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	)	**File No. AW-2016-0312**
and Extra-Record Communications Rule	)	

COMMENTS OF THE OFFICE OF THE PUBLIC COUNSEL

COMES NOW the Office of the Public Counsel ("OPC" of "Public Counsel") and offers the following comments on the Commission's draft rule as follows:

I. Introduction

1. What's Past is Prologue.[1] Whether the Commission's *ex parte* and extra-record communications rules should be amended as proposed by the Commission cannot be examined with completeness without discussion and comprehension of the prior issues concerning these rules and their vital role in preserving the public trust.

2. Article I, Section 1 of the Missouri Constitution cites the basis and aim of government in Missouri: "[t]hat all political power is vested in and derived from the people; that all government of right originates from the people, is founded upon their will only, and is instituted solely for the good of the whole." (Mo. Const. Art. I, § 1). The public, being the foundation of Missouri government, has an inherent right to know the business being conducted on its behalf. Achieving this noble end requires transparency and accountability. To facilitate transparency, all Commission meetings should publicly broadcast and recorded. Technology has advanced to the point where Commission hearings and agenda sessions are broadcast live and recorded making such a standard manifestly achievable.

3. Any modifications to the Commission's standards of conduct should be designed to create an environment of accountability and facilitate transparency. The Commission's current

[1] *The Tempest*, William Shakespeare, Act 2, Scene 1.

standards of conduct policy as contained in 4 CSR 240-4.010 restates Executive Order 92-04 and directs its members and employees to read and comply with that order. Paragraph 1 states "[e]xecutive branch employees shall conduct the business of state government in a manner which inspires public confidence and trust." In furtherance of that goal, subparagraph A, provides "[e]mployees shall avoid any interest or activity which improperly influences, or gives the appearance of improperly influencing, the conduct of their official duties."

A. History of *ex parte* communications in Missouri

4. At times, this Commission has fallen short of these goals. A variety of past practices and incidents between Commissioners and utility representatives including (1) personal relationships, (2) improper discussion during facility tours, (3) private communication about utility issues, and (4) legislative involvement damaged the public's confidence and trust in the Commission. All of these incidents, taken together, created a lasting stain on the integrity of the Commission.

5. This Commission's present standards of conduct are a vital safeguard against future wrongs. To be clear, OPC is not suggesting that any current Commissioners have acted improperly. Rather than weakening the standards, this Commission should elevate the standards to which it and future Commissioners must adhere. To so do, OPC suggests the Commission address the four areas listed above directly.

i. Personal relationships

6. A relationship between a Commissioner and a utility representative creates an unavoidable a conflict of interest. Such a situation should be avoided.

7. Regrettably, the Missouri Commission was presented with such a situation in 2006. A then-member of the Commission was accused of having a relationship with a lobbyist for a telephone company (CenturyTel) the agency regulated. *See In the Matter of the Petition of*

Socket Telecom, LLC for Compulsory Arbitration of Interconnection Agreements with CenturyTel of Missouri, LLC and Spectra Communications, LLC Pursuant to Section 252(b)(1) of the Telecommunications, Act of 1996, Case No. TO-2006-0299, Notice of *Ex Parte* Contact, Doc. No. 164. The Commissioner participated in, and voted on, cases involving CenturyTel during the relationship. *Id*; *See also Complaint of FullTel, Inc., for Enforcement of Interconnection Obligations of CenturyTel of Missouri, LLC*, Case No. TC-2006-0068, Report and Order, Doc. No. 46. The case garnered unfavorable media attention for the Commission. *See* http://www.semissourian.com/story/1160080.html.

8. The Commission's standards of conduct should prohibit this kind of relationship. If the Commission believes it cannot, or is unwilling, to take such step then at a minimum those relationships must be disclosed and the Commissioner should recuse himself/herself from all cases involving the partner's employer. One way to accomplish this notice would be mandatory filing in the Commission's Electronic Filing Information System ("EFIS") for each case.

ii. Discussions during facility tours

9. Commissioners are often invited to tour facilities of regulated utilities. Often, a representative from OPC will also attend. These site visits provide an opportunity for the regulators to view and understand the plant used in providing utility service to the public. Unfortunately, these tours can also present the opportunity for, and appearance of, improper *ex parte* communications between Commissioners and utility representatives.

10. One such tour became the subject of controversy in 2007. During the evidentiary hearing, a then-Commissioner had the following exchange with a company witness:

Q: Last year, we gave you 11.25, correct?
A: Correct.
Q: And that's what you're asking for again this year?
A: Correct.

Q: Is that going -- is that going to do what you need to do? Is that going to give you what you need for this next year?
A: Yeah. If --
Q: **You and I talked a lot about this when I visited the plant up there three or four months ago. We walked the whole thing, and we talked about a lot of things.** What I'm trying to get in my own mind, what did you -- what did you find there, you know? Go ahead.

(emphasis added) *In the Matter of the Application of Kansas City Power and Light Company for Approval to Make Certain Changes in its Charges for Electric Service To Implement Its Regulatory Plan*, Case No. ER-2007-0291, Tr. Vol. 5, pp. 100-01, Doc. No. 154.

11. Citing the appearance of partiality and appearance of impropriety, OPC argued the Commissioner in the above case should recuse himself. *See In the Matter of the Application of Kansas City Power and Light Company for Approval to Make Certain Changes in its Charges for Electric Service To Implement Its Regulatory Plan*, Case No. ER-2007-0291, Motion for Recusal of Commissioner Appling, Doc. No. 148. The Commissioner denied any impropriety, but eventually recused himself from the case. *See In the Matter of the Application of Kansas City Power and Light Company for Approval to Make Certain Changes in its Charges for Electric Service To Implement Its Regulatory Plan*, Case No. ER-2007-0291, Notice, Doc. No. 222.

12. This incident, too, garnered unfavorable – but appropriate – media attention. *See* http://bransonagentnewsline.blogspot.com/2007/10/new-allegations-against-utilities.html. *The Kansas City Star* reported: "a member of the Missouri Public Service Commission, took a tour of one of KCP&L's plants in early summer with Chris Giles, the utility's vice president of regulatory affairs. During the visit they discussed issues including the key point of the rate of return the utility needed[.]" *See* Steve Everly, Regulator's discussions about KCP&L rate case violated Missouri law, watchdog says, Kansas City Star, Oct. 9, 2007; *See also* Steve Everly, KCP&L rate case stalls over allegation, Kansas City Star, Oct. 10, 2007, at C1.

13. The present practice of inviting OPC to attend utility tours for Commissioners helps to ameliorate concerns regarding the perception of improper conduct or communications between Commissioners and utility representatives. The Commission's staff is often invited, too. However, the frequency and duration of plant tours can inadvertently burden the resources of Staff and OPC, when the time spent traveling to and attending the tours could have been spent auditing and scrutinizing any number of utility cases. The incident described above necessarily requires OPC invest precious time and resources to participate in any tours to be attended by Commissioners. OPC's obligation to the public demands participation so as to maintain the public trust.

14. OPC recognizes the Commission's desire to visit and inspect utility facilities and readily admits its own staff appreciates the opportunity to participate. But these visits should be limited. OPC suggests members of the Commission participate in such tours only if: (1) a quorum of the Commission is scheduled to attend, (2) OPC is invited to attend, (3) the event is posted on the Commissioner's calendars in advance, and (4) a summary of the tour is disclosed in each open case file for the sponsoring utility. If tours are scheduled according to these reasonable conditions, the potential for improper conduct or communication between commissioners and utility representatives will be greatly diminished.[2]

[2] OPC does not suggest such tours are designed to encourage improper communication. However as explained in a comment pertaining to CCNs in a recent rulemaking "improper influence…is an insidious thing – it can be hard to identify, hard to prove, and hard to undo." *See In the matter of the proposed amendment of rule 4 CSR 240-3.105*, Case. No. EX-2015-0225, Comments of Dogwood Energy, LLC Regarding Proposed Rule Amendments, Doc. No. 9.

iii. Private communication about utility issues

15. Aside from utility tours, there are a number of other situations where Commissioners interact with representatives of regulated utilities. Often, such interactions occur at symposiums or other events open to the public. This has not always been the case.

16. In the recent past, conduct of Commissioners created a public confidence crisis. In Case No. EM-2007-0374, information surfaced that Commissioners had met secretly with representatives of the two parties seeking Commission authorization of the acquisition that was the subject of the case. Those meetings, along with other instances of Commissioner contact with utilities that resulted in recusals, led to calls for the Commission's *ex parte* rules and standards of conduct to be reviewed (*See In the Matter of the Application of Kansas City Power and Light Company for Approval to Make Certain Changes in its Charges for Electric Service to Implement its Regulatory Plan*, Case No. ER-2007-0291).

