BEFORE THE PUBLIC SERVICE COMMISSION
STATE OF MISSOURI

In the Matter of the Joint Application of Great Plains Energy Incorporated, Kansas City Power & Light Company, and Aquila, Inc., for Approval of the Merger of Aquila, Inc., with a Subsidiary of Great Plains Energy Incorporated and for Other Related Relief	))))))))	**Case No. EM-2007-0374**

STAFF'S RESPONSE TO PUBLIC COUNSEL'S MOTION TO DISMISS

COMES NOW the Staff of the Missouri Public Service Commission ("PSC"), by and through the Commission's General Counsel, and for its Response to Public Counsel's Motion to Dismiss, states as follows:

Introduction

1. The Commission's Staff, like Public Counsel, opposes the proposed transaction that is the subject of this case. Staff opposes the transaction because, in Staff's expert opinion, it is a bad deal for ratepayers in that it would certainly result in higher rates in the short-run while offering only an ephemeral possibility of benefits in the long-run. As Mr. Conrad aptly characterized it, the ratepayers are being asked to pay now for "pie in the sky, bye and bye."[1]

2. Nonetheless, Staff here responds in opposition to Public Counsel's Motion to Dismiss. That Motion asserts that this case must be dismissed because certain conduct by four of the five Commissioners has created an

[1] Staff has elsewhere addressed at length the many detrimental aspects of the proposed transaction and so will not review them here. *See Staff's Prehearing Brief,* filed on November 27, 2007, and *Rebuttal Testimony of Robert E. Schallenberg and Staff Report,* filed on October 12, 2007.

"appearance of impropriety" such that the Commissioners would each be required to recuse were they judicial officers. Staff writes because Mr. Mills has seriously misstated the law applicable to the conduct of the members of the Missouri Public Service Commission.

Summary of Staff's Position

3. The PSC Commissioners are not judicial officers, but administrative officers. Administrative officers are not – and cannot be, as a matter of the Constitutional separation of powers -- subject to the Canons of Judicial Ethics. In particular, administrative officers need not recuse where there is a mere appearance of impropriety. It is well-established that administrative officers need not recuse where they have foreknowledge of specific facts, have formed opinions on matters of policy, and even have reached tentative conclusions on contested issues prior to the hearing of a contested case. When the conduct complained of here is measured against the standards that actually apply to the PSC Commissioners, it is clear that no impropriety has occurred and no recusal is required. In any event, when allegations of bias are made against a majority of the members of an administrative tribunal, such that the tribunal could not act were the challenged members to recuse, the Rule of Necessity permits the challenged members of the tribunal to participate so that the public's business may move forward. In such a case, the administrative decision is subject to heightened scrutiny on judicial review.

The Conduct

4. The conduct in question consisted of "a series of four or five meetings

. . . held with just one or two Commissioners attending each meeting" that occurred "[o]n or about January 24, 2007[.]" *OPC Motion* at ¶ 1. The purpose of these meetings was so the Joint Applicants could determine "that no Commissioner had any objection to the three 'support mechanisms' that Great Plains would later submit for Commission approval." *OPC Motion* at ¶ 2. It is Mr. Mills' position that the Joint Applicants obtained what they sought:

> After their meetings, Mr. Chesser testified that he and Mr. Green "had a general conversation that said that we both had a **favorable** impression from the meetings." Mr. Green went even farther: he said that Mr. Chesser reported back "similar **support**" from both Kansas and Missouri regulators.

OPC Motion at ¶ 3 (internal citations omitted; emphasis as in the original).

Public Counsel's Motion

5. Based on these allegations, Public Counsel asserts that "Commissioners Murray, Appling and Clayton have conducted themselves in such a manner that their recusal is necessary." *OPC Motion* at ¶ 18. Public Counsel reaches this conclusion based on his belief that "[u]nder the Canons of Judicial Conduct 2.03, Commissioners, like judges, must avoid even the appearance of impropriety." *Id.* However, the Canons of Judicial Conduct simply do not apply to the PSC Commissioners as administrative officers of the executive department; rather, they are subject to a different set of rules that does *not* require recusal for the mere appearance of impropriety.

