**BEFORE THE PUBLIC SERVICE COMMISSION**
**OF THE STATE OF MISSOURI**

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| In the Matter of a Proposed Amendment | ) | |
| To the Commission's Rule Regarding | ) | Case No. AX-2012-0072 |
| Ex Parte and Extra-Record Communications. | ) | |

**COMMENTS OF UNION ELECTRIC COMPANY**
**d/b/a AMEREN MISSOURI**

COMES NOW Union Electric Company d/b/a Ameren Missouri ("Ameren Missouri" or the "Company"), by and through counsel, and hereby submits these Comments in response to the Notice issued by the Missouri Public Service Commission ("Commission") and published in the *Missouri Code of State Regulations,* Vol. 36, No. 21 (Nov. 1, 2011).

## INTRODUCTION

Ameren Missouri appreciates this opportunity to provide comments on proposed amendments to the Commission's communications rule (4 CSR 240-4.020). While Ameren Missouri views almost all of the proposed amendments as improvements to this now one and one-half year old rule, the proposed amendments do not go far enough. This is because the proposed amendments do not fully account for lessons learned since the rule originally became effective, and they do not do enough to create a level playing field between utilities and other parties to Commission cases – whether those other parties are the Staff of the Commission (the "Staff"), the Office of the Public Counsel ("OPC"), or groups of customers (such as large industrial customers who are very active in utility cases at the Commission). Ameren Missouri urges the Commission to take this opportunity to further improve the rule in the manner discussed herein.

## SPECIFIC COMMENTS[1]

*Existing Section (8) is unfair, overbroad and should be eliminated.*

Section (8) allows any non-utility litigant or potential litigant (i.e., a non-utility "party" or "anticipated party," according to the rule) to engage in a myriad of communications with a commissioner, technical advisory staff member or the presiding officer (hereinafter collectively referred to as a "commissioner") without any disclosure regarding any of those communications. It is fundamentally unfair for one set of parties (e.g., Large Industrial Customer X, a renewable developer, OPC, or even the Staff), to be free to meet and communicate with a commissioner in private about "general regulatory policy" (e.g., an existing rule, a proposed rule, an idea for a rule; about mechanisms such as trackers or adjustment clauses (riders); about various regulatory or rate treatments; or about a host of other matters which are not specific to a "single entity regulated by the commission"), when a utility can have no such communications unless it complies with Section (8).

And this discriminatory treatment exists all or nearly all of the time for many utilities (and certainly for Ameren Missouri) because Section (8) is written in a manner such that it applies whenever a utility has *any* contested case pending. There is almost no moment in time when Ameren Missouri does not have at least one contested case pending (e.g., a consumer complaint case).[2] Consequently, others who are almost always adverse parties to the utilities are

[1] This section of these Comments will describe and discuss certain additional amendments the Company believes should be made. The next section of these comments will contain a specific "mark-up" of the existing communication rule section or sub-sections for which amendments are suggested. The Company also notes that with one exception (new Section (13)) it supports the specific amendments reflected in the Notice.

[2] Because a hearing is required by law in complaint cases, every complaint case is a contested case, meaning subsection (8) is triggered virtually all of the time.

given undisclosed access to commissioners that utilities do not have, and they have this access virtually all of the time.[3]

The apparent purpose of Section (8) is to both give advance notice to all parties to any pending contested case involving the utility, to give advance notice to the public generally (and in particular those that follow commission business via the posting 48 hours in advance on the commissioners' calendars), and to give OPC an opportunity to "monitor" what is said during such communications. Put another way, subsection (8)'s purpose is to shed the light on these kinds of communications. Presumably the idea is to "keep the utility in line" so that the communications stay within the realm of "general regulatory policy" so that the utility is not somehow influencing or attempting to influence a commissioner on a matter that will or is likely to come up in a pending or later utility case where the commissioner will then be wearing his or her "quasi-adjudicatory" hat and where the commissioner will be called upon to make a fair and impartial decision. Section (8) goes even further; that is, it also applies if a utility (*but not others*) communicates regarding a rule or legislation even though the Commission has no quasi-adjudicatory function regarding such matters.

Ameren Missouri takes issue with the asymmetrical and discriminatory premise that the light should shine only on *its* (or other utilities') communications (and with the premise that others should have the opportunity to serve as a "watchdog" over the utility) when others who may (and often do) take adverse positions in the utilities' cases or on other matters remain free to engage in such communications without notice or disclosure and without anyone serving as a watchdog over them. If the Commission has decided that the appearance of undue influence

[3] For example, various groups (e.g., renewable developers; industrial customer associations) could discuss "rate design" or the need for "lower rates" to support jobs or other similar initiatives that are not necessarily specific to a particular utility and which may or not literally come up in a contested or anticipated contested case but which arguably lay the groundwork for their arguments about specific topics that will come up in such cases.

