

IN THE SUPREME COURT OF THE STATE OF MISSOURI

STATE ex rel. PRAXAIR, INC., AG )  
PROCESSING, INC A COOPERATIVE, )  
and SEDALIA INDUSTRIAL ENERGY )  
USERS' ASSOCIATION, )

Appellants )

STATE ex rel. OFFICE OF THE PUBLIC )  
COUNSEL, )

Appellant, )

v. )

PUBLIC SERVICE COMMISSION OF )  
THE STATE OF MISSOURI, )

Respondent. )

Case No. SC91322

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**SUBSTITUTE BRIEF OF RESPONDENT MISSOURI PUBLIC SERVICE  
COMMISSION IN RESPONSE TO SUBSTITUTE BRIEF FILED BY  
OFFICE OF THE PUBLIC COUNSEL**

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**TABLE OF CONTENTS**

**JURISDICTIONAL STATEMENT** ..... 6

**STATEMENT OF FACTS** ..... 6

**STANDARD OF REVIEW**..... 8

**POINTS RELIED ON**..... 10

**I**..... 10

*The Commission’s denial of Public Counsel’s motion to dismiss must be affirmed because the Commission’s denial of a motion to dismiss is not a final order of an agency that is subject to judicial review under Sections 386.510 and 386.540 in that only final orders are subject to Chapter 386 review provisions. (Responsive to Point I of Public Counsel’s Points Relied On)*..... 10

**II**..... 11

*The Commission’s order approving the merger transactions must be affirmed because the order is lawful and reasonable under Sections 386.510 and 386.540 in that the Commission properly exercised its statutory authority under Section 386.210. (Responsive to Point I of Public Counsel’s Points Relied On).* ..... 11

**ARGUMENT** ..... 11

**I**..... 11

*The Commission’s denial of Public Counsel’s motion to dismiss must be affirmed because the Commission’s denial of a motion to dismiss is not a final order of an*

<i>agency that is subject to judicial review under Sections 386.510 and 386.540 in that only final orders are subject to Chapter 386 review provisions. (Responsive to Point I of Public Counsel’s Points Relied On)</i> .....	<b>11</b>
<b>II</b> .....	<b>15</b>
<i>The Commission’s order approving the merger transactions must be affirmed because the order is lawful and reasonable under Sections 386.510 and 386.540 in that the Commission properly exercised its statutory authority under Section 386.210. (Responsive to Point I of Public Counsel’s Points Relied On).</i> .....	<b>15</b>
<b><u>CONCLUSION</u></b> .....	<b>21</b>
<b><u>CERTIFICATE OF COMPLIANCE AND SERVICE</u></b> .....	<b>22</b>

**TABLE OF AUTHORITIES**

**CASES**

*City of Park Hills v. Public Service Commission*, 26 S.W.3d 401  
(Mo. Ct. App. W.D. 2000)..... 10, 12

*Fitzgerald v. City of Maryland Heights*, 796 S.W.2d 52 (Mo. Ct. App. E.D. 1990) .. 11, 17

*State ex rel. AG Processing v. Thompson*, 100 S.W.3d 915  
(Mo. Ct. App. W.D. 2003)..... 11, 17

*State ex rel. City of St. Louis v. Pub. Serv. Comm’n of Mo.*, 73 S.W.2d 393  
(Mo.banc 1934) ..... 14

*State ex rel. Fee Fee Trunk Sewer, Inc. v. Public Service Commission*, 522 S.W.2d 67  
(Mo. Ct. App. 1975) ..... 10, 12

*State ex rel. Missouri Gas Energy v. Missouri Public Service Commission*, 186 S.W.3d  
376 (Mo. Ct. App. W.D. 2005)..... 9

*State ex rel. Office of Public Counsel v. Public Service Commission*, 289 S.W.3d 240  
(Mo. Ct. App. W.D. 2009)..... 8, 9

*State ex rel. Praxair, Inc. v. Public Service Commission*, 2010 WL3218887 (Mo. Ct.  
App. W.D.) (August 17, 2010)..... 11,15

