

**IN THE SUPREME COURT OF MISSOURI**

<b>State ex rel. PRAXAIR, INC., AG</b>	)	
<b>PROCESSING, INC. and SEDALIA</b>	)	
<b>INDUSTRIAL ENERGY USERS'</b>	)	
<b>ASSOCIATION,</b>	)	
	)	
<b>and</b>	)	
	)	
<b>STATE ex rel. OFFICE OF THE PUBLIC</b>	)	<b>Case No. SC91322</b>
<b>COUNSEL,</b>	)	
	)	
<b>Appellants,</b>	)	
	)	
<b>v.</b>	)	
	)	
<b>PUBLIC SERVICE COMMISSION OF</b>	)	
<b>THE STATE OF MISSOURI,</b>	)	
	)	
<b>Respondent.</b>	)	

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**SUBSTITUTE BRIEF OF INTERVENOR/RESPONDENTS GREAT PLAINS  
ENERGY INC., KANSAS CITY POWER & LIGHT CO. AND  
KCP&L GREATER MISSOURI OPERATIONS CO.**

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## **JURISDICTIONAL STATEMENT**

Intervenor/Respondent Great Plains Energy Inc., Kansas City Power & Light Co., and KCP&L Greater Missouri Operations Co.<sup>1</sup> (collectively, “Intervenors” or “Applicants”) accept the Jurisdictional Statements of Appellants Praxair, Inc., AgProcessing, Inc. and Sedalia Industrial Energy Users’ Association (collectively, “Praxair”), and Appellant Office of the Public Counsel.

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<sup>1</sup> Aquila, Inc. changed its name to KCP&L Greater Missouri Operations Co. after it was acquired by Great Plains Energy Inc. Because the record in this case and the proceedings below at the Public Service Commission refer to the company as “Aquila,” this brief will continue to use the previous name to avoid confusion.

## STANDARD OF REVIEW

All orders of the Missouri Public Service Commission (“Commission” or “PSC”) are prima facie lawful and reasonable until found otherwise, pursuant to Section 386.270.<sup>2</sup> On review, the Commission’s orders are presumed to be valid, and anyone seeking to set aside an order has the burden of showing that it is unreasonable or unlawful. State ex rel. Kansas City Power & Light Co. v. PSC, 76 S.W.2d 343, 350 (Mo. 1934); State ex rel. Midwest Gas Users’ Assoc. v. PSC, 976 S.W.2d 470, 476 (Mo. App. W.D. 1998).

In reviewing an order of the Commission, courts use a two-part test. First, the court determines if the order is lawful, i.e., whether there is statutory authority for its issuance. Second, the court must determine if the order is reasonable. State ex rel. GS Technologies Operating Co. v. PSC, 116 S.W.3d 680, 687 (Mo. App. W.D. 2003). Even under this test, however, the scope of the court’s authority to reverse decisions of the Commission is limited. Upon review by the courts, “the question to be inquired into is only that of the reasonableness or lawfulness of the order, and to warrant a reversal of the order upon the ground that the same is unreasonable, it must appear that the action of the Commission was arbitrary, capricious, and without reasonable basis ....” State ex rel. Anderson Motor Service Co. v. PSC, 134 S.W.2d 1069, 1076 (Mo. App. W.D. 1939), aff’d, 154 S.W.2d 777 (Mo. 1941). In addition, although a court may determine whether

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<sup>2</sup> Unless otherwise indicated, all statutory references are to the Missouri Revised Statutes (2000), as amended.

the Commission exercised its discretion lawfully, the court may not substitute its discretion for that of the Commission, or substitute its judgment for that of the Commission. See State ex rel. GS Technologies Operating Co. v. PSC, 116 S.W.3d 680, 690-91 (Mo. App. W.D. 2003); Jackson v. Board of Directors, 9 S.W.3d 68, 70 (Mo. App. W.D. 2000).

### **STATEMENT OF FACTS**

On April 4, 2007, Great Plains Energy Inc. (“Great Plains Energy”), Kansas City Power & Light Co. (“KCP&L”) and Aquila, Inc. (“Aquila”) (collectively, the “Applicants”) filed a joint application with the Commission requesting authority for a series of transactions by which Great Plains Energy would acquire and operate Aquila as a wholly-owned, regulated public utility subsidiary (L.F. 0001). The transaction was a complex one, involving the sale of Aquila’s natural gas and other assets to Black Hills Corporation, a South Dakota energy firm, and then the purchase of Aquila’s stock by a subsidiary of Great Plains Energy, which would then be merged within and into Aquila, with Aquila as the surviving entity (the “Merger”) (L.F. 3610).

In order to provide the members of the Commission courtesy notice of the Merger prior to its public announcement, representatives of the Applicants met with individual Commissioners in mid-January 2007 to discuss the potential acquisition of Aquila in very general terms. This occurred well in advance of the filing of the application in April (L.F. 1459-1462; 1823-1826). On February 7, 2007, Great Plains Energy and Aquila announced the Merger (L.F. 0004).

Hearings at the Commission convened on December 3, 2007. On December 6, 2007, the Applicants proposed suspending the hearing to give the parties time to review an alternative merger proposal (Tr. 1154). The Commission granted the Applicants' unopposed request (Tr. 1157-1158).