(and the appearance that a commissioner could become biased) could be created when a party or anticipated party to a contested case (or even a rulemaking) meets with or communicates with a commissioner in private even about general regulatory policy, then the potential for that appearance to arise should not be allowed regardless of who the party or anticipated party is.

For example, imagine a utility has a complaint case pending (meaning Section (8) applies), and that the utility wants to discuss with a commissioner its ideas, concerns, etc. relating to current Missouri law or the Commission's regulations or past or current practices at the Commission. Assume that the communication isn't about a subject in the pending complaint case, it isn't about a subject the utility knows will or is likely to come up in a future case, and the issues are of a nature that they apply to all utilities, meaning they are not specific to a single entity (i.e., they are issues of general regulatory policy). Under Section (8), the utility gives the required notice and invites OPC. OPC shows up (as does Industrial Customer X and consumer group lawyer Y). The discussion occurs, a summary of the communication is filed, and the next day OPC, Industrial Customer X, and consumer group lawyer Y call a commissioner's office and request a meeting. When they arrive, they proceed to discuss their viewpoints on those very same issues of general regulatory policy which were the subject of the communication the utility had just concluded. Under those circumstances, neither the subject utility (nor any other utility) received any notice that the communication was taking place, and has no idea what was said or discussed. The utility's communications on the same topics occurred in the daylight; OPC's and Industrial Customers X and Y's communications occurred in the dark of night.[4]

Or consider other examples. Large Industrial Customer X can arguably communicate with a commissioner about jobs, economic development, and the impact of power prices on those

[4] Under the rule as written non-utilities could hold a meeting with a commissioner the day after the rulemaking hearing in this docket is held about this rulemaking, without notice or disclosure, yet a utility cannot do so.

subjects and so long as a case or anticipated case that is believed by them will address such issues is not *known* to them to be pending (which will be true much if not most of the time) they can engage in such communications with no disclosure. They can then advance those same points in the case when it arises. The same could be said for other groups, such as renewable developers or environmental groups who may later become parties to Commission cases and who may then advance the very same issues they previously discussed with a commissioner.

There is no justification for this kind of discriminatory treatment. To reiterate: if the Commission believes communications with parties or anticipated parties to cases the Commission will be called upon to decide should not occur except in the daylight – because otherwise a commissioner can be accused of subjecting himself or herself to undue influence or of being biased -- this is just as true of communications by a non-utility party or anticipated party as it is of communications by a utility.[5] In effect, what Section (8) does is presumptively assume that utilities will act in an untoward manner while presumptively assuming everyone else will not do so, or it presumptively assumes an appearance of impropriety or undue influence can only occur if a utility communicates, but that the same could not be true if Large Industrial Customer X communicates. The Commission has no basis to engage in such presumptions, and in doing so, is evincing a bias against utilities that runs directly counter to the Commission's duty to be fair to customers and utilities alike.

Not only is the purpose apparently being served by Section (8) being served in a discriminatory manner, but it is a purpose that need not be served at all. The communications rule already prohibits ex parte communications and heavily regulates extra-record communications. Those communications deal with *substantive issues* that the Commission may,

[5] As discussed below, Section (8) suffers from a more fundamental flaw; that is, it treats commissioners as judges when in fact commissioners exercise only legislative power.

as part of its quasi-adjudicatory processes, be called upon to decide. But if the communication does not involve a substantive issue in a pending contested case or anticipated contested case, then it need not be proscribed. This is because the Commission has a unique role, as determined by the delegation of power given the Commission by the General Assembly. That unique role puts each commissioner in the position of being not just a person who decides substantive issues in a quasi-adjudicatory setting, but also a person who must be something of an expert; a policy-maker; with respect to public utility regulation, energy policy, and utility infrastructure policy.

Indeed, contrary to the suggestions of others (in particular OPC in earlier workshops or rulemakings regarding the communications rule) the Commission is not a court and it exercises no judicial power. *See State ex rel. Missouri Southern R. Co. v. Pub. Serv. Comm'n*, 168 S.W. 1156, 1164 (Mo. 1914) ("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."); *see also State ex rel. Kansas City et al v. Pub. Serv. Comm'n*, 228 S.W.2d 738, 741 (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)).

