

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

PRAXAIR, INC.; OFFICE OF PUBLIC COUNSEL

APPELLANTS,

v.

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

RESPONDENTS.

DOCKET NUMBER WD72119 cons/WD72120
**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

DATE: August 2, 2011

Appeal From:

Cole County Circuit Court
The Honorable Richard G. Callahan, Judge

Appellate Judges:

Division One: Thomas H. Newton, P.J., James M. Smart, Jr., and Joseph M. Ellis, JJ.

Attorneys:

David Lee Woodsmall, Jefferson City, MO and Lewis Roinson Mills, Jr., Jefferson City, MO,
for **appellants**.

Steven Carroll Reed and Jennifer Leigh Heintz, Jefferson City, MO; Diana C. Carter, Jefferson
City, MO, for **respondents**.

MISSOURI APPELLATE COURT OPINION SUMMARY

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No. WD72119 cons/WD72120

Cole County

Before Division One Judges: Thomas H. Newton, P.J., James M. Smart, Jr., and Joseph M. Ellis, JJ.

In October 2007, Empire District Electric Company (Electric Company) filed tariff sheets with the Public Service Commission seeking a general rate increase of \$34.7 million per year and the implementation of a "fuel adjustment clause," pursuant to section 386.266.1, RSMo. The Appellants in this case, the Office of Public Counsel (OPC), and Praxair, Inc. and Explorer Pipeline Company (collectively, "the Industrials") were allowed to intervene. In an earlier rate case involving the same parties, the Commission had allowed Electric Company the benefit of an "interim energy charge" ("IEC"), as to which the parties had stipulated. The stipulation provided that in return for the allowance of an IEC, Electric Company would forego any right to request a fuel adjustment clause until the IEC terminated three years later. While the rate determination was pending, the IEC stipulation expired by its own terms (on March 27, 2008). Following an evidentiary hearing in May 2008, the Commission issued its Report and Order, granting a rate increase with a fuel adjustment clause.

The Appellants challenge the Commission's approval of the fuel adjustment clause. All Appellants say the Commission was precluded from allowing Electric Company the benefit of a fuel adjustment clause because of the binding stipulation that prevented Electric Company from requesting a fuel adjustment clause during the time that the IEC was in effect. The Industrials contend that section 386.266.8 precludes the Commission from prematurely terminating the previously allowed IEC. The OPC contends that the Commission erred in allowing the fuel adjustment clause to include a "95% pass-through" because such authorization was not supported by adequate findings of fact on the whole record. They say that a lower pass-through rate was supported in the evidence, *and* that the higher level was not.

AFFIRMED.

Division One holds: The Commission did not err in approving the fuel adjustment clause. The stipulation between the parties provided for the IEC to expire in three years. The IEC expired several months before the July 30, 2008 Report and Order. Thus, the Commission did not

prematurely terminate the IEC. The stipulation also provided that the IEC would remain in effect as specified unless "earlier terminated by order of the Commission." Because the Commission had the authority to terminate the IEC prior to its expiration, and the fuel adjustment clause was not adopted until after the IEC expired, the Commission's actions could not amount to a premature termination of the IEC. The Commission did not abuse its discretion in allowing Electric Company a 95% pass-through incentive mechanism. The record demonstrates that the decision was within the Commission's statutory authority, was reasonable because it was supported by competent and substantial evidence, and was not arbitrary, capricious, or an abuse of discretion. The judgment is affirmed.

Opinion by: James M. Smart, Jr., Judge

August 2, 2011

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