IN THE SUPREME COURT OF MISSOURI

State ex. rel. Public Service Commission of the State of Missouri, Relator, v. The Honorable Randall R. Jackson, Judge, Division I, Circuit Court of Buchanan County, Missouri, Respondent.	)	Case No. SC83414

RELATOR MISSOURI PUBLIC SERVICE COMMISSION'S BRIEF

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JURISDICTIONAL STATEMENT

This brief is being filed by the Public Service Commission of the State of Missouri, Relator herein, pursuant to a Preliminary Order in Prohibition issued by this Court to the Honorable Randall R. Jackson, Judge, Division No. 1, Circuit Court of Buchanan County, Respondent herein. This Court issued its Preliminary Order in Prohibition on March 20, 2001. This case is within the jurisdiction of this Court because this Court issued the Preliminary Order in Prohibition and has jurisdiction pursuant to Article V, Section 4 of the Constitution of Missouri, as amended, and Sections 530.010-530.090 RSMo 2000[1]

[1] All citations to statutory sections are to the Revised Statutes of Missouri 2000, unless otherwise indicated.

STATEMENT OF FACTS

Missouri-American Water Company ("MAWC" or "Company") filed a general rate increase case with the Commission, designated as Case No. WR-2000-281, on October 15, 1999. After public hearings and a full evidentiary hearing, which was held in June 2000, the Commission issued its Report and Order authorizing an increase in the Company's revenue.[2] The Report and Order was to be effective on September 14, 2000. Ag Processing, Inc., Friskies Petcare, Inc., Wire Rope Corporation of America, Inc., and the City of Riverside, Missouri (collectively, the "Industrial Intervenors") thereafter filed with the Commission a timely application for rehearing. Six other parties, including the Company, also filed timely applications for rehearing. On September 19, 2000, the Commission issued an order denying all seven applications for rehearing[3] and on September 20, 2000, the Commission issued its Notice Closing Case.[4]

On September 19, 2000, the Company filed its Petition for Writ of Review in the Circuit Court of Cole County, said case being designated as Case No. 00CV325014.[5] This was the first Petition for Writ of Review to be filed. Subsequently, the Industrial

[2] See Exhibit 1 to the Commission's Suggestions in Support of Petition for Writ of Prohibition in this case.

[3] See Exhibit 7 to the Commission's Suggestions in Support of Petition for Writ of Prohibition in this case.

[4] See Exhibit 8 to the Commission's Suggestions in Support of Petition for Writ of Prohibition in this case.

[5] See Exhibit 9 to the Commission's Suggestions in Support of Petition for Writ of Prohibition in this case.

Intervenors filed two petitions for writs of review, first in Buchanan County, and then in Cole County. Both Gilster Mary-Lee Corporation and the City of Joplin also filed two petitions for writs of review, first in Jasper County and then in Cole County. Three other parties or groups of parties[6] filed petitions for writs of review in Cole County only. Thus, there are now seven petitions for writs of review pending in Cole County, in addition to the one that is pending in Buchanan County and the two that are pending in Jasper County.

Proceedings Related to the Action in Buchanan County (by the Industrial Intervenors)

The Industrial Intervenors filed a Petition for Writ of Review in the Circuit Court of Buchanan County (Case No. 00CV73667) on October 16, 2000.[7] Thereafter, on October 18, 2000, the Industrial Intervenors filed another Petition for Writ of Review, this time in the Circuit Court of Cole County (Case No. 00CV325222).[8] They stated in

[6] The other parties were: Public Water Supply District No. 1 of Andrew County, Public Water Supply District No. 2 of Andrew County, Public Water Supply District No. 1 of Buchanan County, and Public Water Supply District No. 1 of DeKalb County (collectively, "the St. Joseph Area Water Districts"); the Office of the Public Counsel ("OPC"); and the City of St. Joseph, Missouri.

[7] See Exhibit 10 to the Commission's Suggestions in Support of Petition for Writ of Prohibition in this case.

[8] See Exhibit 11 to the Commission's Suggestions in Support of Petition for Writ of Prohibition in this case.

their Cole County petition that they filed their Cole County petition "on a provisional basis," and that the petition was "a **provisional filing**." They also said: "**Relator does not at this time request that the court issue a writ of review**."[9] In the prayer clause of their Cole County petition, the Industrial Intervenors requested that "**upon further request by [the Industrial Intervenors],** " the Cole County Circuit Court issue its writ of review.[10] (All emphases are in the original).

The Industrial Intervenors asserted the same claims of error in their Cole County petition that they asserted in their Buchanan County petition.[11] Those claims may be summarized as follows:

- The Commission failed to provide adequate findings of fact, thereby making it impossible for the Industrial Intervenors to identify errors in the Commission's order or for the courts to determine whether the Commission's action was supported by competent and substantial evidence.
- In moving from "Single Tariff Pricing" to "District Specific Pricing," the Commission failed to employ a "phase-in" of rates, and failed to even address the phase-in issue, even though this was a disputed issue.

[9] See page 4 of Exhibit 11 to the Commission's Suggestions in Support of Petition for Writ of Prohibition in this case.

[10] *Id.*

[11] See Exhibits 5 and 10 to the Commission's Suggestions in Support of Petition for Writ of Prohibition in this case as to the claims of error asserted in Buchanan County; see Exhibits 5 and 11 of the Commission's Suggestions in Support of Petition for Writ of Prohibition in this case as to the claims of error asserted in Cole County.

- In its order, the Commission wholly failed to address a rate design issue regarding cost allocation among customer classes, which the parties had presented to the Commission for resolution.
- The Commission erred in shifting the burden of proof on the issue of whether the Company's decision to build a new water treatment plant at St. Joseph was prudent, and the Commission improperly determined that the decision was not imprudent.

On November 14, 2000, the Commission filed, in Buchanan County, its motion to dismiss the writ of review pending there, or in the alternative to transfer the case to Cole County.[12] The Commission also filed a brief in support of its motion. The Commission argued that Cole County is the proper venue for all writs of review of Commission Case No. WR-2000-281, and that is unlawful to file petitions for writs of review in two different venues.[13] After additional briefing and argument, the Buchanan County Circuit Court overruled the Commission's motion on December 1, 2000.[14]

On January 9, 2001, the Commission filed, in the Western District of the Missouri Court of Appeals, as Case No. WD59483, its Petition for Writ of Prohibition, seeking to prohibit the Buchanan County Circuit Court from continuing to exercise jurisdiction over

[12] See Exhibit 12 to the Commission's Suggestions in Support of Petition for Writ of Prohibition in this case.

[13] *Id.*

[14] See Exhibit 13 to the Commission's Suggestions in Support of Petition for Writ of Prohibition in this case.

the case that was pending there. The Western District denied the Petition for Writ of Prohibition on January 22, 2001. On March 1, 2001, the Commission filed, in this Court, as Case No. SC83414, its Petition for Writ of Prohibition, seeking to prohibit the Buchanan County Circuit Court from continuing to exercise jurisdiction over the case that was pending there. This Court issued its Preliminary Order in Prohibition on March 20, 2001. A copy of the Preliminary Order in Prohibition is attached hereto as Appendix A-1.

Proceedings Related to Actions in Jasper County (by Gilster Mary-Lee and Joplin)

Gilster Mary-Lee filed a Petition for Writ of Review in the Circuit Court of Jasper County (Case No. 00CV680824) on October 17, 2000.[15] Thereafter, on October 18, 2000, Gilster Mary-Lee filed another Petition for Writ of Review, this time in the Circuit Court of Cole County (Case No. 00CV325220).[16] It stated in its Cole County petition that it filed its Cole County petition "on a provisional basis," and that the petition was "a **provisional filing.**" It also said: "**Relator does not at this time request that the court issue a writ of review**."[17] In the prayer clause of its Cole County petition, it requested

[15] See Exhibit 10 to the Commission's Suggestions in Support of Petition for Writ of Prohibition in Case No. SC83484, now pending in this Court.

[16] See Exhibit 11 to the Commission's Suggestions in Support of Petition for Writ of Prohibition in Case No. SC83484, now pending in this Court.

[17] *Id.*, at 4.

that "**upon further request by [Gilster Mary-Lee],**" the Cole County Circuit Court issue its writ of review.[18] (All emphases are in original.)

