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.	)	

SUBSTITUTE REPLY BRIEF OF APPELLANTS

PRAXAIR, INC. ET AL.

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SUMMARY OF ARGUMENT

In its ruling in this case, the Commission held that it may not "dictate the manner in which the company shall conduct its business."[1] For this reason, the Commission concluded that any evidence as to KCPL's gift and gratuity policy and its corporate code of conduct "involves a wholly irrelevant matter over which the Commission lacks jurisdiction."[2] As such, the Commission decided that any evidence regarding KCPL's gift and gratuity policy and corporate code of conduct "was appropriately excluded as being wholly irrelevant and no offer of proof is required or warranted."[3]

The Commission's finding as to this perceived lack of jurisdiction evidences a clear failure to understand the standard applicable to utility mergers. It is well established that, when considering a utility merger application, the Commission applies a standard of not detrimental to the public interest. "[T]heir duty is to see that no such change shall be made as would work to the public detriment."[4] As historically applied:

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[1] Report and Order at page 25.

[2] *Id.* at page 26.

[3] *Id.*

[4] *State ex rel. City of St. Louis v. Public Service Commission of Missouri*, 73 S.W.2d 393, 400 (Mo. banc 1934).

> Detriment is determined by performing a balancing test where attendant benefits are weighed against direct or indirect effects of the transaction that would diminish the provision of safe or adequate service or that would tend to make rates less just or less reasonable.[5]

The point of providing the excluded evidence as to gift and gratuity policy and corporate code of conduct was not to have the Commission dictate a corporate code of conduct. Rather, ***the point of such evidence was to show that Aquila ratepayers would be harmed and that rates made less reasonable as a result of the extension of the lax policies to the Aquila operations***. This is the exact point of the "not detrimental" standard. As Appellants note in their Initial Brief,

> 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.[6]

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[5] Report and Order at page 232 (citing to *State ex rel. Fee Fee Trunk Sewer, Inc. v. Litz*, 596 S.W.2d 466, 468 (Mo.App. 1980).

[6] Appellants Initial Brief at page 24.

Recognizing the standard to be applied by the Commission, and the fact that evidence as to KCPL's gift and gratuity policy and corporate code of conduct raises serious concerns regarding the detriment of the proposed transaction, such evidence is not "wholly irrelevant." By mistakenly believing that it was being asked to impose a business practice on this utility, the Commission failed to properly apply the "not detrimental" standard.

Through this review, the Appellants simply ask the Court to determine that such evidence was not "wholly irrelevant" to the Commission's application of the "not detrimental" standard. As such, the Court should remand this matter with directions to accept the proferred evidence as an offer of proof.

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

►Appellants Initial Substitute Brief at pages 11-17.

►Respondent Commission Responsive Brief at pages 17-21.

►Intervenor KCPL Responsive Brief at pages 11-17.

In the Initial Brief, Appellants assert that the Commission's unprecedented and arbitrary refusal to permit an offer of proof "necessarily results in a deprivation of Appellants' constitutional guarantee to judicial review."[7] Recognizing that the reviewing court has the responsibility to determine if the Commission's decision is "against the overwhelming weight of the evidence," the

[7] Appellants Initial Brief at page 15.

Commission's refusal to permit an offer of proof deprives the court of the record needed to fulfill this responsibility.

> 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?[8]

The implications of such "claimed" authority by the Commission are obvious:

> 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, as interpreted by the Commission, Section 536.070(7) deprives Appellants of the guarantee of judicial review.[9]

A. AVAILABILITY OF REMAND PROVISION IN SECTION 386.510

Interestingly, despite the extensive discussion regarding this conundrum in Appellants' Initial Brief, neither the Commission, nor KCPL, chose to respond to the concern that the refusal to allow an offer of proof precludes the court from

[8] *Id.*

[9] *Id.*

properly exercising the full scope of its review. Rather, the Commission simply notes that, if this allegation is true, the reviewing court has a remedy to address the Commission's unlawful action.[10] The Commission, in fact, directs the Court to Section 386.510 that authorizes the Court "to reverse the Commission's order and remand the case to the Commission with instructions to receive the testimony so proffered and rejected, and enter a new order based upon the evidence theretofore taken."[11] As the Commission postulates, the existence of such a remedy preserves the constitutionality of the Commission's interpretation of the offending statute.