Recently, a unanimous Supreme Court, in affirming the Commission's Report and Order in the case that led to this overly-broad rule, specifically rejected the contention that commissioners are in effect judges that must be held to the same standards as judges. *See State ex rel. Praxair et al. v. Pub. Serv. Comm'n*, 344 S.W.3d 178 (Mo. *banc* 2011). In *Praxair*, the Supreme Court made clear that while of course due process demands that commissioners not

have an *actual bias* against a litigant in a quasi-adjudicatory case the commissioner will be called upon to decide (or have an interest in its outcome), merely having communications about general background information or even adjudicative facts that may come up in a later case does not constitute actual bias or an impermissible interest. *Id.* at 192-93. The Supreme Court noted that there might be actual bias against a litigant if a commissioner had been the subject to personal attack or abuse by that litigant, and that there is only an impermissible interest if the commissioner has an actual interest in the outcome (e.g., is associated with a party to the case, as was the case in *Union Electric Co. v. Pub. Serv. Comm'n*, 591 S.W.2d 134 (Mo. App. 1979)). Neither of these considerations is implicated by the kinds of communications that Section (8) seeks to regulate, unless one assumes that the communicating commissioner and the communicating regulated entity are both engaging in improper behavior. In fact, the presumption is that administrative decision-makers act honestly and impartially. *Praxair*, 344 S.W.3d at 192 (*quoting State ex rel. AG Processing v. Thompson*, 100 S.W.3d 915, 919-20 (Mo. App. W.D. 2003).

The foregoing cases demonstrate that Section (8) rests on a false premise; that is, that commissioners are supposed to arrive at quasi-adjudicatory proceedings with a blank mind having spoken with no one about any information that might inform the decisions they may later make. To the contrary, commissioners do, and are expected to, have knowledge regarding matters that arise in the regulation of public utilities. "'Mere familiarity with the facts of a case gained by the agency in the performance of its statutory role . . . does not disqualify a decisionmaker.'" *Id.* at 192 (*citing Hortonville Joint Sch. Dist. No. 1 v. Hortonville Educ. Ass'n*, 426 U.S. 482, 493, 96 S. Ct. 2308, 49 L. Ed. 2d 1 (1976)). *See also Fitzgerald v. City of Maryland Heights*, 796 S.W.2d 52, 59 (Mo. App. E.D. 1990) (Familiarity with adjudicative facts

" even to the point of having reached a tentative conclusion prior to the hearing, does not necessarily disqualify an administrative decisionmaker." Moreover, "[a]dministrative decisionmakers are expected to have preconceived notions concerning policy issues within their expertise."). And, only if an administrative decisionmaker has "made an unalterable prejudgment of operative adjudicative facts" is an administrative decision-maker considered biased such that the administrative hearing at issue becomes unfair. *Id.*

If the communication is not about a substantive issue in a pending contested case or an anticipated contested case then the communication should be allowed to occur – and this is true whether the communication is with a utility or with Large Customer X, a renewable developer, the Staff, or OPC. There is simply no need to create a cumbersome bureaucracy to "regulate" such communications, and doing so reflects a misunderstanding of or misapplication of the Commission's role as a delegee of legislative authority; indeed, a discriminatory misapplication. For these reasons, Section (8) should be eliminated.[6]

In connection with such elimination, the specific authorization to engage in communications regarding general regulatory policy that already appears in the definition of "ex parte communication" should also appear in the definition of "extra-record communication." It makes no sense to allow communications regarding general regulatory policy when a contested case is pending (as an exception to "ex parte communication") but to not also allow such communications when only an anticipated contested case is pending (as an exception to "extra-record communication").

[6] If Section (8) is not eliminated it at least ought to be applied even-handedly to all persons, firms or entities who are parties or anticipated parties to a contested case.

*The 60-Day notification requirement in Section 1(A) and Section (2) should be modified.*

The 60-day notification requirement for tariff filings that affect rates or charges to customers is workable. It is also workable in many other contested cases and when it is not a waiver can be sought (e.g., a certificate case). However, it is far too difficult to anticipate every tariff filing that does not affect rates or charges to customers 60 days in advance. In effect, such non-rate/non-charge tariff filings are being transformed into tariff filings that cannot take effect for 90 days, rather than in 30 days as contemplated by Section 393.140(11). Moreover, the 60-day notification requirement discourages utilities from communicating with the Staff and OPC prior to the filing of such tariffs. This is because if a utility communicates with the Staff or OPC and finds out that the Staff or OPC are going to contest the tariff (that the utility did not believe would be contested – a circumstance that sometimes does happen) the utility is then put in the position of having to wait an additional 60 days to file the tariff.