Gilster Mary-Lee asserted the same claims of error in its Cole County petition that it asserted in its Jasper County petition. Gilster Mary-Lee's claims of error are set forth in the Argument section of the Table of Contents to the Initial Brief that it filed in the Cole County Circuit Court, a copy of which is attached hereto as Appendix A-2 & A-3. Those claims may be summarized as follows:

- The Commission failed to provide adequate findings of fact, thereby making it impossible for Gilster Mary-Lee to identify errors in the Commission's order or for the courts to determine whether the Commission's action was supported by competent and substantial evidence.
- In eliminating "Single Tariff Pricing" and adopting "District Specific Pricing," the Commission failed to eliminate an admitted $800,000 overcharge to the Company's Joplin District.
- In its order, the Commission wholly failed to address a rate design issue regarding cost allocation among customer classes, which the parties had presented to the Commission for resolution.

On November 14, 2000, the Commission filed, in Jasper County, its motion to dismiss Gilster Mary-Lee's petition for writ of review (Case No. 00CV680824), or in the

[18] *Id.*, at 4.

alternative to transfer the case to Cole County.[19] The Commission also filed a brief in support of its motion. The Commission argued that Cole County is the proper venue for all writs of review of Commission Case No. WR-2000-281.[20] After additional briefing, Jasper County Circuit Judge Jon Dermott overruled the Commission's motion on December 1, 2000.[21]

On January 12, 2001, the Commission filed, in the Southern District of the Missouri Court of Appeals, as Case No. SD24034, its Petition for Writ of Prohibition, seeking to prohibit the Jasper County Circuit Court from continuing to exercise jurisdiction over Gilster Mary-Lee's writ of review (Case No. 00CV680824). The Southern District denied the petition on January 29, 2001.

The City of Joplin filed a Petition for Writ of Review in the Circuit Court of Jasper County (Case No. 00CV680808) on October 17, 2000.[22] On the same day, Joplin filed another Petition for Writ of Review, this time in the Circuit Court of Cole County (Case No. 00CV325217).[23] Joplin did not state, in its Cole County petition, that it filed its

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[19] See Exhibit 14 to the Commission's Suggestions in Support of Petition for Writ of Prohibition in Case No. SC83484, now pending in this Court.

[20] *Id.*

[21] See Exhibit 15 to the Commission's Suggestions in Support of Petition for Writ of Prohibition in Case No. SC83484, now pending in this Court.

[22] See Exhibit 12 to the Commission's Suggestions in Support of Petition for Writ of Prohibition in Case No. SC83484, now pending in this Court.

[23] See Exhibit 13 to the Commission's Suggestions in Support of Petition for Writ of Prohibition in Case No. SC83484, now pending in this Court.

petition on a "provisional" basis, as the Industrial Intervenors and Gilster Mary-Lee had stated in their "provisional" petitions.[24] In the prayer clause of its petition, however, Joplin did request that the court issue its writ of review only "when said Writ is presented to [the Cole County Circuit Court] for issuance."[25]

Joplin asserted the same claims of error in its Cole County petition that it asserted in its Jasper County petition. Joplin's claims of error are set forth on pages 1, 2 and 10 of the Initial Brief that it filed in the Cole County Circuit Court, copies of which are attached hereto as Appendix A-4, A-5, and A-6. Both claims pertain to the same subject. They may be summarized as follows:

- The Commission failed to eliminate an admitted $800,000 overcharge to the Company's Joplin District.

On November 14, 2000, the Commission filed, in Jasper County, its motion to dismiss Joplin's petition for writ of review (Case No. 00CV680808), or in the alternative to transfer the case to Cole County.[26] The Commission also filed a brief in support of its motion. The Commission argued that Cole County is the proper venue for all writs of review of Commission Case No. WR-2000-281.[27] After additional briefing, Jasper

[24] *Id.*

[25] *Id.*, at 3.

[26] See Exhibit 16 to the Commission's Suggestions in Support of Petition for Writ of Prohibition in Case No. SC83484, now pending in this Court.

[27] *Id.*

County Circuit Judge David C. Dally overruled the Commission's motion on February 1, 2001.[28]

Also on February 1, 2001, Judge Dally consolidated Gilster Mary-Lee's writ of review (Case No. 00CV680824) and Joplin's writ of review (Case No. 00CV680808).[29]

On March 30, 2001, the Commission filed, in this Court, as Case No. SC83484, its Petition for Writ of Prohibition, seeking to prohibit the Jasper County Circuit Court from continuing to exercise jurisdiction over Gilster Mary-Lee's writ of review and Joplin's writ of review. This Court issued its Preliminary Order in Prohibition on April 10, 2001. A copy of the Preliminary Order in Prohibition is attached hereto as Appendix A-7.

Subsequent Proceedings in the Cole County Circuit Court

In addition to the claims of error that were asserted by the Industrial Intervenors, Gilster Mary-Lee and the City of Joplin, the other four parties or groups of parties, who sought judicial review only in Cole County, asserted additional claims of error in their petitions for writs of review. Those claims may be summarized as follows:

- The Commission erred when it refused to allow the Company to recover the undepreciated balance of the plant that was "prematurely retired," when the

[28] See Exhibit 17 to the Commission's Suggestions in Support of Petition for Writ of Prohibition in Case No. SC83484, now pending in this Court.

[29] *Id.*

old water treatment plant at St. Joseph was taken out of service and replaced by a new water treatment plant (asserted by the Company).[30]

- The Commission erred when it found that the Company's decision to construct a new water treatment plant at St. Joseph was prudent (asserted by the Office of the Public Counsel).[31]
- The Commission erred when it rejected the Office of the Public Counsel's class rate design proposal (asserted by the Office of the Public Counsel).[32]
- The Commission failed to make proper findings of fact and conclusions of law concerning its refusal to phase in the rate increase that it granted to the Company (asserted by the Office of the Public Counsel).[33]
- The Commission's rate design decision was unlawful, because it was not based on appropriate findings of fact and conclusions of law (asserted by the St. Joseph Area Water Districts).[34]

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[30] Page 6 of the Company's Initial Brief in Cole County, wherein the Company sets forth its specific claim of error, is attached hereto as Appendix A-8.

[31] The Table of Contents of the OPC's Initial Brief in Cole County, wherein the OPC sets forth its specific claims of error, is attached hereto as Appendix A-9.

[32] See Appendix A-9 attached hereto.

[33] See Appendix A-9 attached hereto.

[34] The Table of Contents of the St. Joseph Area Water Districts' Initial Brief in Cole County, wherein the St. Joseph Area Water Districts set forth their specific claims of error, is attached hereto as Appendix A-10, A-11 and A-12.

- The Commission's decision regarding the rate design issue of cost allocation among customer classes was unlawful for various reasons (asserted by the St. Joseph Area Water Districts).[35]
- The Commission's decision to move away from "Single Tariff Pricing" and toward "District Specific Pricing" was unlawful for various reasons (asserted by the St. Joseph Area Water Districts).[36]
- The Commission erred when it decided to move away from "Single Tariff Pricing" and toward "District Specific Pricing (asserted by the City of St. Joseph).[37]
- The Commission erred when it decided to implement "District Specific Pricing" without a "phase-in" period (asserted by the City of St. Joseph).[38]

Subsequent actions in the Cole County Circuit Court are shown on the court's docket sheet for the Company's writ of review case (Case No. 00CV325014), a copy of which is attached hereto as Appendix A-15 through A- __.

The Cole County Circuit Court has never issued a writ of review in response to the petitions for writs of review that the Industrial Intervenors, Gilster Mary-Lee, and Joplin

[35] See Appendix A-10, A-11 and A-12 attached hereto.

[36] See Appendix A-10, A-11 and A-12 attached hereto.

[37] Pages 4 and 7 of St. Joseph's Initial Brief in Cole County, wherein St. Joseph sets forth its specific claims of error, is attached hereto as Appendix A-13 and A-14.

[38] See Appendix A-13 and A-14.

filed in Cole County. Nonetheless, the Commission filed its Return to Writ of Review and Notice of Completion to Writ of Review with Indices in each of the subject cases on October 25, 2000. On November 14, 2000, each of the said three relators filed a "Motion to Strike [the Commission's] Return to Writ of Review and Notice of Completion to Writ of Review with Indices." After hearing argument, the Cole County Circuit Court took the motions to strike under advisement on November 22, 2000. The court has not ruled on those motions to strike.[39]

On January 2, 2001, the Cole County Circuit Court consolidated, for purposes of briefing and oral argument, the seven writ of review cases that were pending there, including the cases that were filed by the Industrial Intervenors, Gilster Mary-Lee and the City of Joplin. On the same day, the Cole County Circuit Court entered its order establishing a briefing schedule for those seven consolidated writ of review cases.[40]

The Industrial Intervenors, Gilster Mary-Lee and Joplin each filed an initial brief in those seven consolidated cases on January 22, 2001, in accordance with the court's briefing schedule. Joplin filed a reply brief on February 28, 2001, one day after the date established in the court-ordered briefing schedule for filing reply briefs. On March 26, 2001, twenty-six days after the date established in the court-ordered briefing schedule, the Industrial Intervenors and Gilster Mary-Lee each filed a reply brief, along with a motion requesting leave of court to file the reply brief out of time.[41]

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[39] See Appendix A-15 through A-21 attached hereto.

