BEFORE THE PUBLIC SERVICE COMMISSION
STATE OF MISSOURI

In the Matter of the In the Matter of the	)	**Case No. AX-2008-0201**
Proposed Revision to 4 CSR 240-4.020.	)	**Case No. AO-2008-0192**

STAFF'S RESPONSE TO THE PROPOSED RULEMAKING

COMES NOW the Staff of the Missouri Public Service Commission, by and through the Commission's General Counsel, and for its Response to the Motion for Proposed Rulemaking filed herein by the Office of the Public Counsel and several others,[1] states as follows:

Introduction

1. On December 19, 2007, the Public Counsel, together with other interested parties, filed a Motion for Proposed Rulemaking seeking to initiate a rulemaking to amend Commission Rule 4 CSR 240-4.020, *Conduct During Proceedings.* Attached to the Motion is a list of specific amendments sought by the Movants, which are set out in the Appendix to this Response.

2. Staff states that it views the proposed amendments to Rule 4 CSR 240-4.020 to be frankly unworkable, inappropriate and unlawful. If adopted, the Commission members would be significantly impaired in carrying out many of their statutory duties. As Staff has elsewhere pointed out, the PSC

[1] Joining Public Counsel are the Midwest Gas Users Association, the Sedalia Industrial Energy Users Association, the Missouri Industrial Energy Consumers, the Missouri Energy Group, AG Processing, Inc., Praxair, Inc., AARP, and the Consumers Council of Missouri. The several members of the first four associations are enumerated on the first page of Public Counsel's Motion for Rulemaking.

Commissioners are administrative officers of the Executive Branch; they are not judicial officers.[2] Unlike judicial officers, who are expected to know nothing of the controversies brought to them, the PSC Commissioners are expected to be knowledgeable, if not expert, in the area of the utility industry. Unlike judges, the PSC Commissioners have administrative, regulatory and enforcement duties, as well as policy-making and quasi-legislative duties. These points are not controversial or unusual but are a commonplace of administrative law. *See* A.S. Neeley, *Administrative Practice & Procedure,* 20 Missouri Practice § 1.04 (3rd ed., 2001). Yet the Movants propose rule amendments that would needlessly and unlawfully hamper the Commissioners in fulfilling the full range of their statutory responsibilities. Moreover, in essence, the Movants appear to seek to establish a presumption of misconduct on the part of the Commissioners.

3. Staff further states that, to the extent that any significant change to the existing structure of statutes and rules is deemed absolutely necessary, Staff suggests that some consideration should be given to a change similar to that enacted by the Legislature when similar concerns arose concerning the impartiality of the various boards that regulate the licensed professions. To address that concern, the Legislature removed the adjudicative function from the boards and bestowed it upon a neutral central panel, the Administrative Hearing Commission. In like manner, the Movants' concerns could be better addressed by transferring a measure of the Commission's adjudicative authority to the Commission's cadre of Regulatory Law Judges (RLJs), leaving the

[2] *GPE-Aquila Merger Docket,* Case No. EM-2007-0374 (*Staff's Response to Public Counsel's Motion to Dismiss,* filed on December 27, 2007), p. 7 ff.

Commissioners better able to exercise their policy-making, regulatory and enforcement, and quasi-legislative functions. To allay Movants' concerns, the RLJs – having no function other than the adjudicative – could be made subject to rules similar to the Canons of Judicial Conduct. Staff believes that, while such a restructuring possibly could be accomplished within the present statutory framework, under the authority of § 386.240, RSMo 2000, clearly for such a change after nearly 100 years of the Commission's existence it would be better to seek the blessing and imprimatur of the Legislature, and it is only one of a number of proposals that might be considered.

4. Staff's suggestion at ¶ 3, *supra*, should not be read to indicate that Staff believes that any such significant restructuring is necessary. Rather, Staff believes that a prudent and thoughtful compliance with existing statutes and rules both protects the rights of the parties and protects the Commission from unfair public criticism. Staff is not saying that the Commission should do nothing. For example, the Commission should consider amending its existing rules to provide more transparency in the Commissioners' day-to-day activity out of the hearing room and the Agenda. Staff is merely suggesting that the Commission and others should not overreact. Failing to overreact just a few years ago to the unlimited promises of retail competition has saved the State from the unlimited detriments now being experienced by those States that did so.

Is the Proposed Rulemaking Necessary?

