the department seems to recognize on its published calendar, which indicates that "No filing extensions [for renditions] are available under the law."

In the present case, the Director of Property Valuation has undertaken to arrogate unto himself the authority to set rendition dates inconsistent with the statute, the authority to re-certify values in contradiction to the authority under the statute, and the apparently the authority to make rules up and apply them differently with different taxpayers. These actions are taken without statutory authority. "The constitution of Kansas does not prescribe the method of levy, assessment and collection of taxes, or of determining whether property is exempt; those matters are wholly statutory and whatever remedies or procedures are available in connection therewith are to be found in the statutes." *Shriver v. Board of County Com'rs of Sedgwick Co.* 189 Kan. 548, 555, 370 P.2d

124 (1962). "In the absence of valid statutory authority, an administrative agency may not * * * substitute its judgment for that of the legislature. It may not exercise its powers derived from the legislature to modify, alter, or enlarge the legislative act which is being administered." *Director of Taxation, Dept. of Revenue v. Kansas Krude Oil Reclaiming Co.*, 236 Kan. 450, Syl. 2, 691 P.2d 1303 (1984). Any action "by administrative bodies must be within its statutory authority and may not contravene or nullify a controlling statutory enactment." *Lakeview Village, Inc. v. Board of County Com'rs of Johnson County*, 232 Kan. 711, Syl. 6, 659 P.2d 187 (1983).

Because there is no statutory authority for the administrative actions undertaken by the defendants, this Court has proper jurisdiction to enjoin those actions.

CONCLUSION

For the foregoing reasons, the Court should conclude that it has jurisdiction, and proceed with this action.

Respectfully Submitted,
MORRIS, LAING, EVANS, BROCK & KENNEDY, Chartered

By: Luke A. Sobba, #20812 for
Richard F. Hayse SC#07010
Michael Lennen, SC#08505
Robert W. Coykendall, SC#10137
300 N. Mead, Suite 200
Wichita, Kansas 67202-2722
(316) 262-2671; Telephone
(316) 262-6226; Fax

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing document was deposited in the U.S. mail postage prepaid on this 22nd day of October, 2004, addressed to the following:

William E. Waters
Division of Property Valuation
Kansas Department of Revenue
Docking State Office Building, 4th Floor
915 S.W. Harrison Street
Topeka, Kansas 66612-1585

Luke A. Sobba for
Richard F. Hayse

Kansas Department of Revenue

Public Utility Calendar

- **January 1** - The valuation date (K.S.A. 79-5a04)
- **March 20** - Filing deadline (K.S.A. 79-5a02)
- **Filing Extensions** - No filing extensions are available under the law.
- **Informal Valuation Appeal Conference** - Must be requested in writing, stating objections, within 15 days of the mailing date of the "notice of value indicators". A "notice of value indicators" can be mailed between March 21 and June 14. The mailing of an amended "notice of value indicators" follows all informal conferences and restarts the clock on appeals to the State Board of Tax Appeals (BOTA). All informal valuation conferences must be completed before June 15. Failure to request an informal valuation conference does not preclude an appeal under K.S.A. 74-2438 (BOTA).
- **Appeal Valuation** to State Board of Tax Appeals - Must be requested within 30 days of the mailing date of the "notice of value indicators".
- **June 15** - Certification of the assessed valuations determined by the department is sent to County Clerks. The division can effect no change in value after certification without action of the State Board of Tax Appeals.
- **December 15 or before** - The county treasurer mails tax statements to the taxpayers, which indicate the tax due, and other information required by statute (K.S.A. 79-2001).
- **December 20 or before** - Full or first half taxes must be paid to the county treasurer in order to avoid penalties. If the first half taxes are not paid by December 20th, the full amount becomes immediately due and payable and late payment interest will begin to accrue.
- **May 10th of the next year** - The second half taxes must be paid to the county treasurer in order to avoid penalty (K.S.A. 79-2004a).