[40] See Appendix A-15 through A-21 attached hereto.

[41] See Appendix A-15 through A-21 attached hereto.

On April 26, 2001, the Cole County Circuit Court issued an order severing the three cases that were initiated by the Industrial Intervenors, Gilster Mary-Lee and the City of Joplin from the other four cases that were pending in the Cole County Circuit Court. On the same day, the Cole County Circuit Court heard oral argument on the remaining four petitions for writs of review and took those four cases under advisement.[42]

Procedural Schedule in this Court

On April 18, 2001, Respondent filed in this Court his Motion to Expedite and Consolidate Writs of Prohibition and Suggestions in Support. The Commission filed its response to this motion on April 25, 2001. Also on April 25, 2001, this Court denied Respondent's Motion to Consolidate, but granted the Motion to Expedite and ordered the Commission and intervenors to file their initial briefs on May 9, 2001, the Respondent to file his brief on May 16, 2001, and the Commission and intervenors to file their reply briefs on May 21, 2001. The Court also scheduled oral argument on the Commission's petition for May 22, 2001.

[42] See Appendix A-15 through A-21 attached hereto.

POINTS RELIED ON

POINT I

RELATOR IS ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM TAKING ANY FURTHER ACTION IN BUCHANAN COUNTY CASE NO. 00CV73667 OTHER THAN TO RECALL HIS ORDER OF DECEMBER 1, 2000, OVERRULING THE COMMISSION'S MOTION TO DISMISS OR TO TRANSFER, BECAUSE RESPONDENT'S ORDER VIOLATES THE "ONE-CASE RULE" AND SUBJECTS THE COMMISSION TO IRREPARABLE HARM IN THAT IF THIS RULING IS NOT OVERTURNED, THEN THE COMMISSION WILL HAVE TO DEFEND THE SAME REPORT AND ORDER MULTIPLE TIMES IN DIFFERENT CIRCUIT COURTS INEVITABLY LEADING TO INCONSISTENT JUDGMENTS, WHICH WOULD HAVE TO BE APPEALED TO DIFFERENT DISTRICTS OF THE COURT OF APPEALS.

Cases

Coonce v. Missouri Pacific Railroad, 347 S.W.2d 242, 243-244[2] (Mo. App., Springfield District, 1961).

State ex rel. Summers v. Public Service Commission, 366 S.W.2d 738 (Mo. App., Kansas City District, 1963).

State ex rel. GTE North v. Missouri Public Service Commission, 835 S.W.2d 356 (Mo. App., W.D. 1992).

Heuer v. Ulmer, 264 S.W.2d 895, 896 (Mo. App., Springfield District, 1954);

Horwitz v. Horwitz, 16 S.W.2d 599, 604 (Mo. App., E.D. 2000).

Killian v. Brith Sholom Congregation, 154 S.W.2d 387, 392[1] (Mo. App., St. Louis District, 1941).

Missouri Gas Energy v. Public Service Commission, 978 S.W.2d 434 (Mo. App. W.D. 1998).

State ex rel. Southwestern Bell Telephone v. Brown, 795 S.W.2d 385, 388 (Mo. banc 1990).

State ex rel. Midwest Gas Users' Association v. Missouri Public Service Commission, 996 S.W.2d 608 (Mo. App. W.D. 1999).

State ex rel. Southwestern Bell Telephone v. Brown, 795 S.W.2d 385 (Mo. banc 1990).

Walsh v. Southwestern Bell Telephone, Co. 52 S.W.2d 839, 840 (Mo. 1932);

Statutes:

§ 386.510, RSMo.

POINT II

RELATOR IS ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM TAKING ANY FURTHER ACTION IN BUCHANAN COUNTY CASE NO. 00CV73667 OTHER THAN TO RECALL HIS ORDER OF DECEMBER 1, 2000, OVERRULING THE COMMISSION'S MOTION TO DISMISS OR TO TRANSFER, BECAUSE RESPONDENT'S ORDER VIOLATES SECTION 386.510 IN THAT IT ALLOWS THE ST. JOSEPH INDUSTRIAL INTERVENORS TO PURSUE TWO WRITS OF REVIEW AND SUBJECTS THE COMMISSION TO IRREPARABLE HARM, IN THAT IF RESPONDENT'S RULING IS NOT OVERTURNED, THEN THE COMMISSION WILL HAVE TO DEFEND THE SAME REPORT AND ORDER MULTIPLE TIMES IN DIFFERENT CIRCUIT COURTS, INEVITABLY LEADING TO INCONSISTENT JUDGMENTS BEING APPEALED TO DIFFERENT DISTRICTS OF THE COURT OF APPEALS.

Cases:

Burch Food Services, Inc. v. Missouri Division of Employment Security, 945 S.W.2d 478, 480 (Mo. App. W.D., 1997).

Budding v. SS Healthcare System, 19 S.W.3d 678, 680 (Mo. banc 2000).

State ex. rel. Empire District Electric Company v. Public Service Commission, 714 S.W.2d 623, 625 [1] (Mo. App., S.D. 1986).

In *State v. Poindexter*, 941 S.W.2d 533, 538 (Mo. App., W.D. 1997),

Trice v. State, 792 S.W.2d 672, 674 (Mo. App., W.D. 1990).

Statutes:

§ 386.510, RSMo.

POINT III

RELATOR IS ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM TAKING ANY FURTHER ACTION IN BUCHANAN COUNTY CASE NO. 00CV73667 OTHER THAN TO RECALL RESPONDENT'S ORDER OF DECEMBER 1, 2000, OVERRULING RESPONDENT'S MOTION TO DISMISS OR TO TRANSFER, BECAUSE RESPONDENT'S ORDER INCORRECTLY ASSERTS THAT THE CIRCUIT COURT OF BUCHANAN COUNTY HAS JURISDICTION TO HEAR THE WRIT OF REVIEW FILED BY THE INDUSTRIAL INTERVENORS, IN THAT EXCLUSIVE JURISDICTION OF THIS CASE IS VESTED IN THE CIRCUIT COURT OF COLE COUNTY AND IF RESPONDENT'S RULING IS NOT OVERTURNED THEN THE COMMISSION WILL HAVE TO DEFEND THE SAME REPORT AND ORDER MULTIPLE TIMES IN DIFFERENT CIRCUIT COURTS INEVITABLY LEADING TO INCONSISTENT JUDGMENTS BEING APPEALED TO DIFFERENT DISTRICTS OF THE COURT OF APPEALS.

Cases:

State ex rel. Weigman v. Moentmann, 942 S.W.2d 441, 443-444 [3] (Mo. App., W.D. 1997).

State ex rel. Kincannon v. Schoenlaub, 521 S.W.2d 391, 393 (Mo. Banc 1975).

State ex. rel. Drake Publishers, Inc. v. Baker, 859 S.W.2d 201 (Mo. App., E.D. 1993).

Ostermueller v. Potter, 868 S.W.2d 110 (Mo. banc, 1993).

State ex rel. Kincannon v. Schoenlaub,

State ex rel. Southwestern Bell Telephone v. Brown, 795 S.W. 2d 385 (Mo.banc 1990)

Statutes:

§ 386.510, RSMo

§ 476.410, RSMo

Rules:

Supreme Court Rule 53.01

ARGUMENT

POINT I

RELATOR IS ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM TAKING ANY FURTHER ACTION IN BUCHANAN COUNTY CASE NO. 00CV73667 OTHER THAN TO RECALL HIS ORDER OF DECEMBER 1, 2000, OVERRULING THE COMMISSION'S MOTION TO DISMISS OR TO TRANSFER, BECAUSE RESPONDENT'S ORDER VIOLATES THE "ONE-CASE RULE" AND SUBJECTS THE COMMISSION TO IRREPARABLE HARM IN THAT IF THIS RULING IS NOT OVERTURNED, THEN THE COMMISSION WILL HAVE TO DEFEND THE SAME REPORT AND ORDER MULTIPLE TIMES IN DIFFERENT CIRCUIT COURTS INEVITABLY LEADING TO INCONSISTENT JUDGMENTS, WHICH WOULD HAVE TO BE APPEALED TO DIFFERENT DISTRICTS OF THE COURT OF APPEALS.

