IN THE SUPREME COURT
OF THE STATE OF MISSOURI

STATE ex rel. PRAXAIR, INC., AG PROCESSING, INC. A COOPERATIVE, and SEDALIA INDUSTRIAL ENERGY USERS' ASSOCIATION,	)	
Appellants,	)	
STATE ex rel. OFFICE OF THE PUBLIC COUNSEL,	)	**Case No. SC91322**
Appellant,	)	
v.	)	
PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI,	)	
Respondent.	)	

INITIAL SUBSTITUTE BRIEF OF APPELLANTS

PRAXAIR, INC. ET AL.

Stuart W. Conrad #23966
David L. Woodsmall #40747
Finnegan, Conrad & Peterson, L.C.
428 E. Capitol, Suite 300
Jefferson City, Missouri 65101
(573) 635-2700
Facsimile: (573) 635-6998
Email: dwoodsmall@fcplaw.com

ATTORNEYS FOR PRAXAIR, INC. et al.

January 10, 2011

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JURISDICTIONAL STATEMENT

This appeal involves the judicial review of the Public Service Commission's decision in Commission Case No. EM-2007-0374. Appellants appeal from the Cole County Circuit Court's June 29, 2009 Findings of Fact, Conclusions of Law and Judgment concluding that the Commission's decision was lawful and reasonable. Pursuant to Missouri Rule of Civil Procedure 81.05(a)(1), that judgment became final on July 28, 2009. On August 7, 2009, Appellants timely filed their Notice of Appeal pursuant to Missouri Rule of Civil Procedure 81.04(a).

The issues raised on appeal are not within the exclusive jurisdiction of the Missouri Supreme Court as set forth in Article V, Section 3 of the Missouri Constitution as amended. Nevertheless, pursuant to Rule 83.04, this Court ordered transfer of this matter from the Western District Court of Appeals following the issuance of an opinion by that Court on August 17, 2010, and a revised opinion on November 2, 2010.

STANDARD OF REVIEW

APPLICABLE TO ALL POINTS RELIED ON

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.[1] 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.[2] 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."[3]

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[1] *State ex rel. Midwest Gas Users Association v. Public Service Commission*, 976 S.W.2d 470 (Mo.App.W.D. 1998).

[2] *Id.* at page 476.

[3] *Id.* (citing to *Burlington N.R.R. v. Director of Revenue*, 785 S.W. 2d 272, 273 (Mo. banc 1990)).

STATEMENT OF FACTS

On April 4, 2007, Great Plains Energy, KCPL and Aquila jointly filed for Commission approval of 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).

Commission hearings 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 3616-3618).

On April 24, 2008, the presiding issued his verbal 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 Appellants 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 issued its Report and Order by a 2-1 vote. (LF 3887). 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 the Appellants timely filed their Application for Rehearing with the Commission, also seeking rehearing of the July 1, 2008 Report and Order. (LF 3943-3970). On August 5, 2008 the Commission denied all pending Applications for Rehearing. (LF 4021-4048).

Petitions for Writs of Review were filed in Cole County Circuit Court by Appellants and the Office of the Public Counsel. After briefing and oral argument, the Cole County Circuit Court issued its Judgment on June 29, 2009. Notices of Appeal were filed by the Office of the Public Counsel and Appellants on August 7, 2009. On August 17, 2010, the Court of Appeals issued its opinion finding that the Commission's order was lawful and reasonable. Following the filing of Motions for Rehearing, the Court of Appeals issued its modified opinion on November 2, 2010. Simultaneously, the Court of Appeals denied the pending Motions for Rehearing and Applications for Transfer. On November 17, 2010, Applications for Transfer were filed with the Supreme Court and those Applications were granted on December 21, 2010.

POINTS AND AUTHORITIES RELIED ON

POINT ONE

THE COMMISSION ERRED IN REFUSING TO ALLOW AN OFFER OF PROOF BECAUSE IT DEPRIVES APPELLANTS OF THEIR CONSTITUTIONAL RIGHT TO JUDICIAL REVIEW IN THAT THE MISSOURI CONSTITUTION AND CASE LAW PROVIDES THAT THE REVIEWING COURT SHALL DETERMINE WHETHER THE DECISION IS "AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE" AND THE COMMISSION'S DECISION TO PRECLUDE AN OFFER OF PROOF PREVENTS THE COURT FROM EXERCISING ITS CONSTITUTIONAL RESPONSIBILITY.