Back to the main Property Valuation page

Last Modified 10/06/2004 08:51:13

EXHIBIT
A

BEFORE THE BOARD OF TAX APPEALS
OF THE STATE OF KANSAS

IN THE MATTER OF THE APPEAL OF MISSOURI GAS ENERGY, A DIVISION OF SOUTHERN UNION COMPANY FROM A DECISION OF THE DIRECTOR OF PROPERTY VALUATION OF THE STATE OF KANSAS FOR TAX YEAR 2004 PURSUANT TO K.S.A. 74-2438	)))))))	Docket No. _____

NOTICE OF APPEAL

Taxpayer, Missouri Gas Energy, a division of Southern Union Company ("MGE"), pursuant to K.S.A. 74-2438, gives notice of appeal of the decision of final action of the Director of Property Valuation ("PVD") dated September 28, 2004 (PVD Account No. G4006), attached as Exhibit "A", for reasons which include, but are not limited to, the following:

1. MGE is a division of Southern Union Company, a corporation organized under the laws of Delaware. It is not certificated as a public utility in Kansas, nor does it engage in the business of providing public utility services in Kansas. MGE is not a public utility as defined by K.S.A. 79-5a01, nor is it a public utility under Article 11, Section 1 of the Kansas Constitution.

2. MGE purchases natural gas for resale and contracts with an interstate underground storage operator to receive natural gas storage services on the Panhandle Eastern Pipe Line and Southern Star Central Gas Pipeline systems.

3. Natural gas owned by MGE is merchants' inventory and, accordingly, is exempt from Kansas ad valorem taxation under Article 11, Section 1 of the Kansas Constitution and K.S.A. 79-201m.

4. Natural gas owned by MGE is exempt from ad valorem property taxation as personal property moving in interstate commerce under the provisions of K.S.A. 79-201f.

5. Imposition of an ad valorem property tax on MGE's natural gas that is temporarily stored in underground reservoirs, but continuing to move in interstate commerce, violates the Commerce Clause and the Import Export Clause of the United States Constitution.

6. Imposition of an ad valorem property tax on MGE's natural gas that is merchants' inventory and not owned by a public utility, as that term is defined under Kansas law, violates Article 11, Section 1 of the Kansas Constitution.

7. The attempted retroactive imposition of ad valorem property tax on natural gas owned by MGE as a result of legislative action taken months after the taxation date constitutes a violation of MGE's due process rights secured by the 14th Amendment to the United States Constitution and by the Kansas Constitution.

8. Legislation purporting to impose an ad valorem property tax on natural gas owned by MGE, House Substitute for Senate Bill 147, violates Article 2, Section 16 of the Kansas Constitution in that it contains more than one subject and, as a consequence, should be held to be invalid in its entirety.

9. PVD's final notice of valuation improperly allocates the value of natural gas owned by MGE to Kansas.

10. PVD's final notice of valuation does not reflect the fair market value of natural gas owned by MGE and allocated to Kansas.

WHEREFORE, MGE requests the Board to conduct a hearing pursuant to K.S.A. 74-2438 to resolve any legal and factual issues; to find that MGE's natural gas is exempt from taxation pursuant to K.S.A. 79-201f and K.S.A. 79-201m; to find that PVD has erroneously and unlawfully valued and assessed property of MGE as if it were a public utility under provisions of Kansas constitutional and statutory law; to find that PVD has erroneously allocated volumes of natural gas to Kansas; to find that PVD's valuation of MGE's gas does not reflect its fair market value; to preserve evidence for a judicial determination of constitutional issues beyond the jurisdiction of the Board; and to grant such other relief as may be just and equitable.

Respectfully submitted,

By: _____

Michael Lennen SC#08505
MORRIS, LAING, EVANS, BROCK &
KENNEDY, CHARTERED
300 North Mead, Suite 200
Wichita, Kansas 67202
(316) 262-2671
(316) 262-6226; Fax

ATTORNEYS FOR TAXPAYER
MISSOURI GAS ENERGY, A DIVISION OF
SOUTHERN UNION COMPANY

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing NOTICE OF APPEAL was mailed on this 26th day of October, 2004, by first class United States mail, postage prepaid and properly addressed to:

Mark S. Beck, Director
Division of Property Valuation
Kansas Department of Revenue
Robert B. Docking State Office Building
915 SW Harrison Street, Room 400
Topeka, KS 66612-1585

William E. Waters
Attorney
Kansas Department of Revenue
Division of property Valuation
526-S Docking State Office Bldg.
915 SW Harrison Street
Topeka, KS 66612-1585

Michael Lennen SC#08505

KANSAS

JOAN WAGNON, SECRETARY

KATHLEEN SEBELIUS, GOVERNOR

DEPARTMENT OF REVENUE
DIVISION OF PROPERTY VALUATION

September 28, 2004

SG-MISSOURI GAS ENERGY
JOHN DAVIS
3420 BROADWAY
KANSAS CITY MO 64111

RE: Account Number G4006

Dear Sir:

Enclosed is an amended unit valuation notice of Kansas' Director of the Division of Property Valuation for the above-entitled company. The notice is the results of an informal valuation conference scheduled and held at the request of the company pursuant to K.S.A.79-5a05. Depending on the outcome of the conference the amended notice may or may not reflect a change from the original valuation.

The amended notice represents the written finding, ruling and order of the Director for the purposes of further appeal under K.S.A. 74-2438.

K.S.A. 74-2438 states in part:
An appeal may be taken to the state board of tax appeals from any finding, ruling, order, decision, or other final action on any case of the director of taxation or director of property valuation by any person aggrieved thereby. Notice of such appeal shall be filed with the secretary of the board within thirty (30) days after such finding, ruling, order, decision, or other action on a case, and a copy served upon the director concerned. The board shall fix a time and a place for hearing said appeal, and shall notify the appellant or his attorney of record at least five (5) days prior to the date of said hearing.

The Kansas Board of Tax Appeals address, phone and fax are: Docking, State Office Building, 915 SW. Harrison St., Suite. 451, Topeka, Kansas 66612-1505, Phone (785) 296-2388, Fax (785) 296-6690.

Appeal to the Board of Tax Appeals is a formal appeal and should not be undertaken lightly.

Sincerely,

John H. Hughes

John H. Hughes
CC: Company File

EXHIBIT
tabbies
A

KANSAS

JOAN WAGNON, SECRETARY

DEPARTMENT OF REVENUE
DIVISION OF PROPERTY VALUATION

KATHLEEN SEBELIUS, GOVERNOR

SG-MISSOURI GAS ENERGY
JOHN DAVIS
VP-CONTROLLER (MGE)
3420 BROADWAY
KANSAS CITY MO 64111

September 28, 2004

Amended Notice

PVD ID No. G4006

DIRECTOR'S 2004 UNIT VALUE: 45,223,705

APPLICATION TO KANSAS:

ALLOCATION CALCULATION:

Kansas Investment/System Investment

48,285,145	48,285,145	Allocation Factor:	1.000000

Director's Unit Value	45,223,705
Kansas Allocation Factor	x 1.000000
Kansas Market Value	45,223,705
Assessment Rate @ 33%	x 0.330000
KANSAS ASSESSED VALUE	**14,923,823**

COMPANY INDICATORS

COST APPROACH:

Book Original Cost	48,285,145
Book Original Cost Less Depreciation	0
Net Investment Adjusted for Obsolescence	0
Reproduction Cost Less Depreciation	45,223,705

MARKET APPROACH:

Equity Residual	0
Stock and Debt	0

INCOME APPROACH:

Forecast NOI	0	Rate	.0000	0
Actual NOI	0	Rate	.0000	0

I have considered the information presented at the hearing for your company and have made a review of the materials and testimony available to me. From this examination, I have concluded that the Director's Unit Value of your company is as shown above. This "Notice" constitutes the Director's final action to date.

I wish to extend a note of appreciation for the courteous manner in which your company was represented.