*State v. Kinder*, 942 S.W.2d 313 (Mo.banc 1996) ..... 20

*State v. Smulls*, 71 S.W.3d 138 (Mo.banc 2002)..... 11, 19

**STATUTES**

Section 386.210, RSMo (2000) (Supp. 2009) ..... 11, 15, 19, 20  
Section 386.430, RSMo (2000) ..... 8  
Section 386.500, RSMo (2000) ..... 10, 12, 13  
Section 386.515, RSMo (2000) (Supp. 2009) ..... 10, 12, 13  
Section 386.540 RSMo, (2000) ..... 10, 12, 13  
Section 393.190.1 RSMo (2000) ..... 13, 14

**OTHER AUTHORITIES**

Missouri Constitution, Article V, Section 18 ..... 10,12

**REGULATIONS**

4 CSR 240-3.115 ..... 14  
4 CSR 240-4.020 ..... 15

### **Jurisdictional Statement**

This case is before the Court on the Office of the Public Counsel's (Public Counsel) Application to Transfer under Article V, Section 10 of the Missouri Constitution and Missouri Supreme Court Rule 83.04. This Court granted transfer after an opinion by the Western District Court of Appeals affirming the Missouri Public Service Commission's (Commission) order approving the acquisition of Aquila, Inc. (Aquila) by Great Plains Energy Company (Great Plains). Public Counsel contends that the Commission erred when it denied the Public Counsel's motion to dismiss the case and challenges the Western District's opinion affirming the Commission's order and decision.

The Honorable Jon E. Beetem of the Circuit Court of Cole County affirmed the Commission's orders on June 29, 2009. The Court of Appeals affirmed the Commission's orders on August 17, 2010. The Court of Appeals modified its opinion on November 2, 2010. This Court ordered transfer from the Court of Appeals on December 21, 2010.

### **Statement of Facts**

On four or five occasions in early January of 2007, executives of Great Plains met with Commissioners to discuss the proposed acquisition of Aquila. (Commission's Appendix, p. A 36). During the course of the case, the executives testified that the purpose of the meetings was to give notice of the proposed acquisition to the Commissioners prior to making a public announcement. (Commission's Appendix, p. A 36). The executives testified that the meetings were informational and educational and

were meant to avoid surprise. (Commission's Appendix, p. A 36). The executives outlined the elements of the proposed merger to the Commissioners, but the executives testified that the Commissioners made no commitments to them during the meetings. (Commission's Appendix, pp. A 36-7). The companies publicly announced the proposed acquisition on February 7, 2007. (Commission's Appendix, pp. A 36-7).

On April 4, 2007 Great Plains, Kansas City Power and Light (KCPL) and Aquila filed a joint application with the Commission. (Public Counsel's Appendix, p. A9). The joint application presented a series of proposed transactions for the Commission's approval, with each transaction conditioned on the closing of the other transactions. (Public Counsel's Appendix, p. A9). Because KCPL and Aquila were both regulated by the Commission, the Commission's approval of the transaction was required by statute. (Public Counsel's Appendix, p. A9). The end result of the transactions is that Great Plains effectively acquired Aquila's Missouri electric and steam operations, as well as its merchant service operations and certain residual natural gas contracts. (Public Counsel's Appendix, p. A9). Aquila became a direct wholly owned subsidiary of Great Plains. (Public Counsel's Appendix, p. A10).

The initial evidentiary hearing began on December 3, 2007. (Public Counsel's Appendix, p. A11). On December 6, 2007, Commissioner Davis filed a notice that he did not intend to participate in the case. (Public Counsel's Appendix, p. A11n.5). On the same day, counsel for Great Plains and KCPL requested a temporary recess of the hearing. (Public Counsel's Appendix, p. A11). No party objected to the request for a temporary recess. (Public Counsel's Appendix, p. A11).

Public Counsel filed a motion to dismiss the underlying case based on alleged impropriety by the Commission on December 13, 2007. (Commission's Appendix, p. A 119). The Commission denied the motion on January 2, 2008. (Commission's Appendix, p. A 135). The hearings continued on non-consecutive dates throughout April, May and June of 2008. (Public Counsel's Appendix, p. A 17). On April 21, 2008, newly appointed Commissioner Gunn filed a Notice informing the parties of his prior affiliation of a law firm representing one of the parties. (Commission's Appendix, p. A 136). Public Counsel objected to the Commissioner's participation in the case. (Commission's Appendix, p. A 176). On April 24, 2008, Commissioner Gunn recused himself from the case. (Public Counsel's Appendix, p. A17n.12). The case was heard by the remaining three Commissioners. (Commission's Appendix, p. A 36).