► Section 536.070(7) Revised Missouri Statutes.

► *State ex rel. Chicago, Rock Island & Pacific Railroad Company v. Public Service Commission*, 312 S.W.2d 791 (Mo. banc 1958).

POINT TWO

THE COMMISSION ERRED IN REFUSING TO ALLOW THE APPELLANTS TO MAKE AN OFFER OF PROOF BECAUSE THERE IS NO STATUTORY AUTHORIZATION FOR THE COMMISSION TO REJECT AN OFFER OF PROOF IN THAT THE AUTHORITY CONTAINED IN SECTION 536.070(7), IS NOT APPLICABLE TO THE PUBLIC SERVICE COMMISSION.

► *State ex rel. Noranda Aluminum, Inc. v. Public Service Commission*, 24 S.W.3d 243 (Mo.App.W.D. 2000).

► Section 386.510 Revised Missouri Statutes.

POINT THREE

THE COMMISSION ERRED IN REFUSING TO ALLOW THE APPELLANTS TO MAKE AN OFFER OF PROOF BECAUSE THE SUPREME COURT HAS HELD THAT THE APPROPRIATE STANDARD IS WHETHER THE MERGER IS "NOT DETRIMENTAL TO THE PUBLIC INTEREST" IN THAT THE EVIDENCE PRECLUDED BY THE RULING ON THE OFFER OF PROOF IS DIRECTLY RELEVANT TO THAT BROAD STANDARD.

► *State ex rel. AG Processing, Inc. v. Public Service Commission*, 120 S.W.2d 732 (Mo. banc 2003).

ARGUMENT

POINT ONE

THE COMMISSION ERRED IN REFUSING TO ALLOW AN OFFER OF PROOF BECAUSE IT DEPRIVES APPELLANTS OF THEIR CONSTITUTIONAL RIGHT TO JUDICIAL REVIEW IN THAT THE MISSOURI CONSTITUTION AND CASE LAW PROVIDES THAT THE REVIEWING COURT SHALL DETERMINE WHETHER THE DECISION IS "AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE" AND THE COMMISSION'S DECISION TO PRECLUDE AN OFFER OF PROOF PREVENTS THE COURT FROM EXERCISING ITS CONSTITUTIONAL RESPONSIBILITY.

Prior to the evidentiary hearing in this matter, the Applicants filed a Motion to Limit Scope of the Proceedings. At the April 24, 2008 hearing, the Regulatory Law Judge granted Applicants' Motion to Limit the Scope of the Proceedings. In response to that ruling, Appellants sought to make an offer of proof as to the evidence that was to be excluded by the decision to limit the scope of the proceedings. Presumably based upon Section 536.070(7), the Regulatory Law Judge denied Appellants the opportunity to make an offer of proof on the mistaken basis that the excluded evidence was "wholly irrelevant."[4]

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[4] Mr. Conrad: Well, then, if that's – I'm simply asking that if that is to be your ruling, that a party is completely precluded even from making an offer of

Article V, Section 18 of the Missouri Constitution guarantees the right to judicial review of "all final decisions" of an administrative agency. As the Missouri Supreme Court has recognized, the availability of this judicial review is a necessary condition to the continued legality of administrative agencies. Absent such judicial review, the exercise of judicial or quasi-judicial power by an administrative agency would violate the separation of powers clause of the Constitution.

> The quintessential power of the judiciary is the power to make *final* determinations of questions of law. This *power* is a non-delegable power resting exclusively with the judiciary. The legislature "has no authority to create any other tribunal and invest it with judiciary power." Thus, while the legislature may allow for judicial or quasi-judicial decision-making by legislative or executive (administrative) agencies, it may not preclude judicial review of those decisions. Nor may the legislature alter the principal power of the judiciary to make the *final* review. Short of these two considerations, however, there

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proof to protect the record, I would like that very much to be explicitly so stated on the record.

