IN THE SUPREME COURT
OF THE STATE OF MISSOURI

STATE ex rel. PRAXAIR, INC., *et al*.	)	
	)	
and	)	
	)	
OFFICE OF THE PUBLIC COUNSEL,	)	
	)	
Appellants,	)	Case No. SC91322
	)	
v.	)	
	)	
PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI, *et al*.,	)	
	)	
Respondents.	)	

INITIAL SUBSTITUTE BRIEF OF APPELLANT OFFICE OF THE PUBLIC COUNSEL

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JURISDICTIONAL STATEMENT

This is a writ of review action brought under Section 386.510 *et seq.* RSMo. 2000,[1] by the Office of the Public Counsel asking the Court to hold that the Public Service Commission's Report and Order (included in the Appendix to this brief) that approved the acquisition of Aquila, Inc.[2] by Great Plains Energy, Inc. was unlawful and unreasonable in certain respects. The Office of the Public Counsel, Appellant here and Relator in the circuit court proceedings, is a state agency that represents utility ratepayers. Public Counsel challenges the PSC decision to approve the acquisition as unlawful and unreasonable and an abuse of discretion.

The Cole County Circuit Court, in Case No. 08AC-CC00672 *et al.* affirmed the Commission's Report and Order in all respects and was appealed to the Western District Court of Appeals pursuant to Section 386.540, RSMo 2000. After the Western District Court issued its opinion affirming the Commission's Report and Order, Public Counsel moved the Western District to either rehear the

[1] Unless otherwise noted, all statutory references are to the Revised Statutes of Missouri, 2000.

[2] Following the acquisition, Aquila changed its name to "KCP&L Greater Missouri Operations Company." Because the company used the Aquila name at all times relevant to the issues in this brief, the Aquila name will be used in this brief.

matter or transfer it to this Court, but the Western District Court denied both motions. On November 17, 2010, Public Counsel sought transfer pursuant to Rule 83.04 of the Missouri Supreme Court Rules, and on December 21, 2010, this Court granted transfer.

STANDARD OF REVIEW

A decision rendered by the Public Service Commission is presumed to be valid, and the burden of attacking the validity of the decision is on the party challenging the Commission's decision. State ex rel. Midwest Gas Users Association v. Public Service Commission, 976 S.W.2d 470 (Mo. App. W.D. 1998). The reviewing court must give due deference to the agency's decision, and may reverse a decision only where the Court finds the Commission's decision to be unlawful or unreasonable. Id., at p. 476. The Commission's order was lawful if it is authorized by statute. In determining this prong of the review, the Court may exercise independent judgment and "correct erroneous interpretations of the law." Id. (Citing Burlington N. R.R. v. Director of Revenue, 785 S.W. 2d 272, 273 (Mo. banc 1990).)

The second step that the Court must take in reviewing a decision of the Commission is determining whether the Commission's decision was reasonable. This is accomplished by determining, whether, in reviewing the entire record, the Commission's decision was "arbitrary, capricious, or unreasonable, or whether the PSC abused its discretion." Id., (Citing State ex rel. Chicago, Rock Island & Pacific R.R. Co. v. Public Serv. Comm'n, 312 S.W.2d 791, 794 (Mo. banc 1958).) It is up to the challenging party to demonstrate, by clear and convincing evidence that the Commission's Order is unlawful or unreasonable. State ex rel. GTE North Inc. v. Public Service Commission, 835 S.W.2d 356, 361 (Mo. App. W.D. 1992).

In reviewing the facts upon which the decision is based, the Court may not substitute its judgment for that of the Commission. Rather, the Court must assume that the Commission was correct in determining the facts, and until the contrary is proved, the reviewing court must sustain the order of the Commission. Id.

"The Commission's principle purpose is to serve and protect ratepayers." State ex. rel. Capital City Water Co. v. PSC, 850 S.W.2d 903, 911 (Mo. App. W.D. 1993). (Citing State ex rel. Crown Coach Co. v. Public Service Commission, 179 S.W.2d 123 (1944).) This Court must review the Commission's decision in light of this fundamental principle.

