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FILED[2]
AUG 15 2002
Missouri Public
Service Commission

August 15, 2002

Executive Secretary
Public Service Commission
P. O. Box 360
Jefferson City, MO 65102

RE: MGE - Case No. GR-2001-382

Good morning:

Enclosed for filing in the above-referenced proceeding please find an original and eight copies of Missouri Gas Energy's Memorandum Regarding the Filed Rate Doctrine and "Pike County."

If you have any questions, please give me a call.

Sincerely yours,

Gary W. Duffy

Enclosures
cc w/encl: John Coffman, Office of Public Counsel
Thomas R. Schwarz, Jr.
James B. Deutsh
Jeffrey A. Keevil

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the matter of Missouri Gas Energy's Purchased Gas Cost Adjustment tariff Revisions to be reviewed in its 2000- 2001 Actual Cost Adjustment.	))))	Case No. GR-2001-382

FILED[2]
AUG 1 5 2002
Missouri Public
Service Commission

MISSOURI GAS ENERGY'S MEMORANDUM REGARDING THE FILED RATE DOCTRINE AND "PIKE COUNTY"

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August 15, 2002

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I. Introduction

In an Order Directing Filing issued on July 16, 2002, the Commission raised the question of whether the filed rate doctrine applies to the MKP/RPC adjustment proposed by the Staff in this case. It noted that MGE had suggested the Commission should not take any evidence pertaining to the substance of that proposed adjustment until it has been fully informed of how the filed rate doctrine bars Staff's adjustment. In particular, the Commission said the parties should indicate whether the "Pike County doctrine" set out in ***Pike County Light & Power Co. v. Pennsylvania Public Utility Comm'n.***, 77 Pa. Commw. 268, 465 A.2d 735 (1983) (***"Pike County"***) would apply to Staff's proposed adjustment. This memorandum responds to the Commission's directive.

The issues in this case, first and foremost, are tied to the billed revenues and actual gas costs of MGE for the period of July 1, 2000 through June 30, 2001; the ACA period. The Staff also reviews whether MGE made any imprudent decisions in the time period relating to gas purchasing. Because there has not been any evidentiary hearing in this case yet, there is no evidentiary record to cite for facts. Therefore, this memorandum will rely heavily on facts already in evidence before the Commission from Case No. GR-96-450. The facts relating to this situation cover a much broader span of time than just the ACA period here. To help the Commission in its analysis, the "Time Line" of significant events and a Glossary contained in MGE's initial brief in Case No. GR-96-450, modified slightly for purposes of this case, have been reproduced here as Appendix A.

II. Overview

The basic question is whether the Commission has the legal authority to disallow (or refuse to pass through to ratepayers) costs actually incurred by MGE in transporting natural gas over what was the Mid-Kansas/Riverside pipeline (a/k/a Kansas Pipeline) during the ACA period of 2000-2001. Staff's argument in this case on this issue is presumably the same argument it made in Case No. GR-96-450. Staff's argument is that a portion of those costs are unreasonable when compared to what the Staff believes was an alternative, namely the use of transportation on Williams Gas Pipelines Central. Whether that really was an alternative that was feasible and economic is another question. It was addressed at length in Case No. GR-96-450, where the Commission rejected the Staff's claim for lack of evidence.

The rates MGE pays for transportation on MKP/RPC have been set by the Federal Energy Regulatory Commission (FERC) since mid 1998 and therefore, by definition, cannot be considered unreasonable. MGE has never paid any amounts other than those produced by the FERC rates. Because those rates are set by the FERC, the Commission is constitutionally precluded from using *different* rates (i.e. the amounts suggested by Staff) to determine the costs MGE is ultimately allowed to pass on to MGE's customers. No one, not even a court, can prescribe different rates. This is the essence of the Filed Rate Doctrine.

The FERC has the unquestioned and undivided legal authority to set rates for the interstate transportation of natural gas under federal law. Because that ratemaking authority resides solely with the federal agency, every state is precluded by the

Supremacy Clause of the United States Constitution from establishing a different amount, or "trapping" a portion of those federally-approved costs, at the state level. The Supremacy Clause is the source of the "preemption doctrine." The aspect of the preemption doctrine that deals with federally-established utility rates has come to be known as the "Filed Rate Doctrine."

The "filed rate doctrine" was first described in a 1951 U.S. Supreme Court case. The filed rate doctrine has been followed many times, as will be explained herein. The filed rate doctrine applies even if its application "may seem harsh in some circumstances." ***Am. Tel. & Tel. Co. v. Central Office Telephone, Inc.***, 524 U.S. 214 at 223 (1998).

What has been called an *exception* to the filed rate doctrine arose in the 1983 ***Pike County*** case in a Pennsylvania state court. ***Pike County*** is a case involving electricity. The focus of ***Pike County*** was that, while it is well-established that the FERC has exclusive jurisdiction over interstate matters and the states are preempted in that regard, the states still have the authority to inquire into the reasonableness of a particular utility's decision to purchase power at a FERC-approved rate when the utility has a choice. In other words, the state has the ability to question the prudence of the initial decision of the utility if there were better alternatives available at the time. A few cases have followed this approach. This Commission is very familiar with prudence reviews and the "reasonable man" standard which is applied to judge those situations in the light of what was known to the utility at the time the decision was made.

As it has been explained by some courts, the key to the ***Pike County*** doctrine is whether the utility had a viable *alternative* at the relevant time. In other words, if the utility had a *choice* between taking power (or natural gas) between *two* FERC-regulated sources, the state can lawfully inquire into that decision-making process in a prudence review and not run afoul of the preemption or filed-rate doctrines. Therefore, a major focus of this memorandum will be whether the principles of ***Pike County*** can be applied in this situation. An understanding of the facts involving MGE, an understanding of ***Pike County***'s principles and an understanding of associated cases, is vital to the Commission understanding whether ***Pike County*** applies here, and whether the Staff's proposed disallowance is precluded by the Filed Rate Doctrine.

We will start with an explanation of the filed rate doctrine and review major cases interpreting and applying it, and then explore the ***Pike County*** situation and the major cases following it. Then we will show through a presentation of facts already examined by the Commission why the ***Pike County*** situation does not apply here, and therefore why the Staff's proposed disallowance is barred by the filed rate doctrine.

III. The Filed Rate Doctrine

A. Background

To understand how the exception of ***Pike County*** arose, there first must be an understanding of the general principles of preemption. This memorandum will not attempt to explore the entire concept of preemption since it applies in myriad situations. Instead, it will explore the concept in the context of utility rate-making.

The Filed Rate Doctrine arises from the concept of federal preemption, which in turn emanates from the most fundamental of American legal documents, the U.S.

Constitution. The U.S. Constitution, Article VI, clause 2, declares that

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The preemption doctrine has been used by courts to strike down state actions which conflict with federal authority since the early days of this nation.[1]

B. Cases Finding Preemption in Utility Regulation

In the first part of the last century, when faced with conflicts between federal and state utility regulation, the U.S. Supreme Court attempted to draw a "bright line" between the two by referring to wholesale and retail distinctions. It decided that transactions crossing state boundaries were "interstate," and thus not subject to state regulation. See, ***Missouri v. Kansas Natural Gas Co.***, 265 U.S. 298 (1924). A significant case in this time period was ***Public Utilities Comm'n of Rhode Island v. Attleboro Steam & Electric Co.***, 273 U.S. 83 (1927). In that case, the Supreme Court struck down a ruling by the Rhode Island PUC which attempted to regulate an interstate sale by a utility. The court said the state regulation imposed an impermissible "direct" burden upon interstate commerce. At that time, however, the federal government did not regulate interstate wholesale transactions. Shortly thereafter, to address the perceived gap in regulation created by that decision, Congress passed the Federal Power Act and then the Natural Gas Act.[2] Those acts delegated federal authority to the

[1] See, e.g., ***Gibbons v. Ogden***, 22 U.S. (9 Wheat.) 186 (1824).

[2] Federal Power Act of 1935, 16 U.S.C. § 791a et. seq.; Natural Gas Act of 1938, 15 U.S.C. § 717 et seq.

Federal Power Commission ("FPC"), which has since become the FERC. With the creation of an agency that is now the FERC, Congress has enacted a mechanism to completely govern the interstate sale and transportation of natural gas and electric power. See, e.g., ***Northern Natural Gas Co. v. State Corp. Comm'n. Of Kansas***, 372 U.S. 84, 90 (1963).

The first mention of the Filed Rate Doctrine can be found in the case of ***Montana-Dakota Utilities Co. v. Northwestern Public Service Company***, 341 U.S. 246 (1951). There, the United States Supreme Court held that a rate filed with the FPC, in accordance with the procedure of the FPC and within its jurisdiction, is the only legitimate rate for the transaction in question. No other rate may be charged.

Ten years later, the Mississippi Supreme Court held that the Mississippi PSC was required to pass through to the customers of a local gas distribution company the costs incurred from a pipeline supplier (even if it is an affiliate of the purchaser) when purchased pursuant to a rate schedule filed with the FPC. ***United Gas Corp. v. Mississippi PSC***, 127 So.2d 404 (1961).

Narragansett

There were a few situations where the issue arose in the 1960's and early 1970's, and courts upheld decisions by state commissions to pass through to retail customers costs incurred under FPC rate schedules. In 1976, however, the Rhode Island utility commission balked at passing through FPC-approved costs for purchased power for a utility in its state. This was another situation where the supplier was an affiliate of the purchaser. The state commission said the costs were "strikingly" and "glaringly" unfair and refused to pass them through to ratepayers. The utility appealed, and the Supreme Court of Rhode Island reversed the state commission. ***Narragansett Electric Co. v. Burke***, 381 A. 2d 1358 (R.I. 1977), *cert. denied*, 435 U.S. 972 (1978).

