

**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,)	Case No. SC91322
)	
Appellant,)	
)	
v.)	
)	
PUBLIC SERVICE COMMISSION OF THE STATE)	
OF MISSOURI,)	
)	
Respondent.)	

**SUBSTITUTE BRIEF OF RESPONDENT MISSOURI PUBLIC SERVICE
COMMISSION IN RESPONSE TO
SUBSTITUTE BRIEF FILED BY PRAXAIR, INC.**

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Jurisdictional Statement

This case is before the Court on Praxair, Inc., AG Processing, Inc., a Cooperative and the Sedalia Industrial Energy Users' Association's (the Industrials) 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). The Industrials contend that the Commission erred by refusing to accept an offer of proof regarding evidence that was not relevant to the Commission's determination of whether the proposed merger was detrimental to the public.

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 April 4, 2007 Great Plains, Kansas City Power & Light Company (KCPL) and Aquila filed a joint application presenting a series of three transactions for the Commission's approval. (Public Counsel's Appendix, p. A9). Each transaction was conditioned on the closing of the other transactions. (Public Counsel's Appendix, p. A9). Because KCPL and Aquila were each regulated by the Commission, the Commission's approval of the transactions was required by statute. (Public Counsel's Appendix, p. A9). The first transaction consisted of an Asset Purchase Agreement between Aquila, Black

Hills, Great Plains and Gregory Acquisitions Corp.¹ (Public Counsel's Appendix, p. A9). The second transaction was a Partnership Interests Purchase Agreement. (Public Counsel's Appendix, p. A9). The third and final transaction was the Agreement and Plan of Merger. (Public Counsel's Appendix, p. A9).

The evidentiary hearing began on December 3, 2007. (Public Counsel's Appendix, p. A11). On December 6, 2007 one Commissioner filed a notice of his intent not 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). The hearing resumed on April 21, 2008 and continued on non-consecutive days during April, May and June of 2008. (Public Counsel's Appendix, p. A17).

On April 21, 2008, newly appointed Commissioner Gunn filed a notice informing the parties of his prior affiliation with a law firm that represents Great Plains. (Public Counsel's Appendix, p. A17n.12). The Commissioner invited any party objecting to his participation in the case to file written objections. (Commission's Appendix, p. A128).

¹ Black Hills Corporation is a South Dakota corporation owning both regulated and unregulated businesses. As a result of this transaction, Black Hills would acquire Aquila's gas assets in Iowa, Nebraska, Kansas and Colorado. Gregory Acquisition Corp. is a Delaware corporation and is a wholly owned subsidiary of Great Plains. (Public Counsel's Appendix, p. A9).

Commissioner Gunn filed a notice of recusal and did not participate in the case. (Commission's Appendix, p. A136). The case was heard by the remaining three Commissioners. (Public Counsel's Appendix, p. A286).

The Joint Applicants filed a motion to limit the scope of the proceedings. (Commission's Appendix, p. A121). The presiding officer issued an oral ruling on that motion on April 24, 2008. (Commission's Appendix, p. A320). The presiding officer ruled that the Commission would not hear live testimony regarding corporate codes of conduct or gifts and gratuities policies because such evidence would be wholly irrelevant. (Commission Appendix, p. A320). The presiding officer ruled evidence regarding additional amortizations was probably irrelevant, but not wholly irrelevant, and the Commission heard evidence on this issue as an offer of proof. (Commission's Appendix, p. A321). The presiding officer ruled the scope of the evidence of the interrelationship of the Iatan projects and the debt-rating information would be limited as requested by the Joint Applicants. (Commission's Appendix, p. A321).

