BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of a Working Case Regarding	)	
Amendments to the Commission's Ex Parte and	)	File No. AW-2016-0312
Extra-Record Communications Rule.	)	

SUPPLEMENTARY AND REPLY COMMENTS OF AMEREN MISSOURI

COMES NOW Union Electric Company d/b/a Ameren Missouri ("Ameren Missouri" or "Company"), and submits these supplementary and reply comments regarding the draft proposed rule language included with the Commission's June 8, 2016 Order that opened this working docket, as follows:

1. In its June 8 Order, the Commission solicited comments on the above-referenced draft rule language, ultimately setting a deadline for submission of those comments of August 22, 2016.

2. Nine entities[1] submitted comments regarding the draft rule language. Thereafter, on September 22, 2016, the Commission issued an order in this docket soliciting reply and supplementary comments directed toward the original comments referenced above, or toward the draft rule language. That order also set a deadline for the filing of reply or supplementary comments of October 6, 2016. While a Chapter 536, RSMo. rulemaking process has not yet been commenced, Ameren Missouri appreciates the opportunity to provide input via comments in this workshop docket on potential changes to the Commission's communication rules.[2]

3. As indicated in its August 22 comments, the Company remains largely supportive of the draft language proposed in this docket. However, some of the other commenters have raised points which bear consideration. To the extent the Company finds those points to have

[1] The Company, Office of the Public Counsel ("OPC"), Missouri-American Water Company, Midwest Energy Consumers Group, Missouri Energy Development Association ("MEDA"), Missouri Landowners Alliance ("MLA"), Missouri Cable Telecommunications Association ("MCTA"), Dogwood Energy LLC ("Dogwood") and Kansas City Power & Light Company and KCPL-Greater Missouri Operations Company (collectively, "KCP&L").
[2] References to the Commission's communication rules are, in general, references to Chapter 4 of 4 CSR-240.

merit, the Company supplements its original comments to address them here. Moreover, some of the other commenters have taken the opportunity to express their viewpoints on law and regulatory principles pertaining to communications with the Commission. Where warranted, these comments also reflect the Company's response to those viewpoints.

The Existing Rule's Construct

4. The construct reflected in the existing communications rule essentially separates communications into three categories, as follows: (a) *ex parte* communications – essentially communications about substantive issues involving parties or "anticipated" parties; (b) extra-record communications – essentially communications about substantive issues involving a non-party; and (c) a catch-all provision (4 CSR 240-4.020(8)) that is unfairly applicable only to regulated entities. Given that categories (a) and (b) apply to communications involving substantive issues, category (c) necessarily applies only to non-substantive issues, which would include communications about general regulatory policy. Not only is the category (c) rule unfair and discriminatory, but it, together with other provisions of the existing rule, has always been cumbersome and confusing in its application.

5. The draft rule language proposes to eliminate the catch-all provision that requires a 48-hour notice to be given of certain oral communications covered by it, but only if the communications involved a regulated entity. That same provision also requires disclosure of certain of those communications if they are written. Elimination of this provision is appropriate, including because it was totally lacking in symmetry since it imposes requirements on regulated entities but unfairly fails to apply those same requirements to others.[3]

[3] *See Comments of Union Electric Company d/b/a Ameren Missouri* in File No. AX-2012-0072, where several practical examples of the asymmetry and discrimination inherent in this provision were discussed.

The Proposed Language's Construct

6. The proposed rule language properly simplifies and by that simplicity, brings clarity to, the kinds of communications it covers. In essence, if the communication is substantive, it is regulated; otherwise, it is not. As discussed further below, this approach is reasonable because it reflects the Commission's unique role as a committee of the legislature that has the dual role of implementing the legislative policy reflected in the Public Service Commission Law, while also carrying out the quasi-adjudicative functions created for them by that Law.[4]

7. This approach, as reflected in the draft rule language, is also faithful to Section 386.210 and, in particular, to subsection 4 of that statute, which provides as follows:

> 4. Nothing in this section or any other provision of law shall be construed as imposing any limitation on the free exchange of ideas, views, and information between any person and the commission or any commissioner, provided that such communications relate to matters of general regulatory policy and do not address the merits of the specific facts, evidence, claims, or positions presented or taken in a pending case unless such communications comply with the provisions of subsection 3 of this section.

8. Subsection 4 reflects the intention of the General Assembly (which has chosen to delegate to the Commission what would otherwise be its own authority to regulate public utilities directly),[5] that neither the statute nor *any other* provision of law (including a regulation) limit communication with the Commission so long as the communication does not address the *merits of* the items enumerated in subsection 4 (i.e., specific facts, evidence, claims or positions). As public comments by certain Commissioners in connection with this workshop have indicated, a

[4] State ex rel. Laundry, Inc. v. Pub. Serv. Com., 327 Mo. 93, 34 S.W.2d 37, 42 (1931) ("The Public Service Commission is an administrative agency or committee of the Legislature, and as such is vested with only such powers as are conferred upon it by the Public Service Commission Law, by which it was created.").

[5] State ex rel. Rhodes v. Pub. Serv. Com., 270 Mo. 547, 194 S.W. 287, (1917) (Discussing a state's ability to regulate and fix the rates of its domestic utilities, either *directly or* through an act of its Legislature or through such a commission as the Public Service Commission, unless there be an express restriction of general legislative authority so to do in the State Constitution. There is not such restriction in Missouri's Constitution).

key driver of the need for changes to the existing rule (aside from its unnecessary complexity, vagueness and lack of symmetry) is to make sure that any communication rules in place at the Commission do not, as they do now, constitute a provision of law that does limit communications that under the statute are not to be limited.

9. The proposed rule language comes quite close to preventing such unlawful limits. The language comes close, but it does contain one flaw; that is, it broadens what is a "substantive issue" according to section 386.210.4 by failing to limit the definition of a "substantive issue" to communications regarding the "*merits of*" specific facts, evidence, etc. Instead, the proposed language goes too far and proposes to define a "substantive issue" as the "merits, [of], specific facts…" A discussion about a "specific fact" is not itself substantive; it is only when the merits of that fact as it bears on a specific contested case that it becomes substantive.

10. There is a reason for the distinction. Commissioners, and the Commission itself, play a unique role in our state government. Commissioners are not judges, but rather, exercise administrative powers delegated to them by the Legislature. This is not just Ameren Missouri's view. To the contrary, the courts of this state have so stated. *See, e.g., State ex rel. Missouri Southern R. Co. v. Pub. Serv. Comm'n*, 168 S.W. 1156 (Mo. 1914) (Wherein the Missouri Supreme Court construed the very nature and authority of the Commission in an early rate case initiated shortly after the Public Service Commission law was enacted. With regard to the nature of the Commission, the Supreme Court had this to say, which makes clear that Commissioners are not judges, and thus are not subject to the same standards that apply to judges: "In this state all judicial power is vested in the courts (section 1, art. 6, Const.) and legislative power is vested in the general assembly (section 1, art 4, Const.). So respondent [the Commission] claims only administrative powers. That claim is justified." *Id.* at 1164.)

Indeed, even when rates are set as the result of a quasi-adjudicative contested case process, the Commission does not exercise judicial power, but rather, acts in a legislative capacity, as stated by the Supreme Court in *State ex rel. Kansas City et al v. Pub. Serv. Comm'n*, 228 S.W.2d 738 (Mo. 1950) ("The Public Service Commission is not a court and it has *no judicial power*. The orders which it issues are not judgments or adjudications. It has been described as an 'administrative arm' of the Legislature. In approving or fixing rates of public utilities which come under its supervision, it exercises a *legislative power*" (emphasis added)).