The Rhode Island Supreme Court relied upon ***Montana-Dakota*** and ***United Gas Corp.***, supra. It held that the state commission "must treat the FPC filed and bonded purchase price to NEPCO as an actual operating expense," noting that it was the job of the FPC to set reasonable rates. ***Id.*** at 1363. This case has given rise to what is known as the ***Narragansett*** doctrine. The ***Narragansett*** decision was summarized as follows in ***Northern States Power Co. v. Hagen***, 314 N.W.2d 32 (N.D. 1981):

> Narragansett Electric Company was a retail electric utility company serving customers in Rhode Island. Its retail rates were regulated by the Rhode Island Public Utilities Commission. Narragansett purchased electrical power from New England Power Company (NEPCO), a Massachusetts corporation. Narragansett and NEPCO were wholly owned subsidiaries of New England Electric System (NEES). Because NEPCO was an interstate wholesale supplier of electricity, its rates were subject to regulation by FPC (predecessor of FERC). NEPCO filed a rate increase request with FPC. Part of NEPCO's rate increase resulted from losses incurred when it abandoned construction of a generating station. Narragansett subsequently filed a request with the Rhode Island Public Utilities Commission to increase their rates, subject to a possible refund, to cover the increased cost which resulted from the rate increase filed by NEPCO with FPC. The Rhode Island Public Utilities Commission ruled that it could investigate the reasonableness of the costs underlying NEPCO's rate increase filed with the FPC and could prevent Narragansett from passing through to its retail customers any portion of those costs which were "strikingly" or "glaringly" unreasonable.
>
> Narragansett appealed and contended that the Rhode Island Public Utilities Commission lacked jurisdiction to inquire into the reasonableness of NEPCO's wholesale rate to Narragansett because the Federal Power Act preempted the authority of state commissions to investigate interstate prices. The Rhode Island Supreme Court agreed and held that for purposes of fixing intrastate retail rates, the Rhode Island Public Utilities Commission was required to treat NEPCO's interstate wholesale rate filed with the FPC as an actual and reasonable operating

expense.

314 N.W. 2d at 35.

GRI Cases

The preemption issue came up again in the early 1980's. In ***Public Service Co. of Colorado v. Public Utilities Comm'n of the State of Colorado***, 644 P.2d 933 (Colo. banc 1982), the Colorado PUC sought to disallow a portion of the FERC-approved rate since it included charges related to the Gas Research Institute. The Supreme Court of Colorado said:

> A major operating expense which the PUC must necessarily consider in arriving at a just and reasonable rate is the cost which Public Service and Western Slope must pay to acquire natural gas from their suppliers. <u>Where the rate or acquisition cost is subject to federal regulation and authorized by a federal regulatory agency, however, the PUC may not question its reasonableness.</u>
>
> * * *
>
> If Public Service and Western Slope wish to receive natural gas from CIG, they have no choice but to pay CIG's FERC approved tariffs to receive their supply. ... Accordingly, we conclude that the GRI charge is an added cost of natural gas which <u>the PUC is legally obligated to consider as a reasonable operating expense</u> of Public Service and Western Slope. See, e.g. *Narragansett Electric Company*, supra, *United Gas Corp. v. Mississippi Public Service Commission*, 240 Miss. 405, 127 So.2d 404 (1961); *City of Chicago v. Illinois Commerce Commission*, 13 Ill.2d 607, 150 N.E.2d 776 (1958); *Citizens Gas Users Association v. Public Utilities Commission*, 165 Ohio St. 536, 138 N.E.2d 383 (1956).

Id. at 939-940, emphasis supplied.

GRI charges were the topic again when the utility commission of the District of Columbia attempted to disallow them in setting the retail rates for Washington Gas Light Company. On appeal, the court held the commission erred in disallowing the increased

GRI charges and that state and local commissions have no authority to inquire into the reasonableness of wholesale rates. Instead, they must allow them as reasonable operating expenses. ***Washington Gas Light Co. v. Public Service Commission of the District of Columbia***, 452 A.2d 375 (D.C. 1982), *cert. denied* 462 U.S. 1107 (1983).

Undaunted by the court's rebuff in ruling on the GRI surcharge, the District of Columbia Commission attempted another, more subtle, means of disallowance by issuing an order in 1984 which precluded Washington Gas Light from recovering a percentage of its wholesale natural gas costs attributable to GRI surcharges unless the company could prove that the surcharges specifically benefitted District of Columbia ratepayers. Another appeal by the company resulted in another reversal of the utility commission. This time the court rejected the commission's "benefit" analysis, noting the attempt violated the mandate in the earlier case. Further, the court said that since the commission had no authority to rule on the reasonableness of the FERC-established surcharge for GRI funding, it likewise had no authority to consider whether, for purposes of rate treatment, GRI surcharges were a benefit to District of Columbia ratepayers. ***Washington Gas Light Co. v. Public Service Commission of the District of Columbia***, 508 A.2d 930 (D.C. 1986).

Nantahala

The next significant case is ***Nantahala Power & Light Co. v. Thornburg***, 476 U.S. 953 (1986) when the issue went back to the U.S. Supreme Court. This case arose when the North Carolina commission issued a decision in a retail case to allocate entitlements to low-cost hydroelectric power among retail customers in North Carolina and Tennessee in a manner which was inconsistent with the apportionment approved by FERC. The power company argued on appeal that the commission's decision amounted to a disallowance of wholesale costs and was an impermissible, indirect attack on FERC's jurisdiction. The power company lost at the state supreme court, but won when the case went to the U.S. Supreme Court.

In discussing the line of cases that included ***Narragansett***, the Supreme Court stressed that those decisions "are properly driven by the need to enforce the exclusive jurisdiction vested by Congress in FERC over the regulation of interstate wholesale utility rates... ." 476 U.S. at 966. Once the FERC sets the wholesale rate, a state may not interfere with the FERC's authority by concluding that the FERC-approved wholesale rate is unreasonable when setting retail rates. The Supreme Court explained that this is not a rule of administrative law but a matter of enforcing the Supremacy Clause. Additionally, the Supreme Court extended this preemption analysis by adding that the Filed Rate Doctrine is not limited to rates *per se*, but instead applies equally to *any* interference with FERC's exclusive authority. It said that the FERC's power allocation was "presumptively entitled to more than the negligible weight given it by the" state commission. ***Id.*** at 967.

> Once FERC sets [a rate], a state may not conclude in setting retail rates that the FERC approved wholesale rates are unreasonable. A state must rather give effect to Congress's desire to give FERC plenary authority over interstate wholesale rates, and to ensure that the states do not interfere with this authority.

Id. at 966.

The Supreme Court explained that the essence of the ***Narragansett*** doctrine is the concept that <u>states cannot "trap" federally-approved costs</u>. This doctrine is applied by courts to ensure that purchasers of wholesale services at rates regulated by the federal government can recover all of the costs incurred.

The ***Pike County*** case had arisen by this time, and was relied upon by the North Carolina Supreme Court in upholding the state commission. Reversing, the U.S. Supreme Court in ***Nantahala*** specifically addressed the North Carolina Supreme Court's reliance on ***Pike County***, saying the state court "erred in relying on cases treating the reasonableness of purchasing from a particular source of, rather than paying a particular rate for, FERC-approved power." ***Nantahala*** at 972. The Supreme Court, however, left open the prospect that it might consider applying a prudence determination in particular types of cases:

> Without deciding this issue, we may assume that a particular *quantity* of power procured by a utility from a particular source could be deemed unreasonably excessive if lower-cost power is available elsewhere, even though the higher-cost power actually purchased is obtained at a FERC-approved and therefore reasonable, *price*. The North Carolina Supreme Court apparently felt that Nantahala procured an unreasonably large amount of purchased power in light of the availability of lower-cost entitlement power. But Nantahala's procurement of purchased power is *not* unreasonably large given that Nantahala could not have treated itself as having access to any more low-cost entitlement power than it is eligible to include under FERC's interpretation of what would be a fair allocation. . . . The North Carolina court's ruling that Nantahala had purchased an unreasonably large quantity of high-cost power from TVA therefore conflicts with FERC's orders in the same manner as would a refusal to recognize a FERC-approved price as a reasonable cost for purposes of retail ratemaking.

476 U.S. at 972.

Appalachian Power

Another interpretation of the "filed rate doctrine" is found in the case of

Appalachian Power Co. v. P. S. C. of West Virginia, 812 F. 2d 898 (4th Cir. 1987). This case involved the interaction between a retail and wholesale utility company both owned by the same parent company. ***Id.*** at 900. In this case the PSC of West Virginia denied a retail rate recovery of $1,600,000 after the FERC had already accepted the arrangements made in an agreement on April 1, 1984 between the retail company, the wholesale company and their parent company. ***Id.*** at 901. The Court of Appeals decision that the PSC's assertion of jurisdiction was preempted by the federal agency was completely in line with ***Nantahala*** which stated that states are powerless to exert authority that could potentially conflict with FERC determinations regarding rates or agreements effecting those rates. ***Appalachian***, at 904. The Court also distinguished ***Pike County*** by stating that the essence of that case was whether or not the proper inquiry was made; however, where there is no choice "such an inquiry would be an empty one." ***Appalachian***, at 903.

Mississippi Power

The next significant case from a historical perspective is ***Mississippi Power & Light Co. v. Mississippi ex rel. Moore***, 487 U.S. 354, 93 PUR4th 293 (1988). In that case, the Supreme Court clarified the circumstances where prudence review is proper and reaffirmed the Filed Rate Doctrine. In ***Mississippi Power*** the court established that a state agency may conduct a prudence review of a FERC-approved rate or mandated payment <u>only where the utility had a legal right to refuse the high priced power or to pay for less than allocated amounts</u>.

Pursuant to an order of the FERC, Mississippi Power & Light was required to purchase 33 percent of the output of the Grand Gulf 1 nuclear power plant located in

Port Gibson, Mississippi. This produced a large increase in the wholesale power costs of the utility, which the Mississippi PSC granted. On appeal, the Mississippi Supreme Court ruled that the state of Mississippi was required to examine the prudence of the management decisions leading to the construction and completion of the nuclear power plant before passing the costs through to consumers. The state court reasoned that there would be preemption only where the matters had been *actually determined,* either expressly or impliedly, by the federal agency. It said that as to matters not resolved by the FERC, such as whether the completion of a nuclear power plant, or its continued operation, was prudent, there would not be preemption.

The United States Supreme Court, resting upon its reasoning in ***Nantahala***, reversed the Mississippi Supreme Court and ruled that such a state proceeding on prudence was preempted by the FERC decision which allocated the nuclear power. 93 PUR4th at 299. The Court said the state of Mississippi was required to treat MP&L's FERC-mandated payments for the Grand Gulf costs as reasonably incurred for the purpose of setting its retail rates. ***Id.***

In ***Mississippi Power***, the Supreme Court relied heavily on its previous reasoning in ***Nantahala*** and explained that whether a prudence review is proper turns on whether the utility company has the legal right to refuse to buy the power.