During oral argument, counsel for the Commission's Staff stated its opposition to the Joint Applicants' motion to limit the scope of the proceedings and stated Staff's position regarding the evidence about gifts and gratuities policies. (Commission's Appendix, p. A304). Counsel for Staff had conducted depositions of various witnesses on the issue of gifts and gratuities and proposed calling live witnesses on those issues. (Commission's Appendix, p. A305). Counsel for Staff did not make an offer of proof of either those live witnesses or the depositions of those same live witnesses. Counsel for the Industrials and Public Counsel participated in the oral argument of the Joint

Applicants' motion. (Commission's Appendix, pp. A300-310). Counsel for the Industrials engaged in an on-the-record dialogue with the presiding officer about whether the presiding officer's ruling prevented Staff from making an offer of proof on the issue of gifts and gratuities. (Commission's Appendix, p. A316). The presiding officer indicated that no offer of proof of the live testimony would be accepted because the Commission deemed the issue wholly irrelevant. (Commission's Appendix, p. A320). The Industrials' counsel very specifically argued before the presiding officer that by excluding the evidence the presiding officer was "denying not only *Staff* the ability to put these people on, but you are also denying *them* even the ability to make an offer of proof with respect to that." (Commission's Appendix, p. A325) (emphasis added). Counsel for the Industrials also stated to the presiding officer that parties are entitled to make an offer of proof pursuant to Chapter 536. (Commission's Appendix, p. A326). Neither counsel for the Industrials nor Public Counsel offered the live testimony of these witnesses or requested the opportunity to make an offer of proof on behalf of their own clients. Neither counsel for the Industrials nor Public Counsel offered any other evidence on the issue of corporate codes of conduct or gifts and gratuities.

On July 1, 2008, two of the three Commissioners hearing the case voted to approve the proposed transactions. (Public Counsel's Appendix, p. A286). The Joint Applicants filed a notice of closing on July 18, 2008. (Commission's Appendix, p. A350).

The Industrials filed an application for rehearing before the Commission. (L.F. p. 10). The Commission denied the application for rehearing. (L.F., pp.10-11). The

Industrials sought a writ of review in the circuit court of Cole County. (L.F., p. 9-12). The circuit court affirmed the Commission's decision. (L.F., p. 364-5). The Industrials then appealed to the Court of Appeals. (Commission's Appendix, p. A22). The Court of Appeals affirmed the Commission's decision. (Commission's Appendix, p. A22). This Court ordered transfer following the issuance of a written opinion 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 Report and Order must be affirmed because the Industrials have not complied with the judicial review procedures of Section 386.500, RSMo (2000) in that the Industrials raise arguments on appeal that were not raised in their application for rehearing filed before the Commission. (Applicable to Points I, II and III of the Industrials’ Points Relied On).

Statutes

Section 386.500, RSMo (2000)

II

The Report and Order must be affirmed because the Report and Order does not deprive the Industrials of their constitutional right to judicial review in that the Industrials were not the proponents of the excluded evidence and had no right to make an offer of proof of the

excluded evidence and the Commission may exclude evidence that is wholly irrelevant and may refuse to accept an offer of proof of such evidence. (Responsive to Point I of the Industrials' Points Relied On).

Case Law

State ex rel. A&G Commercial Trucking v. Director of Manufacturing Housing, 168 S.W.3d 680 (Mo. Ct. App. W.D. 2005)

Statutes

Section 386.410, RSMo (2000)

Section 386.510, RSMo (2000)

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

Section 393.190, RSMo (2000)

Section 536.070, RSMo (2000)

Other Authorities

Missouri Constitution Article V, Section 18

III

The Report and Order must be affirmed because Section 536.070 RSMo (2000) is applicable to the Commission in that Chapter 386 does not have a similar evidentiary provision and Section 386.410, RSMo (2000) allows the Commission to adopt procedural rules and the procedural rule adopted by the Commission is drawn directly from the Missouri Administrative Procedures Act, which serves to fill in

procedural gaps in Chapter 386 procedures. (Responsive to Point II of the Industrials' Points Relied On).

Case Law

State ex rel. A&G Commercial Trucking v. Director of Manufacturing Housing, 168 S.W.3d 680 (Mo. Ct. App. W.D. 2005)

Statutes

Section 386.410, RSMo (2000)

Section 536.070, RSMo (2000)

Regulations

4 CSR 240-2.130

IV

The Report and Order must be affirmed because the proper standard to apply in determining whether the proposed transactions should be approved under Section 393.190, RSMo (2000) is whether the proposed transactions were detrimental to the public in that the Commission properly limited its inquiry to this standard and did not consider or accept an offer of proof based on matters outside the Commission's authority. (Responsive to Point III of the Industrials' Points Relied On).

