

**IN THE SUPREME COURT OF MISSOURI**

STATE OF MISSOURI ex rel. )  
RIVERSIDE PIPELINE COMPANY, )  
L.P., AND MID-KANSAS )  
PARTNERSHIP, )

Appellants, )

v. )

PUBLIC SERVICE COMMISSION OF )  
THE STATE of MISSOURI, )

Respondent. )

Case No. SC87495

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Appeal from the  
Circuit Court of Cole County, Missouri  
19<sup>th</sup> Judicial Circuit  
Case No. 02CV324478  
The Honorable Thomas J. Brown, III

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**SUBSTITUTE BRIEF OF RESPONDENT  
PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI**

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Date: June 15, 2006

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## HEADINGS

- I. RIVERSIDE DOES NOT HAVE STANDING TO MAINTAIN AN ACTION TO REVIEW THE PUBLIC SERVICE COMMISSION'S DECISION BECAUSE IT IS NOT AGGRIEVED BY THAT DECISION. (In response to Riverside's Point I.)**

### Cases

*Harrison v. Monroe County*, 716 S.W.2d 263 (Mo. banc 1986)

*State ex rel. Consumers Public Service Co. v. Public Service Commission*, 180 S.W.2d 40 (Mo. banc 1944)

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- II. CONSTRUCTION OF AN AMBIGUOUS CONTRACT IS A FACT ISSUE NOT NEEDED FOR RESOLUTION OF THE RATE CASE, AND IT WAS NOT ERROR FOR THE COMMISSION TO DECIDE THE RATE CASE WITHOUT RESOLVING THIS ISSUE. (In response to Riverside's Point II.)**

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**III. THE WESTERN DISTRICT’S HOLDING THAT THE CIRCUIT COURT JUDGMENT EXCEEDED ITS AUTHORITY IS AN ALTERNATIVE BASIS FOR DECIDING THE CASE. THE WESTERN DISTRICT’S ALTERNATIVE HOLDING IS CORRECT BECAUSE THE COMMISSION FOUND AS FACT THAT THE PARTIES’ EVIDENCE, INCLUDING RIVERSIDE’S EVIDENCE, WAS INSUFFICIENT TO RESOLVE THE AMBIGUITY, AND THAT FINDING OF THE COMMISSION IS REASONABLE BECAUSE SUPPORTED BY THE EVIDENCE IN THE RECORD. (In response to Riverside’s Point III.)**

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RSMo §386.510

## STATEMENT OF FACTS<sup>1</sup>

MGE is a utility subject to the jurisdiction of the Public Service Commission (PSC). Natural gas companies, as part of their rates, are allowed by the PSC to recoup from their customers the reasonable costs associated with obtaining natural gas from their suppliers. *State ex rel. Associated Natural Gas Co. v. Pub. Serv. Comm'n*, 954 S.W.2d 520, 523 (Mo. App. 1997). The adjustment of rates, based on the costs incurred in obtaining natural gas, is done pursuant to a two-step process. In the first step, pursuant to an automatic rate adjustment clause in the PSC-approved rate schedule, a regulated company is allowed to automatically pass on to its customers the wholesale cost of gas. This adjustment is known as a purchased gas adjustment (PGA), which is required to be reported annually to the PSC. In the second step, the ACA, the PSC reviews the required ACA filings to determine: (1) the actual costs that the company should be allowed to recoup; and, (2) based on that determination, whether it has over-recovered or under-recovered its allowable costs for the ACA period under review. In determining what costs of

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<sup>1</sup> This Statement of Facts borrows at length the Court of Appeals opinion in *State ex rel. Riverside Pipeline Co. v. Public Service Commission*, WD63093, filed October 19, 2004. (Riverside's Appendix 4.) Citations to the record on appeal are added as needed.

a company can be recouped from its customers as reasonable, the PSC employs a “prudence” standard.

In 1990, MGE’s predecessor in interest and Respondents Riverside Pipeline Company, L.P. (Riverside) and Mid-Kansas Partnership (MKP) (hereafter, jointly, Respondents) entered into separate contracts for the sale and the transportation of natural gas. In February, 1995, MGE and Riverside entered into a sales agreement with MKP and a transportation agreement with Riverside, replacing the earlier agreements.