5. Section 536.041, RSMo 2000, provides that "[a]ny person may petition

an agency requesting the adoption, amendment or repeal of any rule."[3]

6. Section 536.016 requires that a rulemaking be based upon "substantial evidence on the record and a finding by the agency that the rule is necessary to carry out the purposes of the statute that granted such rulemaking authority." There is no authority that suggests that § 536.016 does not apply to a rulemaking initiated under § 536.041. Therefore, the Motion for Proposed Rulemaking must be considered to include a motion for a finding that the proposed amendment of Commission Rule 4 CSR 240-4.020, *Conduct During Proceedings,* is necessary to carry out the purposes of § 386.410, the statute by whose authority Commission Rule 4 CSR 240-4.020, *Conduct During Proceedings*, was promulgated. That statute provides in pertinent part, "All hearings before the commission or a commissioner shall be governed by rules to be adopted and prescribed by the commission."

7. In the Motion for Proposed Rulemaking, the Movants state that a rulemaking is necessary because "Recent events that have occurred in Case Nos. ER-2007-0291 and EM-2007-0374 have raised issues regarding improprieties associated with *ex parte* communications between utility executives and Commissioners."[4] *Motion for Proposed Rulemaking,* ¶ 1. "Indeed, in

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

[4]With respect to Case No. EM-2007-0374, the Commission has pointed out that conversations in question occurred before the case was filed and thus the characterization of the conversations as "*ex parte*" is not legally accurate. *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 ("GPE-Aquila Merger Docket"),* Case No. EM-2007-0374 (*Order Denying Motion to Dismiss,* issued January 2, 2008) pp. 16-17.

response to the appearance of impropriety, the Governor has called upon the Commission "to review their policies on conflicts of interest." *Id.*

8. The Motion goes on to say:

> Modifications to the Commission's current rule, 4 CSR 240-4.020, should help clarify the procedures by which the Commission may engage in communications with parties or those companies and individuals that are likely to seek Commission action. By making these changes to the current rule, the Commission, consistent with the Governor's request, can ensure that utility matters are being decided "fairly and impartially."
>
> Consistent with these goals, the parties have proposed the attached modifications to 4 CSR 240-4.020.

Motion for Proposed Rulemaking, ¶¶ 2 & 3.

9. Staff has demonstrated elsewhere that, with respect to Case No. EM-2007-0374, no impropriety on the part of Commissioners Murray, Clayton and Appling occurred.[5] *See 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 ("GPE-Aquila Merger Docket"),* Case No. EM-2007-0374, *Staff's Response to Public Counsel's Motion to Dismiss,* filed on December 27, 2007. This was also the conclusion of the Commission itself: ". . . OPC relies on conclusory statements, fractionated legal precepts and innuendo to assert that no necessary quorum of this Commission could objectively preside over and render an impartial decision in this matter. The motion shall be denied as being meritless." *GPE-Aquila Merger Docket, Order*

[5] Chairman Davis did recuse himself, *see GPE-Aquila Merger Docket,* Case No. EM-2007-0374 (*Notice of Recusal for Chairman Davis,* filed December 6, 2007), although it is clear that no impropriety occurred with respect to Chairman Davis, as well. Commissioner Jarrett was not a member of the Commission at the time the conversations in question occurred.

Denying Motion to Dismiss, p. 1. It is also the case that no impropriety occurred in Case No. ER-2007-0291, *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, *Response to Requests for Recusal,* filed October 9, 2007.[6]

10. Although no improprieties occurred, the Commission has nonetheless been the subject of notably adverse comment in the media, culminating on December 6, 2007 – the day on which Chairman Davis recused himself from the GPE-Aquila Merger Docket, Case No. EM-2007-0374 -- with an editorial in the St. Louis Post-Dispatch titled "the Power Fixers," in which the Commission was characterized as "a secret partner of big utilities – catering to corporate executives in closed-door meetings in which ordinary ratepayers are not represented." Governor Blunt's press release, calling on the Commission to "review [its] policies on conflicts of interest following accusations" of inappropriate communications with utility executives was also issued on December 6, 2007. In summary, Staff notes that the circumstances cited by Movants as necessitating the unlawful amendment they propose consist of expressions of public concern rather than any actual improprieties or violations of law.[7]

[6] Commissioner Appling indeed eventually did recuse, but not because any impropriety had occurred: "Although my attorneys advise me that the petition is not well-founded, I cannot and will not waste the resources and energy of my fellow Commissioners, the parties to the rate case, or the Court of Appeals in further vindicating my personal position. I will therefore recuse myself from this case." *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,* filed October 25, 2007).

[7] Staff expresses no opinion as to whether the negative media commentary directed at the Commission was manipulated by any party or stakeholder in order to advance its particular interests or to gain a litigation advantage.

11. It is Staff's view that the proposed amendments are not necessary, and are unworkable and unlawful, because they are not the right amendments. Again, it is Staff's view that the rights of the various stakeholders are amply protected by the existing framework of statutes, rules and case law. The Commission has recently reviewed the applicable jurisprudence.[8] But that is not to say that a refinement of the Commission's rules would not be of benefit

Is the Proposed Rulemaking Lawful?