6. Public Counsel's avowed purpose in filing his Motion to Dismiss is to render the PSC unable to act at all:

> Commissioners Murray, Appling and Clayton have conducted themselves in such a manner that their recusal is necessary. While

> a request for recusal would be appropriate, and the Commissioners should certainly concede that there is a marked appearance of impropriety and the public's faith in their impartiality has been destroyed, recusal would leave the case in limbo. With four Commissioners recused from the case, there would be no way for the Commission as a body to act. Relief could be neither granted nor denied. In this extraordinary circumstance, where a majority of the tribunal is tainted by participation in secret discussions, outright dismissal is the most appropriate course.

OPC Motion at ¶ 18. Staff suggests that a serious infringement of the right of the public and the Joint Applicants to a determination of the application would occur were the Commission to be left unable to act. However, as is discussed below, the law has provided for such a possibility through the doctrine of the Rule of Necessity.

The Public Counsel Has Misread **Slavin**

7. The central thesis of Public Counsel's Motion is that the PSC Commissioners are subject to the same rules of conduct as are judicial officers:

> Public Service Commissioners exercise quasi-judicial power and are subject to the same rules of conduct that apply to the judiciary. (Footnote:) "[T]he courts in this state have held officials occupying quasi-judicial positions to the same high standard as apply to judicial officers by insisting that such officials be free of any interest in the matter to be considered by them." *Union Electric Co. v. Public Service Com.,* 591 S.W.2d 134 (Mo. Ct. App. 1979) [the "Slavin case"].

OPC Motion at ¶ 6 and n. 18.[2]

8. Public Counsel relies principally on the *Slavin* case, properly denominated *Union Electric Co. v. Public Service Com.,* 591 S.W.2d 134 (Mo. App. 1979), cited in the preceding paragraph. However, the *Slavin* case is not on

[2] *See similar statements in State ex rel. Martin-Erb v. Missouri Comm'n on Human Rights,* 77 S.W.3d 600, (Mo. banc 2002), and *State ex rel. AG Processing, Inc. v. Thompson,* 100 S.W.3d 915, 919 (Mo. App., W.D. 2003). Each of these cases, however, is limited to its particular facts.

point. The conduct in question in *Slavin* was entirely different and, indeed, the *Slavin* case serves to illustrate the difference between the rules applicable to judicial officers and those applicable to administrative officers. In *Slavin,* it was not an appearance of impropriety that required recusal, but rather an *actual* impropriety.

9. The *Slavin* court applied the common law rule "that no man is to be a judge in his own cause" to disqualify Commissioner Alberta Slavin from participation in a case in which she had previously participated as a named party prior to her appointment to the Commission:

> In this case it is stipulated that Slavin was a party to case No. 18177, and that by order of the Commission in January, 1978, after she became a member of the Commission, case No. EO78-163 [*sic*] was opened and all parties to No. 18177 were made parties to No. EO78-163 [*sic*]. By this order Slavin then became a party to a case pending before her as a member of the Commission.

Supra, 591 S.W.2d at 136 and 138.

10. The several cases considered by the Court of Appeals in *Slavin* similarly concerned *actual* improprieties of the same sort: a County Court Commissioner who participated in a proceeding involving land owned by his wife, *King's Lake Drainage & Levee Dist. v. Jamison,* 176 Mo. 557, 75 S.W. 679 (1903); a Commissioner of the Ohio PUC who heard a case to which he had been a party prior to his appointment, *Forest Hills Utility Co. v. Public Utility Comm'n of Ohio,* 313 N.E.2d 801 (Oh. 1974); a member of the federal Civil Aeronautics Board who heard a case in which he had participated as an advocate prior to his appointment, *Trans World Airlines v. Civil Aeronautics Bd.,*

102 U.S.App.D.C. 391, 254 F.2d 90 (D.C. Cir. 1958); a member of the Federal Trade Commission who heard a case in which he had participated as an advocate prior to his appointment; *American General Ins. Co. v. F.T.C.,* 589 F.2d 462 (9th Cir. 1979). All of these cases, like *Slavin,* concern the particular impropriety of a conflict of interest and demonstrate that the word "interest," as used by the Court of Appeals in *Slavin* in the quotation set out by Mr. Mills and reproduced above, means a tangible, personal interest or stake in a case rather than a mere appearance of impropriety. None of the PSC Commissioners has any personal interest in the present matter of the sort considered in *Slavin* and Public Counsel has not alleged that they do. Rather, the present matter involves alleged prejudgment or bias rather than a conflict of interest.