17. Those incidents of alleged Commissioner impropriety were chronicled extensively and reported in the media. The reporting focused on transparency and the need for additional restrictions on private meetings that Commissioners have with utility representatives.

18. Similarly, the private interactions of the Commissioners and the utilities they are tasked with regulating drew the attention of other governmental entities. A state audit of the Commission summarized the situation:

> During the 3 years ended June 30, 2009, several instances occurred where commissioners either recused themselves, declared their intent not to participate, or had to defend their decision to continue to participate in regulatory cases. These instances arose as a result of perceived, potential, or actual conflicts of interest resulting from *ex parte* communication, other contact between the Commissioners and regulated utilities, or social relationships.

(Economic Development Public Service Commission, State Auditor's report, Jan. 2010, p. 4, http://app.auditor.mo.gov/Repository/Press/2010-11.htm).

19. If transparency is a goal of the Commission, addressing private meetings to discuss utility related business or gather information is an easy place to start. The Commission has the means to gather information related to utility operations and the regulatory environment and it should not be done in private.

iv. Legislative involvement

20. This legislative session, the Commission appeared to take an active role in legislation. Multiple meetings were held between utility representatives and Commissioners to discuss legislation. The Commission's draft rule revisions would not cease the practice of meetings with commissioners, but instead allows the meetings to occur in secret. When members of the commission engage regulated utilities to develop legislation, questions about prejudgment of future applications for treatment under any new mechanisms/provisions arise. How can a commissioner tell the legislature that a particular provision is necessary (and that he/she supports the legislation) without being unfairly biased? Active participation by the commission in drafting or proposing legislation gives the appearance of pre-approval or official sanction for certain mechanisms / concepts. So even when the mechanism, the FAC for example, is optional – if a commissioner drafted the legislation – there is a strong appearance that he /she has prejudged the issue and would grant a utility's application for that mechanism. That is fundamentally unfair.

21. The meetings in the Spring of 2016 were not merely informational but meetings wherein the Chairman offered drafts of language he preferred to see in the legislation to utility representatives. Here, the Commission seeks to take a more active role in the legislative process – going so far as to provide tracked-changes drafts of legislation to regulated utilities (*See In the Matter of a Working Case to Consider Policies to Improve Electric Utility Regulation*, File No.

EW-2016-0313, *Notice of Policy Initiatives for Stakeholder Consideration*, Doc. No. 6). In the *Notice*, the Chairman explains:

> During the recently concluded legislative session, I participated in several policy discussion regarding electric rate case adjustment procedures, grid modernization incentives, low-income utility rates, and rate case expense sharing. Attached to this notice are copies of draft language designed to address these policies.

Id. Is such activity "general regulatory policy" or does it constitute something more? Even if such an active role can be construed as general regulatory policy, should members of the Commission engage in such activity?

22. Such an active role in legislation is reminiscent of the conduct of a prior Chairman reported by the St. Louis Post in 2008. The article described the actions then-Chairman Davis:

> [H]e boasted before a legislative committee about the role he played crafting Senate Bill 179, a 2005 law that hurts consumers and helps utilities. "I personally was in the room when the law was drafted, word by word," bragged the native of Braggadocio, Mo.
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> That quote, from a story by Post-Dispatch reporters Tony Messenger and Michael D. Sorkin, adds damning detail to Mr. Davis' involvement. This page first reported his role in 2005.
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> Until state law was changed in 2003, commissioners were so scrupulous about even the appearance of conflict of interest that they often declined to speak with legislators except on broad issues. Specifics of a proposed law or a pending case were clearly out-of-bounds.
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> But Mr. Davis was not merely in the room when SB 179 was drafted; he ran the meeting. It was attended by utility representatives and lawyers for large industrial customers — but not consumer advocates or the Office of Public Counsel, which represents ratepayers.

(*See* http://www.stltoday.com/news/opinion/columns/the-platform/sunday-editorial-turn-out-the-lights/article_1c47cc08-247d-5c1a-ab77-ac7314b44f80.html).

23. Since 2003, ratepayers in Missouri have been subjected to legislation enacting a barrage of regulatory mechanisms designed to allow utilities to collect money through interim rate adjustments. The legislation passed since that time has heavily favored utilities. Recent legislation has contributed to higher bills across the board for ratepayers thus begging the question: does commission involvement in legislation benefit ratepayers or only the utilities? The legislation proposed in 2016 would have *guaranteed* rate increases.

24. The meetings between Chairman Hall and utility representatives during the 2016 legislative session are distinguishable from the past actions of former Chairman Davis. During the meetings occurring in 2016, representatives of OPC were provided notice and given the opportunity to attend the meetings between the Chairman and the utility representatives. Other regulatory stakeholders, at least those parties to pending cases of each utility, were also notified of the meetings and provided post-meeting summaries through the Commission's electronic filing system.[3]

25. Importantly, the aforementioned notices and invitations were *required by the Commission's current rules*. Now, the Commission has opened a working docket and filed a draft rule which, if adopted, would eviscerate the notice and invitation requirement.

B. <u>Present *ex parte* rules</u>

26. After several years of glacial progress, the Commission adopted rules revising its standards on extra-record and *ex parte* communications. *See* Case Nos. AO-2008-0192, AX-2008-0201, AW-2009-0313, and AX-2010-0128. These rules led to the current iteration of the Commission's standards of conduct found at 4 CSR 240-4.010 and 4.020.

[3] These post-meeting summaries are insufficient to apprise the public of the discussion and subjects covered.

27. Barely a year had passed before the lessons learned had been forgotten – proving the victory won by the public to be precarious. In 2011, the Commission opened a rulemaking to change the rules stating "amendment is necessary to reflect the Commission's experience with the 2010 revision to the rule and to improve the operation of the rule." *See In the Matter of a Proposed Amendment to the Commission's Rule Regarding Ex Parte and Extra Record Communications,* Case No. AX-2012-0072, Doc. No. 1. However, rather than "improve the operation of the rule", the proposal by the Commission in 2011 would have eliminated entirely subsection 4 CSR 240-4.020(11) that prevents the kind of secret meetings that created the public outcry beginning in Case No. EM-2007-0374.

28. Regulatory Stakeholders and the media rallied against the amendment of the new rules. The St. Louis Post-Dispatch reported (unfavorably) on the Commission's attempt to revisit the communication standards:

> (December 5, 2011) http://www.stltoday.com/news/local/metro/missouri-utility-regulators-may-repeal-ethics-rule/article_e1fac6b2-74c1-50a3-affb-930b4aa3a157.html
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> (December 5, 2011) http://www.stltoday.com/news/local/govt-and-politics/groups-weigh-in-on-changes-to-missouri-utility-regulators-ethics/article_28a00674-1f83-11e1-8d0a-001a4bcf6878.html
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> (December 6, 2001) http://www.stltoday.com/news/local/govt-and-politics/missouri-psc-debates-ethics-rule-change/article_3bbf95d0-72ea-5641-b7f2-4a86573a3d32.html
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> (December 7, 2011) Cite to: http://www.stltoday.com/news/opinion/columns/the-platform/editorial-psc-should-leave-its-tough-ethics-policy-alone/article_d5b5ed56-bee1-5d44-bd0e-15d050368893.html

29. In one article, comments in support of the revisions by then-Chairman of the Commission Kevin Gunn were summarized as follows:

> The rule even precludes discussions on general matters such as bills before the Legislature or transmission of power, Gunn said.

(December 5, 2011): http://www.stltoday.com/news/local/metro/missouri-utility-regulators-may-repeal-ethics-rule/article_e1fac6b2-74c1-50a3-affb-930b4aa3a157.html.

30. The inaccuracy of Mr. Gunn's past representations were laid bare by his actions (and those of the utilities he represented) during the 2016 legislative session. In the spring of 2016 former Chairman Gunn, working on behalf of both Missouri American Water Company and Laclede Gas Company, met with the current Chairman Daniel Hall on multiple occasions to discuss legislation before the General Assembly. *See In the Matter of Missouri-American Water Company's Request for Authority to Implement a General Rate Increase for Water and Sewer Service Provided in Missouri Service Areas* ("MAWC rate case"), Case No. WR-2015-0301, Report of Meeting, Doc. No. 402; MAWC rate case, Case No. WR-2015-0301, Notice of Communication, Doc. No. 387; *In the Matter of the Application of Laclede Gas Company to Change its Infrastructure System Replacement Surcharge in its Laclede Gas Service Territory* ("Laclede case"), Case No. GO-2016-0196, Summary of Meeting, Doc. No. 14; Laclede Case, Case. No. GO-2016-0196, Notice of Communication, Doc. No. 17.