Judge Stearley: I believe I've stated that the Commission's position is it's wholly irrelevant and it would not hear evidence or allow an offer of proof.

> will not customarily be found a violation of the separation of powers clause.[5]

Thus, judicial powers may be exercised by an administrative agency only if it properly recognizes the judiciary's right and responsibility to review that decision. Therefore, any legislative, or agency attempt to circumvent the judiciary's review of an administrative agency would violate the separation of powers clause.

The Missouri Constitution not only establishes a mandate of judicial review, it also establishes that judicial review consider both the lawfulness and reasonableness of the agency order.

> [S]uch review shall include the determination whether the same are authorized by law, and in cases in which a hearing is required by law, whether the same are supported by competent and substantial evidence upon the whole record.[6]

The Missouri Supreme Court has subsequently clarified that the reasonableness prong "is sometimes conversely stated, whether it is arbitrary or capricious ***or is***

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[5] *Asbury v. Lombardi*, 846 S.W.2d 196, 200 (Mo. banc 1993) (citing to *Marbury v. Madison*, 5 U.S. 137 (1803); *Howlett v. Social Security Commission*, 149 S.W.2d 806, 810 (Mo. banc 1941); *Lederer v. State Dept. of Social Services*, 825 S.W.2d 858, 863 (Mo.App. 1992); *State ex rel. Haughey v. Ryan*, 81 S.W. 435, 436 (1904).

[6] Missouri Constitution Article V, Section 18.

against the overwhelming weight of the evidence."[7] In order, then, for an administrative agency to exercise quasi-judicial powers, it must not infringe on the availability of judicial review or the judiciary's ability to determine if the agency decision is "against the overwhelming weight of the evidence."

Therefore, while the agency is permitted to rule on objections and exclude evidence from the record, the constitutional guarantee of judicial review, and the scope of that review, necessarily requires that all such excluded evidence ***be preserved for review*** by the courts. Indeed, this notion has been codified in statute.

> Evidence to which an objection is sustained shall, at the request of the party seeking to introduce the same, or at the instance of the agency, nevertheless be heard and preserved in the record, together with any cross-examination with respect thereto and any rebuttal thereof.[8]

Against this backdrop of judicial review and preservation of evidence for such review, Section 536.070(7) inexplicably permits the agency to exclude and refuse to preserve evidence that it deems "wholly irrelevant, repetitious,

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[7] *State ex rel. Chicago, Rock Island & Pacific Railroad Company v. Public Service Commission*, 312 S.W.2d 791, 796 (Mo. banc 1958).

[8] Section 536.070(7) RSMo.

privileged, or unduly long." Relying on this authority,[9] the Commission refused to hear testimony as to the Applicants' gift and gratuity policy.

The Commission's interpretation of Section 536.070(7), whereby it precludes the preservation of excluded evidence in the form of an offer of proof, necessarily results in a deprivation of Appellants' constitutional guarantee to judicial review. Absent such preservation, the question inevitably arises, how can a reviewing court make a determination that the Commission's decision is against the overwhelming weight of the evidence, if the Court is denied the opportunity to look at the excluded evidence to make such a determination? Granting such unilateral powers to the administrative agency necessarily provides unfettered opportunity to tailor the record in a manner that favors the desired outcome. Moreover, a reviewing court is incapable of determining that the Commission gamed the procedure because it is unable to see the excluded testimony. Clearly then, as interpreted by the Commission, Section 536.070(7) deprives Appellants of the guarantee of judicial review. Absent the protections of judicial review, then, the procedure provided by the legislature and implemented by the Public Service Commission results in a violation of the separation of powers clause.

[9] The Regulatory Law Judge's ruling expressly relied on 4 CSR 240-2.130(3). This Commission rule of practice and procedure mirrors the language in Section 536.070(7).

Strangely, while recognizing that this issue had been raised,[10] the Court of Appeals decision never provides a resolution for this issue. Instead, the Court's decision as to this point is completely lacking.

