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	)	

SUPPLEMENTAL COMMENTS OF
THE OFFICE OF THE PUBLIC COUNSEL

COMES NOW the Office of the Public Counsel ("OPC" of "Public Counsel") and, pursuant to the Commission's *Order Establishing Filing Deadline for Additional Comments*, offers these supplemental comments on the Commission's draft *ex parte* rule as follows:

I. Response to the Commission's concerns during agenda meeting

1. Every commissioner has made clear they do not want to weaken the commission's ethical standards (*See* Agenda 9/22/2016 beginning at 00:39:50; Agenda 9/14/2016 at 01:05:00: "this is one of those issues that we don't want the public or anyone to construe that we are attempting to weaken the ethical standards that we have in place here"). Unfortunately, the Commission's draft rule does precisely that. Other parties' comments suggest - incorrectly - that the *ex parte* rules are more strict than the law permits, and so, need to be relaxed.

2. Certainly, the draft proposal does not change the language of certain standards of conduct adopted by the Commission but that does not mean the ethical standards will not be diminished. For example, in the Commission's draft Commission Rule 4 CSR 240-4.010 continues to restate Executive Order 92-04 and direct Commissioners to "avoid any interest or activity which improperly influences, or gives the appearance of improperly influencing, the conduct of their official duties." However, the draft would relax notice and disclosure requirements *in order to encourage* unlimited, private, and undisclosed meetings at which Commissioners will discuss issues with utility representatives.

3. A too-narrow focus on leaving the literal language of certain ethical standards of conduct intact serves only to mislead the public on the true impact of the changes. Importantly, by removing disclosure and notice requirements, the draft rule eviscerates the process to monitor and observe adherence to other ethical standards. So while it may be technically true that certain standards of conduct remain in place, there will be no administrative process to detect, deter, or enforce any violations because the meetings will have occurred in secret. In effect, even the standards left "as is" are rendered merely ceremonial. The Commission's draft rule cannot be reconciled with the ethical rules and standards of conduct and should be rejected for that reason alone.

4. The current *ex parte* rules constitute reasonable standards and processes to ensure the Commission remains unbiased and impartial when conducting its official business. Whether or not the Commission pursues its draft rule the actions of its members remain subject to public disclosure under Missouri's "Sunshine" laws. *See generally* Mo. Rev. Stat. § 610.010 et. seq. Furthermore "[a]ll proceedings of the commission and all documents and records in its possession shall be public records." Mo. Rev. Stat. § 386.380.1. Public Counsel suggests the current rules provide a framework to facilitate transparency and preserve impartiality in an administratively efficient manner. Of course, the process could be improved by requiring all such meetings to be publicly broadcast and recorded as OPC has encouraged in its previous comments.

5. If the Commission pursues its draft rule, regulatory stakeholders will be forced to devote resources to drafting, sending, and reviewing multiple Sunshine Law requests each and every day to protect the public and interests of their respective clients. As necessary, Public Counsel (or others) can then pursue action when such documentation indicates impropriety may have

occurred. Such a process would be an inefficient use of the regulatory stakeholders and Commission's resources. Following the current *ex parte* rules, supplemented by broadcasting and recording Commissioner meetings with utility representatives, is the preferable course to ensure transparency and maintain public trust.

II. Response to the Chairman's comments during agenda meeting

6. During the Agenda meeting on September 22, 2016 the Chairman returned after the remainder of the Commission had sidelined discussion on the matter as "an issue the Chairman has been very active in" (Agenda 9/14/2016 at 1:04:39) and resumed his effort to change the *ex parte* rules, explaining:

> What we're doing here is trying to craft an *ex parte* extra-record communications rule that complies with the statute. From my perspective the current rule does not.

(Agenda 9/22/2016 beginning at 00:39:50). The Chairman added "we need to … draft a rule that facilitates the free flow of information concerning general regulatory policy and our current rule does not do that" (Agenda 9/22/2016 at 00:40:10). The phrase "facilitate the free flow of information" is an admission, albeit intentionally opaque, that the Chairman's draft weakens the *ex parte* communications rule. The Chairman raises two issues: (1) his opinion that the *ex parte* rules are unlawfully strict and (2) his opinion that rule does not permit a "free flow of information."

II.A. The current *ex parte* rules comply with the law

7. To address the Chairman's first point relating to whether the current *ex parte* rules comply with the statute (identified in prior Commission orders as Section 386.210.4, RSMo.) Public Counsel asserts no conflict exists and the Missouri Supreme Court has agreed with that position. In its initial *Comments*, Public Counsel discussed the various provisions of Section

386.210 RSMo as they have been explained by the Supreme Court. *See* Doc. No. 12, pp. 17-23. The law was not meant to permit Commissioners to communicate privately with representatives of regulated utilities as the Chairman's draft would allow.