The Commission, by a vote of 2-1, issued an order approving the proposed transactions on July 1, 2008. (Public Counsel's Appendix, p. A286). Public Counsel filed a timely application for rehearing, which was denied by the Commission. (L.F., p. 14). Public Counsel sought a writ of review from the circuit court of Cole County. (L.F., p. 13). The circuit court affirmed the Commission's Report and Order. (L.F., pp. 364-5). Public Counsel appealed to the Western District Court of Appeals, which affirmed the Commission's Report and Order. (L.F., p 399). This Court granted transfer following the opinion issued by the Court of Appeals.

### **Standard of Review**

A Commission order has the presumption of validity. *State ex rel. Office of Public Counsel v. Public Service Commission*, 289 S.W.3d 240, 246 (Mo. Ct. App. W.D. 2009).

The party challenging the order has the burden of proving the unlawfulness or unreasonableness of the order “by clear and satisfactory evidence.” Section 386.430, RSMo (2000). The reviewing court views the evidence in the light most favorable to the order and affords the Commission the benefit of all reasonable inferences. *Public Counsel*, 289 S.W.3d at 246-47.

The reviewing court must determine whether the Commission’s order is lawful and reasonable. *Id.* An order is lawful if the Commission acted within its statutory authority. *Id.* In determining an order’s lawfulness, the reviewing court exercises unrestricted independent judgment and must correct erroneous interpretations of the law. *State ex rel. Missouri Gas Energy v. Missouri Public Service Commission*, 186 S.W.3d 376, 381 (Mo. Ct. App. W.D. 2005). A Commission order is reasonable if it is supported by substantial and competent evidence upon the whole record. *Public Counsel*, 289 S.W.3d at 246. A reasonable order is an order that is not arbitrary or capricious and is not an abuse of the Commission’s discretion. *Id.* The reviewing court will not substitute its judgment for that of the Commission on issues within the Commission’s realm of expertise. *Id.* at 247. “It is only where a Commission order is clearly contrary to the overwhelming weight of the evidence that [a reviewing court] may set it aside. *Missouri Gas Energy*, 186 S.W.3d at 382.

This Court reviews the Commission’s decision and not the judgment of the circuit court. *Public Counsel*, 289 S.W.3d at 246.

## **Points Relied On**

### **I**

**The Commission's denial of Public Counsel's motion to dismiss must be affirmed because the Commission's denial of a motion to dismiss is not a final order of an agency that is subject to judicial review under Sections 386.510 and 386.540 in that only final orders are subject to Chapter 386 review provisions. (Responsive to Point I of Public Counsel's Points Relied On).**

### **Cases**

*City of Park Hills v. Public Service Commission*, 26 S.W.3d 401 (Mo. Ct. App. W.D. 2000)

*State ex rel. Fee Fee Trunk Sewer, Inc. v. Public Service Commission*, 522 S.W.2d 67 (Mo. Ct. App. 1975)

### **Missouri Constitution**

Article V, Section 18

### **Statutes**

Section 386.500, RSMo (2000)

Section 386.510, RSMo (2000)

Section 386.515, RSMo (2000) (Supp. 2009)

## II

**The Commission’s order approving the merger transactions must be affirmed because the order is lawful and reasonable under Sections 386.510 and 386.540 in that the Commission properly exercised its statutory authority under Section 386.210. (Responsive to Point I of Public Counsel’s Points Relied On).**

### Cases

*State ex rel. AG Processing v. Thompson*, 100 S.W.3d 915 (Mo. Ct. App. W.D. 2003)

*Fitzgerald v. City of Maryland Heights*, 796 S.W.2d 52 (Mo. Ct. App. E.D. 1990)

*State ex rel. Praxair, Inc. v. Public Service Commission*, 2010 WL3218887 (Mo. Ct. App. W.D.) (August 17, 2010)

*State v. Smulls*, 71 S.W.3d 138 (Mo.banc 2002)

### Statutes

Section 386.210, RSMo (2000) (Supp. 2009)