Case Law

State ex rel. AG Processing, Inc. v. Public Service Commission, 120 S.W.3d 732 (Mo.banc 2003)

State ex rel. Harline v. Public Service Commission, 343 S.W.2d 177 (Mo. Ct. App. K.C. 1960)

Statutes

Section 393.190, RSMo (2000)

Argument

I

The Report and Order must be affirmed because the Industrials have not complied with the judicial review procedures of Section 386.500, RSMo (2000) in that the Industrials raise arguments on appeal that were not raised in their application for rehearing filed before the Commission. (Applicable to Points I, II and III of the Industrials' Points Relied On).

Section 386.500.2, RSMo (2000) provides that an application for rehearing is a necessary prerequisite to filing a petition for writ of review in circuit court. Section 386.500.2 also provides the application for rehearing before the Commission must set out specifically the grounds on which the applicant considers the Commission's order or decision to be unlawful or unreasonable. Section 386.500.2 also precludes applicants from raising arguments before the circuit court or appellate courts that were not addressed by the application for rehearing filed before the Commission.

In their substitute brief, the Industrials raised arguments that were not raised in their application for rehearing filed before the Commission. Because the arguments were not raised in their application for rehearing, they are not properly before this Court.

Specifically, the Industrials' argument Section 536.070(7) is unconstitutional because it is a violation of the separation of powers is not properly before this Court because this argument was not raised in the Industrials' application for rehearing. The Industrials' argument that Section 536.070 is not applicable to the Commission is likewise not in their application for rehearing and is contrary to statements made by the Industrials' counsel during oral argument of the Joint Applicants' motion to limit the scope of the proceedings. This argument is also not properly before this Court. The Industrials' argument that the exclusion of the disputed evidence is inconsistent with the applicable standard of review is not properly before this Court because this issue was not raised in the Industrials' application for rehearing filed before the Commission.²

Because Section 386.500.2 prohibits a party from raising issues on appeal that were not raised in the party's application for rehearing filed before the Commission, the

² The Industrials' application for rehearing does allege that the refusal of the offer of proof was in error. The application does not, however, state the grounds for the error as they have been presented to the Court of Appeals and to this Court. (L.F., p.349). The application for rehearing does not satisfy the specificity requirement of Section 386.500. The vague application for rehearing also undermines the very purpose of requiring an application for rehearing before judicial review is available, which is to allow the Commission an opportunity to correct its alleged errors. See, *Blevins Asphalt Construction Co. v. Director of Revenue*, 938 S.W.2d 899, 902 (Mo.banc 1997).

Report and Order must be affirmed on this point. The Commission discusses these improper arguments on the merits below.

II

The Report and Order must be affirmed because the Report and Order does not deprive the Industrials of their constitutional right to judicial review in that the Industrials were not the proponents of the excluded evidence and had no right to make an offer of proof of the excluded evidence and the Commission may exclude evidence that is wholly irrelevant and may refuse to accept an offer of proof of such evidence. (Responsive to Point I of the Industrials' Points Relied On).

Judicial review of final decisions by administrative agencies is guaranteed by Article V, Section 18 of the Missouri Constitution. Judicial review of Commission orders is specifically provided for in Section 386.510, RSMo (2000). *State ex rel. Public Counsel v. Public Service Commission*, 210 S.W.3d 344, 350 (Mo. Ct. App. W.D. 2006); see also Section 386.515, RSMo (2000) (Supp. 2009). Section 386.510 provides for a party seeking judicial review to file a petition for writ of review in circuit court to have the reasonableness and lawfulness of the Commission's order determined. In cases where the Commission order is reversed and the Commission has "failed to receive testimony properly proffered" the circuit court may remand the case to the Commission "with instructions to receive the testimony so proffered and rejected, and enter a new order based upon the evidence theretofore taken. . . ." The Missouri Administrative Procedures Act serves to fill gaps in Chapter 386 procedures. *State ex rel. A&G Commercial*

Tracking v. Director of Manufacturing Housing, 168 S.W.3d 680, 683 (Mo. Ct. App. W.D. 2005).