31. Ultimately, the Commission withdrew its proposed amendment to the rule (*In the Matter of a Proposed Amendment to the Commission's Rule Regarding Ex Parte and Extra Record Communications*, Case No. AX-2012-0072, Doc. No. 17). Because the rules remained in place, a record that communications occurred exists that OPC can cite in these comments. The attempt in 2012 to relax the Commission's communications rules illustrates that the drive to permit undisclosed private meetings between Commissioners and the utilities they regulate has proven persistent. Safeguarding the transparency and accountability of the Public Service Commission is thus a Sisyphean task, to be taken up and fought each time regulated utilities invite the Commission to forget its primary obligation is to the public; not to the utilities. *See State ex rel.*

Electric Co. of Missouri v. Atkinson, 204 S.W. 897, 899 (Mo. Banc 1918)(declaring"[t]he act establishing the Public Service Commission, defining its powers and prescribing its duties is indicative of a policy designed, in every proper case, to substitute regulated monopoly for destructive competition. *The spirit of this policy is the protection of the public. The protection given the utility is incidental*" (emphasis added)). The Commission fails in its obligation to the public when it attempts to relax its standards of conduct/*ex parte* rules.

C. *Ex parte* Communication in other jurisdictions

32. Restriction of *ex parte* and *extra-record* communication between Commissioners and the utilities they regulate is not unique to Missouri. Attached to these comments as **Exhibit A** is OPC's review of the *ex parte* statutes and rules for every state, FERC, and the District of Columbia.

33. Nearly every state examined in OPC's review had *ex parte* rules. Some went further than Missouri's reporting requirements. Texas requires monthly reporting of *all personal communications* between the commission and public utilities (and affiliates):

> **(1) Personal Communications.** Communications in person by public utilities, their affiliates or representatives, or any person with the commission or any employee of the commission shall be governed by the APA, § 2001.061. Records shall be kept of all such communications and shall be available to the public on a monthly basis. The records of communications shall contain the following information:
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> **(A)** name and address of the person contacting the commission;
> **(B)** name and address of the party or business entity represented;
> **(C)** case, proceeding, or application, if available;
> **(D)** subject matter of communication;
> **(E)** the date of the communication;
> **(F)** the action, if any, requested of the commission; and
> **(G)** whether the person has received, or expects to receive, a financial benefit in return for making the communication

See 16 Tex. Admin. Code § 22.3.

34. Despite broad national acceptance that *ex parte* communications between Commissioners and representatives of the utilities they regulate should be restricted, Missouri is not unique in its history of private communications between Commissioners. In fact, the Commission need look only to the recent activity in Arizona and California for cautionary examples of what happens when transparency and rigorous adherence to standards of conduct are set aside. OPC points out these states because each has a tie to Missouri.

35. In Arizona, members of the Commission are under investigation after a whistleblower letter alleging illegal activity revealed Arizona Public Service (an electric utility) Chief Executive Officer Don Brandt regularly met privately with then-Commissioner Gary Pierce. Don Brandt previously worked in Missouri having served as Senior Vice President and Chief Financial Officer at Ameren Corporation based in St. Louis.

36. The resulting media coverage in Arizona has led to investigations by the FBI, Arizona Attorney General, and the Arizona Commission itself. At this time, the allegations of improper activities continue to be investigated. However, it is undisputed that the private meetings occurred. Reviewing the activities of the Arizona Commission illustrates that private meetings between Commissioners and representatives of regulated utilities are ill-advised.

37. Turning to California, improper communication between regulators and utility representatives has created controversy, led to criminal prosecution, and spurred legislation.

38. A summary of the events in California can be found in the recent legislation aimed at reforming the relationship between regulators and utilities (*See* S.B. 215, as amended June 20, 2016 available at:

https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201520160SB215). The California Senate Committee on Energy, Utilities, and Communications bill analysis report dated April 14, 2015, explained the events precipitating the legislation.

> Fatal Explosion in San Bruno. On September 9, 2010, a natural gas pipeline owned by Pacific Gas and Electric Company (PG&E) exploded in a residential neighborhood in the City of San Bruno. Eight people died, dozens were injured, 38 houses were destroyed and many more were damaged. The investigations by the National Transportation Safety Board (NTSB) and an independent review panel appointed by the CPUC found that PG&E mismanaged their pipeline over decades, failed to adequately test the strength of the pipeline and, more generally, valued profits over safety. These same investigations also noted the CPUC's inadequate oversight of the PG&E.
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> Following the investigation, in May of 2013, the Safety and Enforcement Division (SED) of the CPUC formally recommended the CPUC to levy fines of $2.25 billion against PG&E, the full amount of which to be used to enhance safety. PG&E protested, contending they neither could have nor should have known the gas pipeline was installed incorrectly and that SED based the amount of the recommended penalty on "the deeply flawed analysis of one consultant." The CPUC referred the SED's proposed penalty against PG&E to the Administrative Law Division for assignment to an administrative law judge (ALJ). The ALJ was to review the recommendation and, eventually, propose a final decision on the matter, including how any fines would be allocated among PG&E's shareholders and ratepayers. Eventually, the five commissioners of the CPUC would vote on whether to adopt, modify, or reject the ALJ's proposed decision.
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> Emails Demonstrate "Culture of Conversation". During the summer and fall of 2014, PG&E, bowing to legal pressure from the City of San Bruno, began to release a growing number of emails between the utility and CPUC officials. PG&E released 65,000 emails from over a five year period many of which PG&E says it believes "violated CPUC rules governing *ex parte* communications." **The initial release of emails revealed efforts by PG&E executives to influence the CPUC's assignment of ALJ to a San Bruno-related proceeding. Many of the other emails exposed regular, private, familiar communications between PG&E and certain CPUC commissioners, including former CPUC President Michael Peevey and current Commissioner Mike Florio, as well as senior CPUC officials.**
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> Criminal Investigations Opened. Since PG&E's initial release of the emails, both the state Attorney General and the United States Department of Justice have opened investigations into communications between the CPUC and regulated entities. PG&E has fired three senior executives. A senior CPUC official has

> resigned, while other top CPUC officials – including longtime CPUC President Michael Peevey and Executive Director Paul Clannon – have retired under pressure. Attorneys in CPUC's legal division requested CPUC commissioner's direct staff on how to properly cooperate with ongoing law enforcement investigations and to ensure CPUC staff preserves evidence relative to the investigations. Investigators working with the Attorney General's Office have raided the CPUC offices and the homes of former CPUC Commissioner President Peevey and PG&E former-Vice President Brian Cherry. In early February, only after a newspaper published details of the search warrant, Southern California Edison disclosed a meeting that occurred a year prior in Warsaw, Poland between then-CPUC President Peevey and a utility executive in which they discussed how to resolve the shutdown plans for San Onofre Nuclear Generating Station (SONGS).
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> Recently appointed Interim Executive Director Timothy Sullivan, who described the emails as "shocking to the organization," is considering personnel action against CPUC employees. Newly appointed CPUC President Michael Picker acknowledged the communications have damaged the public's trust in the regulatory agency and that changes are needed.

Id (emphasis added).

39. The events in California led to an exodus of PG&E executives. The connection to Missouri is that, after the events described above unfolded, a former chairman of the Missouri Commission, Robert Kenney, went on to work for PG&E.[4]

40. The above Senate analysis highlights the dangers that accompany creating a "culture of conversation" between commissioners and the utilities they are supposed to regulate. When money is at issue – as is always the case with an economic regulator like the Commission – the pressure to abuse personal relationships in order to improperly influence the regulator is heightened. Even if no improper influence is exerted, such events erode the public trust in the regulatory agency.

41. Mark Toney, the executive director of The Utility Reform Network ("TURN") in California, commented on the legislation: "S.B. 215 offers concrete improvements to promote

[4] *See* http://www.pgecorp.com/aboutus/our_team/RKenney.shtml

transparency, close loopholes in the current process, and limit the opportunities for private interests to seek special favors behind closed doors."[5]

42. In stark contrast, the proposal put forward by the Missouri Commission *inhibits* the Public's ability to see and understand communications between the Commission and utilities, *creates* loopholes, and *encourages* private meetings between commissioners and utilities they regulate.

43. This is not the kind of scrutiny the Commissioners should invite upon themselves. Rather, the Commission in pursuit of transparency should endeavor to require not only notice and disclosure of meetings between Commissioners and utilities, but to broadcast and record those meetings.