There can be only one final judgment in a case that disposes of all parties and all issues. Although any of the parties may appeal, and there may be multiple appeals from the same judgment, there is but one case on appeal, and the separate appeals must be disposed of by one appellate court. This principle, the "One-Case Rule," which has been applied many times to multiple appeals from circuit court judgments, should apply to circuit court reviews of administrative orders, because the circuit court's review of an administrative decision is analogous to an appellate court's review of a circuit court's judgment.

This is a fundamental precept of law, and if Respondent's wrongful order overruling Relator's Motion to Dismiss or, in the Alternative, to Transfer is not recalled,

then the Commission will be forced to defend the same Report and Order multiple times in multiple circuit courts and in multiple appeals to different districts of the Court of Appeals and the result will inevitably be conflicting decisions of the different reviewing courts.

If this Court does not prohibit Respondent from continuing to act in excess of his jurisdiction, the Commission will suffer irreparable harm, because the multiple adjudications in three different circuit courts may result in inconsistent judgments, and because they would result in a waste of judicial resources and would require the Commission to defend numerous actions throughout the state, at great cost, in time and resources, to the Commission.

This Court should therefore issue its writ prohibiting Respondent from continuing to act in excess of his jurisdiction.

The "One-Case Rule"

The Commission rests its argument in this proceeding upon the well-established principle that there can be *only one case* on the appeal of a single judgment by a lower court or, as in the present case, on the judicial review of a single order by an administrative agency, which is, in many respects, very analogous to an appeal, even though it is of a statutorily limited nature. *State ex rel. Southwestern Bell Telephone v. Brown*, 795 S.W.2d 385, 388 (Mo. banc 1990). The Commission will refer to this principle as the "One-Case Rule" throughout the remainder of this brief.

The One-Case Rule holds that there can only be one final judgment in a case disposing of same as to all parties; and while any or all of the parties may appeal, if aggrieved by the judgment, it is yet one case on appeal and the separate appeals must be

disposed by one appellate court. *Coonce v. Missouri Pacific Railroad,* 347 S.W.2d 242, 243-244[2] (Mo. App., Springfield District, 1961. See also *Walsh v. Southwestern Bell Telephone, Co.* 52 S.W.2d 839, 840 (Mo. 1932); *Heuer v. Ulmer,* 264 S.W.2d 895, 896 (Mo. App., Springfield District, 1954); and *Killian v. Brith Sholom Congregation*, 154 S.W.2d 387, 392[1] (Mo. App., St. Louis District, 1941).

The Commission presented the foregoing argument to Respondent in the Commission's Motion to Dismiss.[43] In his ruling on the Motion to Dismiss, the Respondent did correctly note that the Commission's argument "would have merit if all petitions for writs of review of the same Public Service Commission decision and order were treated under the law as one cause of action."[44] However, Respondent then incorrectly concluded that applications for review of the Commission's Report and Order in the underlying case "still maintain their status as a separate cause of action."[45] While it is true, as this Court has noted in *Southwestern Bell*, *supra* at 388, that a writ of review is not exactly an appeal, it is equally true that a writ of review has many of the attributes of an appeal, and § 386.510 certainly does not contemplate multiple writs of review from the same cause of action being prosecuted in different circuit courts in different judicial circuits.

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[43] See Exhibit 12 to the Commission's Suggestions in Support of Petition for Writ of Prohibition in this case.

[44] See page 2 of Exhibit 13 to the Commission's Suggestions in Support of Petition for Writ of Prohibition in this case.

[45] *Id.*

Respondent, in his Order Overruling [the Commission's] Motion to Dismiss or, in the alternative, to Transfer stated:

- Respondent [Commission] contends that this Court has the authority to dismiss this action or transfer it to Cole County because that is the county where the first petition for a writ of review was filed by the Missouri-American Water Company, another party in the original action before the Public Service Commission. This argument would have merit if all petitions for writs of review relating to the same Public Service Commission decision and order were treated under the law as one cause of action. However, the statutes governing judicial review of Public Service Commission decisions, as interpreted by case law, create a right in each party to file, as a separate action, an application for review raising points of alleged error that each party properly preserved. Although such cases are frequently consolidated if filed within the same circuit (apparently pursuant to Supreme Court Rule 66.01), they still maintain their status as a separate cause of action. *State ex rel. Summers v. Public Service Commission*, 366 S.W.2d 738 (Mo. App. 1963). There is no authority for such cases to be consolidated when filed in different circuits.

(See page 2 of Exhibit 13 to the Commission's Suggestions in Support of Petition for Writ of Prohibition in this case.)

To the contrary, the Commission contends that all of these writ of review petitions are actually one cause of action under the law. It is beyond question that each of the petitions for review arises from the Report and Order of the Missouri Public Service Commission in its Case No. WR-2000-281. The law is clear that all petitions for writs of review from a Report and Order (which is, for purposes of this case, akin to the judgment of a circuit court) must be disposed by the same court upon the disposition of the writ of review. This will not in any way deny any party review of any specific issues on the disposition of a writ of review. Each party will still have its specific issues addressed by the circuit court. It will merely implement the One-Case Rule, so that all of the writs of review are decided by the same court.

In *Coonce v. Missouri Pacific Railroad*, *supra*, at 243-244, this Court stated: "Under the law, there can be only one final judgment in a case disposing of same as to all parties and, while any or all of the parties may appeal if aggrieved by the judgment, it is yet one case on appeal and the separate appeals must be disposed of by one appellate court." In *Heuer v. Ulmer, supra*, the appellate court dealt with separate appeals of one judgment by each of the parties to the case. The Court of Appeals noted therein, at page 896, that, while both parties took separate appeals from the same judgment, there was still only one case on appeal since both appeals were from the same judgment. In *Killian v. Brith Sholom Congregation, supra*, at 392, the court held that where two appeals were separately taken by respective appealing parties from the same judgment in a single case in trial court and were separately docketed and briefed, there was nevertheless but one case for determination in the Court of Appeals.

Even though the cited cases all applied the One-Case Rule to proceedings in the Court of Appeals, the situation in the present case is the same, for in reviewing the decisions of an administrative agency, the circuit court functions essentially as an appellate court in that the circuit court is reviewing specific allegations of error raised by the parties. All of the ten petitions for writs of review, mentioned above, seek judicial review of the same administrative decision – the Commission's Report and Order in its Case No. WR-2000-281. In other words, all of the petitions for review are from the same Report and Order of an administrative agency in a single case, and they therefore must be decided together in one court.

The cases that the Respondent cited in his Order, and that the Industrial Intervenors cited in their argument to Respondent are all inapplicable to the present case.

The Respondent and the Industrial Intervenors both relied principally upon *State ex rel. Summers v. Public Service Commission*, 366 S.W.2d 738 (Mo. App., Kansas City District, 1963). The *Summers* case arose from *three* separate cases decided by the Commission, not one as in the present case. *Id*. at 739-740. Telephone companies sought circuit court review of two of those three cases, and the circuit court consolidated those two reviews. A group of individuals intervened in the circuit court in each of those two reviews, and also filed their own, separate, petition for writ of review of the third case in the same circuit court. The circuit court dismissed this third petition as prematurely filed, but the Court of Appeals said that the individuals who had filed this third petition had the right to seek review in their own case, and could not be compelled to participate only in the other two cases that the telephone companies brought. However, this decision by the Court of Appeals is not contrary to the One-Case Rule,

which had no application to the *Summers* case, because in *Summers* there were three separate cases before the Commission.

The Commission recognizes and supports the concept that the Public Service Commission Law gives each party a right to seek judicial review. The One-Case Rule does not abridge that right. Under the One-Case Rule, each party retains this right, but all reviews of one case are heard by the same court. Thus, no party is denied the right to judicial review of its specific issues. However, there is nothing in the Public Service Commission Law that requires or permits a separate cause of action for every writ of review outside of the One-Case Rule, discussed *supra*, and the Commission knows of no legal requirement or authority permitting the courts to keep separate the multiple judicial reviews of the same case.

Furthermore, contrary to the Order that Respondent entered on December 1, 2000, the position of the Commission is fully consistent with *Summers,* which is the primary case relied upon by Respondent.[46] *Summers*, *supra* at 743, does stand for the proposition that an appellant does have the legal right to maintain the "physical structure" of its own proceeding and to prosecute that proceeding to such a termination as the law provides. The Commission's position, pursuant to the One-Case Rule, does not deprive any party of the "physical structure" of its own proceeding, and would leave each appeal from the Commission's Report and Order within its own "physical structure." It would merely

[46] Relator notes that there is no mention or citation of the *Summers* case in Respondent's Answer to Writ of Prohibition as prepared by counsel for the Industrial Intervenors. This is a tacit recognition on their part that the *Summers* case does not support Respondent's position.

mean that all of the writs of review are heard by the same court. This will prevent the Commission from having to defend the same Report and Order up to 10 times and will prevent the highly probable prospect of inconsistent judgments.