The existence of a remedy does not, however, mean that the wrong never happened. Rather, the existence of a remedy merely means that there is a proper response to that wrong. Given that neither Respondent disputes that the Court is precluded, by reason of the Commission's failure to permit an offer of proof, from reviewing whether the Commission's decision was against the overwhelming weight of the evidence; the Court should avail itself of the remedy contained in Section 386.510. Appellants concur that, to permit the Court to properly review the Commission's decision, the Commission's order should be reversed and remanded with specific direction to receive the testimony proferred as an offer of proof.

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[10] *Commission Brief* at pages 19-20.

[11] *Id.*

B. TESTIMONY NOT PROFERRED BY APPELLANTS

The Commission asserts that Appellants should be precluded from raising its concerns because Appellants were not the initial party to offer the suppressed evidence. The Commission postulates, "[a]s the Industrials were not the proponents of the evidence, neither the applicable statute nor the applicable Commission rule allows the Industrials to make an offer of proof."[12] This argument misstates the Commission record.

While the Staff was the initial proponent of the excluded offer of proof, the record readily indicates that the Industrials and Office of Public Counsel supported such evidence and independently sought to make an offer of proof.

> Mr. Conrad [Industrials]: 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 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.

Clearly, the Industrials sought to provide the excluded evidence and actively sought to make an offer of proof.

[12] *Id.*

C. APPLICABILITY OF HOLDING IN *ENVIRONMENTAL UTILITIES*

While not addressing the substance of the argument, that the denial of the offer of proof allows the Commission to tailor its record to prevent the courts from exercising the full scope of its judicial review, KCPL instead seeks to approve the action by pointing to previous cases in which the Commission also refused to accept evidence.

KCPL claims that in Environmental Utility, LLC v. Public Service Commission,[13] the Court of Appeals has "recently upheld the authority of the Commission under this statute [536.070(7)] to refuse to conduct an evidentiary hearing on matters found to be 'irrelevant and repetitious' in a sale of utility assets case."[14] Again, KCPL's argument misstates the nature of the Court's holding in that case. A simple review of that holding readily reveals that it is inapplicable to the pending matter.

In that case, the Commission was asked to approve the sale of utility assets under Section 393.190. In an effort to narrow the scope of the evidentiary issues at hearing, the Commission first issued an order on the pending legal issues. "Here, the Commission chose to first address the threshold legal issues prior to taking evidence, an approach urged by MAWC."[15]

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[13] 219 S.W.3d 256 (Mo.App. 2007) ("*Environmental Utilities*")

[14] KCPL Brief at page 12.

[15] *Environmental Utilities* at 264.

As a result of the Commission's determination on those pending legal issues, the evidentiary issues were rendered irrelevant as a matter of law. As the Commission and Court found, "***the threshold issues addressed at the hearing proved dispositive***. . . . The Commission, having conclusively determined the issue in a prior proceeding, was not required to hold an evidentiary hearing on matters irrelevant and repetitious."[16]

Contrary to KCPL's assertion, *Environmental Utilities* does not address the Commission's authority to preclude, within a hearing, a party from making an offer of proof. While the Court has found that the Commission is not required to hold a factual hearing where such a hearing has been rendered moot by earlier resolution of the legal issues, the Court did not address the immediate issue. In this case, the Commission set the matter for an evidentiary hearing. Unlike *Environmental Utilities*, that hearing was not rendered moot by way of a prior Commission ruling on a legal issue. Rather, the hearing was held, and in an effort to avoid considering evidence which might have impacted the Commission's consideration of the application, the Commission deemed such evidence to be "wholly irrelevant." Moreover, the Commission refused to allow parties to make an offer of proof of such evidence. The Commission's action was not authorized by its governing statute, nor was such action authorized by the holding of *Environmental Utilities*.

