BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of Proposed Amendments to the Commission's Ex Parte and Extra-Record Communications Rule.	)))	File No. AX-2017-0128

SUPPLEMENTARY AND REPLY COMMENTS OF AMEREN MISSOURI

COMES NOW Union Electric Company d/b/a Ameren Missouri ("Ameren Missouri" or "Company"), and submits these supplementary and reply comments related to changes proposed to 4 CSR 240-4.015, 4 CSR 240-4.017, 4 CSR 240-4.020, 4 CSR 240-4030, 4 CSR 240-4.040, and 4 CSR 240-4.050, as published in the *Missouri Register* on January 3, 2017.

As Ameren Missouri noted in initial comments filed February 2, 2017, in the workshop docket that preceded the formal rulemaking the Commission indicated its goals for making changes to the existing ex parte and extra record communication rules were to: (1) comply with Section 386.210.4, RSMo., which mandates that, subject to certain conditions, 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 rules; and (3) promote consistency and fairness. The Company continues to believe the Commission's stated goals are appropriate, and that changes to current rule are necessary and desirable to ensure that those goals are met.

Seven entities[1] submitted comments in response to the *Notice to Submit Comments* published in the *Missouri Register* on January 3. As stated in its previously filed comments, Ameren Missouri largely supports the Commission's proposed rule changes. These supplemental

[1] In addition to Ameren Missouri, the Missouri Energy Development Association ("MEDA"), the Missouri Cable Television Association ("MCTA"), the Office of the Public Counsel ("OPC"), and the Consumers Council of Missouri ("Consumers Council") filed individual comments. The Missouri Industrial Energy Consumers ("MIEC") and the Missouri Energy Consumers Group ("MECG") filed joint comments.

comments reflect the Company's response to viewpoints expressed by other commenters either in support of, or in opposition to, the rule changes the Commission has proposed.

The Existing Rule's Construct

The construct reflected in the existing rule – 4 CSR 240-4.020 – separates into three categories communications to which that rule applies: (a) *ex parte* communications, which essentially are communications about substantive issues involving parties or "anticipated" parties in Commission cases; (b) extra-record communications, which essentially are communications about substantive issues involving a non-party; and (c) a catch-all category that, unfairly, applies only to regulated entities like Ameren Missouri. Categories (a) and (b) apply to communications involving substantive issues, while category (c) applies to non-substantive issues, which would include communications about general regulatory policy. Since the current rule was adopted in 2010, applying the processes and procedures it prescribes has proven to be cumbersome and confusing. In addition, because current rules related to category (c) communications apply only to regulated utilities, the existing rule is both unfair and discriminatory. For example, certain communications require a 48-hour notice be given, but only if the communications involve a regulated entity.

Taken together, the six rules proposed to replace the current rule retain categories (a) and (b) described in the preceding paragraph, but eliminate the catch-all provision, category (c). Ameren Missouri believes eliminating this provision is appropriate, because it applies asymmetrically, and thereby limits certain communications by regulated entities while unfairly exempting unregulated persons and entities from those same or similar limitations.[2] As will be discussed further elsewhere in these supplementary comments, applicable law provides no basis

[2] *See Comments of Union Electric Company d/b/a Ameren Missouri* in File No. AX-2012-0072, where several practical examples of the asymmetry and discrimination inherent in this provision were discussed.

for treating regulated entities differently from their unregulated counterparts insofar as their ability to communicate with commissioners is concerned. The proposed rules' elimination of this double standard represents a major step forward.

Appropriate Limits on Ex Parte and Extra-Record Communications

In addition to eliminating the previously described asymmetry, the proposed rules simplify and bring clarity to the kinds of communications they cover. If the communication is substantive, it is regulated by the rules; otherwise, it is not. This approach is reasonable because it reflects the Commission's unique role as a committee of the legislative branch, which vests it with the dual responsibility of implementing legislative policy reflected in the Public Service Commission Law while also carrying out certain quasi-adjudicative functions.[3]

In contrast with the existing rule, the proposed rules are faithful to Section 386.210 and, in particular, to subsection 4 of that statute, which states:

> 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.

This portion of the statute reflects the General Assembly's intention to delegate to the Commission what otherwise would be legislative authority – i.e. the authority to directly regulate public utilities.[4] Accordingly, neither Section 386.210 nor any other provision of Missouri law does – or should – limit communication with the Commission or individual commissioners so

[3] State ex rel. Laundry, Inc. v. Pub. Serv. Com., 327 Mo. 93, 34 S.W.2d 37, 42 (1931) ("The Public Service Commission is an administrative agency or committee of the Legislature, and as such is vested with only such powers as are conferred upon it by the Public Service Commission Law, by which it was created.").