Section 536.070(7) provides the statutory basis for the presiding officer's ruling as follows:

(7) Evidence to which an objection is sustained shall, *at the request of the party seeking to introduce the same*, or at the instance of the agency, nevertheless be heard and preserved in the record, together with any cross-examination with respect thereto and any rebuttal thereof, *unless it is wholly irrelevant, repetitious, privileged, or unduly long*. (emphasis added).

The Commission has the authority to promulgate procedural rules under Section 386.410, RSMo (2000). Tracking the statutory language of Section 536.070(7), the Commission promulgated 4 CSR 240-2.130(3), which provides as follows:

(3) The presiding officer shall rule on the admissibility of all evidence. Evidence to which an objection is sustained, *at the request of the party seeking to introduce the same* or at the instance of the commission, nevertheless may be heard and preserved in the record, together with any cross-examination with respect to the evidence and any rebuttal of the evidence *unless it is wholly irrelevant. . . .*" (emphasis added).

Section 393.190.1 requires that regulated utilities must obtain the Commission's approval for transactions such as those at issue in this case. The standard the Commission must apply in determining whether a proposed merger transaction should be approved

under Section 393.190.1 is whether the proposed transaction is detrimental to the public. *State ex rel. AG Processing, Inc. v. Public Service Commission*, 120 S.W.3d 732, 735 (Mo.banc 2003). The Commission may not prescribe a company's business practices or require a company to adopt any particular practice or policy. *State ex rel. Harline v. Public Service Commission*, 343 S.W.2d 177, 181-82 (Mo. Ct. App. K.C. 1960).

The evidence at issue before the Commission and now before this Court is live testimony related to the corporate codes of conduct and policies on gifts and gratuities of the companies involved in the proposed transactions. At no time did the Industrials' counsel seek to introduce either the live testimony or the depositions of those same witnesses as evidence offered by the Industrials, which is required by both Section 536.070(7) and 4 CSR 240-2.130(3) as a condition to requesting the opportunity to make a proffer. As the Industrials were not the proponents of the evidence, neither the applicable statute nor the applicable Commission rule allows the Industrials to make an offer of proof.

However, even assuming for the sake of argument that the Industrials had been able to make an offer of proof and the Commission had wrongfully refused to take the offer, the Industrials' constitutional right to judicial review would not be violated because the Commission's exclusive judicial review statute provides that the circuit court may reverse "by reason of the commission failing to receive testimony properly proffered." If an order is reversed for this reason, "the court shall remand to the commission, with instructions to receive the testimony so proffered and rejected, and enter a new order

based on the evidence theretofore taken, and such as it is directed to receive.” Section 386.510 contains adequate protection of the constitutional right to judicial review.

The Commission’s decision not to accept an offer of proof about gifts and gratuities and corporate codes of conduct was lawful under Section 536.070(7) and 4 CSR 240-2.130(3). The Commission’s decision was reasonable because the Commission determined gifts and gratuities and corporate codes of conduct were not relevant to the issue before it, which was whether or not the proposed transactions were detrimental to the public. The excluded evidence is not relevant to this inquiry because the Commission does not have the ability to prescribe any particular business practice of policy as a condition to its approval of the merger because the Commission may not dictate the day-to-day business practices of the companies it regulates.³

The Court of Appeals properly recognized both the scope of the question before the Commission and the Commission’s ability to control the evidence it received both by statute and by Commission regulation. The Missouri Constitution does not require the Commission to receive *all* evidence that is offered. The evidence offered must be

³ The Commission’s ability to disapprove asset disposition is narrow. “The Commission may not withhold its approval of the disposition of assets unless it can be shown that such disposition is detrimental to the public interest.” *State ex rel. Fee Fee Trunk Sewer, Inc. v. Litz*, 596 S.W.2d 466, 468 (Mo. Ct. App. E.D. 1980) (citing *State ex rel. City of St. Louis v. Public Service Commission of Missouri*, 335 Mo. 448, 73 S.W.2d 393, 400 (Mo. banc 1934)).

relevant to the inquiry before the Commission. The Commission's decision to exclude certain evidence in this case was both lawful and reasonable and must be affirmed on this point.

