

SC86474

IN THE SUPREME COURT OF MISSOURI

State of Missouri ex rel.
Riverside Pipeline Company, L.P., and
Mid-Kansas Partnership,

Respondents,

v.

Public Service Commission
of the State of Missouri,

Appellant.

Appeal from the Circuit Court of Cole County, Missouri
Case No. 02CV324478
The Honorable Thomas J. Brown III

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TABLE OF CONTENTS

POINTS RELIED ON.....5

ARGUMENT 8

 I. The Court of Appeals Erred in Dismissing the Commission's Appeal Because the "Aggrieved" Person Test of § 512.020 Does Not Define the Standing Requirements for a Petition for Writ of Review Under § 386.510 In That a Petition for Writ of Review Is Not An Appeal But Rather An Equitable Proceeding That May Be Filed By Any "Interested" Person..... 8

 A. Section 512.020 Does Not Apply to Petitions for Review 8

 B. Even if § 512.020 Applies, the Petition for Review Was Proper 12

 II. The Commission Erred in Reaching the Merits of the Staff’s Proposed Disallowance Review Because Further Prudence Review of the Decisions Associated With the Execution of the Missouri Agreements Was Precluded In That The Stipulation Settled and Compromised the Prudence of the Missouri Agreements 14

 A. “When All Else Fails,” An Ambiguity Must Be Construed Against the Drafter..... 14

B.	To the Extent the Court Does Not Reach the “Construe Against the Drafter” Rule, the Stipulation Must Be Construed in MKP/Riverside’s Favor	18
III.	The Court of Appeals Erred in Holding that Circuit Courts in Missouri Lack Authority to Enjoin the Public Service Commission Because Circuit Courts Have the Authority to Enjoin the Public Service Commission In That Mo. Const. Art. V, §§ 4.1 and 14(a) Grant Circuit Courts Authority to Control Tribunals Within Their Jurisdiction.....	23
	CONCLUSION.....	24
	APPENDIX	A-70

TABLE OF AUTHORITIES

CASES

<i>Berman v. Berman</i> , 701 S.W.2d 781 (Mo. App. 1985).....	16
<i>Graham v. Goodman</i> , 850 S.W.2d 351 (Mo. banc 1993).....	17
<i>In re Marriage of Buchmiller</i> , 566 S.W.2d 256 (Mo. App. 1978)	16, 17
<i>Missouri Consolidated Health Care Plan v. BlueCross BlueShield of Missouri</i> , 985 S.W.2d 903 (Mo. App. 1999)	15
<i>Rougly v. Whitman</i> , 592 S.W.2d 516 (Mo. App. 1979).....	15, 17
<i>Specialty Restaurants Corp. v. Gaebler</i> , 956 S.W.2d 391 (Mo. App. 1997)	15
<i>State ex rel. Consumers Public Service Co. v. Public Service Commission</i> , 180 S.W.2d 40 (Mo. banc 1944)	9
<i>State ex rel. McKittrick v. Missouri Pub. Serv. Commission</i> , 175 S.W.2d 857 (Mo. banc 1943).....	11
<i>State ex rel. Mississippi Lime Co. v. Missouri Air Conservation Commission</i> , 2004 WL 2706316 (Mo. App.W.D., Nov. 30, 2004)	23
<i>State ex rel. St. Louis City v. Public Serv. Comm’n</i> , 228 S.W.2d 1 (Mo. 1950).....	11
<i>State ex rel. Southwestern Bell Telephone v. Brown</i> , 795 S.W.2d 385 (Mo. banc 1990).....	8, 11
<i>Transit Cas. Co. in Receivership v. Certain Underwriters at Lloyd’s of London</i> , 963 S.W.2d 392 (Mo. App. 1998)	22, 22