Director

DOCKING STATE OFFICE BUILDING, 915 SW HARRISON ST., ROOM 400, TOPEKA, KS 66612-1585
Voice 785-296-2365 Fax 785-296-2320 http://www.ksrevenue.org/

Kansas Department of Revenue
Division of Property Valuation
State Appraised Property Bureau
Public Utility Section

Robert B. Docking State office Building
915 S.W. Harrison St.
Topeka, Kansas 66612-1585

Tel. (785) 296-2365
FAX (785) 296-2320

APPRAISAL REPORT
MISSOURI GAS ENERGY (G4006)
For the Tax Year
2004

STORED NATURAL GAS — **28-Sep-04**

ORIGINAL COST			**48,285,145**
STORAGE FIELD	FIELD OPERATOR	Cost of Gas As of January 1 ,2004 (Per mmmbtu)	Gas In Storage (mmbtu)
Alden	Southern Star Central Pipeline	5.38	1,183,716
Boehm	Colorado Interstate Gas Company		
Borches	Panhandle Eastern Pipeline	5.335	715,412
Colony	Southern Star Central Pipeline	5.38	1,214,502
Cunningham	Northern Natural Gas Company		
Elk City	Southern Star Central Pipeline	5.38	1,847,921
Lyons	Northern Natural Gas Company		
McLouth	Southern Star Central Pipeline	5.38	679,598
Piqua	Southern Star Central Pipeline	5.38	100,054
N. Welda	Southern Star Central Pipeline	5.38	925,885
S. Welda	Southern Star Central Pipeline	5.38	1,744,789
TOTAL			8,411,877
MARKET VALUE OF STORED NATURAL GAS			**45,223,705**

Mark S. Beck, Director
John H. Hughes, Bureau Chief
Floyd R. Rumsey, Supervisor
Roger A. Dallam, Appraiser

This appraisal report was produced; (1) by the captioned agency, (2) is the sole property of the captioned agency; (3) under the mandates and guidance of K.S.A. Article 5a; (4) to provide a basis for ad valorem taxation of utility property in Kansas.

BEFORE THE BOARD OF TAX APPEALS OF THE STATE OF KANSAS

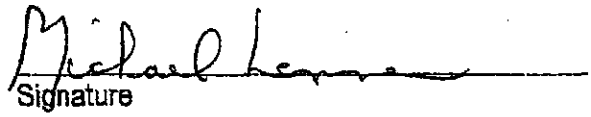
IN THE MATTER OF THE APPEAL OF

MISSOURI GAS ENERGY, A DIVISION OF SOUTHERN UNION COMPANY FROM A DECISION OF THE DIRECTOR OF PROPERTY VALUATION OF THE STATE OF KANSAS FOR TAX YEAR 2004 PURSUANT TO K.S.A. 74-2438

Docket No. _____

ENTRY OF APPEARANCE

COMES NOW the undersigned and enters an appearance as counsel for the appellant in the above entitled matter.



Signature

Michael Lennen #08505

Print Name and Kansas Supreme Court No.

300 N. Mead, Suite 200

Address

Wichita, Kansas 67202

City, State, Zip

(316) 262-2671

Telephone

Rev. 9/00

BTA-Rev. 9/99

DECLARATION OF REPRESENTATIVE

Property Owner(s) Name(s) as it appears on the Change of Value Notice
MISSOURI GAS ENERGY
Property Owner's Mailing Address (street, post office box, city, state, zip code)
ATTN: JOHN DAVIS VP-CONTROLLER (MGE) 3420 BROADWAY KANSAS CITY MO 64111
Property Owner's Telephone Number 816-360-5981

hereby appoints the following individual, corporation, limited liability company, organization, firm or partnership

Individual Representatives Name and Title
Michael Lennen, Attorney
If Applicable, provide Corporation, Limited Liability Company, Organization, Firm or Partnership Name
Morris, Laing, Evans, Brock & Kennedy, Chtd.
Representative's Mailing Address (street, post office box, city, state, zip code)
300 N. Mead, Suite 200 Wichita, Kansas 67202
Representative's Telephone Number 316-262-2671

to represent the above named property owner before the State Board of Tax Appeals pursuant to the Board's rules and regulations for property located in PVD assessed property ~~County~~ **for the** 2004 **tax year(s).**

J. D. Davis

Signature of Property Owner and Date

If signing on behalf of a corporation, limited liability company, organization, firm, or partnership, provide below the printed name and title of person signing.