BEFORE THE PUBLIC SERVICE COMMISSION

OF THE STATE OF MISSOURI

In the Matter of a Proposed Rulemaking Regarding Ex Parte and Extra-Record Communications	))	**Case No. AX-2010-0128**

COMMENTS OF PUBLIC COUNSEL ON PROPOSED RULE

COMES NOW the Office of the Public Counsel and for its comments respectfully states as follows:

1. It is important to remember how and why this rulemaking originated, based at least in part upon specific events in 2007. The public, the legislature, and even the Governor were deeply concerned about meetings between Commissioners and utility executives a few months before Great Plains Energy and Aquila filed for Commission approval of GPE's acquisition of Aquila. The legislature was so concerned that it provided specific additional funding in the Commission's budget for ethics training and reform. A brief recitation of the circumstances back then is necessary to evaluate whether the currently proposed rule will adequately address the issues that lead the Commission to begin this process.

2. In January 2007, senior executives with GPE, Kansas City Power & Light, and Aquila met with some or all of the Commissioners with express intent of laying out the utilities' view of the issues that would arise in the case[1] and gauging the Commissioners' reactions. The Commission's rules did not prohibit these meetings, did not require that they be documented in

[1] The case was filed on April 4, 2007, and was docketed as Case No. EM-2007-0374.

any way, and did not require that they be recorded or transcribed. Because of these shortcomings, even just a few months after the meetings, it was unclear exactly when the meetings took place, whether all Commissioners met with the utility executives, and precisely what was said at the meetings. As a result, one Commissioner filed a lengthy response in the case explaining why he was not sure whether he met with the executives or not, and another Commissioner recused himself even though he disagreed vehemently with the utility executive's characterization of the Commissioner's statements at their meeting. All constituencies – the Commission, the public, parties to a case, utilities -- are ill served by such uncertainty. Any rule revisions should be designed to eliminate (or at least minimize) the likelihood that such situations could recur.

3. More than two years ago, all of the utility customer representatives filed a petition for rulemaking with the Commission (Case No. AX-2008-0201). The petition complied with Commission's rule on rulemaking petitions, yet the Commission never took any action beyond soliciting informal comments. There is not even any indication that the Commission complied with Section 536.041 RSMo 2000, which required the Commission to "furnish a copy thereof to the joint committee on administrative rules and to the commissioner of administration, together with the action, if any, taken or contemplated by the agency as a result of such petition or request, and the agency's reasons therefor." In one of the last filings in that case, petitioners stated:

> The need for action is clear and the Commission's delay only further undermines the public's confidence in the Commission's processes. The Commission may not agree with all of Petitioners' proposed amendments, but it should propose a rule for public comment that – at a minimum – makes it clear that utilities or other parties cannot lobby Commissioners before filing cases for Commission decision, and that meetings with parties or prospective parties about issues that are before the Commission or will come to the Commission for

> decision must be open to all interested entities and must be transcribed or recorded.

Even though those statements were made almost two years ago, they are still absolutely necessary. It appears from discovery in Case No ER-2010-0036, a currently pending case in which AmerenUE seeks a $402 million increase, that an AmerenUE senior executive sought to meet with Commissioners just two weeks before filing the rate increase case. Because the Commission has yet to change its rules, parties to the case do not know whether AmerenUE discussed its soon-to-be filed case, or whether Commissioners would have entertained such a discussion as allowed under the Commission's rules.

4. As an illustration of one of the biggest flaws in the proposed rule, consider the following hypotheticals. Hypothetical 1: A utility representative sets up meetings with all Commissioners[2] thirty-one days before the utility knows it will file for a rate increase. The representative overtly lobbies Commissioners about specific issues that he knows – but the Commissioners do not – will be contested issues. Hypothetical 2: A utility representative sets up meetings with Commissioners two weeks before filing a rate increase case. He does not overtly talk about specific issues, but he talks about generally about regulatory lag and DSM, knowing that even though they might not be listed on the List of Issues, they will generally impact the Commission's thinking about the case.

5. The conduct in these hypotheticals is condoned under the proposed rules. Should it be? Public Counsel submits that it should not. With respect to Hypothetical 1, this conduct would be expressly prohibited if it took place one day later. The rule should be changed to prohibit such discussions when the party initiating them knows that the issues discussed will be

[2] One or two Commissioners at a time, of course, to circumvent the Sunshine Law as is the common Commission practice.

coming to the Commission for decision in the near future. Public Counsel understands that, as a practical matter, the Commission will insist on a definitive cut-off point, but 30 days is much too short. Anything less than 120 days leaves the impression that the Commission is condoning the practice of lobbying for results just before a case is filed. Discussions more than 120 days before a case is filed would have less likelihood of influencing the decision. And even discussions held more than 120 days before a case is filed should be recorded if the party initiating the discussion knows that the issues will come to the Commission for decision. A Commissioner should always ask in a private meeting with anyone who is commonly a party or who commonly represents a party is: "Are you going to discuss anything that you know will be presented to the Commission for decision in a contested case?" If the answer is no, the discussion proceeds. If the answer is yes, the discussion still proceeds, but the Commissioner records it.