11. The *Slavin* decision should not be cited as authority that administrative officers are held to the same standards as judicial officers in all respects because the *Slavin* court did not so hold. The *Slavin* holding was much more narrow and was limited to the actual facts before the court:

> It is clear from *King's Lake, Forest Hills Utility Company,* and *American General Insurance* that the same standards and rules apply to quasi-judicial officers as to judicial officers. **This means that members of the Public Service Commission may not act in cases pending before that body in which they are interested or prejudiced or occupy the status of a party.** This is true under the common law rule that no man may be the judge of his own cause. As stated in *Jones* it is also a requisite of due process to which every party is entitled.

Slavin, supra, 591 S.W.2d at 139 (emphasis added). Note that *Slavin* held that a Commissioner may not participate where the Commissioner is "prejudiced." This

is the cause for recusal alleged in the present case and so will be examined in detail below.

The PSC Commissioners are Administrative Officers, Not Judges

12. Missouri courts have repeatedly stated, "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." *State ex rel. Laundry, Inc. v. Public Service Com'n,* 327 Mo. 93, ___, 34 S.W.2d 37, 43 (1931). The Commission members are thus administrative officers, and "[w]hatever power the [Commission] has must be warranted by the letter of law or such clear implication flowing therefrom as is necessary to render the power conferred effective." *State ex rel. City of St. Louis v. Public Service Com'n of Missouri,* 335 Mo. 448, 457-58, 73 S.W.2d 393, 399 (*banc* 1934). Many more examples of the restatement of these principles by Missouri courts could be provided.

13. The PSC Commissioners, "appointed by the governor, with the advice and consent of the senate," § 386.050, RSMo Supp. 2007, are state officers of the Executive Department: "The executive department shall consist of all state elective and appointive officials and employees except officials and employees of the legislative and judicial departments. Mo. Const., Art. iv, § 12. Judicial officers, by contrast, are members of a separate magistracy and are cloaked with judicial authority. Mo. Const., Art. ii, § 1.

14. Under the doctrine of the separation of powers, the Missouri Supreme Court cannot make rules governing the conduct of officers of the

Executive Department. *See Weinstock v. Holden,* 995 S.W.2d 408 (Mo. banc 1999). In *Weinstock,* the Missouri Supreme Court invalidated a statute that prohibited a person "serving in a judicial or quasi-judicial capacity" from participating "in such capacity in any proceeding in which . . . [t]he person knows the subject matter is such that the person may receive a direct or indirect financial gain from any potential result of the proceeding." 995 S.W.2d at 408. The Supreme Court invalidated the statute because it violated the doctrine of the separation of powers in that the Missouri Constitution reserves to the Court the power to "establish rules relating to practice, procedure and pleading for all courts," including the "authority to regulate the practices of judges and lawyers in the courts of this state." *Id.,* at 410. The Court pointed out that "[t]he doctrine of separation of powers, as set forth above in Missouri's constitution, is vital to our form of government because it prevents the abuses that can flow from centralization of power." *Id.* Thus, the PSC Commissioners *cannot* be subject to the Rules of Judicial Conduct.

15. By its terms, Rule 2 applies *only* to judicial officers. Rule 2.04; *State ex rel Kramer v. Walker,* 926 S.W.2d 72, (Mo. App., W.D. 1996). Public Counsel has not cited a single authority, and Staff has found none, in which the Canons of Judicial Conduct were applied to an administrative officer. Thus, Mr. Mills' references to Canons 3B(7) and 3E(1), and to cases applying and interpreting those rules, are irrelevant to the conduct in question here. Even less relevant is Public Counsel's citation to 28 U.S.C.S. § 455(a), a federal statute applicable by its terms only to judicial officers of the United States.

The Conduct in Question Did Not Violate Any of the Rules of Conduct Properly Applicable to Members of the PSC

16. The conduct herein under discussion did not violate any of the rules of conduct that actually apply to PSC Commissioners. These rules of conduct are found in the state statutes at Chapters 105 and 386, RSMo,[3] in the PSC's own rules at 4 CSR 240-4.010 and 4 CSR 240-4.020, and in the Constitutions of Missouri and of the United States.

17. Sections 105.452, 105.454, RSMo Supp. 2007, and 105.462 contain various rules of conduct applicable, in the case of § 105.452, to all state employees, in the case of § 105.454, RSMo Supp. 2007, only to state employees "serving in an executive or administrative capacity,"[4] and, in the case of § 105.462, applicable only to persons exercising rulemaking authority. All of these provisions apply to PSC Commissioners, but the conduct complained of herein by Public Counsel does not violate the provisions of any of these sections.[5] Section 105.464.1 applies to persons exercising judicial and quasi-judicial authority, and provides that "[n]o person serving in a judicial or quasi-judicial capacity shall participate in such capacity in any proceeding in which the

[3] All statutory references herein, unless otherwise specified, are to the Revised Statutes of Missouri (RSMo), revision of 2000.