8. Based on OPC's review, the Supreme Court examined the meaning of Section 386.210 RSMo 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 Chairmans's expansive reading of the statute to permit its members to hold private meetings with representatives of regulated utilities.

9. In *Praxair*, the Supreme 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 discussing OPC's appeal in *Praxair*, 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.* As it relates to Commissioner's concerns about weakening ethics rules, the Court emphasized "the meetings create an appearance of impropriety[.]" *Praxair* 344 S.W.3d at 193. Thus, if Commission Rule 4 CSR 240-4.010 were considered the Commission meetings with utility representatives would have violated the ethical standards because those meetings would have been "activity which … *gives the appearance of improperly influencing*, the conduct of their official duties" (emphasis added). So, too, would meetings occurring under the Chairman's proposed *ex parte* draft rule violate the Commission's ethical standards of conduct even if they did not run afoul of the due process.

10. The Supreme Court decision in *Praxair* also addressed the substance of the Chairman's mistaken interpretation. 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*. at 190. In footnote 8, the Court recognized that, subsequent to the underlying case, "the applicable regulation relating to *ex parte* communications was changed significantly to *more strictly regulate communications with commissioners*." *Id* (emphasis added). Those rules, referenced with approval, are the current Commission rules. 4 CSR 240-4.020 (as amended in 2009, effective July 30, 2010). It is inexplicable, then, that the Chairman continues to opine that those very same rules are unlawfully restrictive.

11. Reading Section 386.210.4 RSMo. as authority for the Commission to meet privately with utility representatives is an expansive and unwarranted view of the law.

12. The Chairman's objective to "draft a rule that facilitates the free flow of information concerning general regulatory policy" is also flawed (Agenda 9/22/2016 at 00:40:10). Setting aside the fact that an application of the Supreme Court's explanation that undisclosed meetings between Commissioners and utility representatives "create an appearance of impropriety", it further constitutes a *de facto* violation of the Commission's ethics rules found at 4 CSR 240-4.010 it is necessary for Public Counsel to examine the practical impact of the so-called "free flow of information" between monopolies and regulators.

II.B. Revising the *ex parte* rule to permit a so-called "free flow of information" is unnecessary

13. First, there is no evidence to support the proposition that the Chairman's desired "free flow of information" is necessary to protect ratepayers. Second, it is unclear what, exactly, the so-called "free flow of information" is intended to accomplish. Third, this rule does not create a

"free flow of information" that will spark robust policy discussions – far from it. This draft rule weakens the *ex parte* standards in order to encourage regulatory stakeholders to engage Commissioners in one-on-one private discussions about utility issues rather than defending the ideas in a public forum.

14. Permitting this so-called "free flow of information" between regulators and monopolies is bad public policy if allowed to occur in undisclosed, unlimited, and private meetings. To address this point, Public Counsel will discuss certain policy fallacies relating to the purported necessity of the rule change: (i) the *ex parte* rules must be modified to permit the Commission to gather adequate information and (ii) the *ex parte* rules must be modified to permit communication in order to develop regulatory policy.

II.B.i Gathering information

15. No rule change is necessary to enable the Commission to gather information. The Chairman himself has shown that a free exchange of ideas can occur in a variety of contexts. Under his leadership, the Commission has opened rulemakings, workshops, investigations, and issued questions to be answered in rate cases.

16. The Commission, under this Chairman, has been particularly active and adept at requesting information. Examples include: (1) convening workshops (*See In the Matter of a Working Case to Consider Policies to Improve Electric Utility Regulation,* Case No. EW-2016-0313); (2) ordering investigatory dockets (*See In the Matter of Great Plains Energy, Inc.'s Acquisition of Westar Energy, Inc., and Related Matters*, Case No. EM-2016-0324; *In the Matter of Spire Inc.'s Acquisition of EnergySouth, Inc. and Related Matters,* Case No. GM-2016-0342; *In the Matter of an Investigation into the Eligibility of Expenses Recovered Through the Infrastructure System Replacement Surcharge*, Case No. GO-2017-0081); (3) issuing orders in