On December 13, 2007, the Office of Public Counsel ("OPC" or "Public Counsel") filed a Motion to Dismiss on the grounds that three of the four Commissioners sitting on the case must recuse themselves because of the alleged impropriety of the January 2007 meetings with executives of the Applicants. Because one Commissioner could not act to approve the proposed Merger, Public Counsel requested dismissal of the case (L.F. 1398). The Commission denied OPC's motion on January 2, 2008 (L.F. 1811).

On April 17, 2008, Great Plains Energy and KCP&L moved to limit the scope of the proceedings to evidence relating to whether the proposed acquisition of Aquila was not detrimental to the public interest (L.F. 2413). Among other things, the motion argued that an inquiry into Great Plains Energy's code of business conduct and its gifts and gratuities policy were not relevant to whether the Merger should be approved. Id. The Staff, OPC and Praxair opposed the motion.

The evidentiary hearing resumed on April 21, 2008. (L.F. 3618).

On April 24, 2008, following oral argument at the evidentiary hearing, the regulatory law judge ("RLJ"), pursuant to authority delegated by the Commission, ruled that, inter alia:

(1) Purported evidence regarding certain anonymous letters was wholly irrelevant to this proceeding and the Commission would not hear this purported evidence.

(2) Great Plains Energy's Code of Ethical Business Conduct and its gifts and gratuities policy were wholly irrelevant to this proceeding and the Commission would not hear the purported evidence.

(3) While the Commission believed that any evidence regarding a future regulatory plan for KCP&L and Aquila with "Additional Amortizations" was irrelevant, such evidence was not wholly irrelevant. The Commission would preserve this evidence in the record as an offer of proof.

(4) An extensive inquiry into to KCP&L's Comprehensive Energy Plan, approved by the Commission in a 2005 stipulation, including a reforecast of the cost and schedule issues related to the Iatan Unit 1 and Unit 2 power plant construction projects, was overly broad. However, certain evidence in this regard would be permitted, but restricted to: (1) The inter-relationship between the Iatan projects and Great Plains Energy's acquisition of Aquila; (2) KCP&L's procurement function and asserted merger savings estimates; and (3) Credit agency debt rating information and debt ratings.

(5) The witnesses that the Applicants had requested be released would not be released to the extent they could provide testimony on the credit-worthiness of the Applicants.

(L.F. 3620-3621). See Tr. 2095-2117.

No motions for reconsideration of this ruling were filed with the Commission (L.F. 3621).

In his ruling the RLJ stated that the parties would not be permitted to present evidence that the Commission found to be “wholly irrelevant” relating to corporate codes of conduct, gift and gratuity policies. In this regard, he did not permit an offer of proof. However, the RLJ did permit an offer of proof on the issue of Additional Amortizations which the Commission found to be irrelevant but not wholly so (L.F. 3621).

Pursuant to the RLJ’s Order, Great Plains Energy and KCP&L produced a number of witnesses who were cross-examined by all parties present, including: (1) Michael J. Chesser, Chairman of the Board of Directors and Chief Executive Officer of Great Plains Energy (Tr. 2517-2541); (2) William H. Downey, President and Chief Executive Officer of KCP&L (Tr. 2464-2515); (3) Steven Easley, KCP&L Senior Vice President of Supply who was overseeing the Iatan construction projects (Tr. 2647-2709, 2733-34); (4) Brent Davis, KCP&L’s Iatan Unit 1 Project Director (Tr. 2713-2752, 2737-38, 2741-42); and (5) Terry Foster, KCP&L’s Director of Project Controls for the Iatan generating station and other Comprehensive Energy Plan Projects (Tr. 2753-2800, 2763-64, 2788-96). Other witnesses who the RLJ directed Applicants to produce were excused by Staff. (Tr. 2103-2104; 2402).

The hearings at the Commission concluded on May 1, 2008 (Tr. Vol. 23).

That same day Praxair filed a Petition for Writs of Mandamus and Prohibition at the Western District of the Court of Appeals, which was denied on May 2 (L.F. 3632-3633). The sole basis of the Petition was the failure of the presiding officer to permit an offer of proof on certain anonymous letters and the corporate codes of conduct related to gifts and gratuities (L.F. 3633). Praxair then filed a Petition for Writ of Mandamus and a Writ of Prohibition with this Court raising the same allegations that were made in their writ application to the Court of Appeals (L.F. 3633). This Court directed the Commission to file Suggestions in Opposition to the writ no later than May 16, 2008. Id. Suggestions were filed by both the Commission and Great Plains Energy. On June 24, 2008, the Supreme Court denied the petitions without opinion (L.F. 3633).

On May 30, 2008, Praxair filed a petition to reopen the record for the taking of additional evidence regarding the crane accident at the Iatan power plant construction site which Praxair alleged could jeopardize KCP&L's ability to manage its current construction projects while at the same time the Merger was consummated (L.F. 2582). The Commission reopened the record and received additional testimony and arguments on June 11, regarding the effect of the crane accident on the credit worthiness of the Applicants (Tr. 3633-3634).

On July 1, 2008, the Commission issued its 285-page Report and Order approving the joint application (L.F. 3602). The Merger closed on July 14, 2008. The Applicants filed a Notice of Closing on July 18, 2008, advising that the Merger had formally closed on July 14, and that both Standard & Poor's and Moody's had raised Aquila to an

investment-grade credit rating (L.F. 3977). On August 5, 2008, the Commission denied all pending applications for rehearing in an Order effective August 6, 2008 (L.F. 4021).