These legal principles demonstrate why it is completely proper for Commissioners to have communications regarding non-substantive issues (properly defined) without restrictions imposed by a Commission rule or other source of law, as section 386.210.4 commands. Indeed, Commissioners are *expected* to have a level of knowledge about the facts of a particular case that a member of the judicial branch could not have. "'Familiarity with the adjudicative facts of a particular case, even to the point of having reached a tentative conclusion prior to the hearing, does not necessarily disqualify an administrative decisionmaker.'" *Id.* (*quoting Fitzgerald v. City of Maryland Heights*, 796 S.W.2d 52, 59 (Mo. App. 1990)). Moreover, it is only when an administrative decisionmaker has "made an unalterable prejudgment of operative adjudicative facts" that an administrative decisionmaker is considered biased such that the administrative hearing at issue becomes unfair. *Id.* (*quoting Fitzgerald*, 796 S.W.2d at 59). Clearly, Commissioners are free to have communications regarding non-substantive matters without limits in a provision of law, including its own rules. In fact, the cases and the above-cited statute recognize that doing so is completely appropriate.

11. The proposed rule language properly does not seek to limit these other communications. There are likely two reasons for this. First, the existing rule's asymmetrical

and discriminatory requirement that such communications with regulated utilities are to be regulated and limited, while leaving any other person, firm or entity free to communicate with the Commission on such matters without notice or disclosure, is inherently unfair. If, as an example, representatives of large industrial customers can discuss non-substantive issues with Commissioners free of regulation, so too should utilities be free to do so. Once it is recognized that any such regulation must apply equally to all, it becomes obvious that regulating such communications creates severe practical problems.

For example, must prior notice be given before a phone call can be made to the office of the Commission?; Must a filing be made every time a Commissioner speaks to anyone about a non-substantive issue?; and If a Commissioner attends a meeting or a conference and in the hall a person has a ten-minute conversation with the Commissioner regarding renewables, or a proposed regulation, or any number of matters which *do not* involve the *merits of* their position or some other party's position in a contested case, should such a communication not have taken place without prior notice or should it not take place without then having to document it somehow? If the answers to questions like these were "yes," Commissioners will either have full-time jobs managing prior notices or disclosures about non-substantive communications on topics central to their jobs, or non-substantive communications will simply be discouraged to the point that they won't happen as they should.[6]

Specific Comments of Others – Areas of Agreement

12. OPC's comments regarding tours. The Company has given OPC reasonable advance notice of facility tours where members of the office of the Commission have been

[6] For this reason, the Company disagrees with the MCTA's statement that for these kinds of communications disclosure requirements should remain. Doing so is not practical if indeed such requirements are to be applied to all, as they should be.

invited.[7] If the Commission believes it should codify such a requirement the Company has no objection. It makes no sense, however, for such tours to be limited to those where a quorum of the Commission is scheduled to attend. By definition, substantive issues cannot be addressed on such tours. Certainly, the tours are not intended to constitute a meeting of the Commission. Indeed, if a quorum were to attend the provisions of Chapter 610, RSMo. would require advance notice. Moreover, there could be tours where a majority of the Commission has already toured the facility at issue. Must a Commissioner who has already been on a given tour go again just so a Commissioner that has not been on that tour go?

With respect to OPC's other suggestions in this area, the Company would have no objection to having Commissioners post the tour on their calendars in advance and to filing a tour summary. Tours are infrequent enough that these disclosure requirements don't pose the same problems as identified above regarding non-substantive communications generally.

13. MCTA's comment regarding reporting the duration of communications. Where the proposed rule language requires written disclosure, it seems appropriate to also include in that disclosure a statement of the *approximate* duration of the communication.

14. MEDA's comment regarding prior notice before contested cases are filed. In its initial comments, the Company explained why there was no reason to convert what is currently a 60-day prior notice of contested cases to a minimum of 90-days of notice. The Company also explained why there should be an exception from any pre-notification requirement for tariff filings that do not change a rate or charge, and also an exception for tariff filings that propose a new service. MEDA went one step further in its comments in this docket, suggesting that rather than a pre-notification requirement, the Commission should instead require a declaration filed concurrently with the initiation of the contested case stating that the utility has not discussed the

[7] Regardless of the rule's terms, the Company would intend to continue this practice.