Appellants continue to assert that the Commission's decision to deny the Appellants an opportunity to make an offer of proof, such that the reviewing court can determine if the Commission has excluded relevant evidence, is unlawful, unconstitutional and an abuse of discretion. Affirmation of the Commission's action surely encourages that agency to tailor its record to include only that evidence supportive of its decision. Other evidence, contrary to the agency decision, will inevitably be kept from the reviewing court's purview under the theory that it is "wholly irrelevant."

Interestingly, the Court of Appeals decision does recognize that the authority granted by its decision (e.g., the ability to exclude all evidence contrary to the agency's decision) is troublesome. In response, the Court provides a hollow warning.

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[10] Western District Opinion ("Opinion") at page 6 ("Intervenors say the Commission deprived them of their constitutional right to judicial review, in that, absent the excluded evidence, a reviewing court cannot determine whether the decision is 'supported by competent and substantial evidence.' *See* Mo.Const. Art. V, Sec. 18.")

> Of course, if the Commission unreasonably and arbitrarily rejects an offer of proof of evidence that is relevant to the proceeding, then the court, on judicial review, may vacate the ruling of the Commission and remand the proceeding with instructions that the offer of proof be received and considered.

Such a warning undoubtedly has the agency snickering in that, given the unbridled discretion provided by the rest of the Court's decision, the reviewing court will never be able to detect that the Commission has unreasonably and arbitrarily rejected an offer of proof. Such broad agency discretion has been previously warned against, but judicial review was always envisioned to be the safeguard. "Unbridled bureaucracy is the subtle destroyer of people's rights and Mo. Const. Art. V, §18, is their response."[11] By its decision, however, the Court of Appeals has abdicated this safeguard of "people's rights" and ruled in favor of "unbridled bureaucracy."

[11] *State ex rel. Marco Sales Co. v. Public Service Commission*, 685 S.W.2d 216 (Mo.App. 1994).

POINT TWO

THE COMMISSION ERRED IN REFUSING TO ALLOW THE APPELLANTS TO MAKE AN OFFER OF PROOF BECAUSE THERE IS NO STATUTORY AUTHORIZATION FOR THE COMMISSION TO REJECT AN OFFER OF PROOF IN THAT THE AUTHORITY CONTAINED IN SECTION 536.070(7), IS NOT APPLICABLE TO THE PUBLIC SERVICE COMMISSION.

It is well established that the Public Service Commission "is a body of limited jurisdiction and only has such powers as are expressly conferred upon it by the statutes and powers reasonably incidental thereto."[12] The procedure by which the Commission operates is contained in Chapter 386 and the Commission is bound to follow that procedure. This procedure operates to the exclusion of other statutory procedures, including those contained in Chapter 536. The provisions of Chapter 536 are only relevant to the Public Service Commission to the extent that they fill in "gaps" in the Commission's statutory procedure.[13]

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[12] *State ex rel. and to use of Kansas City Power & Light Co. v. Buzard*, 350 Mo. 763, 168 S.W.2d 1044, 1046 (Mo. banc 1943).

[13] *State ex rel. Noranda Aluminum, Inc. v. Public Service Commission*, 24 S.W.3d 243, 245 (Mo.App. 2000) ("Noranda") (citing to *State ex rel. Rogers v Board of Police Commissioners*, 995 S.W.2d 1, 6 (Mo.App. 1999).

In its ruling on the Appellants' offer of proof, the presiding officer rejected the offer of proof and refused to even preserve such evidence on the basis that such evidence was "wholly irrelevant." There is no authority in Chapter 386 for the Public Service Commission to deny an offer of proof or to fail to preserve excluded evidence. Given the lack of such authority, the Commission inappropriately reached into Chapter 536 to find such authority.

As indicated, the provisions of Chapter 536 are applicable to the Public Service Commission only to the extent that the Commission's own authority contains "gaps" that can be filled by Chapter 536. No such "gap" exists. In fact, while Chapter 386 contemplates that the Commission may exclude certain objectionable evidence from the record; it envisions that the excluded testimony would be preserved through an offer of proof for consideration by a reviewing court.