> . . . if the integrity of FERC regulation is to be preserved, it obviously cannot be unreasonable for MP&L to procure the particular quantity of high-priced Grand Gulf Power that FERC has ordered it to pay for. Just as Nantahala had no legal right to obtain any more low cost TVA power than the amount allocated by FERC, it is equally clear that MP&L may not pay for less Grand Gulf power than the amount allocated by FERC.

93 PUR4th at 301.

Thus, according to ***Mississippi Power***, the key which unlocks the door to any state prudence inquiry where FERC rates are involved is whether the utility has discretion in incurring a charge, <u>not</u> whether the federal agency initially made a determination of prudence. In other words, if a gas company freely chose a higher-cost gas supply over a lower-cost supply, all other things being equal, then even though the FERC-approved rates apply to both supplies, the utility may be found to have been imprudent by the state commission in choosing to take the higher-cost supply.

The Supreme Court went on to explain that there were several bases of its decision in ***Nantahala***; one of which was that there could be no "trapping" of the costs at the state level:

> States may not bar regulated utilities from passing through to retail customers FERC-mandated wholesale rates. "The filed rate doctrine ensures that sellers of wholesale power governed by FERC can recover the costs incurred by their payment of just and reasonable FERC-set rates. When FERC sets a rate between a seller of power and a wholesaler-as-buyer, a State may not exercise its undoubted jurisdiction over retail sales to prevent the wholesaler-as-seller from recovering the costs of paying the FERC-approved rate .... Such a 'trapping' of costs is prohibited. [citations omitted]. These principles led us to hold in *Nantahala* that the North Carolina Utilities Commission's order "trapping" federally-mandated costs was pre-empted. ... The facts of this case and *Nantahala* are not distinguishable in any way that has relevance to the operation of the principles stated above.

93 PUR4th at 301.

The Missouri Commission was also involved in the Grand Gulf situation, which gave rise to ***Mississippi Power,*** since Arkansas Power & Light Company operated in Missouri and was assigned 36 percent of the costs of the power plant by FERC. In ***In Re Arkansas Power and Light Company***, 74 PUR 4^{th} 36 (MoPSC 1986), this

Commission was told by the utility that the filed rate doctrine required the pass-through of the FERC-allocated costs pursuant to ***Narragansett*** doctrine. ***Id.*** at 72. Those opposed to that cited to and relied upon ***Pike County***. This Commission recognized that ***Pike County*** "involved the choice between two federally approved wholesale rates." ***Id.***

American-National Can Company

The Missouri Public Service Commission has previously recognized the existence and scope of the Filed Rate Doctrine. In ***American-National Can Company et al. v. Laclede Gas Company***, 30 Mo.PSC (N.S.) 32 (1989) and the companion case of ***In Re Missouri Public Service Company***, 30 Mo.PSC (N.S.) 39 (1989), this Commission discussed ***Nantahala***, ***Mississippi Power***, and ***Pike County*** in determining that Take or Pay Charges approved by FERC and assessed by interstate pipelines should be flowed through 100 percent to retail ratepayers. This was in the face of arguments that the local distribution companies should be required to absorb some of the federally-regulated costs. This Commission concluded:

> The states may inquire into the prudence of the LDC in entering into a given contract when less costly alternatives were available. [Citation to ***Pike County*** omitted]. However, there is no question of imprudence in this case. Once the FERC has approved these charges for pass-through by the pipeline to its customers, Respondent [Laclede Gas Company] has no control over them. No action by Respondent can diminish their amount or eliminate them. Therefore, the Commission must give effect to these wholesale rates which have been approved by FERC.

30 MoPSC (N.S.) at 35.

The same result reached by this Commission regarding Take or Pay Charges was reached two years later by the Supreme Court of Illinois in ***General Motors Corp.***

v. Illinois Commerce Commission, 143 Ill.2d 407, 574 N.E.2d 650 (Ill. 1991). The Illinois Supreme Court reversed the judgment of an appellate court which had directed the ICC to require gas companies to absorb a portion of the costs. The appellate court mistakenly reasoned that FERC had not "intended to preempt" state agencies from requiring distributors to absorb some of the costs. The Court agreed with the decision of the ICC and held that the ICC was preempted from doing that under the Filed Rate Doctrine. "It is clear from the legislative history and express language of the Natural Gas Act, and from the consistent pronouncements by the Supreme Court, that Congress intended Federal law to occupy the field of regulating interstate sale of wholesale gas." 574 N.E.2d at 656.

Great River Gas Company

The Iowa Utilities Board penalized a local gas distribution company by reducing its authorized return on equity and disallowing some natural gas contract demand costs because of the Board's perception that the company had more natural gas available under contract than it needed to supply its customers, and the further perception that the company had not taken sufficient steps to reduce the contract demand. On appeal, the district court for Polk County reversed the IUB on the basis of the Filed Rate Doctrine. ***Great River Gas Company v. Iowa Utilities Board***, 101 PUR 4th 310 (1989).

The Iowa court discussed the issue of preemption and the concept of "trapping" wholesale costs at the retail level, which had been explained by the Supreme Court in ***Nantahala*** and ***Mississippi Power***. It also discussed the evidence as to whether it showed that Great River had the ability to reduce its contract demand and failed to do so. The court said that if Great River had a choice, the filed rate doctrine would be inapplicable. Conversely, if Great River had no choice but to accept the volumes under contract and pay the prices associated with the wholesale rates, then the IUB was obligated under the filed rate doctrine to pass the expense on to Great River's ratepayers. ***Id.*** at 316. Addressing this point, the Iowa court said "The Board can point to no substantial record evidence demonstrating Great River had any legal right to reduce its contract demand." ***Id.*** "Perhaps Great River could have been more persuasive, but absent [the pipeline's] agreement to reduce contract demand, Great River had no choice but to accept and pay for the FERC approved volumes of gas at FERC approved rates." ***Id.*** at 317. The Iowa court reversed the decision of the Iowa Utilities Board, and the Board did not appeal the district court's decision.

Associated Natural Gas Company

Missouri courts have embraced the Filed Rate Doctrine, and this Commission has been reversed by a Missouri appellate court for not adhering to it. In ***State ex rel. Associated Natural Gas Company v. PSC of Missouri,*** 954 S.W.2d 520 (Mo. App. W.D. 1997), this Commission was found to have acted illegally when it attempted to prevent a local gas distribution company from passing through federally-approved Take-Or-Pay costs in its retail rates. "By holding that the ANG (sic) could never recover its TOP costs because it had not yet filed the requisite PGA tariffs would truly trap the TOP costs with ANG, which, pursuant to the filed rate doctrine, the PSC cannot do." ***Id.*** at 531-532.

C. Utility Cases Finding No Preemption

Pike County

The namesake of the "exception" to the Filed Rate Doctrine is the case of ***Pike County Light and Power Company v. Pennsylvania Public Utility Commission***, 77 Pa. Commw. 268, 465 A.2d 735 (1983). This is a decision of a state-level court in Pennsylvania and it was the first case giving states discretion over the acceptance of FERC-mandated rates.

Pike County Light & Power Co. (Pike) was a subsidiary of Orange and Rockland Utilities (O&R), which supplied Pike with all of its power under a FERC-approved wholesale arrangement. The Pennsylvania PUC determined that Pike's reliance on purchases from O&R as its sole source of wholesale power was imprudent because more economical sources of electricity were available. The PUC disallowed almost $600,000 in purchased power expense in a state rate case for Pike.

On appeal, the Commonwealth Court started its analysis with the recognition of the ***Attleboro*** case and acknowledged the existence of the Federal Power Act and the existence of FERC. It made clear that it understood that the state could not regulate the rates in the agreement between O&R and Pike. It said that the setting of the rates for Pike did not examine the cost of service of O&R, but rather looked at Pike's cost of service and a comparison with alternative costs of purchased power. Therefore, the court said, the action of the Pennsylvania PUC did not intrude on the exclusive jurisdiction of FERC. The court said that FERC does not look at the cost of service of Pike in setting O&R's rates, and the state commission does not look at the cost of service of O&R in setting Pike's rates. It concluded, on that basis, that the regulatory functions of the state and federal commissions do not overlap. 465 A.2d at 738.

The Commonwealth Court also reviewed the evidence adduced at the PUC regarding the alternative source of wholesale electric power. According to the court,

> the record contains expert testimony that a purchase from PP&L [Penn. Power & Light Co.] was feasible technically, that economic advantages would accrue to Pike by transmission of power from PP&L over O&R transmission lines, and that because PP&L's generation mix was predominantly coal, its production costs were less than the predominantly oil and natural gas fired generation of O&R. Also admitted into the record was a letter from PP&L indicating the company's willingness to discuss power sales to Pike on the basis of contemporary FERC rate schedules. In contrast, there is no evidence why, in view of the cost advantages apparent in power purchases from PP&L, Pike failed to even explore this alternative to the more costly purchases from its parent company.

465 A.2d at 738.

Pike argued several other bases for reversal on appeal but all were rejected by the court. Pike sought a stay from the state Supreme Court but was denied. It also sought declaratory and injunctive relief before a United States district court but was denied under the doctrine of federal abstention from unresolved state matters.

Sinclair Machine Products

The Supreme Court of New Hampshire addressed preemption questions in ***In re Sinclair Machine Products, Inc.***, 498 A.2d 696 (N.H. 1985). This was an appeal of a New Hampshire PUC decision in 1984 involving a rate increase for Connecticut Valley Electric Company, which was a retail provider of electricity. The retail provider was wholly owned by Central Vermont Public Service Corporation, from whom it purchased the vast bulk of its power at wholesale prices set by the FERC. The FERC approved a rate settlement in a wholesale case which allowed Central Vermont to recover certain investments in abandoned nuclear power plants. Some retail customers appealed from the New Hampshire PUC's retail rate decision, which held that it was precluded from examining the reasonableness of the wholesale rate.

The New Hampshire Supreme Court, relying heavily on ***Pike County***, held that the PUC correctly determined under federal preemption principles that FERC approval precluded the PUC from questioning the reasonableness of the charge. "However, it does not follow automatically that the PUC must find that power costs incurred under a wholesale rate are necessarily a reasonable expense for the retailer. The PUC stated expressly that it did not consider whether CVEC had alternatives to purchasing power from Central Vermont ... and whether the purchases were reasonable." ***Id.*** at 699. The court determined that it "must remand this case to the PUC for additional findings before CVEC's burden of showing the reasonableness of this expense can be found to have been met." ***Id.*** Therefore, even though the New Hampshire Supreme Court declared that ***Pike County*** was a "modern trend," it made no finding on the merits of the issue in the case.