## Argument

### I

**The Commission’s denial of Public Counsel’s motion to dismiss must be affirmed because the Commission’s denial of a motion to dismiss is not a final order of an agency that is subject to judicial review under Sections 386.510 and 386.540 in that only final orders are subject to Chapter 386 review provisions. (Responsive to Point I of Public Counsel’s Points Relied On).**

Article V, Section 18 of the Missouri Constitution provides for judicial review of “final” agency decisions. *City of Park Hills v. Public Service Commission*, 26 S.W.3d 401, 404 (Mo. Ct. App. W.D. 2000). Section 386.510 provides the exclusive mechanism for review of the Commission’s final orders. Section 386.515, RSMo (2000) (Supp. 2009). An order is final when “the agency arrives at a terminal, complete resolution of the case before it.” *Id.* (internal quotation and citation omitted). “The denial of a motion to dismiss is generally not considered a final order, even when the motion is based on contention of lack of jurisdiction.” *Id.*

In *Park Hills*, the appellant, relying on *State ex rel. Fee Fee Trunk Sewer, Inc. v. Public Service Commission*, 522 S.W.2d 67 (Mo. Ct. App. 1975), argued that all orders of the Commission were subject to review, regardless of the finality of the order under consideration. *Id.* at 405. In rejecting the appellant’s argument, the *Fee Fee* court held “we believe the references in § 386.510 to ‘applications for rehearing’ and ‘decisions on rehearing’ suggest that the legislature was thinking of the reviewability of these kinds of agency rulings traditionally subject to review, which are primarily *final* rulings.” *Id.* at 405-06 (emphasis in original).

Section 386.500.2 provides that “[n]o cause or action arising out of any order or decision of the commission shall accrue in any court to any corporation or the public counsel or person or public utility unless that party shall have made, before the effective date of such order or decision, application to the commission for a rehearing. Such application shall set forth specifically the ground or grounds on which the applicant

considers said order or decision to be unlawful, unjust or unreasonable. The applicant shall not in any court urge or rely on any ground not so set forth in its application.”

In this case, Public Counsel purports to challenge the Commission’s denial of the motion to dismiss it filed on December 13, 2007. The Commission’s decision to deny the motion to dismiss is not a final decision subject to judicial review because the Commission’s denial of the motion to dismiss was not a terminal, complete resolution of the case before it. To the extent that Public Counsel seeks to have the Commission’s decision as to its motion to dismiss overturned on review, such action by this Court would not be in accord with Sections 386.500, 386.510 and 386.515. To reverse the Commission’s order in this case for any of the reasons set out in Public Counsel’s motion to dismiss, the Court must find that the final order in this case was either unlawful or unreasonable based on those reasons as set out in Public Counsel’s application for rehearing. The Commission addresses the merits of Public Counsel’s contentions in its second Point Relied On.

Because the Public Counsel’s request to have the Commission’s decision as to its ruling on its motion to dismiss is improper under the procedure for review of Commission orders, the Commission’s order approving the proposed merger transactions must be affirmed on this point.

The Court of Appeals correctly identified the proper standard of review and the inquiry applicable to this case:

The utility companies in this case are regulated public utilities subject to the provisions of Chapter 393. *See id.* Section 393.190.1 requires regulated utilities to

obtain approval from the Public Service Commission for transactions such as those at issue here. *Id.* That statute provides the *lawful authority* for the Commission's decisions in such cases. *See id.* The *reasonableness* of the Commission's decision turns on the standard used to determine whether a merger should be approved, that is, whether the merger would be "detrimental to the public." *Id.*, (quoting *State ex rel. City of St. Louis v. Pub. Serv. Comm'n of Mo.*, 73 S.W.2d 393, 400 (Mo.banc 1934); 4 CSR 240-3.115 (2003)) (emphasis in original).

(Commission's Appendix, p. A 27).

Public Counsel's arguments about the Commission's treatment of its motion to dismiss do not touch on the issues that need to be decided in this case. The Commission order that must be found to be lawful and reasonable is not the order denying Public Counsel's motion to dismiss. The order that must be found lawful and reasonable is the order approving the proposed merger transactions. That order is lawful because the Commission has the authority to decide the issue under 393.190.1. That order is also reasonable because the Commission reasonably determined that the proposed transactions were not detrimental to the public based on the testimony and evidence received.

Because the order approving the proposed merger transactions was both lawful and reasonable under the applicable standards, the order must be affirmed on this point.