The Commission's decision must be based on competent and substantial evidence:

> The provision for circuit court review of orders of the Public Service Commission is found in section 386.510 (all references are to RSMo 1959 unless otherwise noted) which provides that such review shall be for the "purpose of having the reasonableness or lawfulness" of the administrative action determined. This statutory provision is broadened by the application of the provisions of the V.A.M.S., Missouri Constitution, Article 5, Section 22, setting forth the scope of review of administrative action pursuant to a hearing required by law. This constitutional provision provides for review both as to whether such action is "authorized by law" **and whether the action is "supported by competent and substantial evidence upon the**

whole record." Thus, the duty incumbent upon the reviewing circuit court is dual in nature, at least to the extent that a determination of competent and substantial evidence is a determination of a separate question as contrasted with the phrase "authorized by law." State ex rel Centropolis Transfer Co. v. Public Service Com., 472 S.W.2d 24, 25-26 (Mo. Ct. App. 1971) [emphasis added; citations omitted].

The reviewing court may not simply defer to the expertise of the Commission:

> The reviewing court is often faced with the question what lack of evidence can be supplied by the expertise of the Commission. No clear line can be drawn from the cases. We go to considerable lengths to give deference to the expertise of the Commission. Furthermore, we acknowledge the restrictive scope of judicial review, which accords to the Commission's orders every presumption of correctness and places a heavy onus upon its challengers to demonstrate its error. **But if judicial review is to have any meaning, it is a minimum requirement that the evidence, along with the explanation thereof by the witnesses and by the Commission itself, make sense to the reviewing court. We may not approve an order on faith in the Commission's expertise.** State ex rel. Lake Lotawana v. Public Service Com., 732

S.W.2d 191, 195 (Mo. Ct. App. 1987) [emphasis added; citations omitted].

In a contested case such as the one under review, the Commission's order must contain sufficiently definite and detailed findings of fact that the reviewing court can follow the Commission's logic and reasoning:

> In its order and decision, the Commission is required to include findings of fact that are not "completely conclusory." The purpose of that requirement is to provide for meaningful judicial review. Those findings must articulate the "basic facts from which [the Commission] reached its ultimate conclusion" regarding disposition of the case. While detailed factual summaries are not needed there, nevertheless, must be sufficient findings of fact to determine how the controlling issues were decided by the Commission. State ex rel. Coffman v. PSC, 121 S.W.3d 534, 542 (Mo. Ct. App. 2003) [citations and footnote omitted].

STATEMENT OF FACTS

In late January 2007, a series of four or five meetings were held between executives of Great Plains Energy and the Kansas City Power and Light Company (KCPL) and the members of the Public Service Commission. (Legal File (LF) 1822-1824) Two of the three Commissioners who ultimately decided the case participated in these meetings. (Id.) No notice was given to the public or to the

Public Counsel about these meetings. (Id.) The meetings were designed for the utility executives to brief the Commissioners on the contemplated transaction and issues that would be raised by the upcoming joint application, and to allow those executives to gauge the Commissioners' reactions to the briefing. (Id.) The executives decided the reactions were favorable, and several weeks later, on April 4, 2007, Great Plains Energy, KCPL and Aquila, Inc. filed a Joint Application with the Commission requesting authority for a series of transactions by which Great Plains would acquire the stock of Aquila and operate Aquila as a separate wholly-owned subsidiary. (LF 3610) If approval were granted, Aquila and KCPL would both operate as subsidiaries of Great Plains Energy. (LF 3611)

Evidentiary hearings at the Commission began on December 3, 2007, but were halted at the request of the Joint Applicants on December 6. (LF 3612) They resumed on April 21 and, in non-consecutive sessions, concluded on June 11, 2008. (LF 3612-3613) During those hearings, the Joint Applicants filed their Motion to Limit the Scope of the Proceedings. (LF 3616) Specifically, the Joint Applicants sought to preclude any evidence as to their gift and gratuity policy, the regulatory amortization mechanism, the cost reforecasts of the Iatan 1 and 2 generation projects and the effect of these items on the Commission's application of the "not detrimental to the public interest" standard. (LF 3616-1318)