> In case the order is reversed by reason of the commission failing to receive testimony properly proferred, the court shall remand the cause to the commission, with instructions to receive the testimony so proferred and rejected, and enter a new order based upon the evidence theretofore taken, and such as it is directed to receive.[14]

Despite this statutory presumption that excluded evidence would be preserved, and without any statutory authority in Chapter 386 to support the denial

[14] Section 386.510 RSMo.

of an offer of proof, the Commission reached into Chapter 536 to pick out desired authority. This overreaching allowed the Commission to reach the decision it desired, allowed the Commission to bid a hasty exit from the hearing room, and more importantly shielded their decision from judicial review by not preserving the excluded evidence. Such overreaching to the detriment of parties' constitutional rights must be stopped and the order reversed.

In it decision, the Court of Appeals held that the provisions of Section 536 are available to fill in "gaps" in Chapter 386.[15] As such, the Court of Appeals held that the provisions of Section 536.070(8) are applicable to the Commission. Noticeably, the Court of Appeals fails to provide any discussion as to why it believes there is a "gap" in the Commission's procedure. In fact, it is at least as likely that the Court of Appeals may be mistaking the legislature's intentional decision to withhold certain authority from the Commission as a perceived "gap" in that procedure. In fact, given the previously quoted provisions of Section 386.510, it appears that the General Assembly anticipated that all evidence would be preserved and, therefore, that no gap in the Commission's procedure exists.

Noticeably, when the Court has previously found a "gap" to exist in the Commission's procedure, that "gap" was readily apparent.[16] For instance, the Court has previously recognized that Section 386.420 requires the Commission to

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[15] *Opinion* at pages 8-9.

[16] *Noranda* at pages 244-245.

make its decision in writing. Despite such a directive, a noticeably "gap" arises as to what needs to be included in such written decision. As such, the Courts held, given such an apparent gap, that Section 536.090 should fill this gap. Therefore, it is now recognized that the Commission's written decision must include "findings of fact and conclusions of law."

In that case, a "gap" in the Commission's procedure was readily apparent. Therefore, the Court properly looked to Chapter 536 to fill that gap. In the case at hand, however, the alleged "gap" is not apparent. Rather, the "gap" only arises as a result of the Commission's desire to seize authority that is not otherwise ceded to it by the General Assembly. In this case, it is at least as likely that the alleged "gap" may be a result of the General Assembly's conscious decision to withhold such authority. Certainly, given that the General Assembly has not deemed such authority appropriate for the Commission, the Courts should not grant such authority absent an apparent gap.

POINT THREE

THE COMMISSION ERRED IN REFUSING TO ALLOW THE APPELLANTS TO MAKE AN OFFER OF PROOF BECAUSE THE SUPREME COURT HAS HELD THAT THE APPROPRIATE STANDARD IS WHETHER THE MERGER IS "NOT DETRIMENTAL TO THE PUBLIC INTEREST" IN THAT THE EVIDENCE PRECLUDED BY THE RULING ON THE OFFER OF PROOF IS DIRECTLY RELEVANT TO THAT BROAD STANDARD.

The Missouri Supreme Court has noted that the standard used to evaluate a utility merger subject to approval by the Public Service Commission "is whether or not the merger is detrimental to the public."[17] In applying such a standard, the Supreme Court has held that the Commission cannot simply ignore issues. Rather, the Commission must take a broad view of the issues that may impact the public interest. In this way, all issues relevant to the public detriment determination must be considered when weighing the public interest benefits and detriments.

> The fact that the acquisition premium recoupment issue could be addressed in a subsequent ratemaking case did not relieve the PSC of the duty of deciding it as a relevant and critical issue when ruling on the proposed merger. While PSC may be unable to speculate about

[17] *State ex rel. AG Processing, Inc. v. Public Service Commission*, 120 S.W.2d 732, 735 (Mo. 2003).