Wimberly By and Through Bauer v. Furlow,

869 S.W.2d 314 (Mo. App. 1994) 15

STATUTES

§ 386.500, R.S.Mo..... 9, 10

§ 386.510, R.S.Mo.....8-11, 23

§ 386.540, R.S.Mo.....8, 9, 11

§ 512.020, R.S.Mo.....8, 11, 12

POINTS RELIED ON

I. The Court of Appeals Erred in Dismissing the Commission's Appeal Because the "Aggrieved" Person Test of § 512.020 Does Not Define the Standing Requirements for a Petition for Writ of Review Under § 386.510 In That a Petition for Writ of Review Is Not An Appeal But Rather An Equitable Proceeding That May Be Filed By Any "Interested" Person

State ex rel. Consumers Public Service Co. v. Public Service

Commission, 180 S.W.2d 40 (Mo. banc 1944)

State ex rel. McKittrick v. Missouri Pub. Serv. Comm'n,

175 S.W.2d 857 (Mo. banc 1943)

State ex rel. St. Louis City v. Public Serv. Comm'n,

228 S.W.2d 1 (Mo. 1950)

State ex rel. Southwestern Bell Tel. v. Brown,

795 S.W.2d 385 (Mo. banc 1990)

§ 386.500, R.S.Mo.

§ 386.510, R.S.Mo.

§ 386.540, R.S.Mo.

§ 512.020, R.S.Mo.

Rule 84.05(e)

II. The Commission Erred in Reaching the Merits of the Staff’s Proposed Disallowance Review Because Further Prudence Review of the Decisions Associated With the Execution of the Missouri Agreements Was Precluded in That the Stipulation Settled and Compromised the Prudence of the Missouri Agreements

Missouri Consolidated Health Care Plan v. BlueCross BlueShield of

Missouri, 985 S.W.2d 903 (Mo. App. 1999)

Rougly v. Whitman, 592 S.W.2d 516 (Mo. App. 1979)

Specialty Restaurants Corp. v. Gaebler,

956 S.W.2d 391 (Mo. App. 1997)

Wimberly By and Through Bauer v. Furlow,

869 S.W.2d 314 (Mo. App. 1994)

III. The Court of Appeals Erred in Holding that Circuit Courts in Missouri Lack Authority to Enjoin the Public Service Commission Because Circuit Courts Have the Authority to Enjoin the Public Service Commission In That Mo. Const. Art. V, §§ 4.1 and 14(a) Grant Circuit Courts Authority to Control Tribunals Within Their Jurisdiction

State ex rel. Mississippi Lime Co. v. Missouri Air Conservation

Comm'n, 2004 WL 2706316 (Mo. App. W.D., Nov. 30, 2004)

§ 386.510, R.S.Mo.

ARGUMENT

I. The Court of Appeals Erred in Dismissing the Commission's Appeal Because the "Aggrieved" Person Test of § 512.020 Does Not Define the Standing Requirements for a Petition for Writ of Review Under § 386.510 In That a Petition for Writ of Review Is Not An Appeal But Rather An Equitable Proceeding That May Be Filed By Any "Interested" Person

A. § 512.020 Does Not Apply to Petitions for Review

The Commission improperly focuses on the standing requirement for filing an appeal to the court of appeals under § 386.540 rather than the standing requirement for filing a petition for review in the circuit court under § 386.510. MKP/Riverside did not file the appeal here—the Commission did. If the Commission was not “aggrieved” for purposes of filing this appeal, then the circuit court’s judgment must stand. But there should be no question that MKP/Riverside had standing to file its petition for review because this Court has held that a party need only be “interested” in the proceeding to file a petition for review.

The Commission’s focus on the wrong stage of this litigation is first evidenced in its citation to Rule 84.05(e) in support of the application of the “aggrieved person” standard in § 512.020 in this case. Rule 84.05(e), like § 512.020, relates only to appeals to the appellate courts, not to petitions filed in circuit court. *See State ex rel. Southwestern Bell Tel. v. Brown*, 795 S.W.2d 385, 388 (Mo. banc 1990) (finding Rule 84.09 did not apply to a petition for writ of review). Rule 84.05 has no bearing here.