On April 24, 2008, the presiding officer issued his ruling on the Joint Applicants' Motion to Limit the Scope of the Proceedings. (LF 3620) Relevant to this review, the presiding officer ruled that any evidence as to the Joint

Applicants' gift and gratuity policy would be excluded. (Id.) Furthermore, the presiding officer precluded the parties from preserving such evidence in the context of an offer of proof based upon his notion that the evidence was "wholly irrelevant." (LF 3626)

On July 1, 2008, the Commission, with only 3 commissioners participating, issued its Report and Order by a 2-1 vote. (LF 3887) The initial specified effective date for the July 1, 2008 Report and Order was July 11, 2008, but on July 7, 2008, Appellants jointly filed a motion with the Public Service Commission that the effective date of the July 1, 2008 Report and Order be extended. (LF 3991)

On July 8, 2008 the Joint Applicants filed a response suggesting to the Commission that an extension of effective date to July 14, would be acceptable and, on July 9, 2008 the Commission extended the effective date to July 14, 2008. (LF 3912)

On July 11, 2008 the Office of the Public Counsel timely filed an Application for Rehearing with the Public Service Commission seeking rehearing of the July 1, 2008 Report and Order. (LF 3916-3942)

On July 12, 2008 Appellants Praxair, Inc., AG Processing, Inc. and the Sedalia Industrial Energy Users' Association timely filed their Application for Rehearing with the Commission, also seeking rehearing of the July 1, 2008 Report and Order and simultaneously filed a Motion for Stay with the Public Service Commission together with a request for expedited consideration seeking a stay of the July 1, 2008 Report and Order. (LF 3943-3970)

On July 14, 2008, the July 1, 2008 Report and Order became effective. (LF 3912) It is reported that on that same date, and with the Applications for Rehearing and Motion for Stay pending, the Joint Applicants closed their transaction. (LF 3977) Thereafter, on July 18, 2008, the Joint Applicants filed a Notice of Closing with the Public Service Commission. (Id.)

On August 5, 2008 the Commission denied all pending Applications for Rehearing in an order effective August 6, 2008. (LF 4021-4048) In the same order the Commission denied the Motion for Stay and Request for Expedited Treatment. (Id.)

POINTS AND AUTHORITIES RELIED ON

I.

THE PUBLIC SERVICE COMMISSION ERRED IN NOT GRANTING PUBLIC COUNSEL'S MOTION TO DISMISS BECAUSE A MAJORITY OF THE SITTING COMMISSIONERS SHOULD HAVE DISQUALIFIED THEMSELVES IN THAT THEIR PRE-FILING MEETINGS HAD CREATED A STRONG APPEARANCE OF IMPROPRIETY.

Cases

McPherson v. United States Physicians Mutual Risk Retention Group, 99 S.W.3d 462 (Mo App W.D. 2003)

Robin Farms, Inc. v. Bartholome, 989 S.W.2d 238, 248, 246 (Mo. App. 1999)

State v. Garner, 760 S.W.2d 893, 906 (Mo. App. 1988)

Union Electric Co. v. Public Service Com., 591 S.W.2d 134 (Mo. Ct. App. 1979)

Other Authorities

Supreme Court Rule 2, Code of Judicial Conduct, Canon 3A(4)

Supreme Court Rule 2, Code of Judicial Conduct, Canon 3B(7)

Supreme Court Rule 2, Code of Judicial Conduct, Canon 3E(1)

Section 386.210.1 RSMo 2000

ARGUMENT

I.

THE PUBLIC SERVICE COMMISSION ERRED IN NOT GRANTING PUBLIC COUNSEL'S MOTION TO DISMISS BECAUSE A MAJORITY OF THE SITTING COMMISSIONERS SHOULD HAVE DISQUALIFIED THEMSELVES IN THAT THEIR PRE-FILING MEETINGS HAD CREATED A STRONG APPEARANCE OF IMPROPRIETY.

