

**MISSOURI COURT OF APPEALS  
WESTERN DISTRICT**

**STATE OF MISSOURI EX REL.  
PRAXAIR, INC. AND EXPLORER  
PIPELINE COMPANY AND OFFICE  
OF THE PUBLIC COUNSEL**

**APPELLANTS,**

**v.**

**PUBLIC SERVICE COMMISSION OF  
THE STATE OF MISSOURI AND  
EMPIRE DISTRICT ELECTRIC COMPANY**

**RESPONDENTS.**

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DOCKET NUMBER WD71988 Consolidated with WD71989  
DATE: October 26, 2010

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Appeal From:

Cole County Circuit Court  
The Honorable Jon E. Beetem, Judge

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Appellate Judges:

Division Three: Victor C. Howard, Presiding Judge, Thomas H. Newton and Gary D. Witt,  
Judges

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Attorneys:

Lewis R. Mills, Jr., Jefferson City, MO for appellant Office of the Public Counsel; Stuart W. Conrad and David L. Woodsmall, Jefferson City, MO for appellants Praxair, Inc. and Explorer Pipeline Company.

Jennifer L. Heintz, Steven C. Reed and Eric Dearthmont, Jefferson City, MO for respondent Missouri Public Service Commission; Diana C. Carter, James C. Swearngen and L. Russell Mitten, Jefferson City, MO for respondent Empire District Electric Company.

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**MISSOURI APPELLATE COURT OPINION SUMMARY**

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No. WD71988 Consolidated with WD71989

Cole County

Before Division Three Judges: Victor C. Howard, Presiding Judge, Thomas H. Newton and Gary D. Witt, Judges

The Office of the Public Counsel (“OPC”), Praxair, Inc., and Explorer Pipeline Company (“Industrials”) appeal the order of the Public Service Commission (“Commission”), which granted the Empire District Electric Company (“Empire”) its requested general rate increase for its retail electric service.

On February 1, 2006, Empire filed proposed tariff sheets designed to implement a general rate increase for its retail electric service (Case No. ER-2006-0315). The new proposed rates were designed to produce an additional \$29,513,713 in gross annual electric revenues, which was a 9.63% increase over existing revenues. Subsequently, the Commission held the main evidentiary hearing in this matter in September of 2006, and a “true-up” hearing in November 2006. During these hearings, the Commission heard the testimony of forty-four witnesses, and over one hundred exhibits were admitted into evidence.

On December 21, 2006, the Commission issued its Report and Order, which denied Empire’s requested tariffs but directed Empire to “file proposed electric service tariff sheets in compliance with this Report and Order.” Shortly thereafter, Empire filed revised tariffs sheets with a request for expedited treatment so that the tariffs would go into effect on January 1, 2007. On December 29, 2006, the Commission issued its Order Granting Expedited Treatment and Approving Tariffs. On January 1, 2007, Empire began providing service and charging customers pursuant to the tariffs authorized by the Commission.

On December 15, 2008, OPC filed its Petition for Writ of Review in the Cole County Circuit Court, and on December 19, 2008, the Industrials also filed their Petition for Writ of Review in the same court. These matters were consolidated, and on December 28, 2009, the

circuit court issued its Judgment that found “that the Report and Order of [the Commission] is both lawful and reasonable” and “affirmed [the Order] in all aspects.”

## **AFFIRMED.**

### **Division Three holds:**

In Point One, Industrials argue that the Commission erred in quashing subpoenas for two witnesses because Industrials have a statutory right to subpoena witnesses under section 536.070(2). It is not disputed that Industrials had the full and fair opportunity to cross-examine these witnesses at the prior evidentiary hearing in this case. Industrials fail to cite any persuasive authority to support the proposition that they were denied a fair hearing because the Commission prohibited them from presenting this testimony at the "true-up" hearing. Industrials rely heavily on their assumption they have an unfettered and unlimited “right” to subpoena witnesses, which they argue “is guaranteed under Section 536.070.” We agree that this statute confers the general right to call and cross-examine witnesses at a contested hearing, but this right is not without boundaries or limitations. We cannot say that the Commission erred in concluding that “no purpose will be served by requiring Mr. Tarter or Gipson to attend the [true-up] proceedings,” and therefore, we conclude that Industrials have failed to meet their burden in demonstrating that the Commission’s order, which is presumed to be valid, was not based on lawful procedure or a fair trial.

In Point Two, both Industrials and OPC argue that the Commission erred in authorizing a return on equity of 10.9% because its decision was arbitrary and capricious and also because the decision was not supported by substantial evidence. Appellants challenge the specific methodology used by the Commission to reach its ultimate conclusion. Missouri courts are clear that the Commission is not bound to any set methodology in ensuring a just and reasonable return in setting rates. The Appellants also argue that because the Commission failed to use the same methodology in this case as it has in *other* analogous cases that have previously come before the Commission, this somehow illustrates that the instant order is arbitrary and capricious. However, the PSC is not bound by *stare decisis* based on prior administrative decisions, so long as its current decision is not otherwise unreasonable or unlawful. Because these arguments, grounded on the theory of *stare decisis*, are not a viable basis for relief for appealing the Commission’s order, we reject them.

In Point Three, Industrials argue that “the Commission erred in its decision to adopt Empire’s method for calculating fuel and purchased power expense because such a decision is not supported by adequate findings of fact in that the Commission’s rationale is entirely conclusory in nature.” The Commission concluded that “[h]aving considered the prices and methodologies of the Industrials, OPC, Staff and Empire in developing their positions, the Commission concludes that Empire’s is reasonable and most likely to accurately predict its annual fuel costs.” Industrials contend that the Commission erred because its decision rested solely “on the conclusory finding that ‘Empire has a greater familiarity with the intricacies of its system and facilities.’” While this was *one* of the Commission’s findings that led to its ultimate conclusion, Industrials entirely disregard the Commission's other critical findings. Specifically, Industrials completely disregard the various credibility findings of the Commission as it

pertained to the specific evidence adduced as to the appropriate level of fuel and purchased power, which were obviously critical to the Commission's ultimate conclusion. Because the Commission was free to weigh the credibility of the evidence, Industrials have failed to demonstrate that the Commission somehow erred.

In Point Four, Industrials and OPC argue that the Commission erred in terminating Empire's Interim Energy Charge ("IEC"). These arguments on appeal simply ignore the very *specific* finding by the Commission that the IEC "does not allow sufficient recovery of Empire's prudently incurred fuel and purchased power costs by \$26.8 million *annually*." Pursuant to our standard of review, it is incumbent upon OPC to demonstrate on appeal that there was contrary evidence before the Commission that this type of loss was somehow sustainable for a publicly traded corporation. OPC points to no such evidence on appeal but merely makes arguments that are not supported by any authority. We do not believe that the Commission was constrained to wait until Empire was on the brink of literal financial collapse before exercising its authority to ensure the welfare of the public by protecting the viability of the utility. Ultimately, because OPC concedes that the Commission has a duty to ensure the viability of public utilities to *protect the public*, we must reject its argument on appeal that raising rates is inherently contrary to the safety and welfare of the public.

In Point Five, OPC argues that the "Commission erred in delaying ruling upon Public Counsel's application for rehearing because the decision constitutes an abuse of discretion in that the Commission took an unreasonably long time to rule." We disagree. Simply put, OPC fails to cite any persuasive authority to support its argument that the Commission has some sort of strict, time based deadline that the Commission is required by law to meet in issuing its orders in this regard.

The order of the Commission is hereby affirmed.

**Opinion by: Gary D. Witt, Judge**

October 26, 2010

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