rate cases asking parties to address certain issues (*See In the Matter of Kansas City Power & Light Company's Request for Authority to Implement A General Rate Increase for Electric Service*, Case No. ER-2016-0285, Order Directing Consideration Of Certain Questions In Testimony, Doc. No. 64; *In the Matter of Union Electric Company d/b/a Ameren Missouri's Tariffs to Increase Its Revenues for Electric Service*, Case No. ER-2016-0179, Order Directing Submittal of Infrastructure Efficiency Tariff, Doc. No. 91; *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*, Case No. WR-2015-0301, Order Directing Filing of Supplemental Testimony, Doc. No. 87); (4) asking questions from the bench during hearings, oral arguments, or on-the-record presentations; and (5) directing parties to file information in rate cases after the record is closed (*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*, Case No. WR-2015-0301, Order Directing Staff to Prepare Scenarios, Doc. No. 406; *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*, Case No. WR-2015-0301, Order Regarding Motion For Reconsideration, Doc. No. 412).

17. All of the foregoing actions exemplify how the Commission can get information**.** These methods permit parties to research, refine, and present cogent positions for the Commission to consider. Importantly, other parties can see that position and offer additional evidence and different perspectives. When varied stakeholders and interested groups can offer evidence and present argument for or against such concepts, a free exchange of ideas can occur. In contrast, the Commission's draft rule under the pretense of "facilitating a free flow of information" will

eviscerate the Commission's *ex parte* rules, inhibit transparency, and enable future ethics violations.

18. Under the Chairman's proposed change, utility representatives could convene unlimited and undisclosed private meetings with Commissioners. Presumably the argument is that these private meetings provide Commissioners the information they need to perform their job. To be clear, information provided at these private undisclosed and unlimited meetings will almost certainly consist of biased, self-serving propaganda. The information will not be subject to discovery or cross-examination and need not be defended against competing views when presented to the Commissioners. In short, the information is of limited use other than to potentially prejudice Commissioners on matters actively before them.

19. Moreover, stakeholders' ability to challenge or dispute the information provided in private meetings is diminished. Consider the question: how can Public Counsel (or other stakeholders) challenge the assertions made or the putative "facts" presented in meetings OPC does not know occurred? Without sending daily public records requests it cannot. Permitting the kind of communications the Chairman desires invites abuse and shifts the burden of discovery onto every person not privy to the private meetings between Commissioners and regulated entities.

20. The Commission can gather the information it requires to perform its function - protecting the public from the monopoly power of utilities - without resorting to secret rendezvous with utility representatives. The public trust, common sense, and the Missouri sunshine laws demand such information gathering be done in public.

II.B.ii Developing regulatory policy

21. What, exactly, the Commission intends to do with the information gathered in these private meetings is unclear. If the purpose is to permit the Commission to develop regulatory policy, then doing so in private and undisclosed meetings necessarily creates due process concerns and is otherwise improper.

22. As an initial matter, it is the General Assembly that creates regulatory policy. The Commission is the subject-matter expert tasked with carrying out the policy. The Commission has previously discussed the role of the Commission at length during Agenda Meetings. Commissioner Kenney described his view of the Commission's role in providing information to the legislature, stating "we answer questions as to what is the impact…we don't write legislation" (Agenda 3/27/2013 at 02:05:10). In the same Agenda meeting, Commissioner Stoll also commented on the Commission's role, explaining "we are a product of the legislature and don't want to be perceived as interfering in legislative matters in any regard except as technical experts" (Agenda 3/27/2013 at 01:43:00). Commissioner Stoll further suggested all correspondence to, and from, legislators should be filed in a docket (Agenda 3/27/2013 at 01:44:01). During the meeting, then-Chairman Robert Kenney offered a reasonable approach for the Commission to comment on legislation:

> We are subject-matter experts in public utility regulation, obviously. We are the creature of state designated by the General Assembly to be that expert and so I don't feel its inappropriate for us to respond to requests to comment on pieces of legislation. I just think that we got to do it in a way that preserves our integrity and that is open and transparent. And traditionally the way that we've done that is through opening a workshop.

(Agenda 3/27/2013 beginning at 01:28:42).

23. Certainly the Commission can influence regulatory policy in key ways. But these actions must be within its statutory authority and should be pursued in a structured and public process.

24. First, the Commission can create generally applicable policy by following the rulemaking process required by Chapter 536. *See* Admin. Proc. Act, Section 536.010 RSMo et seq. (2000). Within that chapter, a "rule" is defined to include "each agency statement of general applicability that implements, interprets, or prescribes law or policy[.]" *Id*. A "[r]ulemaking involves the formation of a policy or interpretation which the agency will apply in the future to all persons engaged in the regulated activity." *Mo. Soybean Ass'n v. Mo. Clean Water Comm'n*, 102 S.W.3d 10, 23 (Mo. 2003). