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.	)	

SUBSTITUTE REPLY BRIEF OF APPELLANT OFFICE OF THE PUBLIC COUNSEL

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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.

Introduction

This brief will address the salient points in the briefs of Respondent Missouri Public Service Commission (PSC) and Respondents Great Plains Energy, Inc., Kansas City Power & Light Company, and KCP&L Greater Missouri Operations Company (collectively, GPE). The main argument of all Respondents is that, because the PSC acts both quasi-judicially and quasi-legislatively, the PSC Commissioners may act (in the period just before the filing of a contested case) in ways that would not be allowed for a judge. As this brief will demonstrate, this argument is untenable.

Response to the PSC's Argument that Only Final Orders are Reviewable

The PSC raises a novel issue at pages 11-14 of its brief,[1] asserting that only final orders of the PSC are reviewable. The PSC misconstrues Sections 386.500, 386.510 and 386.515 RSMo 2000 and associated case law to conclude that actions of the PSC that are not final orders are never reviewable. Under the PSC's construction, if it ordered an attorney bound and gagged at a hearing (to create an extreme example), that action would not be reviewable because it would not be a final order. Under this construction, any procedural missteps cannot be reviewed and the reviewing court is limited to an examination of the final order in isolation as though that order just appeared, newly minted with any prior procedural flaws stricken. A more reasonable construction, consistent with both the statute and the case law, is that non-final orders are not immediately and independently reviewable but are subject to review when the PSC's final decision is reviewed.

The PSC's reliance on Park Hills[2] is misplaced because Park Hills attempted to seek review of the PSC's denial of a motion to dismiss before the case was finally decided. Park Hills filed its motion to dismiss, then sought reconsideration, and then filed a petition for review in circuit court without

[1] Explanation of citations. References to the briefs of GPE or the PSC will be: (GPE at [page number]) or (PSC at [page number]). References to the record before the Commission will be: (Record on Appeal at [page number]). References to the legal file at the Circuit Court will be (L.F. at [page number]).

[2] City of Park Hills v. PSC, 26 S.W.3d 401 (Mo. Ct. App. 2000)

waiting for a final order.[3] Here, Public Counsel filed its motion to dismiss, then a motion for reconsideration, and then raised the same allegations of error in its application for rehearing of the final order. The issue here was properly preserved in accordance with Sections 386.500 and 386.510 RSMo 2000, and the holding in Park Hills is inapposite. So, too, is the holding in Fee Fee Trunk Sewer[4] on which the PSC also relies. In Fee Fee Trunk Sewer, the court found that it was appropriate to review an order denominated "Interim Report and Order."[5] Neither the holding nor the discussion in Fee Fee Trunk Sewer advances the PSC's argument that only the final order itself is reviewable and all other actions escape review.

Response to the Argument that the PSC's Sometime Quasi-Legislative Role Allows the Communications at Issue

Both KCPL and the PSC argue that the PSC acts both quasi-judicially and quasi-legislatively. (PSC at 15, GPE at 22) While this is axiomatic, it begs the question of under what circumstances (if any) the PSC can act both quasi-judicially and quasi-legislatively with respect to the same issue. The PSC acts quasi-legislatively when it conducts investigations and promulgates rules, and it acts quasi-judicially when it adjudicates contested cases. There is no suggestion

[3] *Ibid*., at 402.

[4] State ex rel. Fee Fee Trunk Sewer, Inc. v. Public Service Com., 522 S.W.2d 67 (Mo. Ct. App. 1975)

[5] *Ibid*., at 71.

from either the PSC or KCPL that the PSC could suddenly switch in the middle of a contested case hearing and hear *ex parte* evidence on the issues in a quasi-legislative fashion, and such conduct would certainly be improper. Thus their argument must be that there is not a sufficient nexus – either in content or in time – between the complained-of conduct and the hearing such that an improper overlap is created between the two roles.

GPE states in its brief that "the elements that would be contained in a filing made several months later were communicated" (GPE at 29), conceding that the issues discussed in the meetings were the same as the issues in the contested case. GPE apparently contends that the passage of "several months"[6] is sufficient to wipe away any unfair advantage created by these *ex parte* meetings. Notably, GPE does not provide any citations[7] in support of this idea that a communication

[6] The meetings apparently took place on January 24, 2007 and the application for approval of the acquisition was filed on April 4, 2007. The difference, depending on the units of time chosen, is seventy days, or ten weeks, or two months and eleven days.