Kentucky West Virginia

In another case involving the Pennsylvania PUC, the U.S. Court of Appeals for the Third Circuit upheld a decision which denied a gas distribution company full recovery of the cost of gas it purchased from an affiliated interstate pipeline supplier. The case of ***Kentucky West Virginia Gas Co. v. Pennsylvania Public Utility Commission***, 837 F.2d 600 (3rd. Cir. 1988), is discussed here because it relies heavily on ***Pike County*** and distinguishes ***Nantahala***.

Equitable Gas was engaged in the production, transportation, storage, distribution and sale of natural gas. The bulk of the gas necessary to serve its 240,000 customers was obtained from three interstate pipeline suppliers under FERC-approved tariffs. The remainder of the gas came from Equitable's own wells in West Virginia and Pennsylvania or independent producers. One of the interstate pipelines was Kentucky West Virginia Gas Company, which was a sister company to Equitable Gas. Kentucky West Virginia sold Equitable approximately 70% of the gas it produced. 837 F.2d at 603.

In 1984 (the year after ***Pike County*** was decided), Pennsylvania enacted a law (Act 74) dictating the mechanism by which natural gas distribution companies in that state must establish retail rates for sales of gas to Pennsylvania consumers. Act 74 applied to the larger gas companies in the state (over $40 million annually in operating revenues) and it also contained a provision which said that a retail tariff would not take effect until the PUC determined that the utility was pursuing a "least cost fuel procurement policy." Particularly of note in this situation was the fact that if a utility purchased natural gas from an affiliated interest, the PUC was required to make the following (among other) specific findings:

> (1) that the utility has fully and vigorously attempted to obtain less costly gas supplies on both short-term and long-term bases from non-affiliated interests,
> (2) that each contract for the purchase of gas from its affiliated interest is consistent with a least-cost fuel procurement policy, [and]
> (3) that neither the utility nor its affiliated interest have withheld from the market any gas supplies which should have been utilized as part of a least cost fuel procurement policy.

After a hearing, the PUC found that Equitable had purchased gas from its affiliate, Kentucky West, *when less expensive gas had been available from other* *sources* and concluded that Equitable had not met its Pennsylvania statutory burden under Act 74. The PUC denied Equitable the opportunity to pass through to consumers approximately $14.3 million of Equitable's proposed rate increase, reflecting the amount paid for gas which the PUC found Equitable had imprudently overpaid for the gas purchased from Kentucky West. 837 F.2d at 604.

Equitable and Kentucky West filed suit in federal court challenging the constitutionality of Act 74, and argued the filed rate doctrine barred the disallowance. The Third Circuit summarized the "principal questions" it faced, namely, whether

> the supremacy clause, the commerce clause, and the due process clause of the United States Constitution prevent a state regulatory agency from determining the prudence of a gas company's <u>choice to buy gas from one source rather than another</u> before permitting the utility a "pass through" to consumers of the cost of power (sic) purchased at wholesale rates approved by the Federal Energy Regulatory Commission ("FERC"). 837 F.2d at 602. (Emphasis supplied)

The Third Circuit phrased the issue like this:

> We interpret ***Nantahala*** as preempting state commissions from questioning or altering the wholesale rate and compelling them to accept it when determining pass-through in their retail rate-setting procedures. In this way, the filed rate doctrine measures whether local retail rate-making activity interferes with federal authority over wholesale rates. Therefore, where a state commission violates the filed rate doctrine, this equates to an unlawful interference with federal authority over the same activity. Id. *106 S.Ct. at 2356.*
>
> Nonetheless, while ***Nantahala*** affirms that the PUC must accept the reasonableness of wholesale rates paid by a retailer, that does not end the inquiry or decide the issue in this case. The basic question before us is whether the PUC, without impugning the reasonableness of the wholesale rate, could consider whether Equitable prudently decided to incur the purchased gas cost from Kentucky West, even if procured at a FERC-approved rate.

837 F.2d at 609.

The Court concluded that the PUC acted lawfully.

There was an issue discussed by the Third Circuit, however, which might have produced a different result had Equitable been able to prove some factual allegations. Equitable argued that the PUC's disallowance represented fixed and unavoidable costs it incurred pursuant to its minimum bill contractual obligation with Kentucky West. From that basis, it argued that the state law was applied in an unconstitutional manner. "An otherwise valid state law may not be applied in such a way as to interfere with a federal regulatory scheme." ***Id.*** There was, however, substantial dispute over whether Equitable had presented facts to the PUC sufficient to preserve that claim. The Third Circuit said it "if that were in fact the case, we would not readily dismiss Equitable's theory of preemption." So the Court undertook a "time-consuming analysis of the proceeding to ascertain whether Equitable had raised the question of its minimum bill obligation ... ." 837 F.2d at 610. The Court ultimately concluded Equitable had not. It said the record did not demonstrate that any portion of the disallowed costs represented Equitable's minimum bill obligation. The Court said that the PUC's conclusion was based on testimony indicating the known availability of less expensive gas which could have been taken in lieu of more expensive gas from Equitable's affiliate. ***Id.*** at 611. There was no evidence that any portion of the disallowed costs represented Equitable's minimum bill obligation. ***Id.*** at 610.

Post ***Pike County***

A 1999 law review article examined the ***Pike County*** doctrine in the context of electricity deregulation. It noted that the ***Nantahala*** and ***Mississippi Power*** cases "have limited the scope of the Pike County doctrine." Pettinari, "You Can't Always Get

What You Want ...", 76 U. Det. Mercy L. Rev. 501 (Winter, 1999)

IV. Facts From Case No. GR-96-450

As indicated earlier, there has not been an evidentiary hearing in this case, so if MGE is to discuss any facts to apply to the law of preemption in this case, there should be some evidentiary basis for them. Since issues involving the Mid-Kansas/Riverside pipelines and associated contracts were extensively litigated in Case No. GR-96-450, and evidence was admitted which transcended the particular ACA period in that case, the record in Case No. GR-96-450 is the logical place for MGE to find and present facts relevant to this discussion. Reference can also be made to the Time Line and Glossary in Appendix A for further details and a chronology of events.

MGE has not always been the gas company serving the Kansas City area. Twelve years ago, in 1990, Western Resources Inc. (Western) was the gas company in Kansas City, Joplin, St. Joseph and other western Missouri areas, in addition to serving natural gas in Kansas. Western is a Topeka, Kansas based company that operates electric and gas companies primarily in Kansas. Western is not now, and never has been, affiliated in any fashion with Southern Union Company.[3]

In January of 1990, Western entered into some contracts with the Bishop Companies.[4] The contracts generally concerned getting natural gas delivered to the

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[3] Although sometimes the terms "MGE" and "Southern Union" are used interchangeably, MGE is not a separate corporation -- it is merely a division of Southern Union, which is a corporation.

[4] This is a shorthand reference to apply generally to Mid-Kansas, Riverside, or whichever of the other members of the Bishop Group that were involved on the other side of

Kansas City area through some pipeline sources that had not previously been used by Western. (Case No. GR-96-450, Ex. 5, pp. 9-10) The 1990 contracts were referred to in Case No. GR-96-450 as **Mid-Kansas I** and **Riverside/WR Transportation Agreement I**. Western entered into those contracts because it was trying to diversify its sources of natural gas due to its belief it was relying too heavily on natural gas coming from the Williams Natural Gas (Williams) interstate pipeline. Williams was the dominant supplier of natural gas to the Kansas City area. (Ex. 5, p. 11) Thus, Western entered into the 1990 contracts with the intention of trying to reduce its dependence on Williams and create some competition in the supply of natural gas coming into the Kansas City area. In other words, Western was trying to diminish what was almost a monopoly by Williams, especially in the face of rising prices for service on Williams, a FERC-regulated interstate pipeline. (Ex. 5)

In October of 1991, Western and the Bishop Companies mutually agreed to amend the 1990 contracts. (Ex. 5, p. 9) One of the aspects of those amendments was that it lengthened the term of the contracts to run through 2009. It also removed what was later called a "price cap."

Sometime in early 1993, Western decided to sell its natural gas properties in Kansas, Oklahoma and Missouri. On July 9, 1993, after a bidding process, Western and Southern Union reached an agreement whereby Southern Union would buy the assets that were being used by Western to provide natural gas service in western Missouri. Western also entered into an agreement to sell its natural gas properties in

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most of the contracts discussed.

eastern Missouri (primarily around Palmyra) to United Cities Gas Company (now Atmos Energy).

Since Missouri law (§ 393.190 RSMo 2000) requires Commission approval of any sale of regulated utility assets that are used and useful in providing service, Western and Southern Union made a joint filing before this Commission on August 5, 1993, in which they specifically asked permission for Western to sell, and Southern Union to buy, the western Missouri properties of Western and the related assets. A copy of the contract for sale was attached to the application. The Commission assigned it **Case No. GM-94-40.**

Significantly, included in the proposed sale was the assignment of Western's contract rights to certain gas supply and transportation contracts which were then being used by Western to supply customers with natural gas in the Kansas City area. Among these were the **Mid-Kansas I** agreement and the **Riverside/WR Transportation Agreement I**.

Although some concerns had been previously raised by the Staff and the Commission[5] about Western's involvement with Mid-Kansas and Riverside, and the prudence of Western's decisions regarding those agreements, at the time of the application filing in **Case No. GM-94-40** in August 1993, there had not been any disallowance of Western's costs as a result of Western having entered into **Mid-Kansas I** and **Riverside/WR Transportation Agreement I.** The only action by the Commission prior to the filing of the asset sale application was the issuance of an order on May 26,

[5] See, **Case No. GR-90-40 and GR-91-149**, 2 MoPSC 3d 194 (May 26, 1993)

1993, in **Case Nos. GR-90-40** and **GR-91-149**, in which the Commission approved a stipulation and agreement resolving those Western ACA cases. Southern Union was not a party to those cases.