II. Commission's Stated Goals

44. In its order opening this working case the Commission outlined to purpose of the docket to examine whether the Commission's rules should be amended in order to (1) comply with Section 386.210.4, RSMo; (2) simplify compliance with the rule; and (3) promote consistency and fairness (Doc. No. 2). The Commission attached a draft of proposed amendments for stakeholders to consider in this working docket.

45. During the June 8, 2016 Agenda meeting, several Commissioners indicated another reason for the rule change – as a way to gather information.[6] To be clear, Commissioners can get the information they desire – but there is no reason for this information gathering to be done in

[5]Sarah Smith, Calif. Leaders announce transparency, accountability reforms for CPUC, June 27, 2016, https://www.snl.com/InteractiveX/article.aspx?CDID=A-36941562-11311&KPLT=4.

[6] (Agenda 6/8/2016 at 01:01:07 and 01:01:40).

private. Indeed, if it is information that they are going to rely on in their decision making, the information should be available to the Missouri public and the other regulatory stakeholders.

46. The history of the Commission, explained above, on *ex parte* and *extra-record* communications is the lens through which any revisions to the standards of conduct must be viewed; the ethical shortfalls and transgressions, perceived or actual, of past Commissioners should not be forgotten and cannot be ignored. Most importantly, rules designed to circumvent such conduct and communications should not be relaxed.

A. <u>Section 386.210.4, RSMo</u>

47. In its order opening this working docket, the Commission suggested that the rules should be examined with a view towards compliance with section 386.210.4 RSMo. That section is a component of 386.210.1 through .8. In their entirety those sections read:

> 386.210. 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
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> (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.

6. The commission may enter into and establish fair and equitable cooperative agreements or contracts with or act as an agent or licensee for the United States of America, or any official, agency or instrumentality thereof, or any public utility or similar commission of other states, that are proper, expedient, fair and equitable and in the interest of the state of Missouri and the citizens thereof, for the purpose of carrying out its duties pursuant to section 386.250 as limited and supplemented by section 386.030 and to that end the commission may receive and disburse any contributions, grants or other financial assistance as a result of or pursuant to such agreements or contracts. Any contributions, grants or other financial assistance so received shall be deposited in the public service commission utility fund or the state highway commission fund depending upon the purposes for which they are received.

7. The commission may make joint investigations, hold joint hearings within or without the state, and issue joint or concurrent orders in conjunction or concurrence with any railroad, public utility or similar commission, of other states or the United States of America, or any official, agency or any instrumentality

> thereof, except that in the holding of such investigations or hearings, or in the making of such orders, the commission shall function under agreements or contracts between states or under the concurrent power of states to regulate interstate commerce, or as an agent of the United States of America, or any official, agency or instrumentality thereof, or otherwise.
>
> 8. The commission may appear, participate, and intervene in any federal, state, or other administrative, regulatory, or judicial proceeding. This subsection applies to all proceedings now pending or commenced after August 28, 2013.

48. It should be obvious the statute was never intended to encourage or permit Commissioners to meet in private with representatives of regulated utilities. Prior to 2003, section 386.210 was quite different:

> 386.210.1. The commission may confer in person, or by correspondence, by attending conventions, or in any other way, with the members of any public utility or similar commission of 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.
>
> 2. The commission may enter into and establish fair and equitable cooperative agreements or contracts with or act as an agent or licensee for the United States of America, or any official agency or instrumentality thereof, or any public utility or similar commission of other states, that are proper, expedient, fair, and equitable and in the interest of the state of Missouri and the citizens thereof, for the purpose of carrying out its duties under section 386.250 as limited and supplemented by section 386.030 and to that end the commission may receive and disburse any contributions, grants or other financial assistance as a result of or pursuant to such agreements or contracts. Any contributions, grants, or other financial assistance so received shall be deposited in the public service commission utility fund or the state highway commission fund depending upon the purposes for which they are received.
>
> 3. The commission may make joint investigations, hold joint hearings within or without the state, and issue joint or concurrent orders in conjunction or concurrence with any railroad, public utility or similar commission, of other states or the United States of America, or any official, agency or instrumentality thereof, except that in the holding of such investigations or hearings, or in the making of such orders, the commission shall function under agreements or contracts between states or under the concurrent power of states to regulate interstate commerce, or as an agent of the United States of America, or any official, agency or instrumentality thereof, or otherwise.

Mo. Rev. Stat. 386.210 (2000). Under that version of the statute, the Commission was authorized to meet and confer with other similar commissions. For example, the Commission would be

permitted to confer with commissioners from Kansas during a conference. There is nothing to suggest that communication with a regulated utility would be encouraged or permitted.

49. Then in 2003, the General Assembly revised the statue in Senate Substitute for Senate Committee Substitute for House Bill 208. *See* S.S. for S.C.S. H.B. 208, 92nd Gen. Ass., 1st Reg. Sess. (Mo. 2003). In that action, the legislature enacted most of the current form of the statute.[7] Notably, the words "the public" were added to section 383.210.1. Nowhere in the original bill or any of the substitutes was language permitting or encouraging communication with regulated utilities.

50. This Commission has, at times, described the statute in its present form as one limiting communications and, other times, described the statute as one authorizing communications (*See* Missouri Landowners Alliance v. Grain Belt Express Clean Line LLC, Grain Belt Express Holding LLC, Clean Line Energy Partners LLC, *Order Granting Motion to Dismiss*, File No. EC-2014-0251, 2014 Mo. PSC LEXIS 463, 3-4 (Mo. PSC 2014) (explaining "that statute limits communications between the Commission and those outside the Commission regarding cases pending before the Commission."); 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, Order Denying Motion to Dismiss, Case No WM-2007-0374, 2008 Mo. PSC LEXIS 3 (Mo. PSC 2008)("there is no question that these types of communications are expressly authorized by Sections 386.210.1 and .2.")).

[7] In 2013, subsection .8 was enacted through House Bill 432. *See* H.B. 432, 97th Gen. Ass., Reg. Sess. (Mo. 2013).

51. Based on OPC's review, the Supreme Court has examined the meaning of section 386.210 RSMo in two cases. First, in *State* ex rel. *Praxair, Inc. v. Mo. PSC* (*Praxair*), 344 S.W.3d 178 (Mo. banc 2011) and again in *State* ex rel. *Mogas Pipeline LLC v. Mo. PSC* (*Mogas Pipeline*), 366 S.W.3d 493 (Mo. banc 2012). Neither case supports the Commission's expansive reading of the statute to permit its members to hold private meetings with representatives of regulated utilities.

52. In *Praxair,* the Court considered an appeal regarding GPE's merger with Aquila. Praxair challenged the Commission's denial of an offer of proof; OPC challenged the Commission's decision on OPC's motion to dismiss the case. In its motion, OPC argued that meetings between commissioners and GPE executives created such a strong appearance of impropriety that the commissioners involved in those meetings were required to recuse themselves with the result that the Commission could not hear the merger issue. *Praxair*, 344 S.W.3d at 189. The court noted OPC's motion in the case did not argue the meetings resulted in actual bias. *Id*.

53. In discussing OPC's appeal, the Court explained "[t]he PSC defends its practice, suggesting that it is commonplace for its commissioners to meet with executives of the utilities it regulates and to discuss upcoming cases in general terms … [and] it suggests, its commissioners' conduct is proper under *section* 386.210[.]" *Id.*

54. The Court refuted directly the Commission's argument that Section 386.210 RSMo authorized the Commissioners to meet with utility representatives, noting: "[F]irst, *subsections 1* and *2 of section 386.210* do not authorize the commission to meet with public utilities; they authorize it to meet with public utility and other similar *commissions*." *Id*. at 190. The Court further explained that even those meetings are limited. Such contact is permitted "on any matter relating to the performance of its duties" and "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." *Id*. The meetings between commission member and the executives of utilities were not authorized under section 386.210.1 or .2. *Id.*

55. In the present working docket, the Commission expressed concern about compliance with Section 386.210.4 RSMo. This section, too, was addressed by the *Praxair* Court. The Court explained, "*subsection 4 of section 386.210* simply says it does not prohibit meetings where there is no pending case. Neither does it authorize such contacts." *Id*. Though it does not rely on the information contained in footnote 8, the Court recognized that, subsequent to the underlying case, "the applicable regulation relating *ex parte* communications was changed significantly to more strictly regulate communications with commissioners." *Id*. Those referenced regulations are the current Commission rules. 4 CSR 240-4.020 (as amended in 2009, effective July 30, 2010). Furthermore, the Court's statement it "agrees that the meetings create an appearance of impropriety" when combined with mention of the new rules suggests the current form of the *ex parte* regulations comply with the law fully. *Praxair*, 344 S.W.3d at 93. No rule making is necessary to meet this objective of the Commission.

56. *Mogas Pipeline* is the second case wherein the Supreme Court examined Section 386.210 RSMo. In *Mogas Pipeline*, the Court examined whether the Commission was authorized to intervene in FERC proceedings. *Mogas Pipeline*, 366 S.W.3d 493. The Commission argued, in part, Section 383.210.1 and .7 authorized it to intervene in FERC cases. *Id* at 497. The Commission argued Section 386.210.1 RSMo authorized its intervention because FERC is a similar commission and intervention is way for it to confer with FERC. *Id*. The Court disagreed, explaining: "[m]oreover, *section 386.210* itself indicates that it uses the term "confer" in the sense of "communicate," for *section 386.210.2* refers collectively to the various ways of

conferring with the public or other commissions permitted in *section 386.210.1* as "communications." *Id* at 498. The Court went on to define "communications" as "the act or action of imparting or transmitting and the interchange of thoughts or opinions." *Id* (internal parentheses omitted).

57. Having adopted that definition, the Court contrasted "communication" with the actions taken in a case by an intervenor (stating, "[i]ntervening parties do more than communicate … [i]ntervenors exercise control over litigation by engaging in oral arguments, presenting evidence and cross-examine witnesses") concluded, "*section 386.210.1*, cannot reasonably be construed to include intervention." *Mogas Pipeline*, 366 S.W.3d at 499. Furthermore, the Court stated "*section 386.210.1* can be read only to authorize the PSC to 'confer' with commissions similar to the FERC by contributing its opinion 'for the purpose of assisting the … [commissions] in cases of general public interest.'" *Id*. Just as in *Praxair*, the Court in *Mogas Pipeline* found no authority in section 386.210.1 RSMo for the Commission to meet with public utilities but authority to meet with other similar commissions.

58. Reading Section 386.210.4 RSMo as authority for the Commission to meet privately with utility representatives is certainly an expansive view of the law. However, even if such an expansive reading were merited, the Commission should not engage in such communications.

B. <u>Compliance with the rule</u>

59. If the Commission has concerns about compliance with the rule, the solution is simple – cease private communications with the representatives of regulated utilities regarding utility issues. Compliance need not be complicated. If such communication is necessary for the Commissioners to conduct public business it should be open to the public. The Missouri Sunshine Law statutes and common sense require as much.

60. The Commission is free to conduct investigations, convene workshops, initiate rulemakings in order to gather information but these other methods should comply with the *ex parte* rules and Chapter 610 (the Missouri sunshine law).

C. Consistency and fairness

61. Strict *ex parte* and communications rules foster consistency and fairness. Relaxing the current rules as suggested by the commission creates a number of issues related to fairness and due process.

62. Private meetings between Commissioners and representatives of regulated utilities foster due process concerns. In Case No. EM-2007-0374, OPC alleged secret meetings between commissioners and GPE executives created the appearance of impropriety and bias. OPC asked the case be dismissed because judicial cannon and due process required a majority of the commissioners to recuse themselves.

63. The Commission disagreed and, although two Commissioners eventually did recuse, The Commission issued a Report and Order in that case. The *Praxair* case, described above, is the result of that appeal. Ruling in favor of the Commission on OPC's judicial cannon and due process argument, the Court held "commissioners are members of the executive branch, not the judicial branch" and so "the judicial canons do not apply to them[.]" Praxair, 344 S.W.3d at 190.

64. Importantly, as to due process, the court reaffirmed that "'[t]he procedural due process requirement of fair trials by fair tribunals applies to an administrative agency acting in an adjudicative capacity.'" *Id* at 191 (citing *State* ex rel. *AG Processing, Inc. v. Thompson* (*Thompson),* 100 S.W. 3d 915, 919 (Mo. Ct. App. W.D. 2003)). However, the court also explained "'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.'" *Id* (citing *Thompson*, 100 S.W. 3d 915at 920). The Praxair Court held OPC did not show actual bias but explained "the Court agrees that the meetings create an appearance of impropriety[.]" *Praxair*, 344 S.W.3d at 193.

65. The Commission has a duty to uphold the highest possible ethical standards, including avoidance of even the appearance of impropriety or impartiality. Commission Rule 4 CSR 240-4.010 restates Executive Order 92-04 and directs Commissioners "avoid any interest or activity which improperly influences, *or gives the appearance of improperly influencing*, the conduct of their official duties" (emphasis added). Undisclosed private meetings between Commissioners and utility representatives create an appearance of impropriety and should be avoided to promote consistence and fairness.

D. Information gathering

66. During the agenda opening the working docket, on June 8, 2016, the Commissioners explained the rationale behind the workshop to consider rule revisions is, in part, to allow the commission to collect information it will use to make decisions that impact Missourians. Chairman Hall provided the following quote to the Missouri Times:

> "What the commission does is very complicated and complex and detailed and vitally important," Hall said. "We need as much information as possible from all sides in order to make a decision that benefits Missouri. Our rules right now are as such that we are not getting as much information as we should."

See Scott Moyers, PSC considering changes to '*ex parte*' rules, The Missouri Times, June 13, 2016, http://themissouritimes.com/30530/psc-considering-changes-to-ex-parte-rules/.

67. Commissioner Rupp was quoted in the same article, providing the following quote:

"It does lead people to not provide information to help us make better informed decisions because of fear over a potential rule violation."

Id. Certainly the Commission must have access to information to perform its function in protecting the public. But, a reasonable – and public – process for gathering information is appropriate.

68. To the extent that the Commissioners seek to meet with utility representatives for purposes of gathering information that will enable them to carry out the business of the state, those meetings should be subject to public disclosure. *See generally* Mo. Rev. Stat. § 610.010 et seq.

III. Comments on the Commission's Draft

69. The Commission's draft rule was not provided in the format where new language is in bold text (i.e. **new text**) and deleted language is italicized in brackets (i.e. *[deleted text]*). Because the Commissions draft extensively rearranges and edits the current version of the rules and creates new sections, OPC has attempted to reproduce the Commission's draft in a format showing the changes where applicable.

A. 4 CSR 240-4.010 Gratuities

70. The Commission's draft leaves 4 CSR 240-4.010 unchanged. Presently, that subsection (2) of the rule reads:

> All companies, corporations or individuals and any representative subject to the jurisdiction of the commission shall be prohibited from offering and all members and employees of the commission shall not accept, directly or indirectly, any gifts, meals, gratuities, goods, services or travel, regardless of value, except meals to a commissioner or an employee of the commission when given in connection with a speaking engagement or when the individual is a guest at a conference, convention or association meeting.

71. During this working docket, the Commission should examine the regulation permitting "meals to a commissioner or an employee of the commission when given in connection with a speaking engagement or when the individual is a guest at a conference, convention or association meeting." Even if permitted only at conferences or speaking engagements, free meals to public officials can create the impression of improper activities and undue influence. This exception is unnecessary especially considering Missouri has established a state meal per diem for both in-state and out-of-state meals. The Commission should take steps to eliminate this unnecessary exception to the prohibition on gratuities.

72. Also left unchanged is subsection (3), requiring:

> All companies, corporations or individuals and any representative subject to the jurisdiction of this commission, and the members and employees of the commission shall immediately file with the chairman and each member of the commission, from and after March 18, 1976, report of any direct or indirect gratuities, meals, services, gifts or travel given or received and the identity and value of same and the purpose for which given or received, which is not permitted by this rule.

73. As explained above, the Commission should eliminate the exception permitting gratuities in certain circumstances. However, if the Commission decides to leave the exemption unchanged, it should change subsection (3) to require those meals be reported, too. Furthermore, the repository of gratuity reports should be made available to the public in the Commission's electronic filing system and via a link on the Commission's webpage. Filing the reports with the very commissioners subject to the rule provides limited transparency and invites abuse.

B. 4 CSR 240-4.015 General Definitions

74. Section 4.015 is new and contains definitions to be used in Chapter 4. Some of the definitions are currently defined in 4 CSR 240-4.020 and others are modified.

75. The revisions are as follows:

4 CSR 240-4.015 General Definitions

PURPOSE: This rule sets forth the definitions of certain terms used in rules 4 CSR 240-4.020 through 4 CSR 240-4.050.

*[**4 CSR 240-4.020 Ex Parte and Extra-Record Communications***
PURPOSE: To set forth the standards to promote the public trust in the commission with regard to pending filings and cases. This rule regulates communication between the commission, technical advisory staff, and presiding officers, and anticipated parties, parties, agents of parties, and interested persons regarding substantive issues that are not part of the evidentiary record.

(1) Definitions.
(A) Anticipated contested case—Any case that a person anticipates, knows, or should know will be filed before the commission within sixty (60) days and that such person anticipates or should anticipate will be or become a contested case.
*(B) Anticipated party—A person who anticipates, knows, or should know that such person will be a party to a contested case.]***(1) Central repository – A repository in the commission's electronic filing information system established by the commission's secretary to maintain a copy of all ex parte and extra-record communications occurring in pending contested cases or noticed contested cases.**
(*[C]***2**) Contested case—Shall have the same meaning as in section 536.010(4), RSMo.
(*[D]***3**) Commission—Means the Missouri Public Service Commission as created by Chapter 386, RSMo.
(*[E]***4**) Commissioner—Means one (1) of the members of the **Missouri Public Service** *[c]***C**ommission.
(*[F]***5**) Discussed case—*[Each]***A** contested case or *[anticipated]* **noticed** contested case *[whose]* **that includes or will likely include** substantive issues **that** are the subject of an **ex-parte or** extra-record communication regulated under this rule.
(*[G]***6**) Ex parte communication—Any communication outside of the contested case hearing process between **a member of the office of** the commission **and any party, or the agent or representative of a party***[, a commissioner, a member of the technical advisory staff, or the presiding officer assigned to the proceeding and any party or anticipated party, or the agent or representative of a party or anticipated party,]* regarding any substantive issue **in or expected to be in a pending or noticed contested case**. Ex parte communications shall not include a communication regarding general regulatory policy allowed under section 386.210.4, RSMo, communications listed in *[section (3) of this rule]***4 CSR 240-4.040**, or communications that are de minimis or immaterial.
(*[H]***7**) Extra-record communication—Any communication outside of the contested hearing process between **a member of the office of** the commission*[, a commissioner, a member of the technical advisory staff, or the presiding officer assigned to the proceeding]* and any individual interested in *[a contested case or anticipated contested case regarding any substantive]* **but not a party to a pending contested case or noticed contested case regarding any substantive issue in or expected to be in that pending or noticed contested case**. Extra*[-]*_record communications shall not include **communications regarding general regulatory policy allowed under section 386.210.4, RSMo, communications with members of the general**

assembly allowed under section 386.210.5, RSMo, communications listed in 4 CSR 240-4.040, or communications that are de minimis or immaterial.
(8) Final determination – A decision of the commission that resolves a contested case, including all applications for rehearing and reconsideration.
(9) Noticed contested case – Any case for which a notice of contested case has been filed in compliance with 4 CSR 240-4.017(2).
(10) Office of the commission – Commissioners, a commissioner, a member of the technical advisory staff, or the commission's regulatory law judges.
[(I) Finally adjudicated—A decision of the commission in a contested case which is no longer subject to appeal.
(J) General regulatory policy—Any topic that is not specific to a single entity regulated ~~by the~~ commission and such topic is not reasonably believed by any person who is a party to the communication to be a subject within a contested case or anticipated contested case of which the person or such person's principal is or will be a party. Any communication regarding the merits of an administrative rule, whether a concept or a pending rulemaking, or legislation, whether a concept or a pending piece of legislation, shall at all times be considered a communication regarding a general regulatory policy allowed under section 386.210.4, RSMo.]
(*[K]***11**) Party—Any applicant, complainant, petitioner, respondent, *[or]*intervenor**, or person with an application to intervene pending in a contested case or noticed** *[in a]*contested case before the commission. Commission staff and the public counsel are also parties unless they file a notice of their intention not to participate in the relevant proceeding within the period of time established for interventions by commission rule or order*[, or where staff serves in an advisory capacity pursuant to any commission rule]*.
(*[L]***12**) Person—Any individual, partnership, company, corporation, cooperative, association, political subdivision, entity regulated by the commission, party, or other entity or body that could become a party to a contested case.
[(M) Presiding officer—Means a commissioner, or a law judge licensed to practice law in the state of Missouri and appointed by the commission to preside over a case.]
(*[N]***13**) Public counsel—Shall have the same meaning as in section 386.700, RSMo.
(*[O]***14**) Substantive issue – The merits, specific facts, evidence, claims, or positions which have been or are likely to be presented or taken in a contested case. The term substantive issue does not include procedural issues, unless those procedural issues are contested or likely to materially impact the outcome of a contested case.
(*[P]***15**) Technical advisory staff—Shall have the same meaning as in section 386.135, RSMo.

76. The Commission should be aware that in limiting *ex parte* communication prohibition to contested cases there is a real possibility that it will effectively allow one sided communication in multi-million dollar cases before the commission. For example, the Commission's decision in EO-2015-0055 regarding Ameren Missouri's MEEIA Cycle 2 application the Commission described the case as a "non-contested case." The Commission should not limit the prohibition

on *ex parte* communications to cases defined as "contested cases." At a minimum, the prohibition should apply to all pending cases as well.

C. 4 CSR 240-4.017 General Provisions

77. This is a new section blending existing rules of 4 CSR 240-4.020 with new language in the new section. The revised rules, with edits to the existing rule visible, read as follows:

4 CSR 240-4.017 General Provisions

PURPOSE: This rule sets forth provisions that are applicable to both ex parte and extra-record communications.

(1) The secretary of the commission shall create a central repository accessible through the commission's electronic filing information system for any notice of ex parte communications filed in any case.

(2) Any *[regulated entity]***person** that intends to file a case likely to be a contested case shall file a notice with the secretary of the commission a minimum of *[sixty]***ninety** (*[60]***90**) days **but no more than one hundred eighty (180) days** prior to filing such case. Such notice shall detail the type of case and issues likely to be before the commission**. The filing of such notice shall initiate a new noticed contested case and be assigned an appropriate case designation and number. If the expected contested case filing is subsequently made, it shall be filed in and become a part of the noticed contested case. If the expected contested case filing is not made within one hundred eighty (180) days, then noticed contested case shall close.**

(A) *[Any case filed which is not in compliance with this section shall not be permitted and the secretary of t]***T**he commission *[shall]***may** reject any *[such]* filing **not in compliance with this section**.

(B) This section shall not apply to small formal complaints under commission rule 4 CSR 240-2.070 or small utility rate cases under commission rule 4 CSR 240-3.050.

(*[B]***C**) A party may request a waiver of this section for good cause. **Good cause for waiver may include a certification from the filing party that has had no discussion with the office of the commission of any substantive issue expected to be in the case within the ninety (90) day period before the filing.**

(3) Unless properly admitted into evidence in subsequent proceedings, no ex parte or extra-record communication shall be considered as part of the record on which the commission reaches a decision in a contested case.

(4) Notwithstanding any provision of this rule to the contrary, thirty (30 days after the commission has reached a final determination in a contested case, the office of the commission may communicate with any person regarding any procedural or substantive issue related to such case, unless the same regulated entity has a contested case or noticed contested case pending before the commission which includes or is expected to include such issue.

(5) Nothing in this rule 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 substantive issues in or expected to be in a pending or noticed contested case.
(6) A utility offering a tour of its facilities to the office of the commission shall also offer the office of the public counsel an opportunity to participate in that tour.

78. Notices should be filed in each case. It is unclear if the Commission's draft would require notice to be provided only in the repository.

79. Public Counsel should not be required to file a notice of contested case prior to filing a complaint. The Commission's draft appears to require notice of 90 days by all "persons" including Public Counsel. If such a complaint is necessary, the waiting period merely prolongs the wrong that a complaint would seek to remedy.

D. 4 CSR 240-4.020 *Ex Parte* Communications

80. This section blends the existing rules of 4 CSR 240-4.020 with new language in the new section. The revised rule, with edits to the existing rule visible, reads as follows:

4 CSR 240-4.020 Ex Parte Communications.
PURPOSE: To set forth the standards to promote the public trust in the commission with regard to pending filings and cases. This rule regulates communication between the commission, technical advisory staff, and presiding officers, and anticipated parties, parties, agents of parties, and interested persons regarding substantive issues that are not part of the evidentiary record.

