

Summary of SC91322, *State ex rel. Praxair, Inc., Ag Processing, Inc., a cooperative, and Sedalia Industrial Energy Users' Association, Office of Public Counsel v. Missouri Public Service Commission, Great Plains Energy, KCP&L, KCP&L Greater Missouri Operations Co.*

Proceeding originating in the circuit court of Cole County, Judge Jon E. Beetem
Argued and submitted March 23, 2011; opinion issued July 19, 2011

Attorneys: Praxair, AG Processing and Sedalia Industrial Energy Users' Association were represented by David L. Woodsmall and Stuart W. Conrad of Finnegan, Conrad & Peterson LC in Jefferson City, (573) 635-2700; the public counsel's office was represented by Public Counsel Lewis R. Mills Jr. of Jefferson City, (573) 751-1304; the public service commission was represented by Jennifer Heintz and Stephen C. Reed of the commission in Jefferson City, (573) 751-8701; Great Plains Energy was represented by Karl Zobrist and Daniel Morris of SNR Denton US LLP in Kansas City, (816) 460-2400; and KCP&L and KCP&L operations were represented by Karl Zobrist and Daniel Morris of SNR Denton US LLP in Kansas City, (816) 460-2400, and Roger W. Steiner of the Kansas City Power & Light Company in Kansas City, (816) 556-2314.

This summary is not part of the opinion of the Court. It has been prepared by the communications counsel for the convenience of the reader. It neither has been reviewed nor approved by the Supreme Court and should not be quoted or cited.

Overview: The public counsel's office and a group of energy companies seek review of the public service commission's decision permitting one energy company to merge with a competing energy company and its subsidiary. In a unanimous decision written by Judge Laura Denvir Stith, the Supreme Court of Missouri affirms the commission's decision. Although the commission should have permitted one party to make a written offer of proof about the gifts and gratuities policy of a company seeking the merger, this Court permitted the offer of proof to be included in a supplemental record on appeal. The commission's failure to consider this offer of proof did not substantially impact its weighing of the evidence regarding the merger. Further, because the rules of judicial conduct do not apply to public service commissioners, any appearance of impropriety created by certain commissioners attending meetings with energy company representatives before the merger request was filed does not warrant reversal. While due process requires that the commissioners not be actually biased as a result of these meetings, there was no evidence or suggestion here of actual bias.

Facts: In late January 2007, a series of four or five meetings were held between members of the commission and executives of Great Plains Energy and its subsidiary, KCP&L. Although only one or two commissioners attended most of those meetings, all of the then-serving commissioners were present for at least one meeting. Those involved believed that such meetings were not improper because, until a proceeding was filed with the PSC, there was no ongoing case and, therefore, no prohibition against general discussions about future filings. Great Plains, KCP&L and Aquila, another energy company, subsequently filed a joint application with the commission requesting authority for a series of transactions by which Aquila would merge with Great Plains. A group of competing energy companies, including Praxair, intervened. The public counsel's office moved to dismiss on the ground that three of the remaining four commissioners

then hearing the case should have recused themselves because of the alleged impropriety of the pre-filing meetings. The commission overruled the motion. Thereafter, Great Plains moved to preclude any evidence as to its gifts and gratuities policies. The commission granted the motion, without allowing Praxair to submit an offer of proof (establishing what its evidence would have been and allowing the other side to respond), finding that the evidence was “wholly irrelevant” to the merger. The commission, with only three commissioners participating, issued its report and order approving the merger by a 2-1 vote. Of these, two had been present at a pre-filing meeting; one voted for the merger, while the other voted against it. Praxair and the public counsel seek this Court’s review of the commission’s decision.

AFFIRMED.

Court en banc holds: (1) Although it was error for the commission not to permit Praxair to make a written offer of proof, this error did not substantially impact the commission’s weighing of the evidence regarding the Aquila merger. While the relevant statute gives the regulatory law judge the discretion to preclude a testimonial offer of proof when, as here, he finds the offered evidence to be “wholly irrelevant,” he erred in failing to allow a written offer of proof to be made as to Great Plains’ gift policy. The purpose of an offer of proof is two-fold – both to allow the judge to decide whether to admit the evidence and to allow review of that judge’s decision on appeal. If the evidence is not made a part of the record, then it cannot be reviewed by the courts, thereby violating separation of powers principles. To rectify the administrative judge’s error, this Court directed the parties to file directly in the Court a written offer of proof and any response thereto. Upon review, while the evidence as to Great Plains’ gift policy should have been admitted, its exclusion was not prejudicial as the gift policy could not have substantially impacted the weight of the evidence evaluated to approve the merger.

(2) A failure to recuse after *ex parte* meetings (where not all parties to a case are present) concerning specific cases that are to be filed before the commission creates an appearance of impropriety that is a basis for recusal under the code of judicial conduct. But although the commissioners act in a quasi-judicial capacity, they are not judges but rather are members of the executive branch of government. As such, the code of judicial conduct does not govern their actions. Due process considerations nonetheless require an impartial arbiter. No suggestion was made, however, that the *ex parte* meetings resulted in actual bias, nor was any evidence presented that could support a finding of actual bias. Moreover, the record is clear that those involved believed the contacts were not inappropriate and did not require recusal because no case had been filed at the time of the contacts. The public counsel has not overcome the presumption that the commission acted impartially.