The Commission said in its May 1993 order in **Case Nos. GR-90-40** and **GR-91-149** that it had "certain reservations" about the prudence of purchases made by Western Resources on Mid-Kansas Gas Gathering, L.P. via Riverside Pipeline Company. 2 MoPSC 3d 194 at 198. It noted that there was a question as to whether an additional pipeline supplier would be of assistance in obtaining a competitive gas supply. "It would, however, in all likelihood increase an LDC's ability to provide reliable service." Id. **But there was no disallowance or finding of imprudence on the part of Western in agreeing to take service from the new pipelines.**

The asset sale approval case was considered by the Commission during the last half of 1993. The Staff and the Office of the Public Counsel raised numerous concerns about various aspects of the proposed sale. They specifically listed twelve areas where they alleged there was a "public detriment" to the sale. See, Case No. GM-94-40, 2 MoPSC 3d at 600. These points included issues related to pensions, retirement contracts, capital structure, and tax issues. The Report and Order approving the asset sale indicates that all of these issues *and more* were addressed by the parties to the case in a stipulation. The stipulation itself shows that *millions* of dollars changed hands from the original sale agreement in order for the Staff and the Public Counsel to agree on the list of 25 specific things that would be accomplished. See 2 MoPSC 3d at 602.

In approving the stipulation and the sale of assets, the Commission expressed "concern regarding the resultant financial condition of [Southern Union] subsequent to the sale." 2 MoPSC 3d at 603. Neither the Staff, the Public Counsel, nor the Commission, however, voiced <u>any</u> objections to the assignment of those pipeline contracts with Mid-Kansas and Riverside, or any other pipeline contract assignments. Someone on the Staff obviously was concerned about pipeline and gas cost matters because there was a specific provision in the stipulation requiring Western to assign its rights in Wyoming Tight Sands antitrust litigation to Southern Union. 2 MoPSC 3d at 602. (Item 14 in the list).

The Report and Order issued by the Commission said it "will approve the stipulation and agreement, and therefore, the proposed transaction." The Commission said it found "the proposed stipulation and agreement to be reasonable and in the public interest." 2 MoPSC 3d at 603.

Pursuant to the authority granted by the Commission in **Case No. GM-94-40**, Southern Union went ahead and closed the transaction. Southern Union created an operating division known as Missouri Gas Energy, and MGE "opened for business" on February 1, 1994. Because MGE had an obligation to provide gas service to its customers, and **Mid-Kansas I** and **Riverside/WR Transportation Agreement I** were already in place and functioning, and had been authorized by this Commission to be assigned, MGE purchased natural gas and transportation on the pipelines in order to physically get natural gas to the Kansas City market where it could be used by MGE's customers.

The specific terms of **Mid-Kansas I** as it existed on January 31, 1993 (pursuant to the amendment of October 3, 1991) when it was assigned to MGE were, among other things, that the term of the agreement was to run at least until October 31, 2009, and that

> the portion of the cost of transporting such natural gas through pipeline transporters upstream of the Delivery Point(s) shall not exceed the maximum transportation rate authorized for such pipeline transporters approved by any applicable state or federal regulatory body.

See Case No. GR-96-450, Exhibit 8, Schedule WCP 1, p. 3 of 31. Those terms had been locked in place by Western's prior actions. So when MGE took assignment of **Mid-Kansas I** and **Riverside/WR Transportation Agreement I** after receiving authority to do so in **Case No. GM-94-40, Mid-Kansas I** was an agreement that still had 16 years to run. But the agreement explicitly provided that the transportation rates would *not be more* than that authorized by the applicable regulatory body setting those transportation rates.

In February of 1995, MGE sought to re-negotiate the terms of **Mid-Kansas I** and **Riverside/WR Transportation Agreement I.** Testimony in Case No. GR-96-450 indicated that MGE's temporary withholding of some funds due the Bishop Companies was sufficient "leverage" to get the attention of the Bishop Companies and bring them to the negotiating table, but it was not sufficient for the Bishop Companies to agree to "give away the farm." (Tr. 611)

One of the results of the February 1995 negotiations between the Bishop Companies and MGE was a new agreement, known as **Mid-Kansas II**. MGE succeeded in getting several beneficial provisions included in **Mid-Kansas II**, such as:

- changing the commodity index on which the natural gas itself was priced from what existed in **Mid-Kansas I** to lower the price, resulting in a savings to Missouri ratepayers during the ACA period of GR-96-450 of $5,015,876;

• eliminating the previous volumetric limitation, which gave MGE the ability to take the 46,332 MMBtu's per day on every day of the year;

• obtaining substantial flexibility on a day-to-day basis as to how much gas could be taken, and other provisions which led to a much more flexible utilization of the contract; and

• through the lateral pipeline called for under **Riverside II**, which was a part of the package deal on February 24, 1995, MGE gained the ability to access greater volumes of lower priced Rocky Mountain gas supplies under transportation rates lower than what would have been incurred on Williams. (Exhibit 2, pp. 10-11)

There were, however, other contract provisions from **Mid-Kansas I** which continued in **Mid-Kansas II**. For example, the potential term of the arrangement, which went out to the end of October of 2009, did not change. Further, "the transportation portion of the sales service continued to be priced on the filed tariff rates applicable in the various regulatory jurisdictions." (Ex. 1, p. 8) Therefore, the provision which the Staff complains about -- the agreement by MGE to pay allegedly "high" transportation rates -- in actuality was already present in **Mid-Kansas I** when MGE assumed that agreement.

The Staff tried to convince the Commission in Case No. GR-96-450 that MGE was imprudent in agreeing in **Mid-Kansas II** to *continue* to pay *regulated* transportation rates on those pipelines. The Staff glossed over the fact that the agreement to pay regulated transportation rates was in the **Mid-Kansas I** agreement as a result of Western's actions in agreeing to the October 3, 1991 amendment -- more than two years before MGE even came into existence.

Those 1991 contract changes were the subject of litigation before this Commission in **Case No. GR-93-140**. While the Commission made a finding of imprudence in that case on the removal of the "price cap" provision, there was no finding by the Commission that the transportation rates were excessive, or that Western was imprudent in agreeing to take service from the Bishop Companies' pipelines in the first place. **Case No. GR-93-140** was appealed and ultimately settled by the Commission's approval of the May 2, 1996 Stipulation and Agreement.[6] Therefore, the prudence of the execution of **Mid-Kansas I** (i.e., the decision of Western to take service from the Bishop Companies' pipelines) was "finally settled" by the explicit terms of the May 2, 1996 Stipulation.

Mr. Langston of Southern Union described the regulatory jurisdiction over the transportation rates on the Bishop Companies' pipelines in his direct testimony in Case No. GR-96-450. (Exhibit 1, pp. 5-6) Natural gas used by MGE's customers under **Mid-**

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[6] The Stipulation provided on pages 4 and 5 that "The intent of the Signatories by the Stipulation and Agreement is that the Commission, in adopting this Stipulation and Agreement, issue an order holding ... that the findings and conclusions regarding the prudence of the execution of **the Missouri Agreements** made by the Commission in **Case No. GR-93-140** shall be compromised and settled as provided for herein. Although the prudence of entering into the **MKP/WR Sales Agreement** [which is **Mid-Kansas I**] is finally settled by this Stipulation, additional questions may arise regarding the administration of the contracts ... ." (Emphasis supplied). The **MKP/WR Sales Agreement** a/k/a **Mid-Kansas I** was the 1990 agreement, as changed by the 1991 amendments, that is identified in paragraph 4.A. of the May 2, 1996 Stipulation as one of **the Missouri Agreements.**

Kansas II came generally from Oklahoma, and was transported from there through pipelines generally owned or controlled by the Bishop Companies. The transportation charges were incurred on essentially three pipeline segments, which Mr. Langston referred to as KansOk, Riverside, and Kansas Pipeline. (Ex. 1, p. 5) He testified that prior to 1998, the Kansas Corporation Commission had rate-setting jurisdiction over the Kansas Pipeline intrastate portion and the FERC had jurisdiction over the rest. (Ex.1, pp. 5-6)

Mr. Langston testified that all of the transportation rates MGE paid that were the subject of the Staff's proposed disallowance in Case No. GR-96-450

> were the tariff rates approved by these applicable regulatory jurisdictions, rates deemed just and reasonable and/or were authorized to be collected subject to refund. In all cases in which refunds were ordered, MGE received and flowed through the refunds to ratepayers. At no time has MGE paid excess rates over and above approved tariff rates for the transportation on these pipeline systems … .

(Ex. 1, p. 9) In essence then, MGE paid transportation costs for the volumes at issue in Case No. GR-96-450 pursuant to rates established by rate-regulatory agencies rather than rates set by the terms of a contract. (Ex. 1, p. 6)

Confirming Mr. Langston's statements in Case No. GR-96-450, Mr. Langley of the Bishop Companies also testified about the regulatory control of the transportation rates, saying that "all components of the transportation charges under the **Mid-Kansas II** Agreement have been deemed just and reasonable" as a result of those regulatory actions. (Ex. 5, p. 29, lines 14-22) He also noted that as a result of FERC's orders, Kansas Pipeline and Riverside Pipeline were consolidated into one interstate entity with interstate rates found to be in the "public interest." (Ex. 5, p. 29-30) Mr. Langley, consistent with Mr. Langston, testified that these are the same rates that were charged MGE under **Mid-Kansas II**. (Id. at p. 30) The Staff never challenged those facts.

Mr. Sommerer of the Staff said in Case No. GR-96-450 that the "excessive" costs the Staff was complaining about were "primarily attributable to the high fixed reservation charges on Kansas Pipeline Company as opposed to" the Williams system. (Ex. 16, p. 14, lines 21-22) On cross-examination, he admitted that those fixed reservation charges were established in orders of the Kansas Corporation Commission and the FERC. (Tr. 1064, lines 6-9) It is therefore undisputed that the transportation costs which were at issue in Case No. GR-96-450 were the direct result of orders from the KCC and the FERC setting the rates for that transportation. In Case No. GR-96-450, the Staff presented no evidence that MGE could have negotiated a contract change to allow it to walk away from **Mid-Kansas I**. As a result of that situation, MGE could not avoid paying those demand or reservation charges set by those regulatory bodies. Even MGE's refusal to take gas would not have helped, because under the "straight fixed variable" rate design utilized on those pipelines, the vast majority (about 90 percent) of the charges would have been incurred whether a single molecule of gas was moved or not. (Tr. 333)

As indicated by Mr. Langley's testimony in GR-96-450, while this Commission was looking at Western and its costs in the early 1990's, the FERC was simultaneously looking at the pipelines at issue here as to whether they were FERC jurisdictional. According to a FERC order[7], Kansas Gas Service Company (operated by Western

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[7] ***Kansas Pipeline Company et. al***, 87 FERC ¶ 61,020 (1999).