In addition to establishing Case No. GR-96-450, the PSC had previously established cases for the ACA periods of July 1, 1992 – June 30, 1993; July 1, 1993 – June 30, 1994; July 1, 1994- June 30, 1995; and July 1, 1995 – June 30, 1995. On June 1, 1998, the Staff of the PSC (Staff), as apart of the ACA review in Case No. GR-96-450, challenged the prudence of the MKP sales agreement, recommending that \$4,532,449.60 of the costs associated therewith, for the ACA period under review, be disallowed. That recommended amount was later lowered to \$3,490,082.81. The Staff had previously challenged the prudence of the Missouri Agreements in the other cases, recommending the disallowance of certain costs associated with the agreements for the ACA periods under review. Given their financial interest in Case No. GR-96-450, MKP and Riverside were allowed to intervene. They had a financial interest in the outcome of the prudence review

in Case No. GR-96-450 inasmuch as they had agreed in their respective sales and transportation agreements with MGE that they would reimburse it for any amounts that it paid to MKP and Riverside under the agreements that were ultimately disallowed by the PSC in MGE's recovery of costs as part of the ACA process.

In May of 1996, MKP, Riverside, MGE, Western, the Staff, and the Office of Public Counsel (OPC), "along with others," entered into a "Stipulation and Agreement" (Stipulation), to "resolve certain disputes [then pending] between the parties." These disputes involved actual and potential disallowances by the PSC for the ACA periods from July 1, 1992, to June 30, 1996, concerning the Missouri Agreements. The Stipulation provided, *inter alia*, that pursuant to an agreed upon schedule set forth therein, MKP, Riverside, and Western would pay \$3,992,500 to MGE, \$2,842,500 of which was to be paid by MKP and Riverside. In accordance with the reimbursement provisions of the Missouri Agreements, these payments were intended to indemnify MGE for credits that would be due its ratepayers as a result of the PSC's disallowing costs associated with MGE's agreements with MKP and Riverside, pursuant to a prudence review of the execution of the agreements done in conjunction with its ACA process. As the Stipulation provided, MGE was "simply [a] conduit[] for the delivery of these funds to [its] ratepayers." In return for the payments by MKP, Riverside and Western, MKP and Riverside contend that it was agreed that the Missouri Agreements would not be

subject to any further ACA prudence reviews by the PSC. The Stipulation was approved by PSC on June 11, 1996.

In order to short circuit the PSC's ACA prudence review of the MKP sales agreement in Case No. GR-96-450 and avoid any possible resulting disallowance, MKP and Riverside filed two motions to dismiss, one on July 31, 1998, alleging that the review was precluded by the Stipulation. Both motions were denied by the PSC on September 29, 1998. In response, MKP and Riverside filed applications for rehearing with the Commission. They also filed a petition for writ of prohibition in the Cole County Circuit Court, seeking to prevent the PSC from conducting the prudence review in Case No. GR-96-450. The circuit court granted a preliminary writ, which the PSC moved to quash on the ground that it should be given the opportunity to rule in the first instance on the meaning of the Stipulation. On December 2, 1998, the circuit court sustained the PSC's motion to quash the preliminary injunction, finding that the PSC 'should, in the first instance, determine it has jurisdiction of the cause after hearing evidence and argument of the parties before it.' On December 22, 1998, the PSC denied MKP and Riverside's applications for rehearing without any further evidence or argument.

On January 15, 1999, MKP and Riverside, in accordance with § 386.510, filed a petition for a writ of review in the circuit court, seeking review of the PSC's order of September 29, 1998, denying its motion to dismiss or limit the

proceedings. The court found that the PSC had “acted unlawfully and/or unreasonably when it failed to make any finding that the 1996 Stipulation and Agreement was ambiguous, yet interpreted the Stipulation and Agreement without hearing any testimony or otherwise receiving any evidence to determine the intent of the parties to the Stipulation and Agreement.” The circuit court remanded the case to the PSC for further action in accordance with its order, “including the interpretation of the 1996 Stipulation and Agreement in accordance with the rules of construction and the need for a sufficient and appropriate evidentiary basis for resolution of any language found to be ambiguous.”

Although the circuit court reversed the decision of the PSC and remanded the case for further proceedings to, *inter alia*, interpret the Stipulation and determine whether it barred the prudence review in Case No. GR-96-450, MKP and Riverside, nonetheless, filed a notice appeal to this court, in accordance with §386.540, challenging the PSC’s decision denying MKP’s and Riverside’s motion to dismiss or limit the proceedings. In *State ex rel. Riverside Pipeline Co., L.P. v. Public Service Commission*, 26 S.W.3d 396, 400 (Mo. App. 2000), the Appellate Court found that the PSC’s decision denying the motion to dismiss or limit was not a final decision subject to judicial review by the circuit court, in accordance with § 386.510, such that it and, consequently, the Appellate Court lacked jurisdiction to review.