The Commission next attempts to distinguish the two controlling decisions from this Court on the issues here, but again focuses on the standing requirement for filing an appeal to the court of appeals rather than on the standing requirement for filing a petition for review.

First, the Commission cites, but essentially ignores, this Court's holding in *State ex rel. Consumers Public Service Co. v. Public Service Commission*, 180 S.W.2d 40 (Mo. banc 1944). The Commission argues that the "interested person" standard found in § 386.500.1 applies only to a party seeking to intervene in or seek rehearing of a Commission order and that the aggrieved party standard still applies to both the filing of an appeal under § 386.540 and to the filing of a petition for review under § 386.510. This Court's holding in *State ex rel. Consumers* actually states that the "interested" person standard of § 386.500.1 governs "the right to be a party to review proceedings *both* in the circuit *and appellate courts*." *Id.* at 46 (emphasis added).

Under the Public Service Commission Act, the "interested person" standard necessarily applies to every stage of the process. Section 386.500 provides that any interested person has the right to apply for rehearing of an order or decision of the Commission. Section 386.510 then states that any "applicant" whose application for rehearing is denied may file a petition for writ of review. It also states that "each party to the action or proceeding before the commission shall have the right to appear in the review proceedings."

Here, MKP/Riverside was a party before the Commission, lost its challenge to the Commission's jurisdiction to proceed, was an "applicant" for rehearing, lost that motion, and then filed a petition for review. There is no statutory or other basis to deny MKP/Riverside standing to have sought a writ of review under § 386.510. *State ex rel. Consumers*, 180 S.W.2d at 46 ("There is nothing in any other section to indicate that such an 'interested' party shall not have the right (if his application for rehearing is denied) to exhaust all further remedies provided both to obtain review in the circuit court and to appeal from a circuit court decision against him."). In *State ex rel. Consumers*, this Court concluded that because the intervenor company had standing to intervene and apply for rehearing, it had "the further right ... to seek a review in the circuit court and appeal to this court from its adverse decision." *Id.*

In *State ex rel. Consumers* the Court found that the term "interested" in § 386.500 is "a broader term than 'aggrieved.'" *Id.* at 43. "Considering the Public Service Commission Act as a whole, it seems apparent that parties to cases before the Commission, whether as complainants or intervenors are not required to have a pecuniary interest, or property or other rights, which will be directly or immediately affected by the order sought or even its enforcement." *Id.* at 46. In fact, the aggrieved person standard would effectively foreclose the opportunity of any intervenor to seek review of a Commission order because this Court has held that a private person cannot be "aggrieved" by a Commission order. *Id.* at 44. Because the aggrieved person standard cannot apply, the interested person standard must govern.

While unnecessary to find that MKP/Riverside had standing to seek review in the circuit court, the interested person standard effectively merges with the aggrieved party standard in § 512.020 in appeals taken under § 386.540. “When an order against such an interested party is affirmed in the Circuit Court it would seem that he is ‘aggrieved.’” *Id.* at 44; *see also State ex rel. St. Louis Cty. v. Public Serv. Comm’n*, 228 S.W.2d 1, 3 (Mo. 1950) (interpreting *State ex rel. Consumers* to hold “that where an order was against ‘an ‘interested’ party’ to a Public Service Commission proceeding, such interested party was a party ‘aggrieved’ within the meaning of [§ 512.020]”); *accord State ex rel. McKittrick v. Missouri Pub. Serv. Comm’n*, 175 S.W.2d 857, 860 (Mo. banc 1943) (declaring in dicta that “at least [as to] appeals,” standing requires that a person be interested and aggrieved).

Thus, to whatever extent, if any, § 512.020 applies to appeals taken under § 386.540, that standard applies only to the appeal in this case taken by the Commission. If the Commission was required to be “aggrieved” under § 512.020 to file this appeal, either it was not aggrieved and the circuit court’s judgment stands or it was aggrieved and the court of appeals had jurisdiction to reach the merits of this case.