For the foregoing reasons, the 60-day notice provision should not apply to tariff filings that do not change a rate or a charge. The blanket 60-day notice provision without excepting non-rate/non-charge tariff filings has created an inefficiency in the regulatory process that Ameren Missouri does not believe was intended when the original rule was adopted.

*The definition of a "substantive issue" should be modified (Section (1)(O)).*

"Substantive issue" should be defined as "the merits **of** [specific facts, evidence] claims or positions which have been or are likely to be presented or taken in a contested case." The reference to "specific facts and evidence" should be deleted from the definition because numerous specific facts are presented in every proceeding. For example, in every rate case the Company provides basic facts—it serves 1.2 million customers, it has four coal-fired plants, it buys $X of coal, its load is up or down, etc. These facts (or the evidence supporting them) are

not "substantive issues." So long as there are not communications about the "claims or positions" (i.e. merits of arguments for or against) the concerns that led to the original adoption of the rule are not implicated. As noted earlier, administrative decision-makers are not expected to lack total knowledge of facts or evidence that may later come up when they employ their quasi-adjudicatory processes.

For example, in August of this year Ameren Missouri President and CEO Warner Baxter met with Chairman Gunn (after compliance with Section (8)) regarding the new Cross-State Air Pollution Rule ("CSPAR). Part of that discussion consisted of explaining the fact that the installation of the scrubbers at the Company's Sioux Plant coupled with the Company's decision to enter into a long-term ultra low sulfur coal contract enabled the Company to substantially delay other scrubber installations at other plants. Recently, as a result of the information Chairman Gunn gained, Chairman Gunn was able to cite and discuss these facts at an EPA session at the November NARUC conference in St. Louis. However, if "specific facts and evidence" remain part of the definition if a rate case is anticipated or pending, even if there may be no issue regarding scrubbers or the low sulfur coal contract, the Company (and the Chairman) would have been hamstrung in their ability to communicate about these *facts*.

*New Section (13) should be further amended.*

Section (13) appears designed to allow the Commission to communicate with parties to cases that have been concluded apparently to take advantage of lessons learned from such cases. In general that goal makes sense, but the proposed rule, as written, may put the Commission in the position of engaging in discussions that properly should be treated as ex parte or extra-record communications. For example, assume that Rate Case No. 1 with Electric Utility X just concluded and that ROE, depreciation, power prices, etc. were issues in Rate Case No. 1.

Assume Electric Utility Y has a rate case pending (or an anticipated rate case pending) – i.e., Rate Case No. 2. The line between discussing those issues from Rate Case No. 1and the merits of those issues in Rate Case No. 2 is very thin and blurry and would expose the Commission to the kinds of criticisms that led to this rule in the first place.

Consequently, the proposed amendment should be further amended to only allow these "post-mortem" communications for issues that are *not the subject of another pending contested case or anticipated contested case.*

*The process for submitting notifications and memoranda regarding extra-record communications should be simplified (Section 4).*

Currently, notifications are filed in numerous dockets followed by memoranda in those same dockets resulting in a large number of duplicative filings. For example, on October 3, 2011 the Company filed a notification (and then a memorandum on October 20) in *33* separate dockets. The Company suggests that filings be made in a single repository, that service should not be required, and that EFIS be set-up in a manner so that interested persons can subscribe to a notification service (much like is currently done with Agenda notices, etc.) so that the subscriber automatically receives notice that the notification or memoranda has been filed. Many contested cases (e.g. individual customer complaints) today are (figuratively speaking) being "swamped" with notifications that bear no relationship to the case. Surely the customer/complainant must wonder what is going on. The Company would also note that this problem would also be greatly mitigated if Section (8) were eliminated, as suggested above.

*Anticipated Parties should not be allowed to wait more than three business days to notify of an extra-record communication (Section 5).*

By definition, an anticipated party either actually anticipates, has actual knowledge, should have the knowledge that the party will be a party to a contested case. There is no reason

such a party should be able to engage in extra-record communications (which by definition deal with a substantive issue in such a case) and withhold notification until they become a party (or until the case becomes a contested case).

*The exclusions in Section 10(A) should contemplate more than mere "notification."*

The idea behind Section (10)(A) is that there are certain subjects which could overlap with issues in a contested case but which also go to the heart of the Commission's ability to exchange information on day-to-day happenings impacting the utilities it regulates. Merely "notifying" a commissioner about these topics provides information of marginal usefulness and prevents the ordinary exchange of information (in particular, a question(s) by a commissioner and an answer to that question(s)) about the occurrence). Consequently, the Company suggests that Section (10)(A) be modified as follows:

> "Communications between the commission, a commissioner, or a member of the technical advisory staff **or the presiding officer assigned to a proceeding** and a public utility or other regulated entity that is a party to a contested case, or an anticipated party to an anticipated contested case, [notifying the commission, a commissioner, a member of the technical advisory staff, or the presiding officer assigned to the proceeding of] **addressing:"**

*Certain additional exclusions should be added to Section (10)(A).*

The Company also believes there are a handful of additional communication types that should be included in the list of exclusions in Section (10)(A), as follows:

- A new exclusion should be created for information regarding new technology applicable to utility service.
- A new exclusion should be created for a customer service problem or other customer-specific issues brought to the utility's attention by a Commissioner, technical advisory staff, etc.
- A new exclusion should be created for tours of utility facilities and explanations provided about the facilities on those tours.