III

The Report and Order must be affirmed because Section 536.070 RSMo (2000) is applicable to the Commission in that Chapter 386 does not have a similar evidentiary provision and Section 386.410, RSMo allows the Commission to adopt procedural rules and the procedural rule adopted by the Commission is drawn directly from the Missouri Administrative Procedures Act, which serves to fill in procedural gaps in Chapter 386 procedures. (Responsive to Point II of the Industrials' Points Relied On).

Section 386.410, RSMo (2000) provides “[a]ll hearings before the commission or a commissioner shall be governed by rules to be adopted and prescribed by the commission. And in all investigations, inquiries or hearings the commission or commissioner shall not be bound by the technical rules of evidence.” Under this statutory authority, the Commission has adopted 4 CSR 240-2.130. 4 CSR 240-2.130(1) provides: “[i]n any hearing, these rules supplement Section 536.070, RSMo.”

Section 536.070(7) states as follows:

(7) Evidence to which an objection is sustained shall, *at the request of the party seeking to introduce the same*, or at the instance of the agency, nevertheless be heard and preserved in the record, together with any

cross-examination with respect thereto and any rebuttal thereof, *unless it is wholly irrelevant*, repetitious, privileged, or unduly long. (emphasis added).

In accordance with its statutory authority to adopt procedural rules, the Commission has adopted a procedural rule that tracks the provisions of Section 536.070(7). 4 CSR 240-2.130 provides:

(3) The presiding officer shall rule on the admissibility of all evidence. Evidence as to which an objection is sustained, *at the request of the party seeking to introduce the same* or at the instance of the commission, nevertheless may be heard and preserved in the record, together with any cross-examination with respect to the evidence and any rebuttal of the evidence, *unless it is wholly irrelevant*. . . . (emphasis added).

The Missouri Administrative Procedures Act serves to fill in gaps in Chapter 386 procedures. *A&G Commercial Trucking*, 168 S.W.3d at 683. Because Chapter 386 does not contain a specific provision about preservation of evidence or offers of proof, it was reasonable for the Commission to rely on Section 536.070 when adopting its rule about the same subject matter. The Commission's intention to follow the procedures of Section 536.070 is made clear by 4 CSR 240-2.130(1). The Commission is free to adopt this procedural approach under Section 386.410.

The Court of Appeals properly determined that Section 386.510 does not require the Commission to receive all evidence. Rather, Section 386.510 allows the reviewing

court, in case the Commission's order is reversed, to direct the Commission to receive "properly proffered" evidence that had been excluded. (Commission's Appendix, p. A29). The Commission is not required by Section 386.510 or any other statute to receive an offer of proof that is "wholly irrelevant." (Commission's Appendix, p. A29). There is no conflict between Sections 386.510 and 536.070. (Commission's Appendix, p. A30). The Commission's reliance on Section 536.070 to refuse wholly irrelevant evidence was lawful.

At oral argument of the Joint Applicants' motion to limit the scope of the proceedings, counsel for the Industrials argued Staff was entitled to make an offer of proof under Chapter 536. (Commission's Appendix, p. A325). The Industrials cannot make this representation to the presiding officer at the hearing and now argue to this Court that Chapter 536.070(7) does not apply to Commission proceedings. Also, the Industrials were not the proponents of the evidence, and the evidence the Industrials claim was wrongfully excluded was not "properly proffered" by the Industrials or by any other party.

Because the Commission's rule regarding the preservation of evidence or offers of proof is lawful under Section 386.410 and because it was reasonable for the Commission to follow Section 536.070(7) in drafting its rule on the same subject matter, the Report and Order must be affirmed on this point.

IV

The Report and Order must be affirmed because the proper standard to apply in determining whether the proposed transactions should be

approved under Section 393.190, RSMo (2000) is whether the proposed transactions were detrimental to the public in that the Commission properly limited its inquiry to this standard and did not consider or accept an offer of proof based on matters outside the Commission's authority. (Responsive to Point III of the Industrials' Points Relied On).