Second, the Commission does not dispute that this Court has already decided that a petition for writ of review under § 386.510 is an original proceeding in equity and not an appeal. *See State ex rel. Southwestern Bell Tel. v. Brown*, 795 S.W.2d 385, 388 (Mo. banc 1990). The Commission instead argues that its appeal under § 386.540

from the circuit court's judgment is an "appeal" and not a proceeding in equity. MKP/Riverside do not disagree—though that is still an entirely separate issue from whether § 512.020 applies. Regardless, this Court's holding in *Brown* is clear that a petition for review is not an appeal and thus § 512.020 does not apply.

B. Even If § 512.020 Applies, The Petition for Review Was Proper

In response to MKP/Riverside's alternative argument that if the aggrieved standard was applied, they should be considered aggrieved, the Commission argues not that MKP/Riverside were not aggrieved, but rather that the Commission's stated inability to interpret the Stipulation was not a final decision—despite entering its final Report and Order. This argument is clearly that of the Commission Staff, which was a party to the underlying Commission proceeding, and not that of the Commission, because the Commission stated in its Report and Order that it could not decide the issue. The Commission did not reserve ruling or put off ruling for another day, it held that it could not interpret the meaning of the Stipulation. That is the error of which MKP/Riverside sought review, and which was rectified by the circuit court.

In the same vein, the Commission's argument that MKP/Riverside were not harmed by the Commission nullifying the settlement provision resolving the prudence of the decisions associated with the execution of the Missouri Agreements simply because it did not disallow any of MGE's gas costs in that particular ACA proceeding misses the point. As the Commission acknowledges, MKP/Riverside are in this litigation due to their underlying agreements with MGE, which pre-date the settlement

agreement. As the Commission also recognizes, due to the Commission's stated inability to interpret and apply the Stipulation, MKP/Riverside will be forced to re-litigate these same issues in numerous subsequent ACA cases.

This is not elective litigation as the Commission argues and the harm MKP/Riverside is suffering is not self-imposed. MKP/Riverside paid roughly \$3 million to absolve itself from continuing potential liability and the Commission nullified that benefit of the settlement bargain. MKP/Riverside have been harmed by the Commission's ruling (or lack thereof) and must be permitted to challenge this jurisdictional decision by the Commission.

II. The Commission Erred in Reaching the Merits of the Staff’s Proposed Disallowance Review Because Further Prudence Review of the Decisions Associated With the Execution of the Missouri Agreements Was Precluded In That The Stipulation Settled and Compromised the Prudence of the Missouri Agreements

A. “When All Else Fails,” An Ambiguity Must Be Construed Against the Drafter

Despite the fact that this case originated before the Public Service Commission, this case presents nothing more than an issue of contract interpretation. Notwithstanding the Commission’s focus in its brief on the proof submitted by the parties, the issue in this case is far more fundamental than a debate about who proved what. Indeed, the Commission stated in its Report and Order that the issue here was a question of law, not fact. This case is thus not about the Commission’s faulty weighing of the evidence but instead its admitted failure to resolve the specific contract interpretation dispute submitted to it. More to the point, the issue here is whether a court or quasi-judicial body may refuse to resolve a contractual ambiguity or whether it is obligated to apply the rules of contract construction.

MKP/Riverside suggest that Missouri law is quite clear, when all else fails to resolve a contractual ambiguity, the ambiguity must be construed against the drafting party, *i.e.*, the “construed against the drafter” principle applies to break the proverbial “tie.” When a question of law is submitted to a judicial or quasi-judicial body, “I

don't know" is not a legitimate response. The entire purpose of rules of contract construction is to resolve ambiguities. Even if the Commission was correct when it found that the parties' proof failed to resolve the ambiguity, it was obligated to construe the agreement against the Staff's position as the drafter of the ambiguity, and should have granted MKP/Riverside the relief they sought.