Appellants each filed a timely petition for review with the Cole County Circuit Court on August 27, 2008. The Cole County Circuit Court affirmed the Commission's Report and Order in all respects on June 29, 2009.

Appellants filed timely appeals at the Western District Court of Appeals on August 7, 2009. The Court of Appeals consolidated the appeals. The Court of Appeals affirmed the Commission's Report and Order in all respects on August 17, 2010 in Case Nos. WD71340 and WD71396. The Court of Appeals issued its modified opinion and denied the pending motions for rehearing and applications for transfer on November 2, 2010.

Appellants filed Applications for Transfer. On December 21, 2010, this Court granted Appellants' Applications for Transfer.

**POINTS RELIED ON**

**I. The Commission Properly Rejected the Offer of Proof Which Related to Evidence that Was Wholly Irrelevant (*Responds to Praxair Argument I*).**

Section 536.070(7), Mo. Rev. Stat. (2000).

4 CSR 240-2.130(3).

Environmental Utilities, LLC v. PSC, 219 S.W.3d, 256 (Mo. App. W.D. 2007).

**II. Section 536.070(7) Is Not In Conflict with the Commission's Governing Statute (*Responds to Praxair Argument II*).**

4 CSR 240-2.130(3).

Section 386.410.1, Mo. Rev. Stat. (2000).

**III. The Exclusion of Wholly Irrelevant Evidence Is Consistent with the Commission's Decision that the Merger Was Not Detrimental to the Public Interest (*Responds to Praxair Argument III*).**

Section 536.070(7), Mo. Rev. Stat. (2000).

4 CSR 240-2.130(3).

Environmental Utilities, LLC v. PSC, 219 S.W.3d, 256 (Mo. App. W.D. 2007).

**IV. The Denial of OPC's Motion to Dismiss was Appropriate as the Commissioners Violated No Standard of Conduct in Meeting with Representatives of the Applicants Well Before the Merger Application was Filed (*Responds to OPC's Argument I*).**

Section 386.210.1, Mo. Rev. Stat. (2000).

4 CSR 240-4.020.

Union Elec. Co. v. PSC, 591 S.W.2d 134 (Mo. App. W.D. 1979).

Moore v. Moore, 134 S.W.3d 110 (Mo. App. S.D. 2004).

## ARGUMENT

### **I. The Commission Properly Rejected the Offer of Proof which Related to Evidence that was Wholly Irrelevant (*Responds to Praxair Argument I*).**

The Commission properly rejected an offer of proof relating to “wholly irrelevant” evidence pursuant to long-standing Missouri statutory authority found in Section 536.070(7) (App. 2)<sup>3</sup>, as well as the agency’s own regulations. Intervenors agree with the Commission that Praxair failed to preserve any constitutional basis to attack Section 536.070(7) or 4 CSR 240-2.130(3). Moreover, as Public Counsel has abandoned its challenge to the exclusion of the offers of proof, any attack upon the provisions’ constitutional validity has not been preserved for appeal.

By lawful authority, the Commission declined an offer of proof that was wholly irrelevant to the proceeding then before it. The legislature granted the Commission the authority to adopt rules regarding the conduct of hearings before the Commission under Section 386.410.1 (App. 1). Pursuant to this statute, the Commission adopted 4 CSR 240-2.130 (App. 5) which provides detailed rules of evidence. One of the rules states that the presiding officer shall rule on the admissibility of all evidence and that if an objection to certain evidence is sustained, the evidence “may be heard and preserved in the record” at the request of the offering party “unless it is wholly irrelevant, repetitious, privileged or unduly long.” See 4 CSR 240-2.130(3) (emphasis added). This is entirely consistent with and parallels Section 536.070(7) which gives the Commission the discretion not to

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<sup>3</sup> A copy of this statute and other relevant materials is found in the attached Appendix.

preserve evidence in the record that is “wholly irrelevant, repetitious, privileged or unduly long.”

Praxair contends that Section 536.070(7) “inexplicably” permits the Commission to exclude and refuse to preserve evidence that it deems wholly irrelevant and that the Commission’s interpretation of the statute was in error. See Praxair Initial Substitute Brief at 14. However, there is no mystery surrounding the Commission’s refusal to admit wholly irrelevant evidence as it was relying on the authority of its own rule found in 4 CSR 240-2.130(3), as well as Section 536.070(7). Moreover, the Court of Appeals has recently upheld the authority of the Commission under this statute to refuse to conduct an evidentiary hearing on matters found to be “irrelevant and repetitious” in a sale of utility assets case filed under Section 393.190. See Environmental Utilities, LLC v. PSC, 219 S.W.3d 256, 264-65 (Mo. App. W.D. 2007).

Contrary to Praxair’s view, the Commission’s refusal to hear an offer of proof was not an interpretation of Section 536.070(7), but rather a straightforward application of the statute and the rule. Section 536.070(7) and 4 CSR 240-2.130(3) provide the Commission with clear authority to determine if evidence is wholly irrelevant or repetitious. In this case the Commission determined that evidence concerning the code of business conduct and the gift policy of Great Plains Energy had no bearing on whether its proposed acquisition of Aquila was not detrimental to the public interest. See Order at 25 (L.F. 3627).