[4] There are four reported cases involving § 105.454, RSMo Supp. 2007. One holds that a declaratory judgment action will not lie to determine whether or not a proposed course of action is violative of the statute. *Cottleville Community Fire District v. Morak,* 897 S.W.2d 647 (Mo. App., E.D. 1995). Another holds that it does not apply to superintendents of school districts. *State v. Hodge,* 841 S.W.2d 658 (Mo. banc 1992). The other two concerned the impeachment of mayors where violation of the statute was one of the specifications of the bill of impeachment or the indictment. *Fitzgerald v. City of Maryland Heights,* 796 S.W.2d 52 (Mo. App., E.D. 1990); *State v. Patterson,* 729 S.W.2d 226 (Mo. App., S.D. 1987).

[5] These statutes prohibit the exercise of governmental power to enrich oneself or one's family, as well as bribery, the improper use of confidential information, and certain activities after the termination of state employment.

person knows that a party is any of the following: the person or the person's great-grandparent, grandparent, parent, stepparent, guardian, foster parent, spouse, former spouse, child, stepchild, foster child, ward, niece, nephew, brother, sister, uncle, aunt, or cousin." This language describes a conflict of interest, not bias or prejudgment. The conduct complained of by Public Counsel is not violative of § 105.464.1.

18. Section 386.210, RSMo Supp. 2007, governs communications between the Commissioners and other persons outside of evidentiary hearings and provides in pertinent part:

> 1. 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.
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> 2. Such communications may address any issue that at the time of such communication is not the subject of a case that has been filed with the commission.
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> 3. Such communications may also address substantive or procedural matters that are the subject of a pending filing or case in which no evidentiary hearing has been scheduled, provided that the communication:
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> > (1) Is made at a public agenda meeting of the commission where such matter has been posted in advance as an item for discussion or decision;
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> > (2) Is made at a forum where representatives of the public utility affected thereby, the office of public counsel, and any other party to the case are present; or
> >
> > (3) If made outside such agenda meeting or forum, is subsequently disclosed to the public utility, the office of the public counsel, and any other party to the case in accordance with the following procedure:

(a) If the communication is written, the person or party making the communication shall no later than the next business day following the communication file a copy of the written communication in the official case file of the pending filing or case and serve it upon all parties of record;

(b) If the communication is oral, the party making the oral communication shall no later than the next business day following the communication file a memorandum in the official case file of the pending case disclosing the communication and serve such memorandum on all parties of record. The memorandum must contain a summary of the substance of the communication and not merely a listing of the subjects covered.

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.

5. The commission and any commissioner may also advise any member of the general assembly or other governmental official of the issues or factual allegations that are the subject of a pending case, provided that the commission or commissioner does not express an opinion as to the merits of such issues or allegations, and may discuss in a public agenda meeting with parties to a case in which an evidentiary hearing has been scheduled, any procedural matter in such case or any matter relating to a unanimous stipulation or agreement resolving all of the issues in such case.

* * *

The meetings in question occurred, according to the Public Counsel, "on or about January 24, 2007[.]" *OPC* Motion at ¶ 1. The Joint Application that initiated this case was not filed until April 4, 2007. *EFIS Docket Sheet,* Case No. EM-2007-0374. Therefore, pursuant to § 386.210, 1 and 2, the Commissioners were free

to confer with any person on any topic, including issues and substantive and procedural matters likely to arise in a case not yet filed. *Compare* § 386.210, 1 and 2, to § 386.210.4, RSMo Supp. 2007. Furthermore, the Commissioners were free to express opinions on those issues. *Compare* § 386.210, 1 and 2, to § 386.210.5, RSMo Supp. 2007.