[7] GPE does discuss Commission Rule 4 CSR 240-4.020. A rule cannot create authority, but only implement it. "The rules or regulations of a state agency are invalid if they are beyond the scope of authority conferred upon the agency, or if they attempt to expand or modify statutes." State ex rel. Doe Run Co. v. Brown, 918 S.W.2d 303, 306 (Mo. App. 1996). Thus the Commission's regulation cannot

which would clearly be improper at one time, is proper because it was made ten weeks earlier.

In its brief, the PSC does not expressly refute Public Counsel's assertion that the Judicial Canons[8] apply to PSC commissioners acting in a quasi-judicial function.[9] (PSC at 24) GPE does: "[PSC commissioners] are not strictly bound by the Code of Judicial Conduct…" and "The Commission's denial of the motion to dismiss properly recognized that the Judicial Canons do not apply to the Commission." (GPE at 25)

While it is apparently true that no Missouri court has explicitly stated that "Each of the Judicial Canons apply to PSC Commissioners," it appears to be equally true that no Missouri court has explicitly stated that they do not. But there

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be read to allow communications that violate parties' rights to a fair hearing. The Commission has since entirely rescinded the provision on which GPE relies.

[8] Supreme Court Rule 2, Code of Judicial Conduct

[9] The PSC does consistently intimate that it does not believe that they do, with statements like "The arguments on this put forth by the Commission Staff and by GPE, KCPL and Aquila regarding whether the judicial canons apply are persuasive…." (Record on Appeal, 1819) Those parties had argued that the canons do not apply.

is one case[10] – concerning PSC Commissioner Alberta Slavin – that does affirm that at least a portion of the Judicial Canons apply to PSC Commissioners. The Western District Court of Appeals addressed the question of whether a PSC Commissioner who had previously been a party to a case could later decide that case:

> It is clear from King's Lake, Forest Hills Utility Company, and American General Insurance that the same standards and rules apply to quasi-judicial officers as to judicial officers.
>
> …
>
> To a large extent the rights of consumers and regulated companies are determined by the Public Service Commission rather than the courts. To hold that a member of the Commission may not be disqualified for participating in a case in which that member is shown to be interested, biased, prejudiced or a party would be to deprive most of the citizens of this state of one of the most cherished attributes of our system of justice -- to have his cause determined by a fair and impartial official. This right does not depend upon the legislature providing a procedure for the disqualification of a

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

> member of the Commission, rather it is woven into the very fabric of our system of justice.[11]

However, states other than Missouri have clearly applied their own Judicial Canons to quasi-judicial officers. A New York appeals court, on the question of whether a member of a medical malpractice panel could be disqualified for failure to disclose a relationship with an attorney for a party, stated:

> Basic to every judicial and quasi-judicial proceeding is that the integrity of the decision-making body must be above reproach and even the appearance of impropriety should be avoided (Code of Judicial Conduct, canon 2; cf. Matter of Labor Relations Section of Northern N. Y. Bldrs. Exch. v Gordon, 41 AD2d 25; Matter of Cross Props. [Gimbel Bros.], 15 AD2d 913, affd 12 NY2d 806; Casterella v Casterella, 65 AD2d 614). [12]

The Hawaii Supreme Court explained the rationale at length in deciding a case concerning a civil service commissioner:

> "[T]here are certain fundamentals of just procedure which are the same for every type of tribunal and every type of proceeding." R. Pound, Administrative Law 75 (1942). "Concededly, a 'fair trial in a fair tribunal is a basic requirement of due process.' In re Murchison,

[11] *Ibid*., at 139.
[12] De Camp v. Good Samaritan Hospital, 66 A.D.2d 766 (N.Y. App. Div. 2d Dep't 1978).