Resources) and MGE raised that issue in a protest filed in a 1995 proceeding. 71 FERC ¶ 61,340, at 62,337 (1995). The FERC issued a show cause order on May 31, 1995. 71 FERC ¶ 61,242 (1995). That order required KansOk, Riverside, and Kansas Pipeline Partnership to show cause why the FERC should not disregard their corporate forms and find them to be one interstate pipeline system subject to FERC jurisdiction. Their pipeline competitor, Williams Gas Pipelines Central, filed a complaint with FERC to the same effect in Docket No. RP95-395 on July 21, 1995. The cases were consolidated. The Missouri Commission, among others, was an intervenor in the consolidated cases.

On November 2, 1995, FERC issued an order finding the three pipelines to be one interstate pipeline subject to FERC jurisdiction under the Natural Gas Act. ***KansOk Partnership et al.***, 73 FERC ¶ 61,160 (1995), stayed, 73 FERC ¶ 61,293 (1995).[8] The order required the three companies to file an application for certificate authorization to operate their system consistent with FERC Order 636. A FERC order on October 3, 1997 granted Kansas Pipeline a certificate and denied the pipelines' request for a rehearing on the jurisdictional question. It also approved a rate base, cost of service, and a tariff.

The pipelines sought a rehearing of the October 3, 1997 FERC order, stating they would be in bankruptcy if those determinations were allowed to stand. On

[8] KansOk operated as an intrastate pipeline performing interstate transportation of natural gas under section 311 of the NGPA; KPP held a section 7(c) blanket certificate authorizing it to transport gas as a Hinshaw pipeline under section 284.224(b) of the FERC's regulations; and Riverside operated as an interstate pipeline transporting gas under section 7(c) of the NGA.

February 27, 1998, they filed a motion acceding to FERC jurisdiction and requesting interim relief. Specifically, Kansas Pipeline proposed to charge the rates that had been "negotiated among the parties and approved by the KCC and Missouri PSC, until such time as the Commission directed Kansas Pipeline to file a NGA section 4 rate case." In its April 30, 1998 order on rehearing, the FERC determined that it was in the public interest to grant the February 27, 1998 motion because doing so would: (1) result in rates that were in the public interest; (2) remove the jurisdictional issue from the proceeding; and (3) preserve the financial integrity of Kansas Pipeline. The order instructed Kansas Pipeline to file a rate case within 16 months.

On May 11, 1998, Kansas Pipeline filed its FERC gas tariff, as required by the FERC's April 30 order. In addition, on June 29 and August 7, 1998, respectively, Kansas Pipeline filed as nonconforming contracts its service agreements with Kansas Gas Service and MGE. The MGE service agreement involved was **Riverside I.** In an order issued on April 2, 1999, the FERC accepted the tariff sheets, effective May 11, 1998, and the nonconforming contracts. ***Kansas Pipeline Company et. al***, 87 FERC ¶ 61,020 at 61,067 (1999). In particular, MGE had asked for clarification that **Riverside I** complied with the FERC's April 30 order. The FERC granted that request: "The Riverside I agreement between MGE and the applicant is conditionally accepted as a nonconforming service agreement, effective May 11, 1998." 87 FERC ¶ 61,020 at 61,067-61,068.

The May 11, 1998 filing of the Kansas Pipeline FERC gas tariff marked the start of FERC approved transportation by MGE pursuant to the **Riverside I** agreement. It also marked the automatic termination of **Mid-Kansas II**, which had included a provision contemplating full FERC regulation of the pipelines. These 1998 events occurred during the ACA period to be considered in **Case No. GR-98-167**. MGE has been transporting natural gas pursuant to the FERC-approved rates under **Riverside I**, as accepted by FERC, since May 11, 1998.

The Missouri Commission has for many years sought to change the FERC-approved rates for Kansas Pipeline by intervening in FERC cases. In FERC Docket No. CP96-152-000, the Missouri Commission, along with Williams, sought rehearing of FERC's April 1998 order which allowed Kansas Pipeline's existing rates to go into effect. On April 2, 1999, FERC denied the request of Williams and the Commission. The Commission sought judicial review in the District of Columbia Court of Appeals. ***Missouri Public Service Commission v. FERC***, 234 F.3d 36 (D.C. Cir., 2000). The U.S. Court of Appeals for the District of Columbia Circuit remanded the case involving the initial rates established by FERC, indicating FERC had not sufficiently explained its rationale for the original order.

Following the D.C. Circuit's decision, the Missouri Commission filed a motion with FERC on September 28, 2001, requesting the FERC, in its order on remand, to reconsider its initial rate analysis to establish the appropriate cost of service and rate base to be used in determining a revised rate level, and to order refunds of amounts collected by Kansas Pipeline in excess of such level between December 2, 1997 and March 1, 2000. On October 15, 2001, the Kansas Commission, MGE, and Western each filed answers in support of the Missouri Commission's claim for refunds in its motion.

In an Order on Remand issued November 9, 2001, FERC affirmed the initial rates and clarified its original order. It also denied the request from the Missouri Commission for refunds to be issued covering the period back to 1997. ***In Re Kansas Pipeline Company***, 97 FERC ¶ 61,168. As summarized by FERC in that order, the rates it approved initially, and reaffirmed in the instant order, were

> necessary to ensure adequate revenues to maintain Kansas Pipeline's financial integrity, thereby avoiding the potential interruption of Kansas Pipeline's existing service and preserving the competition resulting from Kansas Pipeline's entry into its market area. This order also finds that the approved initial rates were not exploitive to Kansas Pipeline's shippers when compared to the rates that were currently being paid by those shippers, were otherwise within a zone of reasonableness, and, based on the Commission's independent analysis, represented departures from its traditional ratemaking policies only to the extent necessary to permit Kansas Pipeline to remain financially solvent on an interim basis. Further, since two of Kansas Pipeline's three predecessor pipelines operated subject principally to state regulation until the effective date of federal NGA jurisdiction, the Commission finds that the April 1998 order's approval of the initial rates established by that order was appropriate to give Kansas Pipeline a reasonable transition period for it to adjust and prepare for the expedited section 4 rate case ordered by the April 1998 order, at which time the elements of Kansas Pipeline's proposed cost of service would be subjected to the traditional ratemaking policies applied by the Commission in establishing just and reasonable rates under section 4 of the NGA.

The section 4 rate case discussed by the FERC has been tried and is still under consideration by the FERC. An order is expected at any time.

V. Argument

When the facts discussed above are applied to the law, the only conclusion that can be supported by those facts is that the Commission is barred by the Filed Rate Doctrine from disallowing natural gas transportation costs incurred by MGE on Kansas Pipeline during the ACA period in this case, July 1, 2000 through June 30, 2001. The simple reason is that MGE paid the FERC-approved rate under a FERC-approved contract (**Riverside I**), and there has been no allegation or showing that MGE had another alternative that was either feasible or economical. Therefore, the Filed Rate Doctrine applies and there is no factual basis for the application of the principles found in the ***Pike County*** exception because there is no indication that MGE had a choice to do anything other than to continue to receive service under the modified contracts it was assigned by Western in 1993, pursuant to Commission approval in **Case No. GM-94-40**.

To demonstrate this conclusion in finer detail, we will review in chronological order the significant points in time when decisions were made about what is now Kansas Pipeline, the regulatory review made of those decisions, and the results of the review.

Item 1. When: January 15, 1990

Who: Western and Bishop Companies

What: They chose to enter into **Mid-Kansas I** and **Riverside/WR Transportation Agreement I**, commencing the relationship and the use of the three pipelines.

The Staff examined this decision in ACA Case Nos. GR-90-40 and GR-91-149, which covered the July 1, 1989 to June 30, 1990 and July 1, 1990 to June 30, 1991, ACA periods, respectively. This Commission said it had "reservations" about the pipelines but it made no finding of imprudence in entering into the contracts themselves in a decision issued on May 26, 1993. 2

MoPSC 3d 194.

Item 2. When: October 3, 1991

Who: Western and Mid-Kansas (Bishop Companies)

What: **Mid-Kansas I** amended by agreement of those parties; the price cap is removed and the term of the agreement extended to 2009.

The Staff examined this decision of Western's in Case No. GR-93-140 which covered the ACA period from July 1, 1992 to June 30, 1993. This Commission examined several issues in that case. It issued a Report and Order on July 14, 1995, finding a disallowance of $1,319,902.76 in Western's costs because of Western's agreement to remove the price cap in **Mid-Kansas I.** ***In Re Western Resources*** 3 MoPSC 3d 480, 487 (July 14, 1995). There is no mention in that Report and Order of any imprudence by Western in utilizing the pipelines. In addition, the prudence of the execution of **Mid-Kansas I**, the 1991 amendment, and the $1,319,902.76 disallowance was completely resolved by the May 2, 1996 Stipulation and Agreement approved by the Commission, which was one of the subjects of Case No. GR-96-450.

Item 3. When: July 9, 1993

Who: Western and Southern Union

What: They reach agreement for Western to sell, and Southern Union to buy, the western Missouri assets of Western. Included in the contract is the assignment of multiple gas supply and transportation/pipeline contracts, including those entered into by Western and the Bishop Companies in 1990 and amended in 1991.

This decision of Western and Southern Union was examined by Staff, Public Counsel, the Commission and several other parties in Case No. GM-94-40, which arose when the application for permission to sell assets was filed on August 5, 1993. The Commission issued a Report and Order on December 29, 1993, in which it approved a stipulation and agreement and the transfer of the assets pursuant to the contract, as modified by the stipulation and agreement. Although there were two dozen issues raised about different aspects of the transfer of assets being detrimental to the public interest, they were all addressed in the Stipulation and Agreement, and millions of dollars changed hands from the original contract in order for the Stipulation and Agreement to be reached. No argument was raised by Staff about the assignment of the contract rights for the pipelines. There is no mention in that Report and Order of any concern about MGE continuing to utilize the pipelines.