8. The Commission has itself adopted rules of conduct at 4 CSR 240-4, 010, "Gratuities," and 020, "Conduct During Proceedings." The second of these applies to communications between members of the Commission and interested parties and is therefore set out below in full:

> (1) Any attorney who participates in any proceeding before the commission shall comply with the rules of the commission and shall adhere to the standards of ethical conduct required of attorneys before the courts of Missouri by the provisions of Civil Rule 4, Code of Professional Responsibility, particularly in the following respects:[6]
>
> (A) During the pendency of an administrative proceeding before the commission, an attorney or law firm associated with the attorney shall not make or participate in making a statement, other than a quotation from or reference to public records, that a reasonable person would expect to be disseminated by means of public communication if it is made outside the official course of the proceeding and relates to any of the following:
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> 1. Evidence regarding the occurrence of transaction involved;
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> 2. The character, credibility or criminal record of a party, witness or prospective witness;
>
> 3. Physical evidence, the performance or results of any examinations or tests or the refusal or failure of a party to submit to examinations or tests;

[6] Staff specifically expresses no opinion as to the propriety of the actions of any party, or the representative of any party, to this matter under either Rule 4 CSR 240-4.020 or Supreme Court Rule 4, the Rules of Professional Responsibility.

4. His/her opinion as to the merits of the claims, defenses or positions of any interested person; and

5. Any other matter which is reasonably likely to interfere with a fair hearing.

(B) An attorney shall exercise reasonable care to prevent employees and associates from making an extra-record statement as s/he is prohibited from making; and

(C) These restrictions do not preclude an attorney from replying to charges of misconduct publicly made against him/her, or from participating in the proceedings of legislative, administrative or other investigative bodies.

(2) In all proceedings before the commission, no attorney shall communicate, or cause another to communicate, as to the merits of the cause with any commissioner or examiner before whom proceedings are pending except:

(A) In the course of official proceedings in the cause; and

(B) In writing directed to the secretary of the commission with copies served upon all other counsel of record and participants without intervention.

(3) No person who has served as a commissioner or as an employee of the commission, after termination of service or employment, shall appear before the commission in relation to any case, proceeding or application with respect to which s/he was directly involved and in which s/he personally participated or had substantial responsibility in during the period of service or employment with the commission.

(4) It is improper for any person interested in a case before the commission to attempt to sway the judgment of the commission by undertaking, directly or indirectly, outside the hearing process to bring pressure or influence to bear upon the commission, its staff or the presiding officer assigned to the proceeding.

(5) Requests for expeditious treatment of matters pending with the commission are improper except when filed with the secretary and copies served upon all other parties.

(6) No member of the commission, presiding officer or employee of the commission shall invite or knowingly entertain any prohibited

> *ex parte* communication, or make any such communication to any party or counsel or agent of a party, or any other person who s/he has reason to know may transmit that communication to a party or party's agent.
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> (7) These prohibitions apply from the time an on-the-record proceeding is set for hearing by the commission until the proceeding is terminated by final order of the commission. An on-the-record proceeding means a proceeding where a hearing is set and to be decided solely upon the record made in a commission hearing.
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> (8) As *ex parte* communications (either oral or written) may occur inadvertently, any member of the commission, hearing examiner or employee of the commission who receives that communication shall immediately prepare a written report concerning the communication and submit it to the chairman and each member of the commission. The report shall identify the employee and the person(s) who participated in the *ex parte* communication, the circumstances which resulted in the communication, the substance of the communication, and the relationship of the communication to a particular matter at issue before the commission.

9. Several provisions of Rule 4 CSR 240-4.020 apply to prohibit communications of the sort complained of herein by the Public Counsel. However, the prohibition is strictly limited in time. Thus, subsection (2) by its terms applies only to matters that are "pending," that is, matters that are the subject of a formal proceeding in which some pleading has been filed with the Commission and a numbered docket opened. Likewise, subsections (6) and (8) apply, according to subsection (7), only "from the time an on-the-record proceeding is set for hearing by the commission until the proceeding is terminated by final order of the commission." The scope of subsections (6) and (8) are thus more limited than subsection (2) in that, with respect to subsections (6) and (8), the matter must not only be pending but also set for hearing. The

conduct complained of herein by the Public Counsel did not violate any provision of Rule 4 CSR 240-4.020.