## II

**The Commission's order approving the merger transactions must be affirmed because the order is lawful and reasonable under Sections 386.510 and 386.540 in that the Commission properly exercised its statutory authority under Section 386.210. (Responsive to Point I of Public Counsel's Points Relied On).**

The Commission acts both quasi-judicially and quasi-legislatively. *State ex rel. Praxair, Inc. v. Public Service Commission*, 2010 WL3218887\*9 (Mo. Ct. App. W.D.) (August 17, 2010). Section 386.210, RSMo (2000) (Supp. 2009) governs communications with Commissioners.<sup>1</sup> That section provides in pertinent part:

1. The commission may confer in person, or by correspondence, by attending conventions, or in any other way, with the members of the public, any public utility or similar commission of this and other states and the United States of America, or any official, agency or instrumentality thereof, on any matter relating to the performance of its duties.
2. Such communications may address any issue that at the time of such communication is not the subject of a case that has been filed with the commission.

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<sup>1</sup> Subsequent to the hearing, the Commission amended 4 CSR 240-4.020(7), its internal regulation governing communications with Commissioners. The new regulation became effective on July 30, 2010.

3. Such communication may also address substantive or procedural matters that are the subject of a pending filing or case in which no evidentiary hearing has been scheduled, provided that the communication:
- (a) Is made at a public agenda meeting of the commission where such item has been posted in advance as an item for discussion or decision;
  - (b) Is made at a forum where representatives of the public utility affected thereby, the office of public counsel, and any other party to the case are present; or
  - (c) If made outside such agenda meeting or forum, is subsequently disclosed to the public utility, the office of the public counsel, and any other party in accordance with the following procedure:
    - (i) If the communication is written, the person or party making the communication shall not later than the next business day following the communication file a copy of the written communication in the official case file of the pending filing or case and serve it upon all parties of record;
    - (ii) If the communication is oral, the party making the oral communication shall no later than the next business day following the communication file a memorandum in the official case file of the pending case disclosing the communication and serve such notice memorandum on all parties of record. The memorandum must contain a summary of the

substance of the communication and not merely a listing of the subjects covered.

4. Nothing in this section or any other provision of law shall be construed as imposing any limitation on the free exchange of ideas, views, and information between any person and the commission or any commissioner, provided that such communications relate to matters of general regulatory policy and do not address the merits of the specific facts, evidence, claims or positions presented or taken in a pending case unless such communications comply with the provisions of subsection 3 of this section.

The procedural due process requirement of a fair hearing by a fair tribunal applies to the Commission when the Commission is acting in an adjudicatory capacity. *State ex rel. AG Processing v. Thompson*, 100 S.W.3d 915, 919 (Mo. Ct. App. W.D. 2003).

Administrative adjudicators must be impartial. *Id.* “Officials occupying quasi-judicial positions are held to the same high standard as apply to judicial officers *in that they must be free of any interest in the matter to be considered by them.*” *Id.* at 919-20 (emphasis added). There is a presumption that administrative adjudicators “act honestly and impartially, and a party challenging the partiality of the decision-maker has the burden to overcome that presumption.” *Id.*

“Administrative decisionmakers are expected to have preconceived notions concerning policy issues within the scope of their agency’s expertise.” *Fitzgerald v. City of Maryland Heights*, 796 S.W.2d 52, 59 (Mo. Ct. App. E.D. 1990). “Familiarity with the adjudicative facts of a particular case, even to the point of having reached a tentative

conclusion prior to the hearing does not necessarily disqualify an administrative decisionmaker. . . .” *Id.* (citation omitted). An administrative decisionmaker is considered biased if the decisionmaker “has made an unalterable prejudgment of operative adjudicative facts.” *Id.* A biased adjudicator should not participate in administrative hearings to avoid the possibility that the biased adjudicator will influence other, unbiased adjudicators. *Id.*

There is no case law expressly stating that the Judicial Canons apply to members of the Commission.<sup>2</sup> Even assuming the Canons do apply, none of the Commissioners who participated in the case violated any of the Canons that are arguably applicable. Canon 3(B)(5) provides that a judge, in the performance of judicial duties, shall not by words or conduct manifest bias or prejudice. Canon 3(B)(7) provides in pertinent part:

(7) A judge shall accord to every person who has a legal interest in a proceeding, or that person’s lawyer, the right to be heard according to law. A judge shall not initiate, permit or consider *ex parte* communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding except that:

(a) Where circumstances require, *ex parte* communications for scheduling, administrative purposes or emergencies that do not deal with substantive matters or issues on the merits; provided:

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<sup>2</sup>The Commission declined to make a specific finding on the applicability of the Canons when it ruled on Public Counsel’s motion to dismiss.