Section 393.190, RSMo (2000) requires regulated entities to obtain the Commission's approval prior to any disposition, merger or acquisition of its assets that are used in the performance of the utility's duties to the public. The Commission's standard of review in merger or acquisition of assets cases subject to the regulatory approval of the Commission is whether or not the proposed disposition, merger or acquisition would be detrimental to the public. *State ex rel. AG Processing, Inc. v. Public Service Commission*, 120 S.W.3d 732, 735 (Mo.banc 2003). A reviewing court will not substitute its judgment for that of the Commission on issues within the realm of the Commission's expertise. *Missouri Gas Energy*, 186 S.W.3d at 382. The Commission may not prescribe the day-to-day management or business practices of entities within its jurisdiction. *State ex rel. Harline v. Public Service Commission*, 343 S.W.2d 177, 181-82 (Mo. Ct. App. K.C. 1960).

Here, the Commission accepted and weighed all the relevant evidence offered with regard to whether the proposed transactions would be detrimental to the public. The substantial record evidence shows that the transactions approved by the Commission are not detrimental to the public. The Commission's findings on this issue are factual matters

within the Commission's expertise. A presumption of validity attaches to the Commission's order. Evidence about the gifts and gratuities policies and corporate codes of conduct of the companies involved in the transactions were not relevant to the applicable standard because those policies are beyond the authority of the Commission to regulate and could not have affected the outcome of the Commission's decision on whether the proposed transactions were detrimental to the public.

The Court of Appeals noted that the Commission was aware of the nature of the evidence that was being excluded based on arguments and the companies' motion to limit the scope of the hearings. (Commission's Appendix, p. A30). The Court of Appeals also noted the extensive nature of the evidence the Commission accepted and considered in making its determination that the proposed merger was not detrimental to the public:

The presiding officer did permit some evidence about the Iatan construction projects on issues that he found to be relevant. The Commission heard two days of testimony on matters such as the creditworthiness of Great Plains and KCPL, management at the Iatan construction projects, procurement issues, and merger savings estimates. The Commission also reopened the record and took additional evidence following a construction accident at the Iatan construction site.

(Commission's Appendix, p. A30).

The Court of Appeals recognized that the Commission has the ability to determine the relevancy of the proposed evidence based on the Commission's own expertise and

understanding of the question that was before it, including the inability of the Commission to order the companies to adopt one policy over another:

The Commission's refusal to make the merger decision a referendum on the ethical practices of these entities may not mean that the Commission is indifferent to the need for public utilities to have in place appropriate ethical restrictions. The Commission stated that it wanted to avoid sidetracking the hearing away from the issues that were, in the minds of the Commission members, relevant to the merger determination. (footnote omitted).

(Commission's Appendix, p. A31).

The Court of Appeals identified this issue as one which rests in the sound discretion of the Commission:

"Missouri courts have long recognized that the Public Service Commission Law delegates a large area of discretion to the Commission and many of its decisions necessarily rest largely in the exercise of sound judgment." *Friendship Vil. of S. Cnty. V. Pub. Serv. Comm'n of Mo.*, 907 S.W.2d 339, 345 (Mo.App. 1995). Where the Commission's decision rests on the exercise of regulatory discretion, particularly within its expertise, we will not substitute our judgment for the Commission's, nor will we reweigh the evidence. *Pub. Counsel*, 289 S.W.3d at 247, 254. It was a matter for the Commission's discretion whether the proposed evidence

about gifts and gratuities policies and corporate codes of conduct was relevant to the ‘detrimental to the public’ analysis.

(Commission’s Appendix, p. A31)

Because the Commission is authorized by Section 393.190 to approve or disapprove a merger or acquisition of assets, the Report and Order is lawful. The Report and Order is reasonable because the Commission’s determination that the merger was not detrimental to the public is supported by competent and substantial evidence upon the whole record. The Report and Order 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 5,387 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 counsel for all parties as shown on the service list this 31st day of January, 2011.

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