After the parties made their oral arguments to Respondent on the Commission's Motion to Dismiss, the attorney for the Industrial Intervenors, in a letter to Respondent, cited three other cases in support of his argument. The Commission did not have an opportunity to respond to this letter before the Respondent overruled the Motion to Dismiss, but will address those cases now, because they may have influenced the Respondent's decision, and because Respondent may cite those cases in this Court as well.

The first of the three cases the Industrial Intervenors' counsel cited was *State ex rel. GTE North v. Missouri Public Service Commission*, 835 S.W.2d 356 (Mo. App., W.D. 1992). In the *GTE North* case, there were two writs of review that arose from a single case before the Commission. Those two writs of review were consolidated in both the circuit court and in the Court of Appeals. Although the Court of Appeals did not discuss the One-Case Rule in its *GTE North* decision, it is worth noting that the court's action was, in fact, *consistent with* the One-Case Rule. Furthermore, the court did not say that "there can be no conflict" between the rulings of two circuit courts when there are multiple appeals, as the Industrial Intervenors' counsel suggested in his letter to Respondent. Rather, the court said that the Commission did not have to rehear the *GTE North* case on remand from the circuit court while the same *GTE North* case was on appeal to the Court of Appeals, because that would produce the unworkable result that two decisions of the Commission in the same case could be on appeal at the same time

(*GTE North*, *supra*, at 367). Although the *GTE* North case did involve multiple appeals of the same Commission order, the One-Case Rule was not in issue, and the court's holding did not undercut its viability.

The other two cases that the Industrial Intervenors' counsel cited, for the first time, in his post-argument letter to Respondent were *State ex rel. Midwest Gas Users' Association v. Missouri Public Service Commission*, 996 S.W.2d 608 (Mo. App. W.D. 1999) and *Missouri Gas Energy v. Public Service Commission*, 978 S.W.2d 434 (Mo. App. W.D. 1998). However, neither of these cases discussed, explained, distinguished, clarified, or addressed the One-Case Rule in any way. Simply put, the One-Case Rule was never raised as an issue in either of these cases.

It is reasonable to infer that the Industrial Intervenors' counsel cited those two cases to Respondent, because they did both arise out of a single proceeding before the Commission; there were two separate petitions for a writ of review of the underlying case (one filed by the utility, and the other filed by a group of the utility's customers); the two writs of review were pending in the circuit court at the same time, and they were not consolidated; and there were two separate appeals to the Western District that were also not consolidated. However, as noted above, no party raised the One-Case Rule as an issue.

Furthermore, the potential for inconsistent adjudications of those cases (the *Midwest Gas Users'* case and the *Missouri Gas Energy* case), and for the waste of judicial and Commission resources, was minimal, for several reasons. First, the issues that the utility raised were "significantly different" from the issues raised by the utility's customers (as counsel for the Industrial Intervenors has acknowledged). Second, the

same Cole County judge heard both writs of review. And third, both appeals were to the Western District of the Court of Appeals. The *Midwest Gas Users'* and *Missouri Gas Energy* cases therefore provide no support for Respondent's Order Overruling Motion to Dismiss.

The Potential for Inconsistent Adjudications

The potential for inconsistent adjudications is far greater in the instant case than it was in the *Midwest Gas Users'* and the *Missouri Gas Energy* cases because, in the instant case: 1) the issues raised in the various petitions for writ of review overlap to some extent; 2) the writs of review are pending before three different judges in three different counties; and 3) appeals of the circuit courts' decisions could go to two different districts of the Court of Appeals.

Contrary to the claims and assertions of the Industrial Intervenors, there is, in the present case, a very real potential for inconsistent judgments from the Circuit Courts of Jasper County, Cole County and Buchanan County.

For example, the Industrial Intervenors seek a determination in Buchanan County and Cole County that District Specific Pricing ("DSP") stay in place but include a phase-in mechanism.[47] However, the St. Joseph Area Water Districts request that the Cole County Circuit Court overturn the Commission's Report and Order and that the

[47] See Exhibits 5, 10 and 11 to the Commission's Suggestions in Support of Petition for Writ of Prohibition in this case; also see the summary of the Industrial Intervenors' arguments, *supra*, at p. 7.

Commission be ordered to implement Single Tariff Pricing ("STP").[48] The City of St. Joseph also urged the Cole County Circuit Court to find that the Commission erred in moving away from "Single Tariff Pricing" and toward "District Specific Pricing."[49] The issue of "Single Tariff Pricing" or "District Specific Pricing" has therefore been squarely presented to both the Cole County Circuit Court and the Buchanan County Circuit Court. Unless these two courts come to the same conclusion with regard to this issue, there will be an irreconcilable conflict between the two circuit courts.

There is also the possibility of inconsistent adjudications on the question of whether the Company's decision to construct a new water treatment plant at St. Joseph was prudent. The Industrial Intervenors claim, both in Buchanan County and in Cole County, that the Commission erred in shifting the burden of proof on this issue and in finding that the Company's decision was prudent.[50] The Office of the Public Counsel makes a similar argument, but only in Cole County.[51] The issue of prudence has therefore been squarely presented to both the Cole County Circuit Court and the

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[48] See Appendix A-10, A-11 and A-12 hereto; also see the summary of the St. Joseph Area Water Districts' arguments, *supra*, at pp 14-15.

[49] See Appendix A-13 and A-14 hereto; also see the summary of the City of St. Joseph's arguments, *supra*, at p 15.

[50] See Exhibits 5, 10 and 11 to the Commission's Suggestions in Support of Petition for Writ of Prohibition in this case; also see the summary of the Industrial Intervenors' arguments, *supra*, at p. 7.

[51] See Appendix A-9 hereto; also see the summary of the OPC's arguments, *supra*, at p. 14.

Buchanan County Circuit Court. Unless these two courts come to the same conclusion with regard to this issue, there will be an irreconcilable conflict between the two circuit courts. In fact, although the Cole County Circuit Court has not yet ruled on the issue, the court has indicated to counsel for the parties in that case that it will find that the Company's decision to construct the new water treatment plant at St. Joseph was prudent. If the Buchanan County Circuit Court comes to the same conclusion, there will, of course, be no conflict. But if the Buchanan County Circuit Court decides, as the Industrial Intervenors urge it to do, that the decision to build the new water treatment plant at St. Joseph was not prudent, there will be an irreconcilable conflict between the two circuits.

Other areas of potential conflict between the various circuit courts abound. For example, the Company claims that the Commission erred in refusing to allow it to recover, in rates, the undepreciated balance of the abandoned St. Joseph water treatment plant.[52] If the Cole County Circuit Court agrees (as it has, in fact, indicated to counsel for the parties in that case that it will do), any decision by the Respondent that finds that the Company was imprudent when it decided to build a new water treatment plant at St. Joseph would be in direct conflict with the Cole County Circuit Court.

[52] See Appendix A-8 hereto; also see the summary of the Company's argument, *supra*, at pp. 13-14.

The rate design issue of "interclass shifts"[53] has also been raised by both the Industrial Intervenors in Buchanan County[54] and by the OPC[55] and by the St. Joseph Area Water Districts[56] in Cole County. If the Cole County Circuit Court affirms the Commission's decision on this issue (as it has, in fact, indicated to counsel for parties in that case that it will do), any decision by the Respondent that finds that the Commission erred would be in direct conflict with the Cole County Circuit Court.

Consequences of Inconsistent Adjudication

There is thus a high possibility and probability of conflicting judgments from the circuit courts and of conflicting appeals to the Southern District from Jasper County and to the Western District from Cole and Buchanan Counties.

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[53] An "interclass shift" is the consequence of a rate design that occurs when a part of the burden of providing the utility company with its revenue requirement is shifted from one class of customers (such as residential customers) to another class of customers (such as sales-for-resale customers).

[54] See Exhibits 5, 10 and 11 to the Commission's Suggestions in Support of Petition for Writ of Prohibition in this case; also see the summary of the Industrial Intervenors' arguments, *supra*, at p. 7.

[55] See Appendix A-9 hereto; also see the summary of the OPC's arguments, *supra*, at p. 14.

[56] See Appendix A-10, A-11 and A-12 hereto; also see the summary of the St. Joseph Area Water Districts' arguments, *supra*, at pp. 14-15.