The Commission determined that evidence regarding the gifts policy and the code of conduct was wholly irrelevant since the Commission is not permitted “to dictate the

manner in which the company shall conduct its business.” See Order at 25 (L.F. 3627), quoting State ex rel. Kansas City Transit, Inc. v. PSC, 406 S.W.2d 5, 11 (Mo. 1966); State ex rel. PSC v. Bonacker, 906 S.W.2d 896, 899 (Mo. App. S.D. 1995). In other words, no matter what the evidence showed, Great Plains Energy had the right to utilize the code of conduct and the gifts and gratuities policy that it determined was appropriate. In a merger proceeding, such as this, there was no need to hear such evidence.

The Commission properly noted that the inquiry into Great Plains Energy’s internal policies would sidetrack the Commission from the questions that must be properly explored to weigh the benefits and detriments relevant to whether the acquisition of Aquila should be approved. See Order at 26 (L.F. 3628). The Commission’s decision not to hear evidence regarding the code of conduct and the gifts and gratuities policy was within the Commission’s authority under both Chapters 386 and 536.

Moreover, the Commission’s evidentiary ruling was consistent with Missouri case law in that the Commission determined that the purported evidence tended neither to prove nor disprove any fact in dispute and did not corroborate any other relevant evidence bearing on the principal issues before the Commission. See Order at 24 (L.F. 3626). These fundamental rules of evidence that apply to civil cases also apply to administrative hearings before the Commission. State ex rel. DeWeese v. Morris, 221 S.W.2d. 206, 209 (Mo. 1949). The Commission clearly had the authority to find that the corporate policies were wholly irrelevant.

**A. The Commission Built a Record of Competent, Relevant Evidence.**

When the issue of the Applicants' corporate policies, as well as relevant concerns, arose, the Commission correctly built a record of the competent, relevant evidence. What matters is that the parties were able to present evidence regarding relevant subjects, such as the Iatan projects and Great Plains Energy's financial ability to do the Merger.

The Commission heard extensive testimony on the credit-worthiness issue, the ability of Great Plains Energy and KCP&L to complete the Iatan power plant construction projects and the Merger at the same time, and the ability of the Applicants to achieve Merger synergies. But the Commission properly excluded testimony regarding gifts and gratuities because it was not relevant to the Merger. A company's choice of a gifts and gratuities policy is not subject to interference by the Commission, whose "authority to regulate does not include the right to dictate the manner in which the company shall conduct its business." State ex rel. Kansas City Transit, Inc. v. PSC, 406 S.W.2d 5, 11 (Mo. 1966).

Thus, as the Commission noted, "volumes of competent evidence were appropriately offered into the record" that addressed the relevant issue of whether the Merger could be consummated. See Order at 22 (L.F. 3624). See also Tr. 1007-1158; 1353-1415; 1445-1574; 1654-1907 (evidence submitted to the Commission on Merger synergy savings). The Commission heard two full days of testimony concerning the creditworthiness of Great Plains Energy and KCP&L, and their ability to manage the Iatan power plant construction projects. See Tr. 2397-2940. At the hearing, the presiding

officer specifically noted that the Commission had heard extensive evidence regarding “issue (b)” under the “Anonymous Public Allegations/Comments” heading. That issue related to KCP&L’s management of the Iatan projects. See Tr. 3082-3085.

The matters excluded related to Great Plains Energy’s policies on employee conduct and gifts (Tr. 2095). When questioned on this point later in the hearing, the judge emphasized that the ruling was directed only at certain anonymous letters and the corporate policies (Tr. 3083, 3093). He observed that the Commission had “taken a couple of days of testimony on KCP&L’s adequate control of the Iatan projects” (Tr. 3083-84), as well as creditworthiness and procurement issues: “All of those issues were validly presented to this Commission with list of witnesses to provide testimony, which was tested by cross-examination and by the Commissioners” (Tr. 3092). Such evidence was presented by KCP&L witnesses Brent Davis (Tr. 2713-52), Terry Foster (Tr. 2753-2800) and Lora Cheatum, who testified that she was responsible for the KCP&L procurement department (Tr. 1502-03).

As the RLJ explained, evidence regarding the gifts and gratuities policy was wholly irrelevant, but extensive questions regarding the Iatan projects and other relevant issues would be permitted. Public Counsel at the time admitted that he had misunderstood the Commission’s evidentiary ruling. See Tr. 3084. Given that statement, and the fact that neither Public Counsel, nor Praxair, nor any other party requested that the Commission reconsider its ruling, Praxair cannot now be heard to complain.

Thus, the Commission’s ruling not to allow evidence regarding the conduct and gifts policies was lawful in all respects. Inquiry was allowed into the issues relevant to

the Merger such as credit-worthiness, the ability to complete both the Iatan projects and the Merger, and the ability of the Applicants to achieve Merger synergies.