MKP and Riverside having been unsuccessful in their attempt to have this court interpret the Stipulation in an effort to block the prudence review in Case No. GR-96-450, the case proceeded to a five-day evidentiary hearing before the PSC in September of 2001. On March 12, 2002, the PSC issued its report and decision (Riverside Appendix 2), in which it declared that the Stipulation was ambiguous such that it could not determine whether it barred the prudence review in Case No. GR-96-450, as contended by MKP and Riverside. However, as to the merits, it rejected the Staff's recommendation to disallow a portion of the costs associated with MGE's sales agreement with MKP for the ACA period under review, such that MKP and Riverside were not required, pursuant to their respective sales and transportation agreements with MGE, to reimburse MGE for any amounts disallowed for the ACA period of July 1, 1996, to June 30, 1996. Nonetheless, MKP and Riverside filed an application for rehearing, which was denied by the PSC. They then filed a petition for a writ of review in the Circuit Court of Cole County. The circuit court reversed, finding, *inter alia*, that the Stipulation "(i) barred the Staff's proposed disallowance in [Case No. GR-96-450], and (ii) precludes any further ACA prudence review of the decisions associated with the execution of the Missouri Agreements."

The PSC appealed. After full briefing and oral argument, the Court of Appeals, Western District, dismissed the appeal, finding that Riverside/MKP were

not aggrieved parties under § 512.020 and thus lacked standing to file an appeal. (Riverside's Appendix 4).

This Court accepted transfer under Rule 83.04 and reversed the Court of Appeals' Opinion, finding that "the circuit court had jurisdiction to entertain the petition for review" and the Court of Appeals "had jurisdiction to entertain the PSC's appeal from the judgment of the circuit court." *State ex rel. Riverside Pipeline Co. v. Public Serv. Comm'n*, 165 S.W.3d 152, 156 (Mo. banc 2005) (*Riverside III*) (Riverside's Appendix 5). This Court "retransferred to the court of appeals for consideration of the merits of the appeal." *Id.*

After re-transfer, the Court of Appeals again dismissed the appeal for lack of jurisdiction on the basis that it did not have a valid "Appellants Brief" before it given that Respondents filed the first brief and were not aggrieved. (Riverside's Appendix 6). The Court of Appeals also suggested in dicta that the circuit court's judgment exceeded its jurisdiction because it "corrected" the decision of the PSC rather than "setting it aside" and therefore declared the underlying circuit court decision null and void. (Riverside's Appendix 6).

On April 11, 2006, this Court accepted transfer under Rule 83.04 for a second time.

## ARGUMENT

### **I. RIVERSIDE DOES NOT HAVE STANDING TO MAINTAIN AN ACTION TO REVIEW THE PUBLIC SERVICE COMMISSION'S DECISION BECAUSE IT IS NOT AGGRIEVED BY THAT DECISION. (In response to Riverside's Point I.)**

In the circumstances of this case, the Commission respectfully asks this Court to reconsider its opinion in *State ex rel. Riverside Pipeline Co. v. Public Service Commission*, 165 S.W.3d 152 (Mo. banc 2005).

#### **A. Standing Generally.**

Rule 52.01 specifies that every civil action must have a “real party in interest.” *Harrison v. Monroe County*, 716 S.W.2d 263, 265 (Mo. banc 1986), identifies standing as a component of the general requirement of justiciability. Standing is said to be a question of “whether the plaintiff has ‘alleged such a personal stake in the outcome of the controversy’ as to warrant his invocation of federal-court jurisdiction and to justify exercise of the court’s remedial powers on his behalf.” *Warth v. Seldin*, 422 U.S. 490, 498-99, 45 L. Ed. 2d 343, 95 S. Ct. 2197 (1975), (quoting *Baker v. Carr*, 369 U.S. 186, 204, 7 L. Ed. 2d 663, 82 S. Ct. 691 (1962)). Under *Linda R.S. v. Richard D*, 410 U.S. 614, 617, 35 L. Ed. 2d 536, 93 S. Ct. 1146 (1973), this personal stake is said to depend upon “whether the plaintiff can allege ‘some threatened or actual injury resulting from the putatively

illegal action.”” *Harrison* confirms that this doctrine extends to Missouri courts, and states that the same requirement of justiciability exists under Missouri law as under Federal law. *Harrison*, at 266.