As the Commission is forced to admit, Missouri law on this point has already been settled—in favor of the position argued by MKP/Riverside. In *Missouri Consolidated Health Care Plan v. BlueCross BlueShield of Missouri*, 985 S.W.2d 903, 910 (Mo. App. 1999), the Court held that an ambiguity must be construed against the drafting party if the parties' intent "cannot be determined otherwise from parole evidence." The Commission argues the court of appeals may have overstated the law in *Health Care Plan*, but other cases stand for the same proposition. See, e.g., *Specialty Restaurants Corp. v. Gaebler*, 956 S.W.2d 391, 395 (Mo. App. 1997) ("when all else fails, '[a]n agreement that is ambiguous should be construed against the drafter'") (emphasis added); *Wimberly By and Through Bauer v. Furlow*, 869 S.W.2d 314, 316 (Mo. App. 1994) ("When other means of construction fail courts apply the rule that an ambiguous contract is construed against the party who drew it.") (emphasis added); *Rougly v. Whitman*, 592 S.W.2d 516, 523 (Mo. App. 1979) ("this rule is employed as a last resort when other available data bearing on the agreement shed no light on actual intent or meaning") (emphasis added).

The Commission's position is truly astounding. According to the Commission, if an ambiguity is too difficult, it can throw up its hands and not resolve the ambiguity. For plainly obvious reasons, there are no cases among the dozens of reported decisions in Missouri addressing issues of contract interpretation where either a court or quasi-judicial body abdicated its duty to interpret a contract because there was only some evidence of intent, but not enough to resolve the ambiguity, which thereby prevented it from applying rules of construction. In arguing that it "attempted" to resolve the ambiguity but was unable to do so, the Commission's position is truly unprecedented.

The Commission's position also begs the question of why the Commission is appealing the judgment and order of the circuit court. Although MKP/Riverside are denominated as "appellants" pursuant to court rule, the Commission filed this appeal of the circuit court's judgment. Because the Commission was unable to resolve the ambiguity in the Stipulation, the Commission should be grateful to the circuit court for properly applying the rules of construction and interpreting the stipulation.

Whatever its motivation, the Commission's argument is based on a hyper-technical reading of three Missouri cases. The first, *Berman v. Berman*, 701 S.W.2d 781, 788 (Mo. App. 1985), states that the "construed against the drafter" rule is only applied when there is no evidence of the parties intent, but the case it cites for that proposition, *In re Marriage of Buchmiller*, 566 S.W.2d 256 (Mo. App. 1978), does not support that proposition. Instead, *Buchmiller* holds that "where other rules of

statutory construction fail, ambiguities appearing in a contract must be construed strongly against the party whose counsel prepared the contract or agreement.” *Id.* at 260. Here, not only did counsel for the Staff/Commission prepare the Stipulation, he refused to permit MKP/Riverside to propose language or assist in drafting the Stipulation. (ROA Transcript Vol. 5, pp. 5, 7-8).

The second case, *Graham v. Goodman*, 850 S.W.2d 351 (Mo. banc 1993), addresses the rules of construction in the context of a jury trial and concludes that the “construed against the drafter” rule of contract construction can only be applied by the court as a matter of law where there are no factual issues to be resolved by the jury concerning the parties’ intent. *Id.* at 355-56. Here the Commission was the fact-finder, and it concluded in its Report and Order that it could not determine the parties’ intent.

The third case relied on by the Commission, *Rougly*, *supra*, is contrary to the Commission’s position because it expressly contemplates the “construed against the drafter” rule being applied “where *other available data* bearing on the agreement” does not resolve the ambiguity. 592 S.W.2d at 523 (emphasis added). Here, according to the Commission’s Report and Order, the other available data did not resolve the ambiguity and thus, under *Rougly*, the Stipulation should have been construed against the Staff.

Because the Commission acknowledges that counsel for the Staff drafted the agreement, it must be construed against the Staff and in favor of MKP/Riverside.