**B. The Commission Properly Rejected an Offer of Proof to Avoid Repetition and Undue Delay.**

The Commission also acted properly in rejecting an offer of proof because an offer of proof would have been repetitive and would have caused undue delay. On page 9 of its Order Denying Rehearing, the Commission indicated that it needed no additional grounds to support its rulings, although other support existed (L.F. 4030). The Commission noted properly that an appellate court will uphold evidentiary rulings if proper on any ground, even if not the ground asserted. Payne v. Cornhusker Motor Lines, Inc., 177 S.W.3d 820, 840 (Mo. App. E.D. 2005); Foster v. Barnes-Jewish Hosp., 44 S.W.3d 432, 438 (Mo. App. E.D. 2001). On pages 24-25 of the Report and Order, the Commission had noted that not only was the subject of the offer of proof wholly irrelevant, the offer of proof would have also been repetitive and resulted in undue delay (L.F.3626-3627). On page 10 of the Order Denying Rehearing, the PSC also further clarified what it meant by “undue delay.” The Commission indicated it was not merely concerned about the time that would be consumed by presenting the irrelevant evidence, but found that the unnecessary proffering of wholly irrelevant testimony would have obstructed and hindered the hearing, given the time the Commission had given the parties to develop their cases (L.F. 4031).

All told, the Commission heard a vast amount of evidence over the course of several weeks. The exclusion of material regarding the corporate policies without an

offer of proof had no deleterious effect on the critical issues of whether the Merger was not detrimental to the public interest. As the Commission concluded: “Even if some minuscule piece of relevant evidence is buried in this incompetent evidence, given the facts that the same witnesses Staff seeks to examine with regard to the anonymous letters already provided competent evidence on the same subject matter, then any ferreting out of this information would merely be repetitive -- another reason for denying the offer of proof.” See Order at 22-23 (L.F. 3624-3625).

**C. Praxair is Responsible for Any Deficiency in the Record.**

While Intervenors maintain the record is sufficient to allow full and proper judicial review, Praxair must accept responsibility if there is any deficiency. Praxair has had opportunities to provide a more complete record of the nature of the material it alleges is competent, relevant evidence. At the time the offer of proof was rejected, counsel’s argument could have made a more complete record of the proffered material. See Roorda v. City of Arnold, 142 S.W.3d 786, 799 (Mo. App. W.D. 2004) (noting that the “nature and extent of this excluded evidence was sufficiently explained and preserved” in other evidence, in documentary offers of proof, and in argument of counsel). And Praxair has done nothing since to provide a more complete record. See 4 CSR 240-2.130(17) (procedure for the filing of post-hearing exhibits); Mo. R. Civ. P. 81.12(f) (procedure for supplementing the record on appeal). Even Praxair’s substitute brief to this Court has been stripped of factual context. Despite the opportunities to develop a more complete record, Praxair has done nothing.

**II. Section 536.070(7) is not in Conflict with the Commission’s Governing Statute  
(Responds to Praxair Argument II).**

Praxair argues that Section 536.070(7) cannot apply to the Commission because it has its own procedures to follow and the Missouri Administrative Procedure Act only fills in “gaps” in the Commission’s statutory procedure. This argument fails for several reasons.

First, the Commission was not solely relying on Section 536.070(7) when it made its determination regarding the gifts and gratuities policy and the code of conduct evidence. The presiding officer relied additionally on the Commission’s own rule at 4 CSR 240-2.130(3) which gives the PSC the authority to exclude evidence that is “wholly irrelevant.” Thus, Praxair’s argument that Section 536.070(7) can only apply to “gaps” in Commission authority is incorrect because there is no “gap” in Commission authority because of the existence of 4 CSR 240-2.130(3). Praxair acknowledges this in its brief, correctly noting that the rule mirrors the language of Section 536.070(7). See Praxair Initial Substitute Brief at 15, n. 9.

The Commission rules were adopted pursuant to Section 386.410.1 which states that all hearings before the PSC shall be governed by rules to be adopted and prescribed by it. Therefore, the Commission did not necessarily need the authority of Section 536.070(7) to exclude the wholly irrelevant evidence. Rather, the Commission had its own authority pursuant to its rule. See State ex rel. Southwestern Bell Tel. Co. v. PSC, 645 S.W.2d 44, 50 (Mo. App. W.D. 1982) (“The authority under Section 386.410-1 for

the Commission to adopt its own rules of procedure seems to be a rather uncommon grant to an administrative agency . . . .”).

Even though the Commission has its own authority to exclude wholly irrelevant evidence, Section 536.070(7) in no way conflicts with its governing statutes. Praxair contends that since Section 386.510 (App. 7) permits a reviewing court to remand a cause to the Commission with instructions to receive testimony that was proffered and rejected, an offer of proof is required. However, Section 386.510 is not inconsistent with Section 536.070(7) because the former says nothing about and does not require an offer of proof for “wholly irrelevant” evidence. In any event, if a reviewing court were to direct the Commission to hear excluded evidence, whether or not preserved in the record by an offer of proof, the Commission is obligated to do so.

This is what occurred in State ex rel. Arkansas Power & Light Co. v. PSC, 736 S.W.2d 457, 461 (Mo. App. W.D. 1987), where the Court of Appeals remanded the case to the Commission with directions for it to admit and receive evidence that was excluded by discovery sanctions. The appellate court found that the sanction was unduly harsh and prevented the Commission from hearing the necessary facts. It made no mention of an offer of proof in its remand order. The Court of Appeals simply ordered the evidence to be heard. Id. at 460-61.

Plainly, Section 386.510 does not mandate the preservation of evidence by the Commission in an offer of proof, and it is not in conflict with Section 536.070(7), which the Commission may rely upon.