[(3) Ex Parte Communications.]
(*[A]***1**) No party *[or anticipated party]* shall initiate, participate in, or undertake, directly or indirectly, an ex parte communication.
(*[B]***2**) *[A commissioner, technical advisory staff, or the presiding officer assigned to a proceeding]***The office of the commission** shall not initiate, participate in, or undertake, directly or indirectly, an ex parte communication regarding a contested case or *[anticipated]* **noticed** contested case. However, it shall not constitute participation in or undertaking an ex parte communication if *[such person]***the office of the commission—**
*[1]***A**. Does not initiate the communication; **and**
*[2]***B**. Immediately terminates the communication, or immediately alerts the initiating *[person]***party** that the communication is not proper outside the hearing process and makes a reasonable effort to terminate the communication.***[***; and*
3. Files notice in accordance with section (4) of this rule, as applicable.

(C) Should an ex parte communication occur, the party or anticipated party involved in such communication shall file a notice in the case file if such exists or if not, with the secretary of the commission. Such notice shall provide the information required in section (4) of this rule.
(D) The secretary of the commission shall create a repository for any notice of ex parte communication filed in advance of an anticipated contested case. Once such a case has been filed, the secretary shall promptly file any such notices in the official case file for each discussed case.](*[4]***3**) A *[person]* **party or member of the office of the commission** who initiates an *[extra-record*] **ex parte** communication *[regarding a pending case]* shall within three (3) business days following such communication give notice of that communication as follows:

(A) If the communication is written, the initiating *[person or]* party shall file a copy of the written communication in the official case file for *[each]* **the** discussed case **and in the central repository**; or

(B) If the communication is not written, the initiating *[person]* **party** shall file a memorandum disclosing the communication in the official case file for each discussed case **and in the central repository**. The memorandum must contain a list of all participants in the communication; the date, time, **and** location*[, and duration]* of the communication; the means by which the communication took place; and a summary of the substance of the communication and not merely a listing of the subjects covered. Alternatively, a recording or transcription of the communication may be filed, as long as that recording or transcription indicates all participants *[and the date, time, location, duration, and means of the communication]* **and the date, time, location, and means of communication**.

(4) If an ex parte communication regarding a pending or noticed contested case occurs and the initiating party fails to file a notice in the manner set forth in subsections 3(A) and (B), any other party or member of the office of the commission involved in the communication shall give notice of the ex parte communication in the manner set forth in subsections (3)(A) and (B) as soon as practicable after learning of the party's failure to give such notice.

AUTHORITY: section 386.410, RSMo 2000.* Original rule riled Dec. 19, 1975, effective Dec. 29, 1975. Amended: Filed April 26, 1976, effective Sept. 11, 1976. Rescinded and readopted: Filed Nov. 4, 2009, effective July 30, 2010.

****Original authority: 386.410, RSMo 1939, amended 1947, 1977, 1996.***

81. It is unclear whether the changes above would not require a party to file the notice in each case. OPC supports the continued filing in each pending case.

82. Each notice should be required to contain the duration of any incidental or planned meetings. The length of a meeting can inform a court (in actions where participation is questioned) of whether the illicit communication was deliberate or incidental.

E. 4 CSR 240-4.030 Extra-Record Communications

83. This new section blends the existing rules of 4 CSR 240-4.020 with new language in the new section. The revised rule, with edits to the existing rule visible, reads as follows:

4 CSR 240-4.030 Extra-Record Communications

PURPOSE: To set forth the standards to promote the public trust in the commission with regard to pending filings and cases. This rule regulates communication between members of the office of the commissions and persons not parties to a case regarding substantive issues that are not part of the evidentiary record.

(*[5]***1**) *[A]***If any** person *[who]* initiates an extra-record Communication**, the member of the office of the commission that is a participant in such communication** *[regarding an anticipated contested case]* shall, within three (3) business days **following such communication***[of the later of becoming a party to the contested case or the conversion of the case to a contested case,]* give notice of **that** *[the extra-record]* communication*[. The notice shall be made in the manner set forth in subsections (4)(A) and (B).]* **as follows:**

[(6) In addition to sections (4) or (5) of this rule, if an extra-record communication regarding a pending case is initiated by a person not a party to the discussed case, the commissioner, the technical advisory staff, or the presiding officer assigned to the discussed case shall give notice of the extra-record communication in the manner set forth in subsections (4)(A) and (B) as soon as practicable after learning of the person's failure to file such notice.

(7) Unless properly admitted into evidence in subsequent proceedings, an extra-record communication shall not be considered as part of the record on which a decision is reached by the commission, a commissioner, or presiding officer in a contested case.

(8) Any communication, other than public statements at a public event or de minimis or immaterial communications, between a commissioner or technical advisory staff and any regulated entity regarding regulatory issues, including but not limited to issues of general regulatory policy under subsection 386.210.4, RSMo, if not otherwise disclosed pursuant to this rule, shall be disclosed in the following manner:]

(A) If the communication is written***[—],* file a copy of the written communication in the official case file for the discussed case and in the central repository; or**

[1. If no contested case or anticipated contested case is pending, no notice is required; or

2. If a contested case or anticipated contested case is pending, notice of extra-record communication shall be filed in accordance with section (4) of this rule. However, any information which is designated by the communicator as highly confidential or proprietary, under federal or state law, or commission rule, shall not be subject to disclosure; or]

(B) If the communication is *[oral—]* **not written, file a memorandum summarizing the communication in the official case file for each discussed case and in the central repository. Alternatively, a recording or transcription of the communication may be filed, as long as that recording or transcription indicates the date, time, location, and means of communication.**

[1. If no contested case or anticipated contested case is pending, the regulated entity shall provide a document to such commissioner or technical advisory staff detailing the participants in the communication, date, approximate time, location, means by which the communication took place, and the subjects covered; or

2. If a contested case or anticipated contested case is pending, notice shall be filed in the case file and posted on the commissioner's public calendar forty-eight (48) hours prior to such conversation. A representative of the office of the public counsel shall be provided an opportunity to attend the meeting in person or by other reasonable means.

A. Following such communication, a notice of extra-record communication shall be filed by the person who initiated the communication in accordance with section (4) of this rule.

B. Inadvertent communication, or any communication which becomes subject to this subparagraph, shall be terminated immediately, and a notice of extra-record communication shall be filed by the person initiating the communication in accordance with section (4) of this rule.

(9) Each commissioner shall include a public calendar on the commission's website which shall provide notice of communications required to be disclosed by section (8), regarding regulatory issues occurring after the effective date of this rule with representatives of entities regulated by the commission, regardless of whether a contested case is pending. However, communications which are de minimis or immaterial are not required to be disclosed. A commissioner's technical advisory staff shall note any such communications he/she is involved in on his/her commissioner's public calendar.]

F. 4 CSR 240-4.040 Communications that are not *Ex Parte* or Extra-Record Communications

84. This new section blends the existing rules of 4 CSR 240-4.020 with new language in the new section. In this section, OPC reflects the Commission's deletion of the provisions applicable to attorneys appearing before the Commission. The revised rule, with edits to the existing rule visible, reads as follows:

4 CSR 240-4.040 Communications that are not Ex Parte or Extra-Record Communications

PURPOSE: To identify examples of communications that are not ex parte or extra record communications.

(*1[0]*) The following communications shall not be prohibited by or subject to the disclosure and notice requirements of section **4 CSR 240-4.020**(3) *[of this rule]* **or .030(1), even** if such communication would otherwise be an ex parte **or extra-record** communication*[, or subject to section (8) of this rule]*:

(A) Communications between the **office of the** commission*[, a commissioner, or a member of the technical advisory staff 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—]***and 1) a party to a contested case or 2) a person interested in a pending or noticed contested case** --

1. *[An anticipated or actual]***Regarding** interruption or loss of service **and efforts to restore service**;

2. **Regarding** ***[****D****]*****d**amage to *[or an incident]* or operational problems at a utility's facility **and efforts to repair that damage or address those operational problems**;

[3. An update regarding efforts to restore service after an interruption, loss of service, damages, or an incident or problems referred in paragraphs (10)(A)1. and 2.;

4. Security or reliability of utility facilities;

5. Issuance of public communications regarding utility operations, such as the status of ~~utility~~ programs, billing issues, security issuances, or publicly available information about a utility's finances. These communications may also include a copy of the public communication, but should not contain any other communications regarding substantive issues;

6. Information regarding matters before state or federal agencies and committees including but not limited to state advisory committees, the Federal Communications Commission, the Federal Energy Regulatory Commission, and the Nuclear Regulatory Commission;

7. Information regarding a regional transmission organization;

8. Labor matters not part of a pending case; or]

*[9]***3**. **Regarding a utility's physical or cyber security and any other** *[M]***m**atters related to the safety of personnel*[;]***, the safety of facilities, and the safety of the general public; or**

4. Made during noticed public meetings of the commission.

[(B) Communications between the commission, a commissioner, or a member of the technical advisory staff and any employee of the commission relating to exercise of the commission's investigative powers as established under Missouri law. If the communication concerns an anticipated case, notice shall be given in accordance with section (4) upon the filing of the case;

(C) Communications between the commission, a commissioner, a member of the technical advisory staff, or the presiding officer and a party or anticipated party concerning an issue or case in which no evidentiary hearing has been scheduled made at a public agenda meeting of the commission where such matter has been posted in advance as an item for discussion or decision;

(D) Communications between the commission, a commissioner, a member of the technical advisory staff, or the presiding officer and a party or anticipated party concerning a case in which no evidentiary hearing has been scheduled made at a forum where representatives of the public utility affected thereby, the office of public counsel, and all other parties to the case are present; and

(E) Communications between the commission, a commissioner, a member of the technical advisory staff, or the presiding officer and a party or anticipated party concerning a case in which no evidentiary hearing has been scheduled made outside a public agenda meeting or forum where representatives of the parties are present when disclosed as provided in section 386.210.3(3), RSMo.]