If any of these conflicts materializes, the Commission would be obliged, by the order of one circuit court, to enforce its Report and Order as entered, but would also be obliged, by the terms of the conflicting order of another circuit court, to correct errors in the Report and Order. It would not be possible for the Commission to comply with the orders of both circuit courts. The only solution would be for the Commission to appeal both decisions to the Court of Appeals.

If the conflict was between the Cole County Circuit Court and the Buchanan County Circuit Court, both cases would be appealed to the Western District of the Court of Appeals, which could resolve the conflict. However, if it happened that the conflict was between the Cole County Circuit Court and the Jasper County Circuit Court, one appeal would go to the Western District and the other appeal would go to the Southern District. The conflict could therefore continue even after presentation to the Court of Appeals. The only means of resolving such a conflict would be to transfer the case to this Court for ultimate resolution.

The Commission submits that a far better solution would be to recognize the potential for conflict, recognize that all of the petitions for writs of review arise out of the same case before the Commission, treat the reviews as a single case, and resolve them all in the circuit court in which the first petition for writ of review was filed – Cole County, in this case.

These very likely conflicting-opinion scenarios are only a small part of the high likelihood that there will be at least one conflicting opinion even after the almost certain appeals to the Courts of Appeals. The Commission may find that it has no choice but to appeal to the Court of Appeals any circuit court decision that does not affirm the

Commission's Report and Order in full, for if it does not appeal, it will be bound, by the doctrine of "law of the case," to enforce the circuit court's judgment, and it would be likewise bound to enforce another circuit court's conflicting judgment. This type of procedurally and substantively dreadful situation was not contemplated by the statutes and was certainly not intended.

The application of the One-Case Rule would end this situation and prevent conflicting opinions. It would also prevent the Commission from being in the untenable position of deciding which conflicting circuit court or Court of Appeals ruling should be disregarded. Any contrary argument by Respondent is wrong.

Even though it is not cited in Respondent's Answer herein, counsel for Industrial Intervenors placed great reliance on their incorrect interpretation of *State ex rel. Southwestern Bell Telephone v. Brown*, 795 S.W.2d 385 (Mo. banc 1990), in their Suggestions in Opposition to the Commission's Petition for Writ of Prohibition in this Court. While this Court did specifically hold, in the *Southwestern Bell* case, that the review permitted under § 386.510 is a separate action and for purposes of procedural analysis, not an appeal, *id*. at 388, it is equally true that this Court noted that § 386.510 is a separate action procedurally initiated for purposes of review. *Id.* at 388. The term "for purposes of review" is the term continually omitted by the Industrial Intervenors in their legal pleadings.

It is clear that all ten of the petitions for review seek some judicial review of the same Commission Report and Order. However, pursuant to § 386.510, there cannot be any new or additional evidence introduced in the judicial review, nor can there be a jury. The only record will be the evidence and exhibits introduced before and certified by the

Commission. See § 386.510. Since § 386.510 provides for a type of review with some of the attributes of an appeal, it defies common sense and reason to allow the various reviews to be pursued in separate courts which inevitably leads to conflicting opinions as discussed, *supra*.

The present case is significantly different from the traditional determination of what a "separate action" is. The traditional determination usually deals with whether claims can be separated. In such cases, these claims have not already been litigated (as they have in this case), and the court is preparing to try the issues for the first time. In *Horwitz v. Horwitz*, 16 S.W.2d 599, 604 (Mo. App., E.D. 2000), the court dealt with a wife's contention that the trial court erred in dismissing her separate claim for necessaries. The Court of Appeals concluded such claim was barred because it should have been joined and tried with her counterclaim for dissolution of marriage. The Court noted, in pertinent part, that a cause of action which is single may not be split or tried piecemeal. *Id*. at 604. The same principle applies in the present case.

In the present case, Respondent wanted to take one case, the seven writs of review from the same Report and Order of the Commission, and allow each of the seven to be reviewed separately, thus inevitably leading to conflicting judgments and a procedural morass. This is inconsistent with the One-Case Rule and the *Southwestern Bell* case, *supra*.

For all of the foregoing reasons, Relator respectfully submits that the Respondent must be permanently prohibited from continuing to exercise jurisdiction over the Industrial Intervenors' petition for writ of review.

POINT II

RELATOR IS ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM TAKING ANY FURTHER ACTION IN BUCHANAN COUNTY CASE NO. 00CV73667 OTHER THAN TO RECALL HIS ORDER OF DECEMBER 1, 2000, OVERRULING THE COMMISSION'S MOTION TO DISMISS OR TO TRANSFER, BECAUSE RESPONDENT'S ORDER VIOLATES SECTION 386.510 IN THAT IT ALLOWS THE ST. JOSEPH INDUSTRIAL INTERVENORS TO PURSUE TWO WRITS OF REVIEW AND SUBJECTS THE COMMISSION TO IRREPARABLE HARM, IN THAT IF RESPONDENT'S RULING IS NOT OVERTURNED, THEN THE COMMISSION WILL HAVE TO DEFEND THE SAME REPORT AND ORDER MULTIPLE TIMES IN DIFFERENT CIRCUIT COURTS, INEVITABLY LEADING TO INCONSISTENT JUDGMENTS BEING APPEALED TO DIFFERENT DISTRICTS OF THE COURT OF APPEALS.

Petitioners For Writs of Review May File In Only One County

Judicial reviews of a Commission Report and Order are controlled by § 386.510. Section 386.510 provides, in relevant part, that:

> …within thirty days after the rendition of the decision on rehearing, 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.

(Emphases supplied).

There is no dispute that both Missouri-American and the Industrial Intervenors filed timely applications for rehearing with the Commission, and then, after those applications were denied, they both filed timely petitions for writs of review, as described above. From the foregoing statute, it is readily apparent that although there *may* be more than one appropriate venue for a writ of review, the petitioner may *only* file its petition in *one* of the appropriate venues. It may file in either Cole County (the county in which the Commission has its principal office) or in the county in which "the hearing" was held. The evidentiary hearing in the instant case was held in Cole County, so it would be appropriate for an applicant to file a petition for writ of review in Cole County. However, it has been held that the occurrence of a public hearing within a county is sufficient to also give the circuit court of that county jurisdiction to issue a writ of review, as well. *State ex. rel. Empire District Electric Company v. Public Service Commission*, 714 S.W.2d 623, 625 [1] (Mo. App., S.D. 1986). This simply means that, in the instant case, any applicant for a writ of review could seek its review in either Cole County (wherein the Commission has its principal offices and wherein the evidentiary hearing was held) or in any of the counties wherein a public hearing was held, including Buchanan County. A party may not, however, file in *both* Cole County and in Buchanan County.

This is a simple matter of statutory interpretation. The key word in the above excerpt from § 386.510 is "or." When courts interpret statutes, the words contained in the statutes must be given their plain and ordinary meaning. *Burch Food Services, Inc. v. Missouri Division of Employment Security,* 945 S.W.2d 478, 480 (Mo. App. W.D., 1997).

Provisions of the entire legislative act must be construed together and, if reasonably necessary, all provisions must be harmonized. *Id.* at 480. Courts of appeals should use rules of statutory construction to subserve rather than subvert legislative intent. *Id.* at 480. The court should not construe the statute so as to work unreasonable, oppressive or absurd results. *Id.* at 480. As used in § 386.510, the word "or" is used in the disjunctive sense, which requires a choice that Industrial Intervenors have failed to make. The plain language of the statute clearly requires that an applicant for a writ of review of a Commission decision must file only one petition for writ of review in the circuit court, and may not file multiple reviews.

Furthermore, the Court's role in interpreting 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 v. SS Healthcare System*, 19 S.W.3d 678, 680 (Mo. banc 2000). Furthermore, in construing the statute, the Court is not to assume the legislature intended an absurd result. *Id.* at 681. A clear reading of the statute and the Respondent's proposed interpretation show that Respondent's position is devoid of merit. Section 386.510 provides detailed procedures to be followed in obtaining a writ of review in the circuit court. It speaks of "the applicant" doing certain actions. It also provides that: "The commission and each party to the action or proceeding before the commission shall have the right to appear in the review proceedings."

The legislature clearly contemplated only one review process with only one writ of review for each party seeking judicial review. It does not provide that each party to the action or proceeding before the Commission shall have the right to multiple review

proceedings in different courts until they obtain a result to their liking**.** Furthermore, it would be absurd to believe that the legislature contemplated multiple reviews of the same Commission Report and Order by multiple circuit courts and then by multiple districts of the Court of Appeals. This would inevitably lead to conflicting opinions and conflicting court orders. Accordingly, this Court should not endorse such an absurd result.