349 U.S. 133, 136 (1955). This applies to administrative agencies which adjudicate as well as to courts.

…

Our ruling, we noted, was "consistent with our general admonition [to judges] that 'A Judge Should Avoid Impropriety and the Appearance of Impropriety in all his Activities,' Code of Judicial Conduct, Canon 2, and our expectation that [a judge would] 'disqualify himself in a proceeding in which his impartiality might reasonably be questioned[.]' Code of Judicial Conduct, Canon 3 C.(1)." State v. Brown, 70 Haw. at 467 n.3, 776 P.2d at 1188 n.3.

Since the fundamentals of just procedure impose a requirement of impartiality on "administrative agencies which adjudicate as well as [on] courts[,]" Withrow v. Larkin, 421 U.S. at 46, we see no reason why an administrative adjudicator should be allowed to sit with impunity in a case where the circumstances fairly give rise to an appearance of impropriety and reasonably cast suspicion on his impartiality.[13]

Even though GPE and the PSC are unwilling to concede that the Judicial Canons apply, both do agree that the principles of due process and fundamental fairness apply. (PSC at 17; GPE at 28) And that is perhaps a more relevant

[13] Sussel v. Honolulu Civil Serv. Comm'n, 71 Haw. 101, 108-109 (Haw. 1989)

question than whether the Canons literally apply, because if the principles of fairness that they embody apply, this Court must find that the appearance of impropriety required recusal. It is no less improper for utility executives to preview their case with PSC commissioners than it would be for a soon-to-be litigant to preview his case with a circuit court judge. In both instances the opposing side operates at a decided disadvantage. GPE concedes that the meetings were designed to brief the Commissioners on the elements of the soon-to-be-filed case and to allow its executives to gauge the Commissioners' reactions to the briefing.

Communicating the elements of a case with a judge before filing the case clearly violates principles of fairness, and so does a similar meeting between utility executives and PSC commissioners. In both situations, the party involved in the communication would know what seeds he planted, subtle or unsubtle, intentionally or innocently, about the coming case. The other parties would not. The party involved in the communication would know what reactions, subtle or overt, the judge or commissioners had to certain concepts and ideas. The other parties would not. The meetings held before the filing of the case under review violate fundamental principles of fairness.

GPE suggests that no reasonable person would question the PSC impartiality or find even an appearance of impropriety. On December 6, 2007, Governor Blunt issued a press release calling for the PSC to examine its policies regarding communications with utilities, Senator Maida Coleman called for Senate

hearings, and the Attorney General sent a letter to Public Counsel asking the Public Counsel seek recusal of any commissioner that had improper communications (Record on Appeal, 1386). The *St. Louis Post* and the *Kansas City Star* published numerous articles condemning the PSC, and the legislature later added money to the PSC budget for ethics training. The PSC has as a result docketed four separate cases to examine *ex parte* communications,[14] and has completely re-written its rules on communications. In light of all this furor that resulted from the revelation of the pre-filing meetings between commissioners and utility executives, it is astounding that GPE now suggests that a "reasonable person" would have no factual basis to find an appearance of impropriety or doubt the impartiality of the PSC. (GPE at 28)

GPE discusses at length the general supervisory role that the PSC exercises with respect to regulated public utilities. (GPE at 22-24) But the meetings at issue here did not have to do with matters of general regulatory policy; they were held to communicate "the elements of a proposal" (GPE at 28) that was soon to be filed for a PSC decision in a contested case. Public Counsel is not suggesting that all communications between PSC commissioners and representatives of utilities be cut off, but rather that the particular meetings here violated Public Counsel's right to a fair hearing.

[14] Case Nos. AO-2008-0192, AX-2008-0201, AW-2009-0313, and AX-1010-0128.

Both GPE and the PSC assert that Section 386.210 RSMo 2000 sanctions the types of meetings at issue here. They point to Section 386.210.1, which 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.

Communications with regulated utilities is only allowed under Section 386.210.1 if one assumes that the legislature made no distinction between "members of the public" and "Chief Executive Officers of regulated utility companies about to file a contested case." This is, of course, an absurd construction. Utility regulation in Missouri has for a hundred years been premised on the notion of protecting the public on the one hand from the monopoly utility on the other hand. The Public Service Commission frequently explains its role as balancing or aligning the interests of the regulated utilities with the interests of the public. As long ago as 1877, the United States Supreme Court recognized that the legitimate purpose of regulation is for "the protection of the people" from the self-

interest of the regulated monopoly.[15] It is impossible that the Missouri Legislature was ignorant of these competing interests and meant to include utility representatives on a mission within the ambit of "members of the public." The point of Section 386.210 is to allow commissioners to communicate about matters of general regulatory policy, not to allow detailed secret previews of a regulated utility's impending case. Under the interpretation of GPE and the PSC that utility representatives are just like any other member of the public, there would appear to be no communication (no matter how pointed) about a not-yet-filed case that would be improper because all such communications are authorized by the statute.