[(11) No person who is likely to be a party to a future case before the commission shall attempt to communicate with any commissioner or member of the technical advisory staff regarding any substantive issue that is likely to be an issue within a future contested case, unless otherwise allowed under this rule. Should such a communication occur, the person involved in the communication shall file a notice with the secretary of the commission. Such notice shall provide

the information required in section (4) of this rule. Once such a case has been filed, the secretary shall promptly file any such notices in the official case file for each discussed case.

(12) 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 employees, or the presiding officer assigned to the proceeding.

(13) Notwithstanding any provision of this rule to the contrary, once a contested case has been finally adjudicated, the commission, a commissioner, a member of the technical advisory staff, or the presiding officer may communicate with any person regarding any procedural or substantive issues related to such case within thirty (30) days of the case being finally adjudicated, unless the same regulated entity has a contested case or anticipated contested case pending before the commission which includes such issues.

(14) An attorney, or any law firm the attorney is associated with, appearing before the commission shall—

(A) Make reasonable efforts to ensure that the attorney and any person whom the attorney represents avoid initiating, participating in, or undertaking an ex parte communication prohibited by section (3) or a communication prohibited by section (11);

(B) Make reasonable efforts to ensure that the attorney and any person whom the attorney represents gives notice of any communication as directed in section (4), (5), (8), or (11);

(C) Prepare a notice in accordance with section (4), (5), (8), or (11) when requested to do so by the commission, a commissioner, technical advisory staff, or the presiding officer assigned to a contested case;

(D) Make reasonable efforts to notify the secretary when a notice of ex parte communication is not transferred to a case file as set forth in subsection (3)(D);

(E) Comply with all the Missouri Rules of Professional Conduct;

(F) During the pendency of an administrative proceeding before the commission, 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:

1. Evidence regarding the occurrence or transaction involved;

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;

4. The attorney's 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; and

(G) Exercise reasonable care to prevent the client, its employees, and the attorney's associates from making a statement that the attorney is prohibited from making.

(15) The commission may issue an order to show cause why sanctions should not be ordered against any party or anticipated party, or the agent or representative of a party or anticipated party, engaging in an ex parte communication in violation of section (3) or (11) of this rule or a

failure to file notice or otherwise comply with section (4), (5), or (8) of this rule. The commission may also issue an order to show cause why sanctions should not be ordered against any attorney who knowingly violates section (14) of this rule.]

G. 4 CSR 240-4.050 Limitation on Appearance before Commission

85. This new section relocates and modifies the existing rule of 4 CSR 240-4.020(16). The revised rule, with edits to the existing rule visible, reads as follows:

4 CSR 240-4.050 Limitation on Appearance before Commission

PURPOSE: To set forth the standards of conduct to promote the public trust and maintain public confidence in the commission's integrity and impartiality with regard to pending filings and cases.

[(16)] No person who has served as a **member of the office of *the[****commissioner, presiding officer, or]* commission *[employee]* shall, after termination of service *[or employment*] with *[or on]* the **office of the** commission, appear before the commission in relation to any **contested case***[, proceeding, or application with respect to which]* that **existed while that** person *[was directly involved or in which that person personally participated or had substantial responsibility during the period of service or employment]* **served** with the **office of the** commission.

[AUTHORITY: section 386.410, RSMo 2000. Original rule filed Dec. 19, 1975, effective Dec. 29, 1975. Amended: Filed April 26, 1976, effective Sept. 11, 1976. Rescinded and readopted: Filed Nov. 4, 2009, effective July 30, 2010.*

**Original authority: 386.410, RSMo 1939, amended 1947, 1977, 1996.]*

IV. Conclusion

86. Former Supreme Court Justice Louis D. Brandeis wrote "[p]ublicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman." *Brandeis, Louis D. (1914). Other People's Money and How the Bankers Use It*., p. 92. Brandeis was referring to the banking business, but his sentiment has been repurposed by those calling for more transparency in government.

87. Missouri's sunshine laws reflect the spirit of transparency. *See* Mo. Rev. Stat. § 610.010, et. seq. Section 610.011.1 RSMo., declares "It is the public policy of this state that meetings,

records, votes, actions, and deliberations of public governmental bodies be open to the public unless otherwise provided by law." Those sections "shall be liberally construed and their exceptions strictly construed to promote this public policy." *Id*.

88. OPC commends the current members of this Commission for their recent statements emphasizing their commitment to transparency. During "sunshine week" this Commission was presented with a stipulation and agreement in the Missouri American Water Company's rate case. This stipulation, being a negotiated settlement between parties to the case, sparked discussion during agenda on transparency:

> [Commissioner Rupp]: At the end of my term I want there to be more transparency for the guy sitting at his kitchen table looking at his bill going "how the heck did - - did it get here?" And so, I want transparency for that guy and that means there has to be transparency all the way up the line to the Commission[.]

(Agenda 3/16/2016 beginning at 1:01:50)

89. Once Missouri American Water's rate case commenced, Chairman Hall remained interested in discussing transparency in relation to the stipulation and agreement:

> 8 Having said that, there is a matter of
> 9 transparency. And I don't know exactly where
> 10 transparency demands trump -- I shouldn't have used
> 11 that word -- I don't know -- know where -- where --
> 12 where transparency is more important then -- then
> 13 resolution.
> 14 Our system is such that we've got all
> 15 interested parties around the table and they negotiate
> 16 a deal. And in theory, if all the parties are
> 17 involved, the resolution is fair and just, leading to
> 18 fair and reasonable rates. But I've got some
> 19 concerns -- some overarching concerns about
> 20 transparency.

(*See* Case Wo. WR-2015-0301, MAWC, Tr. Vol. 15, p 49).

90. After the staff counsel offered to explain certain terms of the stipulation and agreement in-camera (but with all the parties present in the hearing room), the Chairman suggested transparency requires more than that:

> 11 CHAIRMAN HALL: Well, I appreciate that,
> 12 Mr. Thompson. I'm not sure if an in-camera discussion
> 13 satisfies the transparency concern that I have.
> 14 You -- you said the ROE could be, I guess,
> 15 extrapolated from the agreed-to revenue requirement.

(*Id*. at p. 54).

91. Transparency is an appropriate goal for any government agency; this Commission included. Not only does transparency give the public a better understanding of what government is doing, but it encourages those who work for government to better meet their obligation to the public. As it pertains to the Commission's *ex parte* and *extra-record* communication rules, transparency is manifestly achievable. Meetings between Commissioners and representatives of the utilities they regulate, when permitted, should be broadcast and recorded for public review.

92. Given the Commission's recorded concerns about transparency surrounding the terms of a negotiated stipulation and agreement – its members should oppose vociferously unilateral, undisclosed, and unlimited meetings utility representatives. To the extent there is any benefit to holding these meetings there is no reason for these meetings to be held in private. OPC suggests – if these meetings occur – transparency requires the meetings be broadcast and recorded.

93. Not long ago such a requirement would be unworkable. However, technology has advanced to the point where Commission hearings and agenda sessions are broadcast live and recorded. In fact, OPC understands the apparatus already in place records as a default once the meeting/agenda is scheduled. Meaning holding the meeting in secret might require more – not

less – administrative work. Given those circumstances, public broadcast and recording should be an accepted standard.

94. This commission submitted a version of the rules that are diametrically opposed to the principles of an open and transparent government – those edits must be rejected.

WHEREFORE Public Counsel submits these Comments for the Commission's consideration.

Respectfully,

OFFICE OF THE PUBLIC COUNSEL

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been mailed, emailed or hand-delivered to all counsel of record this 22nd day of September 2016:

/s/ Tim Opitz