B. To The Extent The Court Does Not Reach the “Construe Against the Drafter” Rule, The Stipulation Must Be Construed in MKP/Riverside’s Favor

Given the parties’ admissions of the ambiguity in the Stipulation, and the Commission’s inability to resolve the ambiguity, the “construe against the drafter” principle of last resort is dispositive. To the extent, however, the parties’ intent can be gleaned from the Stipulation itself and the evidence presented below, this Court should find, as the circuit court did, that the Stipulation precludes further prudence review of the decisions associated with the execution of the Missouri Agreements.

As an initial matter, in its brief the Commission appears to have confused its role in this proceeding by arguing the position of its Staff in the underlying Commission case rather than the position set forth in its Report and Order. The Commission ruled that it was unable to determine how the Stipulation should be construed. On appeal, the circuit court resolved the ambiguity. Because the Commission could not interpret the Stipulation below, its sudden enlightenment about what the Stipulation means now should be disregarded. If the Commission had a position on the proper interpretation of the Stipulation, it should have made that conclusion in its Report and Order.

Despite now advocating an interpretation of the Stipulation, the Commission explicitly in its Report and Order found that it was “unable to determine the intended meaning” of the Stipulation. L.F. 19. It then simply acted as if it did not exist. The Commission did not construe the Stipulation.

On petition for review, the circuit court found that the Commission violated the circuit court's prior orders and erred as a matter of law by not construing the Stipulation. L.F. 151 (Order and Judgment attached hereto as Appendix A). A primary dispute presented to the Commission by the parties, and by the circuit court in previously remanding the case to it, was to interpret the Stipulation. The Commission failed to do so.

The Commission's argument that the rule that an ambiguity must be resolved against the drafting party has no application where at least some evidence of the parties' intent exists is especially troubling given that the Commission sua sponte excluded testimony concerning the drafting party's intent. The sole drafter of the Stipulation, Mr. Hack, was the Staff's attorney in the process as well as the Commission's General Counsel. At the hearing, the Commission refused to waive the attorney-client privilege. But when the Commission chose not to follow the testimony of Mr. Langley alone, it was obligated to look to the only other evidence available (which was evidence from its own counsel) and make a ruling on the witnesses' credibility. Instead of blaming the parties for failing to prove the parties' intent sufficiently to resolve the ambiguity, the Commission should have either waived the attorney-client privilege and permitted additional first-hand testimony of the parties' intent or relied on the rule of construction that an ambiguity must be resolved against the drafting party.

Invoking the attorney-client privilege was not only inappropriate in the context of this case but also technically inapplicable. The excluded testimony was from MKP/Riverside's own witness, Mr. Langley, who negotiated the Stipulation on behalf of MKP/Riverside. He was asked the basis of his testimony that the parties intended to preclude all future prudence reviews in the Stipulation. Mr. Langley answered that his testimony was based on his own personal knowledge, but was also corroborated by a discovery response provided by Mr. Hack to discovery submitted to Mr. Hack by Staff. (ROA, Transcript Vol. 3, p. 456) Mr. Hack's discovery response, which supported Mr. Langley's testimony about what both he and Staff intended to accomplish through the Stipulation, was elicited by Staff for Staff's use in this case. Mr. Langley's knowledge of discovery in this case does not invoke the attorney-client privilege. In any event, even without the excluded testimony, Mr. Langley's testimony is uncontradicted by any witness with first-hand knowledge. Accordingly, the Commission's arguments in its brief about the excluded portion of Mr. Langley's testimony, which references Mr. Hack's discovery response, miss the point and attempt to shift the focus of the Court away from the fact that Mr. Langley's testimony is uncontradicted by any witness with first-hand knowledge.