[16] *Id.*

D. EVIDENCE IS NOT IRRELEVANT AS A MATTER OF LAW

Respondents, nevertheless, will attempt to bootstrap to the holding of *Environmental Utilities* and assert that the offer of proof and the excluded evidence are irrelevant, as a matter of law, because the Commission may not dictate business policies to its regulated utilities.

> The Commission does not have the ability to prescribe any particular business practice of (sic) policy as a condition to its approval of the merger because the Commission may not dictate the day-to-day business practices of the companies it regulates.[17]

The Respondents' reliance on such legal doctrine is misapplied. Further, the Commission obviously mistakes the applicable standard for its consideration of utility mergers and the purpose for the evidence regarding KCPL's gift and gratuity policy and corporate code of conduct.

[17] Commission Brief at page 20. Similarly, KCPL argues "the Commission determined that evidence regarding the gifts policy and the code of conduct was wholly irrelevant since the Commission is not permitted "to dictate the manner in which the company shall conduct its business." KCPL Brief at pages 12-13; 16-17.

As explained in its Initial Brief, Appellants did not attempt to present evidence regarding the relevant gift and gratuity policies and corporate code of conducts in "an attempt to dictate such practices."[18]

> 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.[19]

Clearly, the fact that the Commission is legal precluded from imposing a corporate code of conduct does not render the excluded evidence "wholly irrelevant" to a "not detrimental to the public interest" determination.

E. APPELLANTS STATUTORILY BARRED FROM SUPPLEMENTING THE RECORD

Finally, KCPL asserts that, despite the Commission's refusal to allow an offer of proof, that Appellants could have supplemented the record on appeal to allow the reviewing court to independently assess the relevance of the excluded evidence.[20] Specifically, KCPL claims that Appellants could have placed the

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[18] Appellants Initial Brief at page 25.

[19] *Id.*

[20] KCPL Brief at page 17.

excluded information into the Commission's through the use of post-hearing exhibits or by supplementing the record on appeal as provided in Missouri Rule 81.12(f).[21]

It is baffling that KCPL would suggest that, while precluding Appellants from making an offer of proof, the Commission would nonetheless allow Appellants to place the exact same information into the record through the use of post-hearing exhibits. It is an absolute certainty, after spending a great deal of record considering and denying an offer of proof, that the Commission would also deny parties the opportunity to include such evidence through the use of post-hearing exhibits.

Finally, KCPL's asserts that Appellants could, despite the Commission's refusal to allow an offer of proof, provide such evidence to the reviewing court as supplemental record. This suggestion represents a blatant disregard of the applicable statutes. As was indicated in its Motion for Rehearing at the Court of Appeals as well as its Initial Brief in this matter, Appellants are statutorily precluded from asking to supplement the record on appeal. Section 386.510 provides "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." (emphasis added).

[21] *Id.*

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

►Appellants Initial Substitute Brief at pages 18-21.

►Respondent Commission Responsive Brief at pages 21-23.

►Intervenor KCPL Responsive Brief at pages 18-19.

In the Initial Brief,[22] Appellants contend that the Commission did not have statutory authority to refuse an offer of proof. Specifically, Appellants note that Commission's procedural authority is wholly contained in Chapter 386, and the authority to refuse an offer of proof is found in Chapter 536 [Section 536.070(7)]. Consistent with this argument, this Court has previously found that the provisions of Chapter 536 are only relevant to the Commission to the extent that they fill in "gaps" in the Commission's statutory procedure.[23] Recognizing that there is no

[22] Appellants Initial Brief at pages 18-21.