Response to GPE's Argument that there are No Cases Directly on Point

It is certainly true, as GPE notes at pages 26-27 of its brief, that none of the cases cited by Public Counsel in its Substitute Initial Brief is directly on point. Apparently the fact situation at issue here – where utility executives secretly met with Public Service Commissioners to preview the issues in an upcoming contested case and the meetings came to light in the discovery process – has not heretofore arisen. But the cases cited are nonetheless generally instructive. They tell us that basic fairness is required. They tell us that communication between the decision-maker and just one side in a dispute is unfair. They tell us that the appearance of impropriety is as grave a concern as actual impropriety. These

[15] Munn v. Illinois, 94 U.S. 113, 126 (U.S. 1877), citing to a treatise written more than 200 years before the 1877 opinion.

lessons are applicable whether the venue is criminal, civil or administrative. In any venue, a litigant is entitled to a fair hearing before a tribunal that not only is impartial but also that has taken no action that would cause a reasonable person to question the tribunal's impartiality.

Response to GPE's Argument that the Factual Record is Insufficient

In its final argument, GPE asserts that "Public Counsel has failed to make the effort to develop a factual record." To the contrary, Public Counsel attempted to reconstruct what had taken place at the secret meetings, and clearly raised these allegations in the Motion to Dismiss (Record on Appeal, at 1398-1423) filed on December 13, 2007. Rather than addressing and attempting to refute the allegations, the Commission chose to issue an order (Record on Appeal, at 1811-1832) that: 1) determined that Public Counsel had not proven actual bias; and 2) asserted that Public Counsel brought the motion to dismiss for unethical reasons. Public Counsel reasserted the allegations in a Motion for Reconsideration (Record on Appeal, at 1847-1863). In its order denying the motion for reconsideration, the Commission acknowledged that it "could address OPC's motion point by point" (Record on Appeal, at 1877), but explicitly chose not to. GPE suggests, at page 30, that Public Counsel should have sought to *voir dire* the Commissioners, but fails to note any provisions of the PSC rules, the PSC statutes, or the Missouri Administrative Procedure Act that would have supported such a request. Moreover, at the time Public Counsel filed its Motion to Dismiss, the proceedings

had been halted at GPE's request and thus there was no active hearing in which to request *voir dire*.

As a final response to GPE's final argument, the sorts of facts that GPE believes Public Counsel should have proven might have been necessary to show actual bias, but are not necessary to prove the appearance of impropriety. Presumably the facts that GPE believes are lacking are details about what specifically was said by the utility executives, what specific response the Commissioners made, etc. Entirely apart from the irony of GPE finding fault with Public Counsel for not knowing the details of what happened at a series of secret meetings, these facts are unnecessary. As Public Counsel noted in its Motion for Reconsideration:

> The Commission does not dispute:
>
> - That the meetings took place;
> - That they were conducted in such a way that notice was technically not required under the Sunshine Law;
> - That no notice was ever given;
> - That the meetings were a necessary and critical part of the process from GPE's perspective;
> - That the specific three "regulatory support" mechanisms were explained to each Commissioner;

- That these three mechanisms are now contested issues requiring Commission resolution;
- That GPE needed some feedback – at least a lack of a negative reaction – from the Commissioners about these issues; and
- That GPE understood the Commissioners' reactions to be generally positive. (Record on Appeal, at 1858)

These are the "points" in Public Counsel's Motion for Reconsideration that the Commission **expressly** declined to "address point by point." (Record on Appeal, at 1877). These admitted facts are all the facts that are necessary to find an appearance of impropriety.

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 Substitute Reply Brief of Appellant Office of the Public Counsel was mailed or hand delivered this 10th day of February, 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 3,703 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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