12. It is well-established that administrative rules may only be promulgated within the scope of the authorizing legislation. *State ex rel. Doe Run Company v. Brown,* 918 S.W.2d 303, 306 (Mo. App., W.D. 1996). An administrative rule that is contrary to statute is a nullity. "The rules or regulations of a state agency are invalid if ... they attempt to expand or modify statutes. Further, regulations may not conflict with the statutes and if a regulation does, it must fail." *Hansen v. State Dept. of Social Services, Family Support Div.,* 226 S.W.3d 137, 144 (Mo. banc 2007), quoting *PharmFlex, Inc. v. Division of Employment Security,* 964 S.W.2d 825, 829 (Mo. App., W.D. 1997).

13. 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

[8] *GPE-Aquila Merger Docket,* Case No. EM-2007-0374 (*Order Denying Motion to Dismiss,* issued January 2, 2008) pp. 2-4.

matter relating to the performance of its duties.

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.

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:

(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;

(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.

* * *

14. It is immediately apparent that the amendments proposed by the Movants are contrary to § 386.210, RSMo. Supp. 2007, or other provisions of law, and are thus unlawful:

A. At proposed subsection (1)(A), Movants propose to extend the ban on *ex parte* communications to encompass matters that, while not pending before the Commission, "can reasonably be foreseen to come before the Commission for decision." This definition is contrary to established legal usage and, additionally, prohibits communications that are otherwise lawful under § 386.210, RSMo. Supp. 2007.

B. Movants propose deleting present subsection (7) of Rule 4 CSR 240-4.020, which states when the prohibitions on communications in the rule apply, although the subsection restates the timing provisions contained in the statute.

C. Proposed subsection (10) is contrary to both § 386.450 and the provisions of Chapter 610, RSMo, constituting the "Missouri Sunshine

Law," and is thus unlawful.

D. Additionally, the proposed amendments are unlawful because they would prevent the Commissioners from discharging their duties under the statutes.

Is the Proposed Rulemaking Practicable?

15. It is also apparent that the proposed amendments are not practicable:

A. As noted previously, at proposed subsection (1)(A), Movants propose to extend the ban on *ex parte* communications to encompass matters that, while not pending before the Commission, "can reasonably be foreseen to come before the Commission for decision." This definition is so incredibly overly expansive as to effectively prohibit any communication by a Commission member with almost anyone on any matter relating to the business of the Public Service Commission.

B. Proposed subsection (4) does not use the term "ex parte communication" that Movants have carefully (and over-expansively) defined at proposed subsection (1)(A) and is thus ambiguous. By referring to "the merits of the cause," do Movants intend this prohibition to apply only to pending cases?

C. Movants propose to amend existing subsection (8) to provide that reports of inadvertent *ex parte* communications must be either filed publicly in the appropriate pending case or, if no case is pending, copies to "each party to the utility's most recent general rate case or earnings

complaint case." This proposal imposes an onerous and expensive reporting burden upon the Commission.

D. The language "to an individual Commissioner or to any two Commissioners or to a quorum of the Commission" at proposed subsection (10) is poorly drafted and redundant. Additionally, why should the prohibition in subsection (10) apply only to utilities? Prohibitions should apply to all parties and stakeholders equally.

E. Proposed subsection (11) imposes an expensive obligation upon the Commission that serves no public purpose. Let those who desire transcripts of the Commission's open meetings pay for reporters and copies of transcripts. What public purpose is served by making a verbatim record of the Commission's closed meetings? If a person or entity wants to challenge the Commission's closing of a meeting, the burden is on that person or entity. The Movants appear to seek to establish a presumption of misconduct on the part of the Commissioners. Such a presumption is contrary to settled Missouri law, which presumes that administrative officers act properly and lawfully. [9]

F. Proposed subsection (12) is unworkable. It is inappropriate for the Public Counsel, let alone private parties, to have any investigatory authority with respect to the Commission. The Public Counsel is hardly disinterested and there are no provisions proposed that would prevent the Public Counsel from abusing this authority.

[9] *GPE-Aquila Merger Docket,* Case No. EM-2007-0374 (*Order Denying Motion to Dismiss,* issued January 2, 2008) p. 6.

G. Proposed subsection (14) is unworkable. Who will determine that an *ex parte* communication was made?

H. Proposed subsection (15) is unnecessary as it merely restates existing law.

I. Additionally, the proposed amendments are not practicable because they would prevent the Commissioners from discharging their duties under the statutes.

16. Staff also files this pleading as its contribution to Case No. AO-2008-0192.

WHEREFORE, on account of all the foregoing, Staff prays that the Commission will not promulgate the amendments to Rule 4 CSR 240-4.020 proposed herein by Movants; 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 **4th day of January, 2008.**

/s/ Kevin A. Thompson