### **III. The Exclusion of Wholly Irrelevant Evidence is Consistent with the Commission’s Decision that the Merger was not Detrimental to the Public Interest (*Responds to Praxair Argument III*).**

Praxair argues that the exclusion of evidence without being preserved in an offer of proof cannot occur in a merger case because the Commission “must take a broad view of the issues that may impact the public interest.” See Praxair Initial Substitute Brief at 22.

This novel argument must be rejected for two reasons. First, it ignores the express holding of Environmental Utilities, LLC v. PSC, 219 S.W.3d 256, 264-65 (Mo. App. W.D. 2007), discussed above in Section I, where the Court of Appeals upheld the exclusion of wholly irrelevant and repetitious evidence in a proceeding under Section 393.190, the PSC’s merger statute.

Secondly, Praxair’s argument misinterprets State ex rel. Ag Processing, Inc. v. PSC, 120 S.W.3d 732, 735 (Mo. 2003) (“Ag Processing”), where UtiliCorp United Inc. applied for permission to acquire St. Joseph Light & Power Co. and to recoup a \$92 million acquisition premium in future rates. The Commission decided that questions concerning the recovery of an acquisition premium should be determined in a future general rate case and declined to rule on the request in the merger proceeding. This Court reversed, holding that the PSC must consider the issue in determining whether the acquisition was detrimental to the public interest. The holding in Ag Processing is narrow and simply required the Commission to consider the \$92 million acquisition premium as part of the evidence in the merger.

Unlike the Ag Processing case, the Commission did not defer for future action any decision regarding rate treatment or other matter regarding codes of corporate conduct or gifts and gratuities policies. It merely found evidence on such issues “wholly irrelevant” to the many relevant facts that pertained to whether the transaction was not detrimental to the public interest. While a \$92 million acquisition premium was “necessary and essential” to “the cost analysis when evaluating whether the proposed merger would be detrimental to the public,”<sup>4</sup> Great Plains Energy’s business practices related to its employees were not.

Rather, the Commission properly determined that an examination of internal corporate personnel policies was not relevant to whether the Merger was detrimental to the public interest. Since the Commission had authority under 4 CSR 240-2.130(3), as well as Section 536.070(7) to make this determination, the Commission’s ruling is consistent with the “not detrimental to the public interest” standard.

**IV. The Denial of OPC’s Motion to Dismiss was Appropriate as the Commissioners Violated No Standard of Conduct by Meeting with Representatives of the Applicants Well before the Merger Application was Filed (*Responds to OPC Argument I*).**

Public Counsel moved to dismiss the case because several months prior to the filing of the Merger application representatives of KCP&L and Aquila met informally with members of the Commission to advise them of the impending transaction (L.F.

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<sup>4</sup> Ag Processing, 120 S.W.3d at 736.

1398). The Commission, in a lengthy and well-reasoned order, carefully considered the facts provided by OPC, noting that they were scant, and discussed the law, noting that no ex parte or other improper conversation occurred (L.F. 1811-31). In particular, the Commission observed that communications with all members of the public, including regulated public utilities like KCP&L and Aquila, was expressly encouraged by Section 386.210.1 (App. 8) regarding industry matters that were not the subject of a pending proceeding.

Given the nature of a commissioner's job, which spans both legislative and judicial roles, the Commission's order denying OPC's motion to dismiss should be upheld.

**A. The Role of the Members of the Public Service Commission.**

When the Public Service Commission Act was passed by the General Assembly in 1913, it created a system for the regulation of public utilities that was mainly legislative, not judicial, in nature. "The design of the Act was to create an administrative agency of the lawmaking power." Lusk v. Atkinson, 186 S.W. 703, 704 (Mo. 1916). The powers of the Commission are derived from the police power of the state, and the Missouri Supreme Court has described it as "an administrative agency or committee of the Legislature." State ex rel. Laundry v. PSC, 34 S.W.2d 37, 42-43 (Mo. 1931).

In reviewing the contents of the new law, the Supreme Court noted that the General Assembly had given the Commission the power of "general supervision" over electrical corporations and other utilities, as well as the power to "investigate" the operations and "the methods" employed by public utilities in carrying out their business.

See § 393.140(1)-(2). In an early decision the Court observed that “such regulation, to command respect from patron or utility owner, must be in the name of the overlord, the state, and to be effective, must possess the power of intelligent visitation and the plenary supervision of every business feature to be finally (however invisible) reflected in rates and quality of service.” State ex rel. Barker v. Kansas City Gas Co., 163 S.W. 854, 858 (Mo. 1913). That expansive view of the Commission’s responsibilities has continued to the present day. In Borron v. Farrenkopf, 5 S.W.3d 618, 624 (Mo. App. W.D. 1999), this Court observed that the Commission “was given sweeping regulatory jurisdiction over various public utilities, including electric power companies” under Section 386.250.

This is consistent with how all other state and federal commissions were established. “Regulatory commissions have been characterized as quasi-judicial and quasi-legislative.” See Charles F. Phillips, Jr., The Regulation of Public Utilities at 152 (1993). Contrary to the concept of separation of powers, “a commission assumes the tasks of administrator, judge and legislator.” Id. A former member of the Massachusetts Commission has characterized these responsibilities:

“To be familiar with the history of regulation; to understand the meaning of objectivity in the light of the dual capacity of a public utility commissioner as a party and as judge, and to cultivate in his own judgments this quality; to become familiar with the fundamental characteristics of the industries over which he exercises control; to exercise a wide discretion over the procedures followed before the

commission, having in mind the basic guides of fairness to the parties and uniformity of application; ....”