Item 4. When: February 24, 1995

Who: Southern Union and Bishop Companies

What: They reach agreement on modifications to **Mid-Kansas I**, which becomes **Mid-Kansas II**, and enter into **Riverside I** and **Riverside II.**

The decision of Southern Union (MGE) to enter into **Mid-Kansas II**,

Riverside I and **Riverside II** were all up for review in the ACA period covered in Case No. GR-96-450. The Commission found the Staff did not produce sufficient evidence to support any disallowances in MGE's costs related to those agreements.

The summary of the four items above highlights the fact that the decision to utilize Kansas Pipeline was made by Western Resources in 1990. It shows the Commission had the opportunity to review that decision, and did so. The Commission did not find it to be an imprudent decision when it had the opportunity to do so.

The facts demonstrate that Western's decision in 1991 to amend the original agreement was also reviewed for imprudence by the Commission. A disallowance was made for that. But the disallowance was compromised in a stipulation and agreement approved by the Commission in May of 1996, which provided that the decision to enter into those agreements would not be the subject of "any further" ACA prudence review.

Western and Southern Union's decision and agreement to transfer assets in 1993 was reviewed and approved by the Commission in 1993. Although any party to **Case No. GM-94-40** could have made an argument in that case that the Kansas Pipeline contracts should not be assigned to Southern Union as a part of the asset transfer -- in other words, that they were detrimental to the public interest -- ***no one said anything about that*** in that case. The Commission approved the transfer of assets, including the assignment of the contract rights on Kansas Pipeline, namely **Mid-Kansas I**.

The facts show that Southern Union did have an opportunity to *amend* **Mid-**

Kansas I in early 1995. It was an opportunity that it apparently created by temporarily withholding payments that were due. As demonstrated by substantial evidence already considered by the Commission in **Case No. GR-96-450**, Southern Union did not have the ability to simply "walk away" from **Mid-Kansas I** at no cost. Southern Union negotiated certain changes to **Mid-Kansas I** which were, even in the eyes of the Staff, beneficial to the ratepayers. Southern Union was not able to negotiate a shorter term than the one agreed to by Western in 1991. Southern Union was also not able to negotiate rates which were better than those set by the appropriate regulatory authorities for the service.

The facts also show that Kansas Pipeline has been under full FERC jurisdiction since May 11, 1998. 87 FERC ¶ 61,020.

So how does all of this relate to federal preemption, ***Pike County***, and Case No. GR-2001-382? The ACA period in Case No. GR-2001-382 is July 1, 2000 through June 30, 2001. Therefore, all of the transportation costs incurred by MGE on Kansas Pipeline during that period have been at rates set by FERC and pursuant to a contract approved by FERC. FERC has had exclusive jurisdiction over Kansas Pipeline since its finding that it was an interstate pipeline on November 2, 1995. Kansas Pipeline has had FERC-approved tariffs since the filing on May 11, 1998. Therefore, federal preemption and the Filed Rate Doctrine applies to the service MGE took from Kansas Pipeline from July 1, 2000 through June 30, 2001, unless there is some showing of facts to support the type of exception found in ***Pike County***.

The relatively few ***Pike County*** cases where federal preemption has not been invoked all rest on the common situation that the utility involved clearly had a *choice* in picking which supply it took. Both ***Pike County*** and ***Kentucky West Virginia*** were situations where there was credible evidence that the retail utility had *other options* that were both available and economical, but the utility chose instead to stay with an affiliated supplier.

In stark contrast, there are no facts to support such a conclusion in this situation. The Staff in Case No. GR-96-450 attempted to create a *hypothetical* alternative on the Williams pipeline, but among many problems, that hypothetical did not consider the high fixed costs that MGE would have been required to continue to pay to Kansas Pipeline whether MGE moved any gas through the pipelines or not. The Staff has made no allegations (supported by facts or otherwise) in its recommendation in this case that MGE had a feasible and economical choice of another supplier who could have supplied the same service at a better net price during this ACA period.

Has MGE had the ability to make choices which would allow the Commission to invoke the principles of ***Pike County***? The answer is yes, but those choices were limited in scope and were not present in the ACA period for Case No. GR-2001-382. The initial *choice* to use the Kansas Pipeline companies as an alternative and competitor to Williams for natural gas service into the Kansas City market was made by Western Resources in 1990. The *choice* to pay regulatory-commission approved rates for service on Kansas Pipeline was made by Western Resources in 1991. Both those choices have previously been reviewed by the Commission.

Southern Union's first *choice* was whether to buy some of Western's assets in 1993. Southern Union's choice was limited by the fact that Western had already agreed to eliminate the price cap and extend the term of **Mid-Kansas I** two years before that time. Southern Union's *choice* on what assets of Western to buy and how much to pay for them was reviewed by multiple parties in **Case No. GM-94-40**, substantially modified as a result of a stipulation and agreement in that case, and ultimately approved by the Commission, as modified by the stipulation, in late 1993.

The Commission itself had a *choice* in 1993 whether to allow Southern Union to buy or take assignment of the Western assets. No party to **Case No. GM-94-40** raised the argument that **Mid-Kansas I** represented a long-term detriment to the public interest. If the Staff or someone else had raised that argument, the Commission could then have exercised its right of choice and refused to approve the asset transfer if it included **Mid-Kansas I**. That did not happen because no one raised the argument, even though it was a "golden opportunity" that would have served to eliminate all of the Staff's expressed concerns about these pipelines. As a result, Southern Union rightly believed that it had dealt with all of the objections of the parties when a stipulation and agreement resolving all of the issues in the case was presented to the Commission in December 1993. Southern Union also had a right to believe there were no problems with taking assignment of those pipeline contracts when, considering all of the other specific allegations of detriment that were raised and addressed in prepared testimony, no mention was made of any detriments with the assignment of contracts that were delivering gas to customers in Kansas City.

Southern Union's second *choice* was whether to negotiate changes to **Mid-Kansas I** in early 1995. Southern Union chose to negotiate. The negotiation produced certain tangible and intangible benefits to the ratepayers, but it did not shorten the term of the arrangement from what had been set in 1991, and it did not alter the 1991 provision that the rates would be set by regulatory authorities. There has never been any evidence presented to the Commission that MGE could have struck an even better deal in 1995 than it did. Two witnesses for the Staff admitted on the stand in GR-96-450 that they had no such evidence.

The Missouri Commission and other parties have for years exercised their rights to challenge the level of Kansas Pipeline's rates at the FERC – the regulatory agency with exclusive jurisdiction to set those rates since May 11, 1998. The discussion above of the Missouri Commission's efforts in FERC Docket No. CP96-152-028 highlights the fact that the Missouri Commission has always understood that FERC is the exclusive forum in which to advocate changes to those pipeline rates. The Missouri Commission, along with others, has devoted significant resources in attempting to convince the FERC that Kansas Pipeline's rates should be lower. But just as the Missouri Commission is the final arbiter of rates (within the boundaries of the law) for its jurisdictional entities, the FERC is the same. Kansas Pipeline's rates are what they are as a result of FERC actions.

VI. Conclusion

The Commission is precluded by the Filed Rate Doctrine from "trapping" any of the costs MGE paid to Kansas Pipeline in the ACA period under review in this case. There are no facts, such as were present in ***Pike County*** or ***Kentucky West Virginia***, to support any argument that an exception to preemption is present in this situation.

Respectfully submitted,

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Certificate of Service

The undersigned certifies that a true and correct copy of the foregoing document was either hand delivered or placed with the U.S. Postal Service, first class postage prepaid, this 15th day of August, 2002, to the below-listed counsel.

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Appendix A

Time-line of Important Events and Glossary of Certain Terms

To aid the reader, a time line has been prepared which shows when notable events occurred in relation to other events. References are to the evidentiary record in Case No. GR-96-450. Further, a glossary has been prepared to aid the reader in discerning between the different contracts and understanding some of the technical terms. Terms shown in boldface type can be found in the Glossary.

Time-line

1990

Jan. 15 — **Mid-Kansas I** entered into by Western Resources and Mid-Kansas Partnership. **Riverside/WR Transportation Agreement I** entered into between Western Resources and Riverside Pipeline Company, L.P.

1991

Oct. 3 — **Mid-Kansas I** amended by Western Resources and Mid-Kansas, including contract term being extended to 2009.

1993

May 26 — Commission order issued in **Case Nos. GR-90-40** and **GR-91-149** (Western Resources) saying the Commission has reservations about the prudence of purchases made by Western Resources on Mid-Kansas Gas Gathering, L.P. via Riverside Pipeline Company. 2 MoPSC 3d 194 at 198.

July 9 — Date of "Agreement for Sale of Assets" from Western Resources to Southern Union of the former's western Missouri assets (Tr. 926)

Aug. 5 — "Agreement for Sale of Assets" presented to Missouri PSC in Application filing in **Case No. GM-94-40** (including listing of **Mid-Kansas I** and **Riverside/WR Transportation Agreement I** as contracts to be assigned) (Tr. 925)

Dec. 16 — Unanimous Stipulation presented to PSC on sale of assets by Western Resources to Southern Union

Dec. 29 — Commission issues order approving sale of assets by Western Resources

(including assignment of gas contracts)

1994

Jan. 31	Closing occurs on sale of western Missouri properties from Western Resources to Southern Union
Feb. 1	MGE commences operations; takes assignment from Western of **Mid-Kansas I** and **Riverside/WR Transportation Agreement I** (Langley reb. p. 10)
April 29	Missouri Staff issues recommendation for disallowance in **GR-93-140**
May 26	Bishop Group rate case No. 190,362U filed at Kansas Corporation Commission (See Ex. 14NP, Shaw rebut. p. 9)
June 1	Southern Union files federal court lawsuit against Western and Bishop Group (See Adger reb. P. 7, ftn. 5) (for copy of draft of complaint, see Sommerer rebuttal, schedule 3)
Nov. 17	Missouri Staff (Shaw and Wallis) files rebuttal in **GR-93-140** (See Sommerer rebuttal schedule 2)
Dec. 16	Hearing memo in **GR-93-140** filed with Commission, showing removal of price cap from **Mid-Kansas I** contract as an issue (See Sommerer rebuttal schedule 2)

1995

Jan	Williams Natural Gas files a FERC rate case; proposing to increase its fixed reservation charges to $9.68 per Dth. (Shaw reb. P. 11; Adger surr. p. 15)
Jan/Feb	MGE withholds $2.5 million in payments for service under **Mid-Kansas I** and **Riverside/WR Transportation Agreement I**
Feb. 2-3	Hearings at Missouri Commission held on **GR-93-140**
Feb. 14	Reed Consulting Group Report issued predicting gas capacity shortfalls between 1996 and 1999 for MGE in Kansas City
Feb. 23	Gas Cost Incentive mechanism workshop held in Jefferson City (Shaw

rebuttal Schedule 2)