Procedural Due Process Does Not Require Dismissal

19. Also applicable to the PSC are the Due Process Clauses of the Missouri and United States Constitutions.[7] The procedural due process requirement of fair trials by fair tribunals applies to an administrative agency acting in an adjudicative capacity. *State ex rel. AG Processing, Inc. v. Thompson,* 100 S.W.3d 915, 919 (Mo. App., W.D. 2003), *Fitzgerald v. City of Maryland Heights,* 796 S.W.2d 52, 59 (Mo. App. E.D.1990), *both citing Withrow, supra,* 421 U.S. at 46, 95 S.Ct. at 1464, 43 L.Ed.2d at 723. Thus, administrative decision-makers must be impartial, *AG Processing, supra,* and "free of bias, hostility and prejudgment." *State ex rel. Brown v. City of O'Fallon,* 728 S.W.2d 595, 596 (Mo. App., E.D. 1987); *Jones v. State Dept. of Public Health and Welfare,* 345 S.W.2d 37, 40 (Mo. App., W.D. 1962). "The cardinal test of the presence or absence of due process in an administrative proceeding is defined . . . as 'the presence or absence of rudiments of fair play long known to the law.'" *Jones, supra*.

20. However, the impartiality required of an administrative officer is not quite the same as the impartiality expected of a judicial officer. An administrative officer is not expected to be a *tabula rasa:* "Administrative decisionmakers are expected to have preconceived notions concerning policy issues within the scope of their agency's expertise." *Hortonville Joint School Dist. No. 1 v. Hortonville*

[7] Mo. Const., Art. I, § 10; U.S. Const., Amd. 14, § 1.

Education Assoc., 426 U.S. 482, 493, 96 S.Ct. 2308, 2314, 49 L.Ed.2d 1, 9 (1976); *Fitzgerald, supra*. Indeed, administrative officers may permissibly have not only "preconceived notions concerning policy issues" and familiarity with the actual facts of a case, but are allowed to have even reached a "tentative conclusion":

> **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**, *Wilson v. Lincoln Redevelopment Corp.,* 488 F.2d 339, 342-43 (8th Cir.1973), "in the absence of a showing that [the decisionmaker] is not 'capable of judging a particular controversy fairly on the basis of its own circumstances.'" *Hortonville Joint School District,* 96 S.Ct. at 2314.

Fitzgerald, supra (emphasis added).

21. Public Counsel has shown that meetings occurred, before this matter was filed, at which officers of the Joint Applicants disclosed the details of the proposed transaction to the members of the Commission. Public Counsel seeks to imply, further, that some of the members of the Commission, at least, expressed approval of the particular ratemaking treatment necessary to support the proposed transaction. Public Counsel may thus have shown "[f]amiliarity with the adjudicative facts of a particular case, even to the point of having reached a tentative conclusion prior to the hearing," *Fitzgerald, supra,* 796 S.W.2d at 59, but this showing "does not necessarily disqualify an administrative decisionmaker[.]" *Id.* What Public Counsel has *not* shown is that the members of the PSC are "not 'capable of judging [this] particular controversy fairly on the basis of its own circumstances.'" *Fitzgerald, supra,* 796 S.W.2d at 59, quoting

Hortonville Joint School District, supra, 96 S.Ct. at 2314. In the absence of such a showing, there is no denial of Due Process.

The Public Counsel has Not Shown Actual Bias, Prejudice or Prejudgment

22. Bias exists where an "administrative decisionmaker . . . has made an unalterable prejudgment of operative adjudicative facts[.]" *Fitzgerald, supra.* Where bias exists, the officer in question may not participate in the proceedings. *State ex rel. Brown v. City of O'Fallon,* 728 S.W.2d 595, (Mo. App., E.D. 1987); *In re Weston Benefit Assessment Special Road District of Platte County,* 294 S.W.2d 353, (Mo. App., W.D. 1956).

23. "[A]dministrative decisionmakers are no more expert at determining their impartiality than judges are at determining theirs." *Orion Security, Inc. v. Board of Police Commissioners of Kansas City,* 90 S.W.3d 157, 164 (Mo. App., W.D. 2002), quoting *Fitzgerald, supra,* 796 S.W.2d at 59. Because the Public Service Commission Law places the PSC Commissioners in the position of adjudicators making findings of fact and conclusions of law, "the determination of the existence of their impartiality should be reviewed using the same standard used to review a judge's determination of his or her challenged impartiality." *Orion, supra,* 90 S.W.3d at 164. The inquiry is an objective one and must be based upon the whole record and not solely on the basis of the judge's conviction of his own impartiality. *Orion, supra; see Fitzgerald,* 796 S.W.2d at 59; *see also In re Marriage of Burroughs,* 691 S.W.2d 470, 474 (Mo. App.1985). The relevant inquiry is whether, on the whole record, a reasonable person would have factual

grounds to doubt the officer's impartiality. *Fitzgerald, supra,* 796 S.W.2d at 59-60.