Id. at 140, quoting David M. Brackman, 66 Public Utilities Fortnightly 981 (Dec. 22, 1960).

Missouri law recognizes the ability of Commissioners to “confer in person, or by correspondence, by attending conventions, or in any other way, with members of the public,” as well as other state and federal public utility commissions “on any matter relating to the performance of its duties.” See § 386.210.1. This is exactly what some of the Commissioners were doing in January 2007 when they individually met with representatives of the Applicants with regard to the proposed Merger, a matter that had not yet been publicly announced and that was not the subject of a proceeding before the Commission until April.

It is clear that Commissioners acting “in an adjudicative capacity” must follow procedural due process requirements to insure that a fair hearing occurs and, like judicial officers, “they must be free of any interest in the matter to be considered by them.” State ex rel. Ag Processing, Inc. v. Thompson, 100 S.W.3d 915, 919-20 (Mo. App. W.D. 2003); Union Elec. Co. v. PSC, 591 S.W.2d 134, 137 (Mo. App. W.D. 1979). However, it is equally clear that they are not strictly bound by the Code of Judicial Conduct of Supreme Court Rule 2 and its Canons because they are not judges.

**B. OPC’s Argument Misapplies the Law.**

OPC contends that the Code of Judicial Conduct applies to the Commission. Specifically, OPC alleges that under Canon 3B(7) the Commissioners are prohibited from independently investigating facts and must not initiate or consider ex parte or other communications concerning a pending or impending proceeding. However, Canon 3B(7)(e) provides an exception for communications that are expressly authorized by law. As noted above, Section 386.210.1 authorizes the Commissioners to confer in person with anyone on any matter relating to the performance of their duties. The Commission’s denial of the motion to dismiss properly recognized that the Judicial Canons do not apply to the Commission.

OPC further argues that the Commissioners’ conversations were “ex parte on what would be the contested issues in this case ....” See OPC Initial Substitute Brief at 21. However, OPC fails to note that the ex parte rules contained in 4 CSR 240-4.020 (App. 10), entitled “Conduct During Proceedings,” do not apply because there was no proceeding pending at the time of the meetings in January 2007.<sup>5</sup> The application that began this case was not filed until April 4, 2007. Because there was no case or proceeding, there was no ex parte conversation and certainly no conversation or meeting

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<sup>5</sup> The rule in 4 CSR 240-4.020(7) states: “These prohibitions apply from the time an on-the-record proceeding is set for hearing by the commission until the proceeding is terminated by final order of the commission. An on-the-record proceeding means a proceeding where a hearing is set and to be decided solely upon the record made in a commission hearing.”

that was prohibited by law. The meetings were permitted under the Missouri Sunshine Law, which does not prohibit or even regulate conversations between Commissioners, public utilities, the Staff of the Commission, OPC or any other member of the public if there was no pending case. See § 610.010(4)-(5). The Commission correctly concluded that there were no ex parte contacts between the Commissioners and the Applicants (L.F. 1827).

Lacking any legal authority to support its attack on the Commissioners' conversations, OPC retreats to a discussion of cases that address situations where judges or judicial officers conducted ex parte conversations in the course of a judicial proceeding. None of those cases bears the slightest relevance to the facts of this case or the conduct of the Commissioners in question.

Every one of the cases cited by OPC dealt with a member of the judiciary who was alleged to have made inappropriate statements or engaged in questionable conduct during the course of a proceeding. Two of the cases relate to Missouri's procedures that permit a party to move for a change of judge without stating any facts alleging bias or prejudice. State ex rel. Raack v. Kohn, 720 S.W.2d 941, 943-44 and n.1 (Mo. 1986), concerned the procedure to remove a probate judge through the timely objection of a party in interest under Section 472.060. Similarly, State ex rel. McNary v. Jones, 472 S.W.2d 637, 640 (Mo. App. E.D. 1971), related to the change of judge process in criminal cases under Missouri Rule of Civil Procedure 32.06 (formerly Rule 30.12), and its civil counterpart in Rule of Civil Procedure 51.05. None of these statutes or rules is applicable to Commission proceedings. Smith v. Armontrout, 632 F. Supp. 503, 507 n.7 (W.D. Mo.

1986), as noted by OPC, refers to an instance where an appellate judge initiated an ex parte communication while the case was pending before the court.

Several of the cases cited by OPC held that the judge did not need to recuse himself from the case being heard. See Graham v. State, 11 S.W.3d 807, 814 (Mo. App. S.D. 1999) (“insufficient facts to form a basis for recusal”); Robin Farms, Inc. v. Bartholome, 989 S.W.2d 238, 249-50 (Mo. App. W.D. 1999).

The remainder of OPC’s cases relate to clear instances of a judge in the course of a lawsuit making remarks or engaging in conduct that indicated a bias or prejudice and are distinguishable from the Commissioners’ actions in this proceeding. See Moore v. Moore, 134 S.W.3d 110, 114-15 (Mo. App. S.D. 2004) (Family Court commissioner receiving ex parte investigative report during custody case); McPherson v. U.S. Physicians Risk Retention Group, 99 S.W.3d 462, 487-91 (Mo. App. W.D. 2003) (judge’s statements to special deputy receiver during course of receivership proceedings and related litigation); Williams v. Reed, 6 S.W.3d 916, 923-24 (Mo. App. W.D. 1999) (judge’s wife serving as a material witness); State v. Garner, 760 S.W.2d 893, 902, 906 (Mo. App. S.D. 1988) (judge receiving ex parte evidence of the guilt of the accused); State v. Lovelady, 691 S.W.2d 364, 368 (Mo. App. W.D. 1985) (judge’s “blunt and unnecessary” criticism of defense counsel requiring recusal).