These are topics about which commissioners will benefit from information and education. Again, commissioners have a unique role and they should not be hamstrung in their ability to gain knowledge and information about these kinds of subjects by the flawed premise that they must show-up each time they act in a quasi-adjudicatory role (where they are still exercising only legislative power) blind to all facts that could in theory also come up in that later proceeding.

*Section (1)(G) contains an apparent mistake that should be corrected.*

Section (1)(G), the definition of "ex parte communication," excludes from that definition "communications listed in section (3) of this rule …." But section (3) is the ex parte provision of the rule. It appears that the rule should have read "communications listed in section (3)**(B)** of this rule …."

## SPECIFIC RECOMMENDED AMENDMENTS

- *Section (1)(A)*: "Anticipated contested case – Any case **(except a tariff filing that does not change a rate or a charge to customers)** that a person . . . within sixty (60) days and . . . . contested case."
- *Section (1)(G)*: "Ex parte communication – Any communication . . . regarding any substantive issue. Ex parte communications shall not include . . . communications listed in section (3)**(B)** of this rule, or . . .."
- *Section (1)(H)*: "Extra-record communication – Any communication outside the contested case hearing process . . . regarding any substantive issue. Extra-record communications shall not include communications **regarding general regulatory policy allowed under section 386.210.4, RSMo or** that are de minimis or immaterial."

- *Section (1)(O)*: "Substantive issue – The merits **of** [specific facts, evidence] claims or positions . . .."
- *Section (2)*: "Any regulated entity that intends to file a case **(except a tariff filing that does not change a rate or a charge to customers)** shall file a notice . . . a minimum of sixty (60) days . . . before the commission."
- *Section (4)(A) and (4)(B)*: "(A) If the communication is written . . . **in a repository established by the** commission [in the official case file for each discussed case]; or (B) If the communication is not written, . . . **in a repository established by the** commission [in the official case file for each discussed case];
- *Section (5)*: "Any person **other than an anticipated party** who initiates . . ." [rest of Section (5) to remain the same].
- *Section (8)*: **Eliminate and renumber the rest of the rule (and any cross-references) accordingly**.[7]
- *Section (10)[will become Section (9)]*: "(A) Communications between the commission, a commissioner, or a member of the technical advisory staff **or the presiding officer assigned to a proceeding** and a public utility or other regulated entity that is a party to a contested case, or an anticipated party to an anticipated contested case, [notifying the commission, a commissioner, a member of the

[7] If not eliminated, section (8) should read: "Any communication, other than public statements . . . between a commissioner . . . and **a party or anticipated party to a contested case or anticipated contested case** [any regulated entity] . . . shall be disclosed in the following manner." In addition, other references to "the regulated entity" in section (8) should become references to "a party or anticipated party to a contested case or anticipated contested case," all filings required should be made in "a repository established by the commission," and the sentence giving public counsel an opportunity to attend meetings should be eliminated. A provision should be added allowing any interested person to subscribe to a notification regarding all filings made in the repository established by the commission so such persons are afforded the opportunity to attend such communications just as OPC can do.

technical advisory staff, or the presiding officer assigned to the proceeding of]

**addressing:"**

* * *

(8) Labor matters not part of a pending case; [or]
(9) Matters relating to the safety of personnel . . .;
(10) Information regarding new technology applicable to utility service;
(11) Customer service problems or other customer-specific issues brought to the utility's attention by a commissioner, technical advisory staff, OPC, or a Commission employee; **or**
(12) Explanations about a utility facility provided during a tour of such facility."

- *[New] Section (13)[will become Section (12)]*: "Notwithstanding an provision of this rule to the contrary, . . . with any person regarding any procedural or substantive issues related to such case **so long as the same or substantially the same procedural or substantive issue is not the subject of another regulated entity's pending contested case or anticipated contested case."**

The Company urges the Commission to consider these Comments, and to adopt the additional amendments specified herein.

Dated: December 1, 2011.

Respectfully submitted,

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