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

COMMENTS OF AMEREN MISSOURI

COMES NOW Union Electric Company d/b/a Ameren Missouri ("Ameren Missouri" or "Company"), and submits these comments on the draft rule language included with the Commission's June 8, 2016 Order that opened this working docket, as follows:

1. In the above-referenced Order, the Commission indicated its goals were to: (1) comply with Section 386.210.4, RSMo., which mandates the Commission's rules not impose "any limitation on the free exchange of ideas, views and information between any person and the commission or any commissioner;" (2) simplify compliance with the rule; and (3) promote consistency and fairness. The Company supports those goals, as did Ameren Missouri in earlier communication rules proceedings, in which it was an active participant. *See* File No. AX-2010-0128 (which led to the adoption of the current communication rules), and AX-2010-0128 (where amendments were considered, but later withdrawn by the Commission). These goals are appropriate for this workshop because the current communication rules in some respects are inconsistent with each of those goals.

2. While the Company is offering a few suggestions in these comments, the Company is largely supportive of the draft language proposed to change the existing communications rule because it believes the proposed language substantially supports each of the goals identified above. The Company is particularly encouraged by the changes that address some of the most troublesome aspects of the existing rules, which were the subject of Ameren

Missouri (and other party) comments in prior dockets. For example, a consistent theme advanced by Ameren Missouri in both of the prior dockets referenced above was that the Commission's communication rules (4 CSR 240-4.020) should at all times maintain a level playing field for utilities under the Commission's jurisdiction, and for other persons or entities who are or may be parties in Commission cases. This is because a key shortcoming of the existing communication rules is that the playing field is not level. *See e.g.,* 4 CSR 240-4.020(8), which imposes requirements on utilities that simply do not apply to non-utility litigants. Another key shortcoming of the current rule, which Ameren Missouri has also previously identified, is that it is unduly complex and in practice, is frankly difficult to apply. Consistent with the Commission's goals, the draft language is fairer and is far more straightforward in its application.

3. The remainder of these comments provide specific suggestions and supporting commentary for further improving the draft language.

Pre-Filing Notices

4. The draft language (4 CSR 240-4.017(2)) changes the existing pre-filing notification for contested cases from a 60-day in advance filing, to a filing that would need to occur in a 90- to 180-day window. The Company understands the desire to create a window (the current rule essentially allowed a notice to "live" forever after it is given), but has concerns about requiring a filing 90 days in advance for certain kinds of cases. A utility will generally know sufficiently in advance for major cases (like a general rate case or a certificate of convenience and necessity case for a major, long lead time project) to give the 90-day notice. However, there are cases, including many tariff filings, which can arise such that the case needs to be filed in a significantly shorter time frame.

For tariff filings that do not change a rate or charge or propose a new service, the pre-notification provision is very problematic because it is extremely difficult to anticipate every tariff filing that does not affect rates or charges or that proposes a new service to customers 60 days in advance. In effect, such tariff filings, which are often routine in nature, are being transformed into tariff filings that cannot take effect for 90 days (or 120 days if a 90-day requirement were imposed), rather than in 30 days as contemplated by Section 393.140(11). Moreover, the pre-notification requirement in the existing rules discourages utilities from communicating with the Staff and OPC prior to the filing of such tariffs. This is because if a utility communicates with the Staff or OPC and finds out that the Staff or OPC are going to contest the tariff (that the utility did not believe would be contested – a circumstance that sometimes does happen) the utility is then put in the position of having to wait an additional 60 (or 90) days to file the tariff because the tariff is likely to be suspended, turning the tariff filing into a contested case.

Consequently, the pre-notification provision should not apply to tariff filings that *do not change a rate or a charge* or that *propose a new service*. In addition, consideration should be given to acknowledging in the rule that there are other kinds of cases, such as certificate cases for smaller projects with relatively short lead times (e.g., a renewable resource addition, such as a solar facility), for which pre-notification may be impractical. For example, projects such as these may be on a relatively fast track in order to take advantage of opportunities (e.g., a tax credit) or to provide a resource or service that customers are demanding. For projects like these, that may only have a timeline of three or six months to begin with, adding 60 (or 90) days produces a very significant project timeline extension that could kill or undermine the project. To address this concern, the Commission could include in the waiver provision regarding the

pre-notification requirements indicating that shorter timelines for projects or initiatives which require a case is a relevant consideration in whether a waiver of the pre-notification provisions should be granted.

Exclusions

5. The current rule and the proposed language for 4 CSR 240-4.040 exclude certain communications from the definition of "ex parte" or "extra-record" communications. The Company offers the following comments on the exclusions that remain in the proposed language. For exclusions (1)(A)1 to 2, the phrase "actual or anticipated" should be added after the word "regarding." For example, there could be civil unrest, a riot, storm, etc. that is anticipated to cause an interruption of service or damage and for the same reasons communications should be allowed if the interruption or damage actually occurs, so too should communications if such interruptions or damage is anticipated.

The Company also questions the elimination of the current rule's exclusion (in 4 CSR 240-4.020(10)(A)5), relating to public communications. By definition, such communications are issued publicly, so the Commission could be aware of them and is free to see or hear them, but there are certainly instances where they don't come to the Commission's attention. In those cases, the first time the Commission may hear of them could be via a phone call from the media. The Company has routinely provided such communications to keep the Commission apprised of such matters, so that the Commission does not learn of them for the first time from a third-party source. The Company suggests the Commission reconsider the elimination of this exclusion.

Substantive Issue Definition

6. "Substantive issue" should be defined as "the merits **<u>of</u>** ~~specific facts, evidence~~ claims or positions which have been or are likely to be presented or taken in a contested case." The reference to "specific facts and evidence" should be deleted from the definition because numerous specific facts are presented in every proceeding. For example, in every rate case the Company provides basic facts—it serves 1.2 million customers, it has four coal-fired plants, it buys $X of coal, its load is up or down, etc. These facts (or the evidence supporting them) are not "substantive issues." So long as there are not communications about the "claims or positions" (i.e. merits of arguments for or against) the concerns that led to the original adoption of the rule are not implicated. Administrative decision-makers are not expected to lack total knowledge of facts or evidence that may later come up when they employ their quasi-adjudicatory processes. To the contrary, commissioners do, and are expected to, have knowledge regarding matters that arise in the regulation of public utilities. "'Mere familiarity with the facts of a case gained by the agency in the performance of its statutory role . . . does not disqualify a decisionmaker.'" *Id.* at 192 (*citing Hortonville Joint Sch. Dist. No. 1 v. Hortonville Educ. Ass'n*, 426 U.S. 482, 493, 96 S. Ct. 2308, 49 L. Ed. 2d 1 (1976)). *See also Fitzgerald v. City of Maryland Heights*, 796 S.W.2d 52, 59 (Mo. App. E.D. 1990) (Familiarity with adjudicative facts "even to the point of having reached a tentative conclusion prior to the hearing, does not necessarily disqualify an administrative decisionmaker." Moreover, "[a]dministrative decisionmakers are expected to have preconceived notions concerning policy issues within their expertise."). And, only if an administrative decisionmaker has "made an unalterable prejudgment of operative adjudicative facts" is an administrative decision-maker considered biased such that the administrative hearing at issue becomes unfair. *Id.*

In light of the role of a Commissioner and the functions that the Commission performs, keeping the broad definition of "substantive issue" that includes specific facts and claims goes too far.

Respectfully submitted,

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