Even though the Commission desperately seeks to avoid having the Stipulation construed against the Staff as the drafting party, it still argues in its brief about the specific language used and why different words were not chosen. For example, the Commission argues that paragraph 6 of the Stipulation only references a settlement

of six specific cases. In context, the Stipulation states that the settlement payment “shall be paid to effect a settlement of *all issues involving the prudence of the execution of the Missouri Agreements as specified in paragraph 5* in the following cases GR-93-140, GR-94-101, GR-94-227, GR-94-228, GR-95-82 and GR-96-78.” (Schedule DML-1 to Ex. 5, p. 6 (Appendix 1)) (emphasis added). The six cases listed were all of the docketed cases then pending before the Commission concerning the Missouri Agreements. Subsequent annual cost adjustment cases had not yet been docketed and therefore could not have been specifically listed in the Stipulation. The Commission moreover fails to explain how “all issues involving the prudence of the decisions associated with the execution of the Missouri Agreements” can be resolved for certain cases but at the same time unresolved for any other cases.

The Commission’s further arguments that the Stipulation can be construed in its favor without rules of construction must fail. The Commission admits the ambiguity. It also admits that the entire document must be given meaning if possible and yet its interpretation gives no meaning whatsoever to the first sentence of paragraph 5 of the Stipulation. That sentence states that the parties agree that “the decisions associated with the execution of the Missouri Agreements shall [not] be the subject of any further ACA prudence review.” Indeed, the Commission argues that Staff drafted the Stipulation in such a way that the first sentence is negated by the second sentence. (Commission Br. at p. 22). This contention is completely unreasonable and contrary to Missouri law requiring all provisions of an agreement

to be given meaning. *Transit Cas. Co. in Receivership v. Certain Underwriters at Lloyd's of London*, 963 S.W.2d 392, 296 (Mo. App. 1998). Acting as if this provision of the Stipulation did not exist is plainly wrong and deprived MKP/Riverside of the consideration for which they bargained. MKP/Riverside paid MGE almost three million dollars, which MGE passed on to its customers, to settle all disputes between the parties. The Stipulation must be enforced.

III. The Court of Appeals Erred in Holding that Circuit Courts in Missouri Lack Authority to Enjoin the Public Service Commission Because Circuit Courts Have the Authority to Enjoin the Public Service Commission In That Mo. Const. Art. V, §§ 4.1 and 14(a) Grant Circuit Courts Authority to Control Tribunals Within Their Jurisdiction

The Commission makes no response whatsoever to MKP/Riverside's Point III. Presumably, the Commission's silence on this issue signals its agreement with MKP/Riverside on this issue, probably because it is fully aware that it has been enjoined by the circuit court on countless occasions and the court of appeals' dicta to the contrary would overturn years of practice before the Commission and impose an unreasonable interpretation of § 386.510. In fact, in its brief the Commission states "that in the next established ACA case at the Commission, MKP/Riverside would be free ... to seek injunctive relief against the Commission." Although the court of appeals' dicta makes MKP/Riverside's right to do so unclear, MKP/Riverside should not be forced to take that action in the next case.

Moreover, the court of appeals has itself recognized since handing down its decision in this case that this Court has previously recognized a circuit court's authority to enjoin and/or issue a writ of prohibition to an administrative agency under its power of superintending control. *State ex rel. Mississippi Lime Co. v. Missouri Air Conservation Comm'n*, 2004 WL 2706316 (Mo. App. W.D. Nov. 30, 2004) (attached hereto as Appendix B).

**CERTIFICATE OF COMPLIANCE WITH MO. R. CIV. P. 84.06(B) AND
84.06(G)**

The undersigned certifies that the foregoing brief complies with the limitations contained in Mo. R Civ. P. 84.06(b) and, according to the word count function of MS Word 2002 by which it was prepared, contains 4,604 words, exclusive of the cover, Certificate of Service, this Certificate of Compliance, and the signature block.

The undersigned further certifies that the cd rom and diskette filed herewith containing this Substitute Reply Brief of Respondents in electronic form complies with Mo. R. Civ. P. 84.06(g), because it has been scanned for viruses and is virus-free.

Attorney for Respondents

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing, along with a diskette and cd rom containing a copy of the above and foregoing, was mailed postage prepaid, this 5th day of April, 2005, to:

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