[4] State ex rel. Rhodes v. Pub. Serv. Com., 270 Mo. 547, 194 S.W. 287, (1917) (Discussing a state's ability to regulate and fix the rates of its domestic utilities, either *directly or* through an act of its Legislature or through such a commission as the Public Service Commission, unless there be an express restriction of general legislative authority so to do in the State Constitution. There is no such restriction in Missouri's Constitution).

long as the communications do not address the *merits of* the items enumerated in subsection 4 with respect to a specific contested case. As public comments by certain Commissioners in the workshop docket that preceded this rulemaking indicated, a key driver of the Commission's decision to propose changes to the existing rule (aside from concerns about its unnecessary complexity, vagueness, and lack of symmetry) was the desire to make sure communication rules in effect do not, as is now the case, limit by rule communications the statute clearly indicates are not to be limited.

There is a reason for the distinction between communications that address the merits of a specific contested case and other communications. Commissioners, and the Commission itself, play a unique role in state government. Missouri courts clearly and consistently have held commissioners are not judges, but rather, exercise administrative powers delegated to them by the General Assembly. For example, in *State ex rel. Missouri Southern R. Co. v. Pub. Serv. Comm'n*, 168 S.W. 1156 (Mo. 1914), which was decided soon after the Public Service Commission Law took effect, the Missouri Supreme Court construed the Commission's role and authority in a rate case as follows: "In this state all judicial power is vested in the courts (section 1, art. 6, Const.) and legislative power is vested in the general assembly (section 1, art. 4, Const.). So respondent [the Commission] claims only administrative powers. That claim is justified." *Id.* at 1164.)

When it exercises its authority through the quasi-adjudicative contested-case process prescribed by the Public Service Commission Law, the Commission does not wield judicial power, but instead, acts in a legislative capacity. *See State ex rel. Kansas City et al v. Pub. Serv. Comm'n*, 228 S.W.2d 738 (Mo. 1950) ("The Public Service Commission is not a court and it has *no judicial power*. The orders which it issues are not judgments or adjudications. It has been

described as an 'administrative arm' of the Legislature. In approving or fixing rates of public utilities which come under its supervision, it exercises a *legislative power"* (emphasis added)).

These legal principles demonstrate why it is completely proper for commissioners to communicate within the sphere Section 386.210.4 contemplates. Indeed, commissioners are expected to have a level of knowledge about facts and issues germane to the types of cases they must decide and the entities they regulate. "'Familiarity with the adjudicative facts of a particular case, even to the point of having reached a tentative conclusion prior to the hearing, does not necessarily disqualify an administrative decisionmaker.'" *Id.* (*quoting Fitzgerald v. City of Maryland Heights*, 796 S.W.2d 52, 59 (Mo. App. 1990)). Only when an administrative decisionmaker has "made an unalterable prejudgment of operative adjudicative facts" is that decisionmaker considered biased to such a degree that his participation in the administrative hearing at issue becomes unfair. *Id.* (*quoting Fitzgerald*, 796 S.W.2d at 59).

These cases establish it is appropriate and lawful for commissioners to have communications regarding matters within the Commission's jurisdiction so long as those communications do not contravene limits prescribed in Section 386.210.4. Therefore, those portions of the current rule that restrict commissioner communications beyond those limits are both unnecessary and inappropriate and should be changed.

Specific Comments of Others – Areas of Disagreement

OPC's Comments. OPC's comments clearly reflect lingering displeasure with both the Commission's 2008 approval of the merger of a Great Plains Energy subsidiary with Aquila, Inc. (resulting in the formation of KCP&L – Greater Missouri Operations Company), and the Missouri Supreme Court's decision in *State ex rel. Praxair v. Pub. Serv. Comm'n*, 344 S.W.3d 178 (Mo. *banc* 2011), which upheld, in all respects, the Commission's order approving that

merger. It also is important to note that just because the Commission adopted the current rule governing ex parte and extra-record communications in the wake of *allegations* of improper commissioner bias made by OPC and others in that prior case, that sequence of events alone does not prove, as OPC's comments seem to imply, that the existing rule is "right," should not be amended, or is consistent with Section 386.210.4.

OPC also spills significant ink arguing about the meaning of Section 386.210.1, pointing out that in *Praxair* the Supreme Court concurred with OPC's interpretation of that subsection. But that statute has nothing to do with the rule changes under consideration here. Moreover, OPC fails to point out the court in *Praxair* confirmed that commissioners are not judges, and are presumed to act honestly and impartially. Therefore, in retrospect, those portions of the current rule that suggest otherwise may have been inappropriate and unnecessary.