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

"gap" in the Commission's statutory procedure, this provision of Chapter 536 is not applicable to the Commission.

A. ASSERTION THAT A "GAP" EXISTS

Without any evidence or reasoning to support a finding that a "gap" exists in Chapter 386, the Commission and KCPL assert that the Commission is nonetheless permitted to rely on Section 536.070(7). Such an assertion is based simply on the Commission's observation that "Chapter 386 does not contain a similar evidentiary provision."[24]

Such an assertion misreads the holding of the Noranda decision.[25] *Noranda* did not hold that Chapter 536 acts as a supplement to Chapter 386. Additionally, *Noranda* did not find that Chapter 536 represents a grab-bag of legislation from which the Commission is free to randomly choose bits of authority. Rather, *Noranda* held that Chapter 536 is only available to fill "gaps" in Chapter 386.

Contrary to the Commission's current belief, however, a "gap" is not created by the Commission's belief as to the authority that it needs. Similarly, a "gap" is not created from the fact that the General Assembly deemed it appropriate

[24] Commission Brief at page 21. Similarly, KCPL simply suggests that Section 536.070(7) must be applicable to the Commission simply because it "is not in conflict with the Commission's governing statute" KCPL Brief at page 18.

[25] *Noranda* at page 6.

to grant disparate amounts of authority to various executive agencies. Instead, the logic of *Noranda* indicates that a "gap" must be apparent.

In *Noranda*, the Court faced a dilemma. The Supreme Court had previously held that Section 386.420 required Commission decisions to include "findings of fact." There was, however, no standard in Chapter 386 by which the reviewing court was supposed to review the adequacy of such findings of fact. Recognizing the obvious "gap", the Court found that similar provisions in Chapter 536 could be used to fill this "gap." Thus, in *Noranda*, the "gap" was apparent by the existence of a statutory dilemma.

In the case at hand, however, no "gap" is apparent in Chapter 386. While a difference may exist between the General Assembly's grant of authority and the level of authority the Commission believes it should be permitted to exercise, such a difference does not amount to a "gap" which should be corrected by resorting to other statutes. Absent an apparent "gap" in its authority, the Commission should be limited to Chapter 386 and the authority the General Assembly has deemed appropriate to grant.

B. RELIANCE ON 4 CSR 240-2.130(3)

KCPL then posits that Appellants' argument is misplaced because the Commission "was not solely relying on Section 536.070(7)" when it denied Appellants the opportunity to make an offer of proof.[26] Since the Commission had

[26] KCPL Brief at page 18.

previously used its rulemaking authority to enact 4 CSR 240-2.130(3), which is identical to Section 536.070(7), KCPL posits that the Commission's action was lawful.

KCPL's argument is misplaced. KCPL's argument would essentially allow agencies with rulemaking authority to self-prescribe the authority it desires. Recognizing that the General Assembly has not provided for such authority, KCPL suggests that the Commission can simply create such authority through its procedural rulemaking authority. Such an assertion is certainly contrary to this Court's holding that the Commission, despite such rulemaking authority, is limited solely to the authority provided by statute.

> As a creature of statute, ***the Commission's 'powers are limited to those conferred by statute, either expressly, or by clear implication, as necessary to carry out the powers specifically granted.***' Accordingly, whether the Commission's actions are lawful 'depends directly on whether it has statutory power and authority to act.' Neither convenience, nor expediency, nor necessity is a proper matter to consider in determining whether the Commission's actions are authorized by statute.[27]

[27] *Missouri Public Service Commission v. ONEOK, Inc.*, 318 S.W.3d 134, 137 (Mo.App. 2009) (citations omitted) (emphasis added).

In this case, the General Assembly has clearly not provided the authority now craved by the Commission. The grant of procedural rulemaking authority was not designed to grant the Commission authority to implement all substantive authority that it deemed appropriate. Given that the Commission is a "creature of statute," and that no statutory authority exists, the Commission's decision to deny an offer of proof is unlawful.