24. A presumption exists that administrative decision-makers act honestly and impartially and a party challenging the partiality of the decision-maker has the burden to overcome that presumption. *AG Processing, supra,* at 920; *Orion, supra; Burgdorf v. Bd. of Police Comm'rs,* 936 S.W.2d 227, 234 (Mo. App., E.D.1996); *Wagner v. Jackson County Board of Zoning Adjustment,* 857 S.W.2d 285, 289 (Mo. App., W.D. 1993).

25. It should be noted here that it is not at all unusual in administrative proceedings for the members of the agency to have familiarity with the facts of a particular case and the issues presented by it prior to the evidentiary hearing. It is common, for example, in the area of the regulation of licensed professionals that the appropriate board or commission both authorizes the initiation of disciplinary proceedings and, after the determination of the Administrative Hearing Commission that discipline is appropriate, imposes sanctions upon the erring licensee. Indeed, it is not *per se* objectionable where the board both initiates the prosecution and tries the case:

> Where the charge is general medical incompetency rather than specific medical misconduct, the Board [of Healing Arts] serves as investigator, prosecutor, judge, and jury. Although a neutral decisionmaker is preferable, the mere fact that the Board both initiates a charge and then tries it, does not, by itself, violate due process.

Artman v. State Board of Registration for the Healing Arts, 918 S.W.2d 247, 250 (Mo. banc 1996), citing *Rose v. State Board of Registration for the healing Arts,* 397 S.W.2d 570 (Mo. 1965).

26. Public Counsel has shown conduct that, on the part of judicial officers, would violate the Canons of Judicial Conduct and require the recusal of judicial officers based on the appearance of impropriety. However, as has been shown, the PSC Commissioners are not subject to the Canons of Judicial Conduct. The PSC Commissioners need not recuse to avoid the mere appearance of impropriety. Most importantly, Public Counsel has *not* shown that any impropriety occurred when the conduct in question is measured against the rules that actually do apply to the PSC Commissioners. Consequently, it cannot be concluded that a reasonable person would have factual grounds to doubt the impartiality of the members of the Commission.

The Rule of Necessity Permits This Case to Proceed

27. The Rule of Necessity allows "an otherwise disqualified decisionmaker to participate if a decision is necessary and there is no alternative." *Stonecipher v. Poplar Bluff R1 School District,* 205 S.W.3d 326, 328 (Mo. App., S.D. 2006). The Rule of Necessity is based on the litigants' right to have their dispute adjudicated. *Id.,* at 330, citing *U.S. v. Will,* 449 U.S. 200, 101 S.Ct. 471, 66 L.Ed.2d 392 (1980), and *Evans v. Gore,* 253 U.S. 245, 40 S.Ct. 550, 64 L.Ed. 887 (1920). "The reason behind the rule of necessity is that denying any individual access to courts for the vindication of rights is a far more egregious wrong than for a judge to sit in a case that may economically benefit the judge." *Weinstock v. Holden,* 995 S.W.2d 408, 410 (Mo. banc 1999), citing *Rose, supra.* Interestingly, in view of Public Counsel's attempt to apply the Canons of Judicial Conduct to the PSC Commissioners, the Missouri Supreme

Court has observed that the Rule of Necessity applies in Missouri to permit adjudication to go forward even where judicial officers would otherwise be required to recuse. *Weinstock, supra,* 995 S.W.2d at 409-410. "[T]he canons now specifically make an exception from the recusal requirement where to follow the canons would result in no judge being able to decide the case." *Id.*

28. The Missouri Supreme Court has held that the Rule of Necessity applies to Missouri administrative agencies. *Rose v. State Board of Registration for the Healing Arts, supra,* 397 S.W.2d at . In *Rose,* a physician sought to avoid professional discipline by disqualifying the entire tribunal, much as Public Counsel here seeks to require dismissal by disqualifying four of the five PSC Commissioners. The Court held that, "even if the hearing board is possessed of prior knowledge of the matters in hearing, necessity dictates that the only board authorized to hold the hearing must proceed." *Id.,* at 575.