Many of OPC's comments regarding the proposed rules appear to be driven by a desire to reverse that presumption. Many of those comments also gloss over the clear meaning of Section 386.210.4 and the communications that statute authorizes, although in the end even OPC seems to concede that statute prohibits rules that limit communications with commissioners regarding certain matters. But despite that concession, OPC continues to argue that while communications between commissioners and utilities should be heavily regulated, OPC and others should be free to engage in similar communications to the full extent allowed by Section 386.210.4. No such disparate interpretation of the statute is warranted.

With regard to OPC's comments about communications regarding legislation in particular, the premise of those comments is flawed because it fails to recognize or acknowledge a well-established principle of law discussed earlier in this response: commissioners are *administrators* who are not expected to enter the hearing room devoid of knowledge or even of

tentative views on matters over which they have jurisdiction. This includes new or pending legislation that may impact Commission cases. Moreover, communications regarding such matters do not involve "the merits of the specific facts, evidence, claims or positions presented or taken in a pending case." Consequently, Section 386.210.4 does not allow the types of limitations on such communications that OPC proposes in its comments.

Another of OPC's arguments against the proposed rule regarding communications related to legislation stretches Missouri's Sunshine Law (Chapter 610, RSMo.) beyond its statutory boundaries and the purposes for which it was enacted. That law does not prohibit an individual commissioner from meeting with a utility, OPC, an industrial group, or anyone else without prior notice or some kind of disclosure. As the Commission is well aware, the Sunshine Law applies to "public governmental bodies;" it does not apply to individual commissioners meeting with utilities, the OPC, or any other person or entity who is not another commissioner. To the extent OPC's comments imply otherwise, those comments are contrary to Missouri law and should be ignored.

As for OPC's concerns about the "transparency" of commissioner communications, if transparency is necessary when a commissioner communicates with a utility, the same transparency must also be required when a Commissioner communicates with OPC, an industrial group, or anyone else. Again, Section 386.210.4 does not allow the Commission to impose limitations on communications other than those outlined in the statute, and that statute does not differentiate between communications between a commissioner and a utility, on one hand, and a commissioner and anyone else, on the other.

The Company has several other concerns regarding changes proposed in comments filed by OPC. Those concerns are summarized as follows:

- In several places – e.g. in comments to proposed rule 4 CSR 240-4.015 – OPC proposes to extend to "any other pending case" certain of the proposed restrictions on ex parte or extra-record communications. This proposal should be rejected because the Commission acts in a quasi-judicial role only in contested cases. Therefore, applying reporting requirements to communications in all pending cases would impose a burden that is both unreasonable and unnecessary.[5]
- In proposing certain of its changes – e.g. the definition of "general regulatory policy" in proposed rule 4 CSR 240-4.015 (15) – OPC includes terms that are defined in the current rule but not in the proposed rules. This "cut and paste" approach adds confusion and ambiguity, which will make the changes OPC proposes difficult to interpret and apply. Effectively, OPC appears to be attempting to completely undo the changes the Commission has proposed to the existing rules by cutting and pasting large portions of the existing rule into the newly proposed rule, even though the structure and operation of the newly proposed rule is, for good reason, different.
- Certain of OPC's proposed changes to 4 CSR 240-4.050 would impose a significant burden on the Commission and its members. For example, OPC's proposal to prohibit any commissioner from participating in a case decision where the commissioner "knows the result of the decision may . . . result in a direct financial gain or loss to him or her" would prohibit a commissioner from acting in cases filed by a utility that serves the commissioner simply because, to use a rate case as an example, a commissioner's utility bill may be higher or lower as a result of the case

[5] OPC cites approval of a MEEIA plan as justification for its proposal. However, approval of a MEEIA plan *is* a contested case because 4 CSR 240-20.094(3) requires the Commission to provide the opportunity for a hearing.

- Other changes OPC proposes – more specifically, changes proposed to 4 CSR 240-4.050 – go well beyond the scope of the Commission's proposed rule changes. Such changes do not comply with the notice requirements of Chapter 536, RSMo, and therefore, regardless of whether such topics might be worthy of discussion in a proper rulemaking dedicated to those topics, cannot lawfully be considered by the Commission in *this* proceeding.

In summary, OPC's comments reflect an apparent view that favors retention of the existing confusing, overly complex, inherently unfair, discriminatory, and likely unlawful existing communication rules that fail to recognize the unique role of the Commission, which acts as a committee of the legislature, and that asymmetrically allow OPC and others free access to commissioners while denying utilities that same access. As a consequence, OPC's proposed changes to the rules should be rejected.

Respectfully submitted,

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