On December 13, 2007, Public Counsel filed a motion to dismiss on the grounds that meetings held between some of the sitting Commissioners and executives with KCPL and Great Plains before the Joint Applicants filed their case created such a strong appearance of impropriety that the Commissioners involved in those meetings were required to recuse themselves. On January 2, 2008, the Commission denied Public Counsel's motion, finding that the Judicial Canons do not apply to Public Service Commissioners.

Commissioners exercise quasi-judicial power and are subject to the same rules of conduct that apply to the judiciary.[3] Supreme Court Rule 2, Code of

[3] "[T]he courts in this state have held officials occupying quasi-judicial positions to the same high standard as apply to judicial officers by insisting that such officials be free of any interest in the matter to be considered by them." Union Electric Co. v. Public Service Com., 591 S.W.2d 134 (Mo. Ct. App. 1979) [the "Slavin case"].

Judicial Conduct, Canon 3B(7)[4] requires a judge to accord to every person legally interested in a proceeding or his lawyer a full right to be heard according to the law and, except as authorized by law, to neither initiate nor consider *ex parte* **or other communications concerning a pending or impending proceeding.**

Canon 3B(7) does contemplate an exception for communications that are specifically authorized by law. But there is no such authorization for the communications at issue here. A casual and careless reading of Section 386.210.1 might leave one with the impression that it authorizes such communications. Section 386.210.1 provides that:

> 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.

A careful reading of the entire phrase set off between commas – "public utility or similar commission of this and other states and the United States of America" – and an analysis of the sentence structure conclusively shows that this phrase must mean "any public utility [commission] or similar commission." The legislature chose a sentence structure that omitted the first "commission," but the reference to

[4] All citations to Canons herein refer to the Code of Judicial Conduct.

"similar commission" only makes sense if the first (omitted) "commission" is understood. The word "similar" necessarily needs an antecedent, and the only plausible antecedent is the omitted "commission." Otherwise the word "similar" would necessarily imply that the legislature found a commission of another state "similar" to a public utility corporation.

Canon 3E(1) states that a judge shall recuse in a proceeding in which his partiality might reasonably be questioned. Furthermore, commentary to 3E(1) makes it clear that a judge must disclose on the record information that the judge believes the parties or their lawyers might consider relevant to the question of disqualification, even if the judge believes there is no real basis for disqualification.

Canon 3B(7) outlines the evidence a judge can lawfully hear. Specifically, the rule provides that a judge must not independently investigate facts in a case and must consider only the evidence presented.

In Moore v. Moore, 134 S.W.3d 110, (Mo App S.D. 2004), a family court Commissioner without notice to the parties directed an independent investigation and report and used this *ex parte* communication made outside the presence of the parties as a basis of his decision regarding child custody. The appeals court emphasized the importance of the appearance of impropriety. Even though the Commissioner thought he was impartial, it is the appearance of impartiality that governs recusal. Litigants are entitled to a trial which is not only fair and impartial, but which also appears fair and impartial. The test for recusal is not

whether the court is actually biased or prejudiced, but rather whether a reasonable person would have a legitimate basis to find an appearance of impropriety and thereby doubt the impartiality of the court.

In McPherson v. United States Physicians Mutual Risk Retention Group, 99 S.W.3d 462 (Mo App W.D. 2003), the Court said "A judge's impartiality might reasonably be questioned if a reasonable person would have a factual basis to doubt the judge's impartiality. Graham v. State, 11 S.W.3d 807, 813 (Mo. App. 1999)." The public's confidence in the judicial system is the paramount interest. Canon 3E(1) does not limit recusal to instances of actual bias, but is much broader. Robin Farms, Inc. v. Bartholome, 989 S.W.2d 238, 248, 246 (Mo. App. 1999). "'No system of justice can function at its best or maintain broad public confidence if a litigant can be compelled to submit [a] case in a court where the litigant sincerely believes the judge is . . . prejudiced.'" State ex rel. Raack v. Kohn, 720 S.W.2d 941, 943 (Mo. banc 1986) quoting State ex rel. McNary v. Jones, 472 S.W.2d 637, 639 (Mo.App. 1971).

Missouri courts have held that the appearance of impartiality is scarcely less important than actual impartiality:

> Acts or conduct which give the appearance of partiality should be avoided with the same degree of zeal as acts or conduct which inexorably bespeak partiality.