C. NO AUTHORITY FOR SUBSTANTIVE RULE

Recognizing that Section 536.070(7) does not apply to the Commission and thus cannot provided the basis for the Commission rule 4 CSR 240-2.130(2), KCPL asserts that such authority is somehow provided by Section 386.410.1.[28] Again, KCPL is mistaken. Section 386.410.1 provides that "[a]ll hearings before the commission or a commissioner shall be governed by rules to be adopted and prescribed by the commission." Clearly, this statute is designed to give the Commission authority to adopt procedural rules.[29] For this reason, the Commission has adopted rules regarding filing of written testimony, briefs, etc.

Indeed, the case cited by KCPL does not concern the adoption of substantive rules, such as that contained in 4 CSR 240-2.130(2), but instead the adoption of procedural rules. In State ex rel. Southwestern Bell Telephone Co. v,

[28] KCPL Brief at page 18.

[29] Interestingly, the Commission also recognizes that Section 386.410 merely acts as "statutory authority to adopt procedural rules." Commission Brief at page 22.

Public Service Commission,[30] the Court addressed the Commission's ability to prescribe discovery rules. In that decision, the Court held that the Legislature had granted the Commission the authority to adopt procedural rules. Included in that was the authority to adopt discovery rules.

Unlike the procedural rules contemplated by Section 386.410, the authority contained in 4 CSR 240-2.130(2) is substantive in nature. Indeed, by its very nature, 4 CSR 240-2.130(2) is designed to preclude parties from making an offer of proof and thereby preclude this Court from exercising its full scope of judicial review. Given that judicial review is a substantive right provided by the Missouri Constitution, any rule which seeks to restrict such a right must necessarily be substantive.[31] Since Section 386.410.1 is only focused on the authority to enact procedural rules, it cannot be the basis of the Commission's authority to adopt the substantive rule in question. In fact, by its very terms, 4 CSR 240-2.130(2) recognizes that it is focused on the substantive provisions of Chapter 536. "In any hearing, these rules supplement section 536.070, RSMo."

[30] 645 S.W.2d 44 (Mo.App. 1982).

[31] See, *Asbury v. Lombardi*, 846 S.W.2d 196 (Mo. banc 1993). A legislative or agency attempt to preclude judicial review represents "a violation of the separation of powers clause."

D. DENIAL OF OFFER OF PROOF CONFLICTS WITH SECTION 386.510

In addition, while the Commission may adopt procedural rules, they may not use such rules to eviscerate the purpose of other statutory obligations. In this case, KCPL claims that the Commission may, based upon a procedural rule, refuse an offer of proof. KCPL fails to recognize, however, that such a procedural rule would directly conflict with the Commission's statutory obligation under Section 386.510 to preserve excluded evidence for judicial review.[32] That statute contemplates that reviewing court shall be given the opportunity to review evidence that has been excluded from the record, and determine whether such evidence should have been received and considered by the Commission. The Commission, by way of its general authority to issue procedural rules, may not suddenly eviscerate the purpose of this rule.

Indeed, while KCPL suggests differently[33], the holding in State ex rel. Arkansas Power & Light Co. v. Public Service Commission[34] expressly recognizes

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[32] Section 386.510: "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."

[33] KCPL Brief at page 19.

[34] 736 S.W.2d 457 (Mo.App. 1987).

that all evidence, even that excluded by the Commission, must still be reviewable by the courts. In that case, the Commission struck certain prefiled testimony on the basis that the utility had been dilatory in providing discovery responses. On review, the Court held that, while it may impose discovery sanctions, the Commission's sanctions in this case were unduly harsh. As such, the Court ordered the Commission "to admit and receive the evidence excluded."[35]

The important portion of this decision is that the Commission did not deny an offer of proof and had not excluded the stricken evidence from the review of the Court. Rather, consistent with the relief being sought today, the evidence was excluded, but preserved for judicial review. Such action is entirely consistent with Section 386.510. Contrary to the Court's decision in Arkansas Power & Light, however, this Court has been precluded from reviewing the excluded evidence. As such, it is impossible for the Court to avail itself of the remedy provided in Section 386.510 (i.e., receive the proferred evidence). Instead, the Court must first order the Commission to accept the offer of proof so that the Court may subsequently determine whether the Commission may properly exclude such evidence as irrelevant.