The Industrial Intervenors have violated the mandates of § 386.510, by filing an application for a writ of review in the Circuit Court of Buchanan County on October 16, 2000 (Case No. 00CV73667), and then filing a second application for writ of review in Cole County on October 18, 2000 (Case No. 00CV325222). This is true, despite the Industrial Intervenors' claim that the Cole County filing was something they call "provisional,"[57] and despite the fact that they actually requested that the Cole County Circuit Court *not* issue a writ of review.[58] They have in fact filed two applications for writs of review.

It is the filing of the petition for review that triggers § 386.510. As discussed s*upra*, the Industrial Intervenors may file one – and only one – application for review. There is no authority to file more than one application for review. The statute contemplates that petitions for writs of review will be diligently prosecuted to their conclusion, and neither delayed nor held in abeyance for the convenience of the Industrial

[57] The Industrial Intervenors cite no authority for the filing of a "provisional" petition for writ of review, and the Commission has not been able to find any authority for such a filing.

[58] Although the Industrial Intervenors filed their Cole County petition on October 16, 2000, the Cole County Circuit Court has not yet issued a writ of review.

Intervenors. Likewise, there is no authority for an applicant to file a petition for a writ of review, to avoid the clear intent of the statute that applications for review be diligently prosecuted. Nor does the statute authorize the applicant to maintain absolute, sole and complete control of the application to the complete exclusion of the other parties and the court, and to seek two applications for review for strategic reasons, because the applicant fears that it may not be pursuing its application for review in the proper venue and because it wants to have an "ace in the hole" if it later learns of its mistake.

Section 386.510, as discussed *supra*, provides that an appeal is proper in either the Circuit Court of Cole County (wherein all seven of the applicants who are seeking judicial review have filed petitions for writs of review) or in the Circuit Court of Buchanan County (wherein one of these seven parties filed) or in the Circuit Court of Jasper County (wherein two of these seven parties filed).[59] However, § 386.510 allows each party to choose only one of these venues.

The Industrial Intervenors have clearly violated this statute and they have not cited any authority for the proposition that one can have two applications for review on file at the same time by merely labeling one to be "provisional" and asking the Circuit Court of Cole County not to issue the writ of review. This is either a strategic attempt by the Industrial Intervenors to improperly gain two reviews of the same Report and Order or it is a strategy to have a "fall-back" position if they should fail in Buchanan County. The blatant and overt failure by the Industrial Intervenors to cite any authority for this outlandish theory is tantamount to admitting that there is no such authority and that they

[59] This is, of course, subject to the provisions of the One-Case Rule that all judicial reviews of the Commission's Report and Order must occur in the same circuit court.

know that it is improper to file two applications for review, no matter how such are denominated, controlled or manipulated.

The Commission has searched diligently for some authority that authorizes "provisional filings" as contemplated by the Industrial Intervenors. The Commission sought any authority for the proposition that one can violate the terms of § 386.510 – which allows an application to be filed in *one* place – by filing an application in *two* places and denominating one of the applications as a "provisional filing." The Commission did not find any such authority.

The only reference to any type of "provisional filing" that the Commission could find was in the context of inmates seeking to file lawsuits or motions, "provisionally," *in forma pauperis*. In *State v. Poindexter*, 941 S.W.2d 533, 538 (Mo. App., W.D. 1997), the Court stated:

> We recognize the line of cases form this court which speak in terms of "summary dismissal" in regard to *in forma pauperis* motions.[Citations omitted]. These cases endeavor to set for the appropriate procedure for handling *in forma pauperis* motions. As this court said in *Cooper*, "When a plaintiff seeks to sue as a poor person, the court should **provisionally file** the suit papers subject to summary dismiss if the court determines the plaintiff not to be indigent. [Emphasis supplied].

See also *Trice v. State*, 792 S.W.2d 672, 674 (Mo. App., W.D. 1990). The Industrial Intervenors, Gilster Mary-Lee and the City of Joplin have certainly not claimed to be inmates or any other entity needing to file *in forma pauperis*.

Instead the Industrial Intervenors have opted to file two applications for review. They seek to avoid the clear prohibition against double filings found in § 386.510 by labeling the Cole County filing as "provisional" and asking the Circuit Court of Cole County to not issue the Writ of Review unless and until the Industrial Intervenors request it.

This is clearly a desperate attempt by the Industrial Intervenors to protect themselves in case this Court tells them that they cannot file two applications for review or that the one in Buchanan County is improper. The first flaw in this plot is that it clearly violates § 386.510, as discussed *supra*. The next major flaw in this scheme is that it is totally improper, because the Industrial Intervenors cannot file a Petition for Writ of Review and then tell the Commission that it must not defend the petition and tell the Circuit Court of Cole County that it must not act upon it. The purpose of a petition for writ of review is to obtain a judicial review. But the Industrial Intervenors contend that they can refuse to prosecute the case, while they pursue another writ in another venue. Then, if they don't like the result, they contend they can try again in Cole County. They want to have two opportunities to litigate the same action.

The Industrial Intervenors cannot seriously argue that such an outrageous and erroneous argument has any validity. Clearly the Industrial Intervenors were concerned about the propriety of filing their case in both Buchanan and Cole Counties. They tried to avoid the applicability of § 386.510, and now it is time for them to face the consequences of their actions.

Instead of accepting the consequences of their chosen course of action, the Industrial Intervenors seek to justify and gain credibility for their questionable strategy of

filing two applications for review and labeling one "provisional" by relying on a gross misstatement and incorrect assertion. In Respondents' Suggestions in Opposition to Petition for Writ of Prohibition in this Court, counsel for the Industrial Intervenors assert that the Industrial Intervenors' county of choice for their writ of review is Buchanan County. (Respondent's Suggestions in Opposition to Petition for Writ of Prohibition at 2). They also state that they also filed a "provisional" petition for writ of review in Cole County "…only as a precaution in expectation that a challenge would be made to their petition in Buchanan County." (*Id.* at 2).

Simply because a party fears that a challenge may be raised to its case does not grant it authority to improperly file two petitions for review, in direct violation of §386.510. Furthermore, merely because counsel can invent the notion of a "provisional filing," and clearly describe what they mean by a "provisional filing" does not mean that such a thing is lawful or proper. Relator Commission once again challenges and encourages counsel for the Industrial Intervenors to identify the authority for such a proposition.

Counsel for the Industrial Intervenors further stated an additional reason for their notion of a "provisional filing." They said:

> Ag Processing et al. had reason to be concerned. In a Commission adjudication workshop held at the Commission on September 1, 2000 before the text of the Report and Order here involved was available (and before a single petition for review had been filed), Commission General Counsel Dan Joyce stated to those assembled that a review proceeding could only be held in Cole County.

(Respondent's Suggestions in Opposition to Petition for Writ of Prohibition in this case, at 3.)

This statement is wrong for a multitude of reasons. First of all, the statement that the text of the Report and Order was not then available is false. The Commission actually issued its Report and Order on August 31, 2000. Accordingly it was available on September 1, 2000.

The next incorrect part of this statement is the assertion that Commission General Counsel Dan Joyce stated to a group that the only place that a petition for review of a Commission Report and Order can be had is in the Cole County Circuit Court. It is very difficult to understand why the Industrial Intervenors believe that their fear that they may have filed in the wrong venue entitles them to improperly file two applications for review in direct violation of § 386.510. Furthermore, any attorney involved in a case knows that attorneys for opposing parties will zealously represent their clients; such knowledge should not strike fear in the heart of another attorney. It is necessary for an attorney to rely on his own sound legal research and knowledge of the law rather than react to some fear that the attorney on the other side might not be sufficiently "nice."

In any event, attributing this statement to Commission General Counsel Dan Joyce is improper. This alleged comment is not a part of the record in this case; it is an unsworn hearsay statement by counsel for the Respondent, it appears that it was taken out of context, and it is of absolutely no relevance in this case. This Court should disregard Respondent's claims about this statement.

The Industrial Intervenors also failed to explain the context in which Mr. Joyce made his statement. Mr. Joyce was explaining that the Commission planned to have

legislation introduced, so that Commission Reports and Orders would be appealed directly to the Court of Appeals. If such legislation passed, and if there was a need in a given appeal for a special order, such as a stay, then only the Circuit Court of Cole County would hear such motions. The Industrial Intervenors' implication that Mr. Joyce was talking about the proper venue under existing law is therefore entirely fallacious.

Mr. Joyce did not at anytime state that *current law* requires that Commission Reports and Orders can only be reviewed in Cole County. It is not reasonable for the attorneys for Respondent to fear this statement because the authority of the General Counsel of the Commission to issue opinions pursuant to former Section 386.070 was repealed in 1977. Furthermore, the Industrial Intervenors fail to note that the Commission only speaks through its briefs and other documents filed in Court.