None of these cases presents any relevant legal authority to question, much less condemn, the meetings that occurred with Commissioners in January 2007 -- months before a filing was made. To the contrary, the evidence demonstrates that these meetings

were courtesy visits conducted in a professional and respectful manner, without any hint of seeking commitments or approvals.

**C. OPC’s Argument Lacks Factual Support.**

It goes without saying that any party to a proceeding before the Commission is entitled to a fair and impartial ruling. However, the only factual basis contained in OPC’s argument is the suggestion that statements by the Applicants somehow tainted this proceeding, even though there is absolutely no evidence that the Commissioners prejudged any facts or gave any assurances to anyone.

Under Missouri law “the test for recusal when the judge’s impartiality is questioned is ‘whether a reasonable person would have a factual basis to find an appearance of impropriety and thereby doubt the impartiality of the court.’” Moore v. Moore, 134 S.W.3d 110, 115 (Mo. App. S.D. 2004) (emphasis added). It is, therefore, a factual analysis that must occur to determine whether recusal is necessary under the guidance provided by the case law.

“A presumption exists that administrative decision-makers act honestly and impartially, and a party challenging the partiality of the decision-maker has the burden to overcome that presumption.” State ex rel. Ag Processing, Inc. v. Thompson, 100 S.W.3d 915, 920 (Mo. App. W.D. 2003). Moreover, a commissioner or a judge “has an affirmative duty not to disqualify himself unnecessarily.” Helton Constr. Co. v. Thrift, 865 S.W.2d 419, 422 (Mo. App. S.D. 1993).

The nature of the conversations conducted with the three Commissioners was informational and educational. See Tr. 911 (KCP&L President William H. Downey: “We were there to educate”). Although the elements of a proposal that would be contained in a filing made several months later were communicated, it is clear that the Commissioners made no commitment to either Mr. Downey or Great Plains Energy CEO Michael J. Chesser. When Mr. Chesser was pointedly asked during the hearing whether he received “a negative commitment” from Commissioners, Mr. Chesser stated: “I walked away with a sense that they were going to look at the merits of the deal.” See Tr. 844. As Mr. Chesser explained:

“Actually, this was not intended to have them look at the merits of the deal. This was to make sure they weren’t surprised, as I said, in ... similar processes I followed in other mergers [in other jurisdictions] where we make sure the regulators are advised ahead of time before it’s announced in the press.” [Tr. 862]

Having testified that he had not heard anything “significantly negative” from the Commissioners, he was asked: “Did you hear anything insignificantly negative?” His response: “I heard nothing.” See Tr. 864.

Mr. Downey similarly stated that the meetings with Commissioners were “an effort on our part to outline the transaction that was about to be announced.” See Tr. 977. He elaborated:

“I would describe it as typical whenever -- in my experience in our industry -- if you’re a regulated utility and you’re about to embark on something that will have significant impact on the institution and will ultimately involve the regulator, that you would let them know.

It’s always our desire not to surprise either the Commissioners or the Staff with anything significant.” [Tr. 977-78]

In response to a question from the bench whether “those meetings took place as a matter of courtesy and respect for the regulatory process,” Mr. Downey stated: “Absolutely.” Id. at 978.

OPC has failed to make the effort required to develop a factual record. OPC did not seek to voir dire the Commissioners. OPC cannot even state with certainty which Commissioners were at the meetings. There is no factual record here to substantiate OPC’s allegations.

Moreover, the evidence of record contains nothing to indicate that any improper communication occurred between representatives of the Applicants and the Commissioners. Clearly, there was no ex parte communication because there was no pending proceeding, much less one that had been set for hearing. See 4 CSR 240-4.020(7).

Because Public Counsel failed to meet his legal and factual burden of proof, the Commission properly denied the motion to dismiss (L.F. 1830-31).

## CONCLUSION

WHEREFORE, Intervenor/Respondents Great Plains Energy Inc., Kansas City Power & Light Co. and KCP&L Greater Missouri Operations Co. respectfully request the Court to affirm the Report and Order of the Public Service Commission as reasonable and lawful in all respects.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the Brief of Intervenor/Respondents Great Plains Energy, Inc., Kansas City Power & Light Company and KCP&L Great Missouri Operations Company was mailed this 29<sup>th</sup> day of January, 2011 to the attorneys of record.

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**CERTIFICATE PURSUANT TO RULE 84.06(c) and 84.06(g)**

I hereby certify that the foregoing Initial Brief of Intervenor/Respondents Great Plains Energy, Inc., Kansas City Power & Light Company and KCP&L Great Missouri Operations Company complies with the limitations contained in Rule 84.06(b) and, according to the word count of the word-processing system used to prepare the brief (excepting therefrom the cover, certificate of service, this certificate, and the signature block and the appendix), contains 7,942 words. I hereby further certify that the disk containing this brief and submitted to the Court has been scanned for viruses and that the scan indicated that it is virus free.

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