[35] *Id.* at 461.

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

► Appellants Initial Substitute Brief at pages 22-28.

► Respondent Commission Responsive Brief at pages 23-27.

► Intervenor KCPL Responsive Brief at pages 20-21.

As addressed in its Summary of Argument, as well as at pages 22-28 of its Initial Brief, the Commission's failure to consider evidence as to the detriment created by the expansion of the KCPL gift and gratuity policy and corporate code of conduct violates the applicable standard to be applied by the Commission.

At page 25 of its Brief, the Commission asserts that "evidence about the gifts and gratuities policies and corporate codes of conduct of the companies involved in the transactions were not relevant to the applicable standard because those policies are beyond the authority of the Commission to regulate."

Again, the Commission fails to understand and apply the appropriate standard. Appellants did not proffer the excluded evidence for the purpose of having the Commission dictate an appropriate policy for KCPL. Rather,

Appellants offered the evidence to show that the expansion of the KCPL policy to Aquila operations would result in detriment. Certainly, even the Commission should admit that evidence that tends to show a detriment associated with the proposed merger is relevant to the application of the "not detrimental standard."

Through its continued assertion that the Commission may not dictate such policies, the Commission confuses the nature of its inquiry and ultimately fails to appropriately apply the "not detrimental to the public interest" standard.

As the Supreme Court has noted, the standard used to evaluate a merger subject to approval by the Public Service Commission "is whether or not the merger would be detrimental to the public."[36] The Commission, then, must take a broad view of the evidence and the issues that may impact the public interest and may not dodge its statutory responsibility by postponing certain issues for consideration in future cases.[37]

Just as the "not detrimental to the public interest" standard does not allow the Commission to postpone matters for a future case, that same standard does not allow the Commission to ignore evidence of utility practices which may show public detriment from the proposed transaction. In its decision, the Commission refused to even consider evidence of KCPL's gift and gratuity policy and the

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

[37] *Id.*

detriment caused by the extension of that policy to Aquila. That evidence, if presented, could have shown not only the loose nature of KCPL's policy, but also its lackadaisical approach to policing even that loose policy. Questions properly arose as to whether KCPL was operating in a least cost manner, or whether KCPL was engaged in purchasing practices which were simply designed to protect the "behind the scenes" benefits that procurement personnel might have received for swinging business in a particular direction. Questions were properly raised as to whether this liberal and loose KCPL policy would become the standard mode of operation for the new combined company, or whether the stricter Aquila standard would be retained.

Interestingly, KCPL never denies that its gift and gratuity policy and corporate code of conduct are not significantly more liberal than that implemented at Aquila. Rather, Respondents merely argue that the expansion of that policy is wholly irrelevant because the Commission is not permitted "to dictate the manner in which the company shall conduct its business."[38]

Respondents' argument is fallacious. While the Commission may not dictate managerial policies on the utility, it is obligated to ensure that those managerial policies do not result in detriment to the ratepayers.[39] Given the

[38] KCPL Brief at page 14.

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

responsibility to protect ratepayers from management decisions, the Commission's contention that the evidence was irrelevant and would not have had an effect under the "not detrimental to the public" balancing standard is erroneous.