matter with a commissioner within a specified, reasonable period of time (60-90 days would be reasonable) or, if a substantive discussion had occurred within that timeframe, disclosing the discussion. MEDA's suggestion is a sensible one. It obviates the practical problems that can exist with a prohibition on making a filing at all within a certain window of time. It also eliminates the need to have exceptions such as those the Company originally recommended (regarding tariffs that don't change rates or that propose new programs). Finally, a declaration requirement will discourage such communications during the window and, if a communication occurs, will require complete transparency.[8]

15. Dogwood's comments about Agenda discussions. Paragraph 6 of Dogwood's comments raises two points about proposed 4 CSR 240-4.040. First, Dogwood indicates that for the listed exceptions, disclosure should still be required if the communication involves a substantive issue. With the Company's recommended change to the proposed rules' definition of "substantive issue," the Company agrees. The Company would note, however, that exceptions in subsections (A)1. – 3 are by their nature not the kind of items where the Company would address the merits of an interruption of loss of service (to cite an example) in the first place.

Dogwood's main point in paragraph 6 of its comments relates to the fact that the exceptions could be read to allow discussions of substantive issues at a Commission agenda. The Company shares Dogwoods concerns in this area. Recently, there have been several instances where some kind of order in a case (or perhaps a case discussion) is listed on the Commission's agenda, but when the order/discussion comes up, Commissioners have not merely discussed it among themselves as part of deliberations, but have instead initiated discussions about the merits of various positions with representatives of some, but not all, of the parties to the case. While it is typical for a Staff attorney or OPC attorney to be present (and all of those

[8] Dogwood makes a similar suggestion.

attorneys work in the Commission's office building), many other parties have no representative present at Agenda meetings and even if they do, often that representative is not the person responsible for the case being discussed. Commissioners should not discuss substantive issues in the case unless all parties have been given proper notice and an opportunity to be present and heard.

Nor is an Agenda meeting the right forum for such discussions to take place. Commission decision must rest on evidence, developed in a proper hearing with appropriate rules and safeguards in place. If there are substantive issues for which discussion or questions are needed in a pending contested case, then the Commission should schedule a hearing (which could be live or by phone, or both) in that case with adequate notice and an opportunity to ensure that the right personnel can participate.

Consequently, as written, the proposed language for 4 CSR 240-40.040(1)(A)4 is too broad.

Specific Comments of Others – Areas of Disagreement

16. As outlined above, while there are some areas of agreement between the Company and other commenters, areas of significant disagreement remain.

17. OPC's Comments. The Company will attempt to largely refrain from addressing what OPC's comments clearly indicate is OPC's lingering displeasure with both the Commission's 2008 approval of the merger of a Great Plains Energy subsidiary with Aquila, Inc. (resulting in the formation of KCP&L – Greater Missouri Operations Company), and its displeasure with the Missouri Supreme Court's opinion in State ex rel. Praxair v. Pub. Serv. Comm'n, 344 S.W.3d 178 (Mo. *banc* 2011), where the Supreme Court upheld the Commission's order in that merger case in all respects. It is important to note, however, that just because OPC

and others made *allegations* of improper bias on certain Commissioners' parts in that case, and just because revised communications rules were adopted by the then-Commission after those controversies were raised in that case, does not prove, as OPC's comments un-mistakenly imply, that the existing communication rules are "right" or are otherwise infallible, workable or consistent with section 386.210. They are not.

Moreover, no one, the Company included, is suggesting that there should be no communication rules or that utilities (or any other party) should engage in *ex parte* communications, or have undisclosed communications about substantive issues.[9] The proposed rules properly limit those communications, and the Company supports those limits. However, the focus here should be on the *merits* of the proposed rule language. Instead, OPC engages in a rather transparent, renewed attack on past Commissioners and an 8-year old Commission decision that OPC doesn't like. OPC also spills significant ink arguing about the meaning of subsection 1 of section 386.210, pointing out that the Supreme Court interpreted it as OPC had argued. While that is true, it is also irrelevant. No one argues in this docket that the existing rules need to be changed to comply with subsection 1. OPC also fails to point out that the Supreme Court also confirmed, as reflected in prior case law, that Commissioners are not judges and are presumed to act honestly and impartially. OPC's comments appear to attempt to reverse that presumption.