29. Similarly, in *Fitzgerald, supra,* the court found that three of six city council members sitting as an impeachment panel to determine charges against the mayor were likely biased due to the mayor's prior vituperative attacks upon them. *Supra,* 796 S.W.2d at 60. However, noting that disqualifying the three challenged councilmen would have disabled the impeachment panel, which could only act upon the vote of two-thirds, or six, of its eight elected members, the court held that "[d]ue process considerations do not require a biased administrative agency to forego making a decision which no other entity is authorized to make. Under such circumstances, the so-called Rule of Necessity permits an adjudicative body to proceed in spite of its possible bias or self-interest." *Id.*

(emphasis in original)*; State ex rel. Powell v. Wallace,* 718 S.W.2d 545, 548 (Mo. App., E.D. 1986).

30. The Joint Applicants have an absolute right under the law to have the Commission act upon their application. "To deny them that right would be to deny to them an incident important to ownership of property." *State ex rel. City of St. Louis v. Public Service Com'n of Missouri,* 335 Mo. 448, 459, 73 S.W.2d 393, 400 (Mo. banc 1934). This is a right, therefore, of constitutional dimension. "Disqualification can not [*sic*] be allowed to bar the doors to justice or to destroy the only tribunal vested with the power to act." *Barker v. Secretary of State's Office of Missouri*, 752 S.W.2d 437, 439 (Mo. App., W.D. 1988). It is clear that the Rule of Necessity must be applied here and that Public Counsel's Motion to Dismiss must be denied.

31. Public Counsel argues against applying the Rule of Necessity, but misstates the law:

> There may be response to this Motion to Dismiss citing the "rule of necessity," but that rule does not apply in this situation. The rule of necessity provides that if only one particular judge can hear a matter that must be adjudicated, that judge will be allowed to hear the matter even if there is some cause to disqualify him. Here, the joint applicants caused the situation in which they deliberately and consciously compromised the impartiality of the tribunal. They should not now be able to use the rule of necessity to allow that apparently partial tribunal to nonetheless decide the issues.

In fact, as demonstrated above, the Rule of Necessity *does* apply in this situation. Public Counsel cites no authority, and Staff has found none, supporting his assertion that the Rule should not be applied here because "the joint applicants caused the situation in which they deliberately and consciously

compromised the impartiality of the tribunal" and thus "should not now be able to use the rule of necessity to allow that apparently partial tribunal to nonetheless decide the issues." The Commission must apply the Rule of Necessity and go forward to determine the application before it. Should the four participating members of the Commission deadlock, the Chairman must participate to break the tie, despite his recusal. *See Barker, supra.*[8]

32. Staff notes that, where the Rule of Necessity is invoked to permit an administrative agency to act, the courts will subject the administrative action to heightened scrutiny to ensure that no injustice is done:

> The doctrine [i.e., the Rule of Necessity] is so clear that it is seldom litigated, but when it causes results that are palpably unjust, perhaps it ought to be litigated, because ways can sometimes be found to relieve against the injustice. Whenever the rule of necessity is invoked and the administrative decision is reviewable, the reviewing court, without altering the law about scope of review, may and probably should review with special intensity.

Barker, supra, 752 S.W.2d at 441, quoting 3 K. Davis, *Administrative Law Treatise* § 19.9 (2nd ed. 1980).

Conclusion

33. "One of the fundamental precepts which govern the sound administration of justice is that, not only must justice be done, an appearance of justice must be maintained." *Barker, supra,* 752 S.W.2d at 439. Staff recognizes that there may be relevant prudential and public confidence considerations that might make Public Counsel's solution attractive. However, the review of the relevant law set out herein suggests that the Commission cannot dismiss the

[8] In *Barker,* the Court applied the Rule of Necessity to approve the participation of the Chairman of the Board of Industrial and Labor Relations, who cast the deciding vote in a case despite her earlier recusal where the remaining members had deadlocked. 752 S.W.2d at 442.

application without denying the procedural Due Process rights of the Joint Applicants. In Staff's opinion, the only lawful course open to the Commission is to render a decision on the merits of the application, supported by findings of fact based on the competent and substantial evidence of record and conclusions reached by applying existing law to those findings of fact. The heightened scrutiny that will be afforded this matter on judicial review will serve to protect the interests of the various parties.

WHEREFORE, on account of all the foregoing, Staff prays that the Commission will deny Public Counsel's Motion to Dismiss and determine the application herein on the merits as shown in the record of this matter; and grant such other and further relief as is just in the circumstances.

Respectfully submitted,

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Certificate of Service

I hereby certify that copies of the foregoing have been mailed, hand-delivered, transmitted by facsimile or emailed to all counsel of record on this **27th day of December, 2007.**

/s/ Kevin A. Thompson