Citing *Harrison*, this Court stated in *State ex rel. Williams v. Mauer*, 722 S.W.2d 296, 298 (Mo. banc 1986), that where “relators claim a threatened injury to future plaintiffs...” “[t]hey have no personal stake in their challenge...” and “are, therefore, without standing....” In *State ex rel. Williams v. Marsh*, 626 S.W.2d 223, 227 (Mo. banc 1982), this Court noted that standing “is a jurisdictional matter antecedent to the right of relief.” Further, this Court stated that “if a party’s interests are unaffected by resolution of an issue he has no standing to raise it,” concluding that any opinion rendered absent proper standing is necessarily advisory in nature. *Id.*

**B. Neither §386.500, Nor §386.510 Abrogate Otherwise Applicable Standing Requirements.**

Given the pervasiveness of traditional requirements for justiciability, this Court should examine carefully any argument that the legislature has done away with those requirements. In *Nicolai v. City of St. Louis*, 762 S.W.2d 423, 426 (Mo. banc 1988), this Court stated that “In construing a statute, the Court must presume the legislature was aware of the state of the law at the time of its enactment.” With that implied knowledge, an overt attempt is required on the part of the legislature

to depart from the settled law. *See, City of Springfield v. Coffman*, 979 S.W.2d. 212, 214 (Mo. App. 1998.) Further, in determining the meaning of a statute, the starting point is the plain language of the statute itself. *L & R Egg Co. v. Director of Revenue*, 796 S.W.2d 624, 625 (Mo. banc 1990).

Here, §386.510<sup>2</sup> cannot be taken to eliminate traditional standing requirements by affording the right of review to persons interested in an order or decision of the Public Services Commission. This statute facially expands the right to an appeal-like proceeding from only parties to the proceeding (the traditional standing), to include persons who were not parties, but do have a personal stake, or “interest,” in the proceeding’s outcome. There is nothing in the text to indicate the abandonment of the “aggrieved” element of standing. The most reasonable reading of the text of §386.500 is to find that this section relaxes the “aggrieved party” standing requirement, for a motion for rehearing, to an “aggrieved person in interest,” standing requirement. The language of §386.510, governing suits for review of Commission orders, is consistent with this construction.

The requirement of application for rehearing found in §386.510, while a threshold requirement for maintaining petition for writ of review, does not abrogate other requirement to maintain a lawsuit. This section simply functions to require exhaustion of administrative remedies prior to resort to judicial remedies.

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<sup>2</sup> All references to statutes refer to RSMo 2000, unless otherwise noted.

*See, State ex rel. Riverside Joint Venture v. Missouri Gaming Commission*, 969 S.W.2d 218, 222 (Mo. 1998). Section 386.500 is facially intended to conserve judicial resources by requiring that those who would seek judicial relief from a PSC decision first pursue all available avenues of recourse within the agency. It does not diminish standing requirements that would otherwise bar suit in circuit court, rather, it increases them. While the word “aggrieved” is not in the text of this section, requirements of competency, actual case or controversy, and ripeness, are also notably absent. It cannot be that anyone “interested” in a PSC proceeding may wastefully consume judicial resources on the basis that they had merely applied to the PSC for a rehearing of a proceeding on an issue that did not harm that person’s interest. *See, Budding v. SSM Healthcare System*, 19 S.W.3d 678, 681 (Mo. 2000). Surely, then, normal standing requirements apply to §386.510 review proceedings.

The use of the word “interest” in §386.500 may give rise to some confusion. Black’s Law Dictionary defines “interest” as “right, claim, title, or legal share in something.” **Black’s Law Dictionary** 812 (6th ed. 1990). Likewise, Rule 52.13(c) uses the word “interest,” to refer to a party’s stake in a pending civil action. In *Budding*, this Court noted that “The Court’s role in interpreting these statutes is to ‘ascertain the intent of the legislature from the language used, to give effect to that intent if possible, and to consider the words used in their plain and

ordinary meaning.’” *Budding*, at 680; (citing *State ex rel. Riordan v. Dierker*, 956 S.W.2d 258, 260 (Mo. banc 1997)). Thus, facially, the use of the word “interest” does not abrogate the requirement that the interested party be aggrieved, in that they also allege that the commission has truncated that interest.

Prior judicial consideration of sections 386.500 and 386.510 also confirm that interested persons seeking review of a Commission order must be aggrieved by that order. Standing for review of a Public Service Commission order was at issue in *American Petroleum Exchange v. Public Service Commission*, 176 S.W.2d 533 (Mo. App. 1943). In that case the Commission directed the Missouri Pacific Railroad to remove all buildings, pumps, lights, signs, tanks or other obstructions located on the railroad’s right-of-way. *Id.*, at 534. Those items were the property of American Petroleum, constructed under a lease agreement with the railroad. *Id.* The Court of Appeals held that the Commission’s order did not directly affect American Petroleum’s interest, but only the interest of Missouri Pacific. Because its interest was not directly affected, the court held that American Petroleum was not aggrieved by the Commission order. *Id.*, at 535. Noting that an appellant must be aggrieved to seek review, the Court dismissed American Petroleum’s appeal, citing the predecessor of present §512.020.