Feb. 24	**Mid-Kansas II**, **Riverside I**, and **Riverside II** contracts signed by Southern Union
May 31	**Mid-Kansas I** and **Riverside/WR Transportation Agreement I** terminated at midnight
June 1	**Mid-Kansas II** takes effect, replacing **Mid-Kansas I** and **Riverside/WR Transportation Agreement I**.
June 16	Missouri Staff issues recommendation for disallowance in **GR-94-101 and 228**
July 14	Commission issues disallowance order in **GR-93-140** (Tr. 931)
Oct. 10	Circuit Court of Cole County issues stay of **GR-93-140** order
Nov. 6	Hearing in gas incentive mechanism case at Commission (**GO-94-318 Phase II**) begins (Tr. 934)
Dec. 14	First Stipulation and Agreement in **GR-94-101 and 228** filed with Commission (Ex. 1, sched. MTL-3)

<u>1996</u>

Jan. 31	Commission issues order adopting EGCIM for MGE in **GO-94-318 Phase II** (Tr. 934)
May 2	Second Stipulation and Agreement filed in **GR-94-101 and 228** while cases are pending in circuit court
May 31	Mo. Staff files recommendation in **GR-95-82** (Tr. 938)
June 11	Commission approves 1st and 2nd Settlements in **GR-94-101 and 228**
July 1	Start of **ACA period** for **Case No. GR-96-450**

<u>1997</u>

June 30	End of **ACA period** for **Case No. GR-96-450**

July 1	Start of **ACA period** for **Case No. GR-98-167**
Sept.	new lateral (arising from **Riverside II** contract) connecting to Panhandle Eastern Pipeline Co. completed
Oct 3	Reductions in transportation rates approved by FERC in Kansas Pipeline case

<u>1998</u>

April 3	Staff sends Data Request 23 to MGE in Case No. **GR-96-450** requesting Williams scenario
April 30	FERC approval for transportation obtained but not effective. 83 FERC ¶ 61,107
May 11	FERC approved transportation pursuant to **Riverside I** takes effect and **Mid-Kansas II** automatically terminates.
June 1	Staff files its recommendation proposing a disallowance of $4.5 million in **Case No. GR-96-450**
June 30	End of **ACA period** for **Case No. GR-98-167**
July 1	Start of **ACA period** for **Case No. GR-99-304**

<u>1999</u>

June 30	End of **ACA period** for **Case No. GR-99-304**
July 1	Start of **ACA period** for **Case No. GR-2000-425**

<u>2000</u>

June 30	End of **ACA period** for **Case No. GR-2000-425**
July 1	Start of **ACA period** for **Case No. GR-2001-382**

2001

June 30 End of **ACA period** for **Case No. GR-2001-382**

Glossary

The Missouri Agreements:

Four separate contracts referred to collectively as such on page 3 in the Stipulation and Agreement filed on May 2, 1996 with the Commission in **Case Nos. GR-94-101** and **GR-94-228.** The four contracts referred to were **Mid-Kansas I** (4.A), **Riverside/WR Transportation Agreement I** (4.B.), **Mid-Kansas II** (4.C.), and **Riverside I** (4.D.)

Mid-Kansas I:

A contract executed on Jan. 15, 1990, and amended on Oct. 3, 1991, between Western Resources and Mid-Kansas Partnership. It basically provided for a point of sale between the intrastate pipelines in Kansas and Riverside Pipeline (an interstate pipeline) (Tr. 143) It is what is referred to in paragraph 4 A. of the definition of The Missouri Agreements in the May 2, 1996 Stipulation. (Tr. 143) It is one of the agreements assumed by Southern Union as a result of the Asset Sale approved by the Commission in December 1993. (Tr. 145) It terminated on May 31, 1995. (Tr. 148)

A copy of the January 15, 1990 agreement can be found in Exhibit 8 (Putman rebuttal) at Schedule WCP-1, starting on page 17 of 31. A copy of the October 3, 1991 amendment can be found in Exhibit 8 (Putman rebuttal) at Schedule WCP-1, starting on page 2 of 31.

Riverside/WR Transportation Agreement I

A contract executed on Jan. 15, 1990 between Western Resources and Riverside Pipeline Company, L.P. It provided for gas transportation over Riverside Pipeline, a two or three mile pipeline crossing between Kansas and Missouri between northern Kansas City, Kansas and northwestern Kansas City, Missouri (Tr. 143). It was amended by letter agreement dated September 15, 1992. It is what is referred to in paragraph 4 B. of the May 2, 1996 Stipulation in the definition of The Missouri Agreements. (Tr. 144) It is one of the agreements assumed by Southern Union as a result of the Asset Sale approved by the Commission in December 1993. (Tr. 145) It terminated on May 31, 1995. (Tr. 148)

A copy can be found in Exhibit 8 (Putman rebuttal) at Schedule WCP-2.

Mid-Kansas II

A contract executed on February 24, 1995 between Southern Union Company and Mid-Kansas Partnership. It provided for both transportation and commodity gas sales delivered into the MGE distribution system in Missouri. (Tr. 146) Transportation was to be pursuant to rates set by the KCC and the FERC. Gas commodity costs were linked to referenced indexes. It terminated automatically on May 11, 1998, when the FERC took over jurisdiction of all of the Bishop pipelines. It is the contract referred to in paragraph 4 C. of the definition of The Missouri Agreements in the May 2, 1996 Stipulation. (Tr. 146)

A copy can be found in Exhibit 1 (Langston direct) at Schedule MTL-2. Another copy can be found in Exhibit 8 (Putman rebuttal) at Schedule WCP-3, beginning on page 3 of 31.

Riverside I (46,332 MMBtu's per day)

A contract executed on Feb. 24, 1995 between Southern Union Company and Riverside Pipeline Company, L.P. It basically provided a transportation-only service (i.e. no gas commodity involved) at a maximum daily quantity of 46,332 MMBtu's per day. The contract provided that it would automatically take effect if the FERC took jurisdiction over the Mid-Kansas pipelines and Riverside. It took effect on May 11, 1998 as **Mid-Kansas II** automatically terminated, due to FERC jurisdiction. (Tr. 138, 141)

It is the contract referred to in paragraph 4 D. of the definition of The Missouri Agreements in the May 2, 1996 Stipulation. (Tr. 148)

A copy can be found in Exhibit 8 (Putman rebuttal) at Schedule WCP-4.

Riverside II (150,000 MMBtu's per day)

A contract executed on Feb. 24, 1995 between Southern Union and Riverside Pipeline Company, L.P. which provided for the construction of a new pipeline lateral into Kansas City. (Tr. 140) It had a maximum daily quantity of 150,000 MMBtus. This was a totally new agreement rather than a renegotiation of an existing agreement (such as **Mid-Kansas II**). It provided for 150,000 MMBtus a day of firm capacity from a Panhandle Eastern Pipeline Company interconnect to 107th and Elm in the MGE distribution system. (Tr. 151)

Riverside did not give MGE notice to implement this agreement until right before October 1, 1996. Lateral was ultimately constructed after contract was assigned to KN Energy which also allowed MGE to connect to the Pony Express pipeline (Tr. 151)

A copy can be found in Exhibit 8 (Putman rebuttal) at Schedule WCP-5.

Case No. GR-90-40

Western's ACA case for the July 1, 1989 to June 30, 1990 period. See, ***In Re Kansas Power & Light Company***, 2 MoPSC 3d 194 (Mo.PSC May 26, 1993).

Case No. GR-91-149

Western's ACA case for the July 1, 1990 to June 30, 1991 period. See, ***In Re Kansas Power & Light Company***, 2 MoPSC 3d 194 (Mo.PSC May 26, 1993).

Case No. GM-94-40

The joint application of Western and Southern Union for Southern Union, filed August 3, 1993, to buy the assets generally comprising the service territory in western Missouri, including the Cities of Kansas City, St. Joseph and Joplin.

Case No. GR-93-140

Western's ACA case for the July 1, 1992 through June 30, 1993 period. See ***In Re Western Resources***, 3 MoPSC 3d 480 (Mo.PSC July 14, 1995)

Case No. GO-94-318 Phase II

The second of two "phases" of this case. The Report and Order in Phase I appears at 4 MoPSC 3d 53 (Sep. 7, 1995) and the Report and Order in Phase II appears at 4 MoPSC 3d 299 (Jan. 31, 1996). Phase I dealt with electronic gas metering. Phase II dealt with an incentive gas purchasing mechanism, which was approved to commence on July 1, 1996 for MGE.

Case Nos. GR-94-101 and 228 were the ACA cases for Western and MGE for the first ACA period after the sale of the assets. GR-94-101 was designed to cover when Western owned the properties which was from July 1, 1993 through January 31, 1994 when the sale closed, and Case No. GR-94-228 was to cover February 1, 1994 through June 30, 1994 when MGE owned the system. (See Order Approving Stipulations and Agreements in Case Nos. GR-94-101 and GR-94-228 issued June 11, 1996, page 1.)

Case No. GR-95-82 covered the July 1, 1994 to June 30, 1995 ACA period for MGE. This case was settled as a part of the settlement in **Case Nos. GR-94-101 and 228.**

Case No. GR-96-78 covered the July 1, 1995 to June 30, 1996 ACA period for MGE. This case was settled as a part of the settlement in **Case Nos. GR-94-101 and 228.**

Case No. GR-96-450 is the case which covers the July 1, 1996 to June 30, 1997 ACA period for MGE. In it, the Commission determined the Staff did not produce sufficient evidence to justify its proposed disallowance. Kansas Pipeline has appealed the Commission's decision, and it currently is in the Circuit Court of Cole County.

FERC means Federal Energy Regulatory Commission

KCC means Kansas Corporation Commission

MCF means 1,000 cubic feet of gas (Tr. 326)

MMBtu A measurement of the heat content of gas, containing one million British thermal units. Roughly equivalent to 1,000 cubic feet (MCF) of natural gas, which is a volumetric measurement. (Tr. 77)

WACOG Weighted average cost of gas.

ACA period Typically, a one year period examined by the Commission to reconcile gas costs with gas revenues for purposes of the PGA and to examine whether there were any imprudent actions of the utility during the period.