(i) the judge reasonably believes that no party will gain a procedural or tactical advantage as a result of the ex parte communication, and

(ii) the judge makes provision promptly to notify all other parties of the substance of the ex parte communication and allows an opportunity to respond.

(8) A judge may initiate or consider any ex parte communication when expressly authorized by law to do so.

Even if the Canons apply to the Commissioners, a point which the Commission does not concede, the communications that happened in this case are subject to the exception set out in Canon 3(B)(7)(c) because the communications were authorized by Section 386.210. Canon 3(E)(1) provides that a judge shall recuse in a proceeding in which the judge's impartiality might reasonably be questioned. Canon 2(A) states that a judge shall act at all time in a manner that promotes confidence in the integrity and impartiality of the judiciary. The Commentary to Canon 2 provides: "The test for an appearance of impartiality is whether the conduct would create in reasonable minds a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired."

Judges are required to recuse in proceedings where a reasonable person has a factual basis to doubt the judge is impartial. *State v. Smulls*, 71 S.W.3d 138, 145 (Mo.banc 2002). Proof of actual bias is not required; the appearance of justice must be satisfied. *Id.* A "reasonable person" is one who "gives due regard to the assumption 'that

judges act with honesty and integrity and will not undertake to preside in a trial in which they cannot be impartial.”” *Id.* quoting *State v. Kinder*, 942 S.W.2d 313, 321 (Mo.banc 1996). Disqualification on due process grounds is constitutionally required only in extreme cases. *Id.*

The communications between the utility and executives and certain Commissioners occurred in January of 2007. (Commission’s Appendix, p. A 119). The joint application was not filed until April of 2007. (Public Counsel’s Appendix, p. A9). At the time the communications occurred, there was no case pending before the Commission and the Commission was not acting in its quasi-judicial capacity. Because the Commission was not acting quasi-judicially when the communications occurred, the communications at the time were not *ex parte* communications and the communications were permitted by Section 386.210.

Unlike judges, Commissioners are expected to have knowledge about policy matters that are within the Commission’s area of expertise. To that end, Commissioners are permitted by statute to have discussions on matters that are within the scope of their duties. While Commissioners must be free of bias, they need not be free of any knowledge of the subject matter of the cases that are coming before them. There is no evidence in the record that any of the Commissioners who cast votes in this case made any comment or engaged in any conduct that would lead a reasonable person to question the Commissioners’ impartiality. None of the Commissioners who voted had any improper interest in the case that would require recusal. Public Counsel has not presented

any evidence to overcome the presumption that the voting Commissioners acted impartially.

Because the January 2007 communications were permitted by statute, the Commission acted lawfully. Because there is no evidence of bias, it was not necessary for the three Commissioners who heard the case to recuse and their decision to hear the case on the merits did not render the decision to approve the proposed transactions unlawful or unreasonable. Because the decision was both lawful and reasonable, the Commission's decision must be affirmed on this point.

### **Conclusion**

**FOR THE ABOVE REASONS**, the Commission requests that this Court affirm the Commission's decision in all respects.

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE AND SERVICE**

I hereby certify that the foregoing substitute brief of Respondent Missouri Public Service Commission complies with the limitations contained in Rule 84.06 and that:

- (1) The signature block above contains the information required by Rule 55.03;**
- (2) The brief complies with the limitations contained in Rule 84.06(b);**
- (3) The brief contains 4,469 words, as determined by the word count feature of Microsoft Word;**
- (4) I am filing with this brief a computer disk which contains a copy of the above and foregoing brief in the Microsoft Word format; and**
- (5) That the attached computer disk has been scanned for viruses and that it is virus free.**

I further certify that copies of the foregoing have been mailed first-class postage prepaid to all counsel of record as shown on the service list the 31<sup>st</sup> day of January, 2011.

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