This Court considered the standing issue in *State ex rel. Consumers Public Service Co. v. Public Service Commission*, 180 S.W.2d 40 ( Mo. banc 1944). In a

case before the Commission, Consumers intervened in opposition to the sale of an electric utility to an electric co-operative. *Id.*, at 41. The co-operative moved to dismiss Consumers' subsequent review on the grounds that Consumers did not have an interest in the case, and therefore could not be aggrieved. *Id.*, at 43. This Court held that the construction of "interested" in *American Petroleum* was unduly narrow. *Id.*, at 44. "Since no Commission order acts directly and immediately upon the rights, pecuniary interest or property of a party, it must be apparent that no one could be aggrieved by an order of the Commission in the sense he would be by a court judgment, because it would still take a court action and judgment to enforce any such order." *Id.*, at 44. In its decision, this Court expanded the scope of persons with sufficient interest to maintain review of Commission action, but did not eliminate the separate standing requirement that such interested persons be aggrieved by Commission action.

Riverside was not aggrieved by the Commission decision at the time that they applied for rehearing, and the Commission properly exercised its discretion in denying the rehearing. The requirement of an application for rehearing under §386.500 does not abrogate the general standing requirements for petition to the courts of this State.

**II. CONSTRUCTION OF AN AMBIGUOUS CONTRACT IS A FACT ISSUE NOT NEEDED FOR RESOLUTION OF THE RATE CASE, AND IT WAS NOT ERROR FOR THE COMMISSION TO DECIDE THE RATE CASE WITHOUT RESOLVING THIS ISSUE. (In response to Riverside’s Point II.)**

Riverside argues that construction of an ambiguous Stipulation and Agreement was necessary to the Commission’s rate case decision below, and that this Court should assume the role of fact-finder. Such is not the case.

**A. The Commission’s Jurisdiction Is Derived From Statute.**

One source of Commission jurisdiction is §386.250 which provides that “[t]he jurisdiction, supervision, powers and duties of the public service commission herein created and established shall extend under this chapter (1) To the manufacture, **sale or distribution of gas, natural and artificial...** ...and to **persons or corporations owning, leasing, operating or controlling the same.** (Emphasis added.) MGE is admittedly a distributor of gas, owns and operates a gas distribution system, and is regulated by the Commission. The Commission clearly has jurisdiction over the public utility service provided by MGE.

Under §393.150 “the commission **shall have, and it is hereby given, authority...** ...**to enter upon a hearing concerning the propriety of such rate charge,** form of contract or agreement...” as is filed with the commission or

brought about by the commission's initiative. (Emphasis added.) Case GR-96-450 was an MGE rate case. The Commission clearly has jurisdiction to entertain a hearing on the grounds of the propriety of a rate change.

Further, under §393.140, “[t]he commission shall (1) have general supervision of all gas corporations.... (5) Examine all persons and corporations under its supervision.... ...Whenever the commission shall be of the opinion... ..that the rates or charges... ..of any such persons or corporations are unjust, unreasonable... ..or in any wise in violation of any provision of the law, the commission shall determine and prescribe the just and reasonable rates....” Section 393.140(1) indicates that MGE is clearly within the PSC's statutory purview. Section 393.140(5) establishes the Commission's statutory obligation to examine all such gas corporations, and specifically to investigate the reasonableness of the rates of gas corporations. These statutes dispel Riverside's allegation that a Stipulation and Agreement could constitute a jurisdictional limitation of the PSC's statutory obligation to pursue rate cases.

**B. As Other Issues Were Dispositive of Rate Case GR-96-450, It Was Not Necessary For the Commission to Construe the Ambiguous Stipulation and Agreement.**

Under *Tuttle v. Muenks*, 21 S.W.3d 6, 9 (Mo. App. 2000), if a contract is ambiguous, a question of fact exists as to the parties' intent. The possible

preclusive effect of the Stipulation and Agreement (S&A) was but one fact issue for the Commission to address in determining whether or not to impose the Staff's proposed disallowance under the prudence review at issue in GR-96-450. The Commission rejected the disallowance on a basis unrelated to the ambiguous S&A, and, therefore, had no need to reach that issue.