> future merger-related rate increases, it can determine whether the acquisition premium was reasonable, and it should have considered it as part of the cost analysis when evaluating whether the proposed merger would be detrimental to the public. ***The PSC's refusal to consider this issue in conjunction with the other issues raised by the PSC staff may have substantially impacted the weight of the evidence evaluated to approve the merger.*** The PSC erred when determining whether to approve the merger because it failed to consider and decide all the necessary and essential issues, primarily the issue of UtiliCorp's being allowed to recoup the acquisition premium.[18]

As the Supreme Court has noted, therefore, the scope of the Commission's review in a merger case is very broad. Further, the Commission cannot limit its inquiry by punting issues to future cases, but must consider all evidence that a merger may be detrimental to the public. Such evidence necessarily includes issues as to utility practices which will accelerate or increase future rate increases.

In the case at hand, KCPL proposed to export its detrimental gift and gratuity policy to Aquila. As previously explained, KCPL's gift and gratuity policy and the expansion of that policy to Aquila will have a direct impact on the utility's costs and, therefore, its future rate increases. By refusing to consider such

[18] *Id.* at page 736 (emphasis added).

evidence, the Commission has, once again, failed to consider all evidence relevant to the "detrimental to the public interest" standard.

Evidence that shows inadequate controls against "under the table" payments from contractors to KCPL procurement personnel, or that shows a general disregard for what ought to be a fully "arms length" contracting procedure is certainly not "wholly irrelevant" to whether a proposed transaction would result in public detriment. Inevitably, issues regarding a utility's procurement practices and the fact that a utility's gift and gratuity policy may undermine the least cost nature of such practices are relevant to the Commission's determination.

Rather than consider such weighty issues, however, the Commission simply made a declaration that such issues are "wholly irrelevant" because the Commission may not "dictate the manner in which the company shall conduct its business."[19] In its decision, the Court appears to have simply accepted such an assertion.[20] The Court's decision is wrong for two reasons:

First, the fact that the Commission may not "dictate" business policies does not limit the Commission's authority or duty to protect ratepayers from such harmful business practices. Despite its claimed inability to dictate utility "business practices," the Commission has nonetheless sought to protect ratepayers from such practices in the past. Indeed, Missouri courts have previously

[19] *Opinion* at page 9.

[20] *Opinion* at pages 9-10.

recognized the Commission's ability to promulgate rules to protect ratepayers from utility business practices that would otherwise work "to the detriment of the rate-paying customers."[21]

Second, aside from any argument as to whether the Commission may dictate utility business practices, the issues regarding KCPL's gift and gratuity policy as presented in this case was not an attempt to dictate such practices. Rather, by raising such an issue, the Appellants were simply asking the Commission to consider whether the expansion of such a harmful policy would be detrimental to the public. Certainly, then, evidence of KCPL's harmful gift and gratuity policy, and the fact that KCPL intended to expand such a policy to the Aquila, is relevant to the Commission's merger inquiry.

In addition, the Court's decision is faulty in that it appears to assess blame on the Appellants for procedural deficiencies in the manner in which it presented this issue.

> As a reviewing court, we do not *automatically* reverse the ruling of an administrative agency or tribunal merely because an offer of proof was rejected. . . . But it is up to the proponents of the evidence to demonstrate that the evidence would in fact have been directly pertinent to the matter at issue. This court cannot *assume* that the

[21] See, *State ex rel. Atmos Energy Corp. v. Public Service Commission*, 103 S.W.3d 753, 763-764 (Mo. banc 2003).

> gift and gratuity policies of KCPL and Great Plains are or would be so detrimental to the public interest that the merger should not be disallowed. The Appellants completely fail to make the necessary showing.

The Court continues to note that ultimately while the Appellants did explain why the rejected evidence was relevant to the Commission's inquiry the Appellants provided "no citation to the record."[22]

The Court fails to understand the Catch 22 nature of the standard that it seeks to impose on the Appellants. While the Commission refuses to allow the Appellants to make an offer of proof, the Court simultaneously chastises the Appellants for their failure to provide a "citation to the record." It is a practical impossibility to satisfy the Court's demand for citations to the record when the entity responsible for compiling that record refuses to allow you to make such a record. Furthermore, it should be recognized that, while such evidence exists, Appellants are precluded, under Section 386.510, from providing evidence that is not in the Commission's record.[23]

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[22] *Opinion* at pages 11-12.