6. Non-participating parties would be harmed by the conduct in Hypothetical 2 as well. The utility representative would know what seeds he planted, subtle or unsubtle, intentionally or innocently, about regulatory lag and DSM. The other parties would not. The utility representative would know what reactions, subtle or overt, Commissioners had to certain concepts and idea. The other parties would not. It is not at all hard to imagine a scenario in which a utility representative brought up one mechanism for DSM cost recovery and observed several Commissioners frown in disapproval, while they nodded in approval at (or simply looked more receptive to) another mechanism. It goes without saying that these observations give the utility a huge advantage over all other parties if the two mechanisms are litigated, yet the proposed rule does nothing to prevent or even limit such conduct. Commissioners' calendars should be open and accessible, and many meetings should be recorded or transcribed, including those that occur within 120 days of the filing of a rate increase case or other major case.

Specifically, proposed rule 4 CSR 240-4.020(6)(B) should be changed so that recording or transcription is the preferred method, and a summary is only allowed if it includes a detailed explanation of why recording or transcription was not reasonably feasible.

7. There are two broad goals[3] that the current rule does not adequately meet, and that this proposed rule should address: 1) to prohibit communications with Commissioners that may give one party an advantage over other parties in a contested case; and 2) to require sufficient documentation of extra record communications so that parties and the public can have confidence that no impropriety has occurred. The proposed rule fails on both. As to the first, nothing in the proposed rule would prevent a party to an anticipated case from lobbying Commissioners shortly before filing a case,[4] and nothing in the proposed rule would require Commissioners or the party to disclose the discussions to other parties. As to the second, nothing in the proposed rules requires any documentation of any meetings unless they occur during a contested case or within thirty days of the start of a contested case, and the proposed rules do not require transcription or recording even of meetings that occur shortly before the filing of a contested case.

8. Throughout the two-year-long process that has led to the proposed rule under consideration, utility representatives and others have stated that the Commission's role is a unique and challenging one, and that Commissioners have the need and the obligation to

[3] Another important goal that the current rule does meet – allowing Commissioners access to information – should not be constrained by any revised rule. This point is addressed in paragraph 8.

[4] The time between the meetings that preceded the filling of EM-2007-0374 and the actual filing that so concerned the public, the legislature and the Governor was approximately two and a half months. In order to adequately address those concerns, the definition of an anticipated contested case in 4 CSR 240-4.020(1)(A) must be at least this long. Public Counsel suggests 120 days.

constantly educate themselves about utility matters. Public Counsel does not disagree. Public Counsel does not suggest cutting the Commission off from useful sources of information. The Commission should be able to freely meet and confer with anyone, including utility representatives, about any issues whenever there is no pending or impending case concerning those issues, but **these meetings should not be held in secret**. The public should be able to attend or at the least have access to a recording or a verbatim transcript of all such meetings. A written disclosure statement filed after-the-fact by a utility representative is woefully insufficient; it will not protect the public interest in knowing what is communicated to government decision-makers, nor will it protect those decision-makers if disagreements arise about specific communications made in private meetings.

9. The rules should obligate Commissioners, advisors, and presiding officers to record or transcribe meetings in the event that the party otherwise obligated to do so is unable or unwilling to. A few hand-held recorders on the ninth floor of the Commission's offices would allow easy compliance with this requirement in the vast majority of situations. The sanctions provided for in 4 CSR 240-4.020(9) are a poor substitute for an actual transcript or recording, and may be of limited value. Moreover, there are entities that represent parties' interests that are not actually parties themselves and may not be subject to sanctions.

10. There appears to be a recurring misinterpretation of Section 386.210(1) as allowing communications with public utilities in the same manner as communications with members of the public. (See, *e.g.*, comments of Southwestern Bell Telephone Company, d/b/a AT&T Missouri, filed January 21, 2010). The full text of that section is:

> The commission may confer in person, or by correspondence, by attending conventions, or in any other way, with the members of the public, **any public**

> **utility or similar commission of this and other states and the United States of America**, or any official, agency or instrumentality thereof, on any matter relating to the performance of its duties.

There is no plausible way to read this statute as allowing the Commission to confer with public utilities in the same way it confers with the public and governmental agencies. The phrase "or similar commission" only makes sense with reference to "public utility," and as a result, the phrase should be read as "any public utility [commission] or similar commission." If one is to read the phrase as AT&T does, to what does "similar" refer? If these "similar commissions" are not similar to public utility commissions, what are they similar to? AT&T (among others) apparently presumes that the legislature thought that there were commissions of other states that are similar to public utilities rather than similar to public utility commissions; clearly a nonsensical notion. The Commission's proposed rules do not follow this nonsensical interpretation, and the Commission should not change the proposed rule in an effort to implement it.

WHEREFORE Public Counsel respectfully submits these comments and requests that the Commission modify its proposed rules in accordance with them and in accordance with the additional comments that Public Counsel will provide at the comment hearing on January 22, 2010.

Respectfully submitted,

/s/ Lewis R. Mills, Jr.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been emailed to parties listed on the Commission's certified service list this 21st day of January, 2010.

/s/ Lewis R. Mills, Jr.