It is well within the Commission's discretion, in the conduct of its official duties, to allocate its resources in a manner it finds most efficient. *See* §386.410, §393.270; *see also, Smith v. Public Service Commission*, 336 S.W.2d 491, 493, 494 (Mo. 1960). It is not within the jurisdiction of the State courts to interfere with the conduct of the Commission's official duties. *See, State ex rel. A&G Commercial Trucking, Inc, v. Public Service Commission*, 168 S.W.3d 680, 684 (Mo. App. 2005); *Wabash R.R. Co v. City of Wellston*, 276 S.W.2d 208, 209-10 (Mo. 1955); *see also*, §386.510. Finally, if a case is disposed of on one or more issues, it is traditionally within the purview of a court to decline to consider the remaining issues presented. *State Board of Registration for the Healing Arts v. McDonagh*, 123 S.W.3d 146, 149 (Mo. banc 2003); *State ex rel. Simmons v. Roper*, 112 S.W.3d 397, 413 (Mo. banc 2003).

If, within a particular case such as GR-96-450, the Commission disposes of that case upon the resolution of a single dispositive issue, it is not for the trial courts of this state to interfere with the Commission's allocation of time and

resources, by ordering the resolution of an immaterial issue. Here, as the rejection of the proposed disallowance was dispositive of GR-96-450, the Commission did not abuse its discretion in declining to resolve the issue of the interpretation of the ambiguous Stipulation and Agreement.

**III. THE WESTERN DISTRICT’S HOLDING THAT THE CIRCUIT COURT JUDGMENT EXCEEDED ITS AUTHORITY IS AN ALTERNATIVE BASIS FOR DECIDING THE CASE. THE WESTERN DISTRICT’S ALTERNATIVE HOLDING IS CORRECT BECAUSE THE COMMISSION FOUND AS FACT THAT THE PARTIES’ EVIDENCE, INCLUDING RIVERSIDE’S EVIDENCE, WAS INSUFICIENT TO RESOLVE THE AMBIGUITY, AND THAT FINDING OF THE COMMISSION IS REASONABLE BECAUSE SUPPORTED BY THE EVIDENCE IN THE RECORD. (In response to Riverside’s Point III.)**

**A. The Circuit Court Exceeded Its Jurisdiction Under §386.510.**

In *State ex rel. A&G Commercial Trucking, Inc. v. Public Service Commission*, 168 S.W.3d 680, 684 (Mo. App. 2005), the Western District held that §386.510 “explicitly limits the circuit court’s jurisdiction to the judicial review set forth in the statute.” Further, §386.510 is the exclusive provision for judicial review of a PSC order or decision. *See Id.*, at 683. In *Budding v. SSM Healthcare System*, 19

S.W.3d 678, 680 (Mo. 2000) (citing, *State ex rel. Riordan v. Dierker*, 956 S.W.2d 258, 260 (Mo. banc 1997)), this Court noted that “The Court's role in interpreting these statutes is to ‘ascertain the intent of the legislature from the language used, to give effect to that intent if possible, and to consider the words used in their plain and ordinary meaning.’”

Section 386.510 states:

Within thirty days after the application for rehearing is denied,  
... the applicant may apply to the circuit court of the county  
where the hearing was held or in which the commission has its  
principal office for a writ of certiorari or review (herein referred  
to as a writ of review) for the purpose of having the  
reasonableness or lawfulness of the original order or decision or  
the order or decision on rehearing inquired into or determined.  
.... Upon the hearing the circuit court shall enter judgment either  
affirming or setting aside the order of the commission under  
review. .... No court in this state, except the circuit courts to the  
extent herein specified and the supreme court or the court of  
appeals on appeal, shall have jurisdiction to review, reverse  
correct, or annul any order or decision of the commission .... Or  
to enjoin, restrain or interfere with the commission in the

performance of its official duties. ... [T]he same shall be tried and determined as suits in equity.

The Riverside brief does extreme violence to the language of §386.510 (Respondents' Brief Pg 43 et seq. Lines 10 et seq., Point III; Pg 44, Line 5, Point III.) by arguing that this section does not limit a reviewing court's discretion. Excepting a "circuit court of the county where a hearing was held or in which the commission has its principal office," no court has jurisdiction to review, reverse, correct or annul an order or decision of the commission. Further, even the appropriate circuit court has only the authority to "enter judgment either affirming or setting aside the order of the commission under review." Although there is a provision enabling a court to direct the reception of testimony improperly rejected, the courts of this state are facially prohibited from interfering in the performance of the Public Service Commission's official duties. While a circuit court may remand reversed causes to the commission for further action, that is not the action taken by the court in this instance. The court, rather purported to correct the commission's decision by finding facts based on substitution of its judgment for that of the Commission, which is clearly prohibited by the statute. The language Riverside cites is clearly taken out of its proper statutory context (Respondents' Brief Pg 43, Line 12, et seq. Point III; Pg 44, Line 5, Point III). The statutory language prohibits all courts from correcting or annulling an order or decision of the

commission, and bars circuit courts from enjoining, restraining, or interfering with the commission in the performance of its official duties. Clearly, the hearing of a rate case by the PSC is an “official duty” of the Commission, and insulated from circuit court interference.