[23] "No new or additional evidence may be introduced upon the hearing in the circuit court but the cause shall be heard by the court without the intervention of a jury on the evidence and exhibits introduced before the commission and certified to by it." Section 386.510

Finally, in its Decision, the Court of Appeals appears to confuse the scope of its inquiry. Initially, the Court recognizes that the "Appellants argue only that the *offers of proof* were wrongly excluded. They wish for this court to remand for the Commission to receive the excluded offers of proof and reconsider their merger."[24] As such, the Appellants are asking the Court to review the Commission's finding that evidence of the gift and gratuity policy was "wholly irrelevant." Later, however, the Court of Appeals heightens the burden and asks the Appellants to not only show that the evidence was not "wholly irrelevant," but that it was actually relevant to the Commission's inquiry.

> In fact, we cannot know that the proferred evidence was relevant unless the appellant is able to demonstrate the relevance. . . . But it is up to the proponents of the evidence to demonstrate that the evidence would in fact have been ***directly pertinent*** to the matter at issue.[25]

Clearly, in addition to the myriad of other problems with the Court's decision, the Court appears to demonstrate confusion with the exact nature of its inquiry. As initially recognized, the Appellants are simply asking the Court to review the Commission's decision that evidence regarding KCPL's gift and gratuity was "wholly irrelevant." Under such an inquiry, the Appellants should only have to

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[24] *Opinion* at page 7.

[25] *Opinion* at page 11 (emphasis added).

show that the excluded evidence was not "wholly irrelevant." Once achieved, this Court should remand this matter to the Commission with directions to allow the previously denied offer of proof. Only then, with the availability of the proferred evidence will Appellants be required to show that the excluded evidence is relevant. By requiring the Appellants to show that the excluded evidence was actually relevant at this point, the Court has accelerated the inquiry and, given the unavailability of the excluded evidence, imposed a hurdle that Appellants cannot possibly clear.

CONCLUSION

WHEREFORE, Appellants request that the Court find that the Commission's decision to deny Appellants an opportunity to make an offer of proof regarding KCPL's gift and gratuity policy to be unlawful, unconstitutional and an abuse of discretion and remand this matter to the Commission with the mandate that it open up these proceedings for the purposes of accepting that previously denied offer of proof.

FINNEGAN, CONRAD & PETERSON, L.C.

BY:

Stuart W. Conrad, MBE #23966
David L. Woodsmall, MBE #40747
428 E. Capitol, Suite 300
Jefferson City, Missouri 65101
(573) 635-2700
Facsimile: (573) 635-6998
Internet: dwoodsmall@fcplaw.com

ATTORNEYS FOR PRAXAIR, INC. et al.

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies pursuant to Supreme Court Rule 84.06(c) that this brief includes the information required by Rule 55.03, complies with the limitations contained in Rule 84.06(b), and contains 5,024 words (exclusive of the cover, certificates of compliance and service, and signature block), as calculated by Microsoft Word, the software used to prepare this brief.

The undersigned further certifies that a three-and-one-half inch diskette containing an electronic copy of this brief is in compliance with Supreme Court Rule 84.06(g), has been scanned for viruses, and is virus-free.

_____
David Woodsmall

CERTIFICATE OF SERVICE

Pursuant to Supreme Court Rules 84.07(a) and 84.06(g), the undersigned hereby certifies that two copies of this brief, along with a disk containing an electronic version of the brief complying with Supreme Court Rule 84.06(g), were hand-delivered or sent by U.S. Mail, postage prepaid, on this 10th day of January, 2011, to the following counsel of record:

Steven Reed
Missouri Public Service Commission
200 Madison Street, Suite 800
P.O. Box 360
Jefferson City, MO 65102

Lewis R. Mills, Jr.
Office of the Public Counsel
101 Madison Street, Suite 400
P.O. Box 2230
Jefferson City, MO 65101

Karl Zobrist
Great Plains Energy
4520 Main Street, Suite 1100
Kansas City, MO 64111

_____
David Woodsmall