For all of the aforementioned reasons, the Commission respectfully submits that Respondent must be ordered to recall his Order Overruling the Commission's Motion to Dismiss or Transfer.

POINT III

RELATOR IS ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM TAKING ANY FURTHER ACTION IN BUCHANAN COUNTY CASE NO. 00CV73667 OTHER THAN TO RECALL RESPONDENT'S ORDER OF DECEMBER 1, 2000, OVERRULING RESPONDENT'S MOTION TO DISMISS OR TO TRANSFER, BECAUSE RESPONDENT'S ORDER INCORRECTLY ASSERTS THAT THE CIRCUIT COURT OF BUCHANAN COUNTY HAS JURISDICTION TO HEAR THE WRIT OF REVIEW FILED BY THE INDUSTRIAL INTERVENORS, IN THAT EXCLUSIVE JURISDICTION OF THIS CASE IS VESTED IN THE CIRCUIT COURT OF COLE COUNTY AND IF RESPONDENT'S RULING IS NOT OVERTURNED THEN THE COMMISSION WILL HAVE TO DEFEND THE SAME REPORT AND ORDER MULTIPLE TIMES IN DIFFERENT CIRCUIT COURTS INEVITABLY LEADING TO INCONSISTENT JUDGMENTS BEING APPEALED TO DIFFERENT DISTRICTS OF THE COURT OF APPEALS.

The Commission submits that, pursuant to Supreme Court Rule 53.01, all seven of the writ of review cases (or ten, if one counts the multiple petitions that three of the parties have filed) must be decided in Cole County. Supreme Court Rule 53.01 provides that a civil action is commenced by filing a petition with the Court. This rule has been interpreted to mean that the court in which the first petition is filed has *exclusive* jurisdiction of the action, without any regard to time of service. *State ex rel. Weigman v. Moentmann*, 942 S.W.2d 441, 443-444 [3] (Mo. App., W.D. 1997). See also *State ex rel. Kincannon v. Schoenlaub*, 521 S.W.2d 391, 393 (Mo. Banc 1975). The *time of filing*

creates a "bright line test" that is easy to administer because there are no questions about whether faulty or defective service is sufficient to commence a suit. *Weigman, supra*, at 444.

Even Respondent recognized the applicability of the first-filed rule, citing *State ex rel. Kincannon v. Schoenlaub, supra* with approval.[60] Respondent's only mistake was in not recognizing that all petitions for review arising from the same Report and Order of the Public Service Commission, while procedurally separate, *State ex rel. Southwestern Bell v. Brown*, *supra*, are also part of the same case pursuant to the "One-Case Rule." Each party seeking a writ of review has its own writ of review proceeding, but it must be raised in the Court wherein the first case was filed. This is logically designed, to prevent conflicting rulings.

Pursuant to this bright-line test, it is clear that the only Court that has authority to proceed with the Industrial Intervenors' writ of review is the Circuit Court of Cole County, because the first petition for writ of review was filed in the Circuit Court of Cole County, by Missouri-American, on September 19, 2000, as Case No. 00CV325014. Since all of the petitions for review are only one cause of action under the law, all petitions for review can only be decided in Cole County. As discussed *supra*, it is true that each party gets its own writ of review, but pursuant to the "One-Case Rule" there can only be one final judgment regarding all of the writs of review.

Furthermore, it cannot be argued that Supreme Court Rule 53.01 does not control this situation, since § 386.510 does not specifically address the procedural nightmare that

[60] See page 2 of Exhibit 13 to the Commission's Suggestions in Support of Petition for Writ of Prohibition.

has developed in this case, and there is no conflict, of any type, between the statute and the rules of the Supreme Court. Even if there were a conflict, however, the Supreme Court Rules would govern over conflicting statutes in a procedural matter such as this, unless the General Assembly amends the rule by enacting a bill specifically for that purpose. *Ostermueller v. Potter*, 868 S.W.2d 110 (Mo. banc, 1993).

Accordingly, the proper remedy under the particular circumstances of this case is to transfer this case to Cole County Circuit Court pursuant to § 476.410. Since venue is improper in the county in which the action was brought, prohibition lies to bar the circuit court from taking any further action except to transfer this cause to the county of proper venue. *State ex. rel. Drake Publishers, Inc. v. Baker,* 859 S.W.2d 201 (Mo. App., E.D. 1993). In view of the foregoing, this case must be transferred to Cole County Circuit Court.

Related Venue Issues

Because the gist of the Commission's argument on its Motion to Dismiss may not have been fully understood, the Commission will identify some arguments upon which it does *not* rely for the support of its position.

The Commission does not seek to prohibit the Industrial Intervenors from having their argument heard. The Commission recognizes that each party to the case is entitled to a writ of review after all of the procedural hurdles have been met, as in the instant case, and agrees that each party to the case is entitled to a distinct appeal of its own issues. However, pursuant to the One-Case Rule and Supreme Court Rule 53.01, this must be done in the county where the first petition for writ of review was filed. Otherwise,

Relator Commission will have to defend the same decision on multiple occasions, in multiple venues.

The Commission does not contend that Buchanan County would not be a proper venue, *but for* the fact that Missouri-American filed a prior petition for writ of review in Cole County. As the discussion above makes clear, Buchanan County *would* be a proper venue, if Cole County did not have exclusive jurisdiction.

The Commission does not contend that the Buchanan County writ of review should have been dismissed under the doctrine of *forum non conveniens.* As Respondent correctly noted in the Order Overruling Motion,[61] the Supreme Court of Missouri has clearly held that a statutory designation of a site where venue is proper "presupposes legislative determination that it cannot be overly inconvenient for a defendant to appear in that location." Also, a court cannot disturb a plaintiff's choice of proper venue within the state, and there is no intrastate application of the doctrine of inconvenient forum.[62] However, these legal rules do not address the current situation and do not deal with the One-Case Rule.

Finally, the Commission did not seek, in the Buchanan County Circuit Court, the consolidation of the Industrial Intervenors' writ of review with other cases pending in

[61] See pages 2-3 of Exhibit 13 to the Commission's Suggestions in Support of Petition for Writ of Prohibition.

[62] See page 3 of Exhibit 13 to the Commission's Suggestions in Support of Petition for Writ of Prohibition.

other counties, as Respondent seemed to believe.[63] Rather, the Commission merely contends that the Buchanan County Circuit Court lacks jurisdiction and that the Cole County Circuit Court is the only court that has jurisdiction to decide the issues raised by all of the parties who sought writs of review of the Commission's decision in Commission Case No. WR-2000-281.

[63] See page 2 of Exhibit 13 to the Commission's Suggestions in Support of Petition for Writ of Prohibition, where Respondent noted: "There is no authority for such cases to be consolidated when filed in different circuits."

CONCLUSION

The One-Case Rule requires that there be only one case on the writ(s) of review of the Commission's Report and Order in Case No. WR-2000-281. The potential harm in failing to apply the One-Case Rule in this case is obvious: it would result in the inefficient use of judicial, and also Commission, resources, and it would very likely lead to inconsistent judgments in different jurisdictions.

The very likely potential for conflicting opinions from the circuit courts exists, and appeals to the Court of Appeals would inevitably follow. For example, if one circuit court deals with only three issues raised by a party seeking a writ of review in that court, then that court would leave all other aspects of the Commission's Report and Order intact. However, it is possible that one of the other circuit courts would reach a contrary ruling on one of those three issues that were raised in the first court (either remand, reverse or affirm) and rule adversely on the other aspects of the Commission decision which the first circuit court left intact.

As the Respondent himself observed in his Order Overruling Motion[64]: "to allow multiple petitions for writs of review in numerous circuits throughout the state involving the same decisions and order of the Public Service Commission creates an unnecessary duplication and waste of effort and resources and the potential for conflicting opinions."

Accordingly, Relator requests that this Court issue a writ of prohibition prohibiting Respondent from taking any further action is this case other than the ministerial act of transferring the case to Cole County pursuant to § 476.410 or dismissing it.

[64] See page 2 of Exhibit 13 to the Commission's Suggestions in Support of Petition for Writ of Prohibition.

Respectfully submitted,

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Certificate

Pursuant to Special Rule No. 1(c), I hereby certify that: the signature block above contains the information required by Rule 53.03; the foregoing brief complies with the limitations contained in Special Rule No. 1(b); and that the foregoing brief contains 11,781 words.

I further certify that copies of the foregoing have been mailed or hand-delivered to all counsel of record as shown on the attached service list this 9th day of May 2001.