To endorse Riverside’s selected text of §386.510 would grossly misconstrue the statute (Respondents’ Brief Pg 43, Line 12, et seq. Point III, Pg 44, Line 5, Point III). To read the limiting language cited as enabling language, as urged by Riverside (*Id.*), would not only be facially improper, but would also specifically defeat the purpose of the words “except circuit courts to the extent herein specified.” As the text specifies the ability of a court of the proper venue to affirm, set aside, order the consideration of improperly rejected testimony, or remand for consideration of a cause reversed, that text would be entirely surplusage given the appellants’ interpretation. Interpretations that yield surplusages are to be avoided. *State v. Haskins*, 950 S.W.2d 613, 615 (Mo. banc 1998). Further, strained readings, such as the one suggested by the Riverside, are to be avoided. *State ex rel. Riordan v. Dierker*, 956 S.W.2d 258, 260 (Mo. banc 1997). Finally, where a plain meaning is facially and textually present, as is the case here, the Court’s role is to, above all else, give effect to the plain legislative language. *Butler v. Mitchell-Hugeback, Inc.*, 895 S.W.2d 15, 19 (Mo. banc 1995). Here, the

legislature plainly intended to limit the role of courts of this state on review of Commission decisions.

Because the disallowance issue was not challenged on review, the circuit court did not reverse the Commission's decision. Rather, by selecting specific fact issues for the Commission to reconsider, while not affecting the ultimate outcome of the rate case, the circuit court plainly interferes in the Commission's performance of its official duties. Further, by ordering limitations on the future proceedings of a rate case, clearly within the Commission's exclusive jurisdiction, the Circuit court exceeded its authority under §386.510.

*Wabash R.R. Co v. City of Wellston*, 276 S.W.2d 208 (Mo. 1955), cited by appellants (Respondents' Brief Pg 44, Line 5, Point III.) neither states nor implies that §386.510 affords circuit courts the authority to "correct" a decision of the PSC. While dealing with a related statute, §386.550, there is a reference to §386.510 as the proper avenue for judicial review of an agency decision. *Wabash*, at 209-210. But this reference stands for the proposition that the language of §386.510 limits the authority of state courts to interfere with commission in the performance of their official duties to direct review as prescribed by the statute – namely to affirm or set aside a decision, or to order the consideration of improperly rejected testimony, or to remand for consideration a cause reversed.

Riverside urges this Court's fact summary in the *Riverside III* decision as dispositive of the characterization of all facts contained therein (Respondents' Brief Pg 43, Line 20, Point III). As the characterization of the circuit court decision was not at issue in *Riverside III*, this Court's characterization of the circuit court's decision as a "reversal" does not appear to be dispositive. If this Court did intend, within the header summary, to definitively find the circuit court decision to be a reversal, then it is respectfully urged that this Court reconsider that finding, in light of the characterization of that judgment by the circuit court, in light of the actual contents of that judgment, and in light of the importance of that characterization within this proceeding.

As §386.510 expressly limits a reviewing circuit court's jurisdiction to the review process prescribed there-in, circuit courts are nowhere enabled to enjoin the PSC in any way that hinders the ability of the PSC to carry out its statutory duties. *See, State ex rel. A&G Commercial Trucking, Inc v. Public Service Commission*, 168 S.W.3d 680, 684 (Mo. App. 2005). As regulating gas rates is clearly a statutory duty of the PSC under §386.250, the circuit court clearly escaped its proper jurisdiction in enjoining the PSC from fairly calculating those rates in the manner proscribed by the statutes and regulations relevant to the PSC.