OPC's comments also attempt to gloss-over the clear provisions of section 386.210.4, although in the end, even OPC seems to recognize that it says what it says, arguably conceding (in paragraph 58 of its comments) that the statute does prohibit the imposition of limits on non-substantive communications with Commissioners. OPC chooses to characterize the lack of

[9] As earlier noted, the definition of "substantive issue" does need a slight but important revision so that it is focused on discussions about the *merits* of issues, not merely a communication that might involve a mention of a piece of evidence, e.g., that a power plant addition is estimated to cost $200 million.

limits as allowing only such discussions with utilities, completely ignoring that OPC and everyone else similarly is free to have such communications and that the statute indicates they cannot be limited.

Regarding OPC's comments about discussions about legislation in particular, the premise of OPC's criticisms is flawed in that it fails to recognize or acknowledge that Commissioners are administrators who are not expected to enter the hearing room devoid of knowledge or even devoid of tentative views on a particular matter, as discussed above. This would include Commissioner views on the application of new legislation in later cases before it. And that this is the Commissioner's role can certainly cut both ways. For example, there could certainly be instances where a utility wishes a Commissioner would have a different view on a proposed piece of legislation than the Commissioner has, which may have been shaped by the urging of others (e.g., OPC). Conversely, a utility may advocate for particular legislation and a Commissioner may agree or agree in part, meaning OPC might wish the Commissioner's views were different. In neither case, however, does this mean that the Commissioner or the utility or OPC has done anything wrong, and it certainly does not mean that such parties' Free Speech rights to discuss such matters, which in the words of section 386.210.4 do not involve "the merits of the specific facts, evidence, claims or positions presented or taken in a pending case," can or should be restricted. It can't, and that goes for a utility, for OPC and for any other party.

OPC's final main theme is to in effect stretch the Sunshine Law (Chapter 610, RSMo.) beyond its actual boundaries. As part of its discussion, OPC also pounds the drum for different treatment for utilities than for the many parties who regularly take positions at odds with utilities in adjudications and other proceedings before the Commission. It is crystal clear that an individual Commissioner is free to meet with a utility or OPC or an industrial group, etc. without

prior notice or some kind of disclosure without in any way running afoul of the Sunshine Law. The Sunshine Law applies to "public governmental bodies;" that is, the Commission as a body. To the extent OPC implies otherwise through its citation to section 610.010 et. seq,[10] OPC is mistaken. And if "transparency" is to be demanded if a Commissioner has a communication with a utility, the same transparency must be demanded if a Commissioner has a communication with OPC, an industrial group, etc. Again, however, section 386.210.4 does not allow the Commission to impose limitations on communications other than those outlined in the statute.

In summary, OPC's comments reflect an apparent OPC view that favors retention of the existing confusing, overly complex, inherently unfair and likely unlawful (in part) existing communication rules that asymmetrically allow OPC and others free access to Commissioners for non-substantive communications, but impose requirements on utilities and utilities alone respecting those same kinds of communications.

18. Missouri Landowner's Alliance (MLA) comment re: publicity. MLA's proposed language (appearing in indented text at page 2 of its comments) almost certainly violates the Free Speech rights of parties to engage in advertising or public relations as they see fit. Commissioners are required by law to decide contested cases based on the record before them. That any party, whether a utility seeking public support for a project, or a landowner group seeking public opposition to a project, engages in public relations efforts before, during, or after hearings in a case take place is neither the Commission's business nor concern.

19. Dogwood's comments regarding cases on appeal. The Company disagrees with Dogwood's suggestion that the proposed rule language's restrictions on discussions continue after a Commission decision becomes final if that decision is on appeal. Commission decisions have the force and effect of law pending appeal. Section 386.490, .520. The Commission

[10] See ¶ 68 at page 26 of OPC's comments.

becomes a party to any appeal. As a party, the Commission ought to be able to discuss any issue with the other parties to the appeal, as a party would be free to do in any other piece of litigation.

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