In order for the Commission to properly determine whether the merger was "not detrimental to the public," the Commission should have considered all aspects of the utilities' operations and management and, then, determined whether the ratepayers would be harmed by perpetuation of an imprudent operation or management practice. Not only is the Commission not precluded from considering certain management practices, as held in *Ag Processing*, ***all*** aspects of the utility and its operations and policies (including their enforcement) should be reviewed. By ignoring KCPL's liberal gift and gratuity policy and the extent to which that policy would be subsequently implemented at Aquila, the Commission ignored its statutory obligation and failed to properly apply the "not detrimental to the public interest" standard. Frustrated previously by this Court's ruling in *Ag Processing,* the Commission now tries to duck the holding of that case by simply rejecting evidence altogether.

POINT FOUR

THE RESPONDENTS' ASSERTION THAT JUDICIAL REVIEW SHOULD BE TERMINATED SHOULD BE REJECTED BECAUSE APPELLANTS HAVE FULLY COMPLIED WITH SECTION 386.500 IN THAT IT RAISED ALL ARGUMENTS WITHIN THE CONTEXT OF ITS APPLICATION FOR REHEARING. (APPLICABLE TO POINT I OF THE RESPONDENT COMMISSION'S BRIEF)

►Respondent Commission Responsive Brief at pages 15-17.

In an effort to avoid confronting the substance of Appellants' argument, the Commission claims that arguments related to the Commission's refusal to accept an offer of proof should not be considered. Relying upon Section 386.500.2, the Commission mistakenly asserts that Appellants did not raise these arguments in their Application for Rehearing.[40]

The Commission's claims are specious. Appellants repeatedly raised issues regarding the constitutionality and legality of the Commission's refusal to permit an offer of proof in their Application for Rehearing:

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[40] Commission Brief at pages 15-17. Without providing any substantive argument, KCPL simply joins the Commission's argument. "Intervenors agree with the Commission that Praxair failed to preserve any constitutional basis to attack Section 536.070(7) or 4 CSR 240-2.130(3)." As with the Commission's argument, KCPL's assertion is equally mistaken.

14. The commission erred as a matter of law and fact in finding that imposition of Great Plains and KCPL's Ethics Policy would not result in public detriment to the ratepayers of Aquila in that it refused to admit evidence that would have shown that KCPL either defines this policy differently in practice than the wording of such policy would suggest. The commission also erred as a matter of law by refusing to preserve such evidence for judicial review through an offer of proof. The commission has repeatedly confused an investigation in to the underlying circumstances that may have prompted an anonymous letter with an inquiry into certain anonymous letters.[41]

17. The commission erred as a matter of law and fact in denying requesting parties an opportunity to submit evidence regarding materials as an offer of proof. Such practice is meant to preserve evidence for judicial review and the commission's arbitrary action is calculated and intended to frustrate that review and deny opposing parties due process.[42]

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[41] *Application for Rehearing of Industrial Intervenors*, filed July 12 2008, at pages 6-7 (emphasis added) (L.F. 3943-3966).

[42] *Id.* at page 7 (emphasis added).

18. The commission erred as a matter of law and fact in ruling that evidence was wholly irrelevant without even hearing such evidence. There is no basis in fact and law to make such a determination.[43]

As demonstrated from the citations to their Application for Rehearing, Appellants raised and preserved issues regarding the legality of the Commission's actions. Further, Missouri courts take a broad and practical view of the needed specificity to preserve issues for review in an Application for Rehearing and liberally interpret issues raised in an Application for Rehearing in an effort to preserve those points of appeal.[44] The Commission's argument should be disregarded as an attempt to avoid addressing Appellants' substantive arguments.

[43] *Id.*

[44] *State ex rel. Capital City Water Company v. Public Service Commission*, 850 S.W.2d 903, 909 (Mo.App. WD); *see also, State ex rel. Chicago, Rock Island and Pacific Railroad Company v. Public Service Commission*, 441 S.W.2d 742, 748 (Mo.App. 1969).

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.

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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 5,808 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.

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David Woodsmall

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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 February, 2011, to the following counsel of record:

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