> As emphasized in State v. Lovelady, 691 S.W.2d 364, 365[1] (Mo.App. 1985), the law is very jealous of the notion of an impartial arbiter. It is scarcely less important than his actual impartiality that the parties and the public have confidence in the impartiality of the arbiter. Where a judge's freedom from bias or his prejudgment of an issue is called into question, the inquiry is no longer whether he actually is prejudiced; the inquiry is whether an onlooker might on the basis of objective facts reasonably question whether he is so. State v. Garner, 760 S.W.2d 893, 906 (Mo. App. 1988).

The combination of a judge's questions and statements may create an appearance of impropriety. See, Williams v. Reed, 6 S.W.3d 916 (Mo. Ct. App. 1999), at 922-23; McPherson at 490. There may be insufficient evidence of actual bias, but the question is whether the judge's impartiality might reasonably be questioned, not whether the judge was, in fact, biased. Robin Farms, 989 S.W.2d at 247.

In Smith by and through Smith v. Armontrout, 632 F.Supp. 503, 507, n.7 (W.D. Mo. 1986), Federal District Judge Scott Wright held that an *ex parte* conversation between a judge sitting on a case and a witness about the issues in the case was improper:

> [W]hile Gerald Smith's case was pending before the Missouri Supreme Court in January, 1986, one of the judges on that court

> initiated *ex parte* communications with one of the psychiatrists who had examined Smith. Such *ex parte* contact not only violates that court's own canons of ethics, *see* Mo.S.Ct.R. 2, Canon 3A(4) (prohibiting judges from initiating *ex parte* communications concerning pending proceedings), it also strikes at the very heart of the adversarial system. Nothing can undermine the fairness of a judicial proceeding more than when a judge turns his back on the adversary system -- where each side has an equal opportunity to test its opponent's evidence by means of cross-examination – and conducts his own *ex parte* investigation of the facts. *See Reserve Mining Co. v. Lord*, 529 F.2d 181, 184-88 (8th Cir. 1975). Under these extraordinary circumstances, it clearly appears that the state court's conclusion concerning Smith's competency was not the product of a full and fair hearing.

A reasonable person would understandably believe that the secret meetings held in early January before the Joint Applicants filed their case, along with Great Plains' reliance on the reactions of the Commissioners during those meetings, give a strong appearance of impropriety and partiality to the utility. Actual bias or partiality is not the issue, nor is it necessary in determining the appropriateness of recusal. Even an appearance of impropriety commands recusal. Whether or not any of the Commissioners intended anything inappropriate, that is not the

controlling issue on whether they are required to recuse. Under the Canons of Judicial Conduct 4, Commissioners, like judges, must avoid even the appearance of impropriety. The test is whether a reasonable person would view the circumstances as having the appearance of partiality and impropriety. The Commissioners were briefed *ex parte* on what would be the contested issues in this case, for the express purpose of allowing one party to judge their reactions to those issues, and that party decided the reactions were favorable to its positions on those issues. Giving one party reason to believe it will receive favorable treatment on the issues is – by definition – a lack of impartiality. Even if Great Plains was wrong in its interpretation of the Commissioners' reactions, there is still the appearance of impartiality. The Commission erred when it refused to recognize the appearance of impartiality created by the series of pre-filing meetings.

CONCLUSION

The court should reverse the Commission's order because it is unlawful, unreasonable, arbitrary and capricious and an abuse of discretion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the Brief of Appellant Office of the Public Counsel was mailed or hand delivered this 10th day of January 2011 to the attorneys of record.

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CERTIFICATE PURSUANT TO RULE 84.06(c) AND 84.06(g)

I hereby certify that the foregoing Brief of Appellant Office of the Public Counsel of Missouri complies with the limitations contained in Rule 84.06(b) and, according to the word count of the word-processing system used to prepare the Brief (excepting therefrom the cover, certificate of service, this certificate, and the signature block and the appendix), contains 4,003 words. I hereby further certify that the disk containing this Brief and submitted to the Court has been scanned for viruses and that the scan indicated that it is virus free.

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