**B. The Commission’s Findings in GR-96-450 Were Not Unreasonable or Unsupported.**

As noted in *State ex rel. Utility Consumers Council v. Public Service Commission*, 585 S.W.2d 41, 49 (Mo. banc 1979), broad discretion is accorded to the commission in the course of judicial review of commission decisions. Here, in determining the appropriate weight to be afforded Mr. Langley’s testimony, the reviewing court must defer to the commission as the finder of fact. Langley’s interpretation of the parties’ intent was not uncontroverted. Testimony was accepted from PSC Staff participants in the Stipulation and Agreement negotiations. Mr. Shaw’s testimony indicated that he did not believe the Stipulation and Agreement would bar findings of imprudence regarding the Missouri Agreements (Transcript at page 954, lines 20-25, and Tr. Page 955, line 1). Mr. Sommerer testified to the reluctance of staff to provide a “safe harbor” against prudence reviews for an extended period of time (Sommerer Rebuttal Testimony at page 6, lines 14 through 22, and page 7, lines 1 through 5). That these gentlemen participated only in the negotiation stage of the settlement, as opposed to final drafting does not negate the fact that the weight to be accorded their testimonies is a question of fact for the commission to assign.

The Riverside brief excludes by ellipsis a pertinent clause of §536.070(8), namely the obligation of an Administrative procedure to adhere to the rules of

privilege (Respondents' Brief Pg. 39, Line 10 et seq, Point II. B. 2.). As Mr. Hack's statement contained within Langley's testimony was attorney-client privileged, and the client-Commission had no intention to waive that privilege, then that testimony was inadmissible. Further, since Mr. Hack's statement was being conveyed to the court to purport the truth of the matter asserted, it was properly excluded as hearsay intended to prove the truth of the matter asserted. As noted by Riverside, it is well within the Commission's discretion to exclude irrelevant evidence (Respondents' Brief Pg. 39, Line 13, Point II. B. 2.).

Finally, the "construe against the drafter" rule, upon which Riverside desperately clings, is inapplicable here (Respondents' Brief Pg. 41, Line 12 et seq, Point II. B. 3.). That the "drafter" rule is disfavored is illustrated in that the rule is only to be employed as a last resort, and is based more upon a concept of assigning blame for faulty language than on any notion of ascertaining the true intent of the parties. *See Berman v. Berman* 701 S.W.2d 781, 788 (Mo. App. 1985); *Rougly v Whitman*, 592 S.W.2d 516, 523 (Mo. App. 1979). This rule is often stated as "that construction must be adopted which is against him who prepared it and in favor of him who **merely signed** it." (emphasis added). *Graham v. Graham*, 850 S.W.2d 351, 355 (Mo. banc 1993); *John Deere Co v. Hensley*, 527 S.W.2d 363, 365 (Mo banc 1975). *Parker v. Pulitzer*, 882 S.W.2d 245 (Mo. App. 1994), cited by Riverside/MKP, dealt with the interpretation of contracts consummated by

paperboys that were prearranged by an impeccably literate publishing empire (Respondents' Brief, Pg 31 Line 3, Point II.B.1.; Pg 41 Line 17, Point II. B.3.).

Here, if Mr. Langley was as involved in the final negotiations as Riverside urges, then the "drafter" rule is clearly inapplicable. (Respondents' Brief, Pg 36 Line 5 et seq., Point II.B.2.a.). Mr. Langley is an attorney and a sharp businessman, who acknowledged that he had supplementary legal counsel during the creation of the stipulation (ROA Tr. Vol. 3 pp 477-480). It seems unlikely that he "merely signed," the long-negotiated Stipulation and Agreement. As such, the "drafter" rule should not be held to apply as a means to resolve the ambiguities of the S&A. This Court should resist Riverside's invitation to construe the Stipulation and Agreement in any way; and be especially reluctant to employ the "drafter" rule, in particular.

## CONCLUSION

Reading section 386.500 together with the balance of the Public Service Commission Law and with prior appellate opinions, this Court should hold that the legislature intended to relax the requirement that review is available only to parties; the legislature did not abrogate the requirement that a person seeking review be aggrieved by the decision. Riverside was not aggrieved by the Commission's decision in Commission case GR-96-450, and therefore did not have standing to maintain an action for review in the circuit court pursuant to section 386.510. Because the circuit court did not have jurisdiction to entertain Riverside's cause of action, the circuit court's judgment is void and this appeal must be dismissed.

Alternatively, the Court of Appeals was correct in holding that the circuit court exceeded its statutory authority by purporting to "correct" the Commission decision by substituting its judgment for that of the Commission in making fact findings on the issue of the intent of the parties in executing a Stipulation and Agreement. Thus, the circuit court judgment below is void.

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE WITH RULE 84.06(b) and (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 2000 by which it was prepared, contains 6,866 words, exclusive of the cover, Certificate of Service, this Certificate of Compliance, and the signature block.

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

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**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the above and foregoing was mailed, postage prepaid this 15<sup>th</sup> day of June, 2006 to:

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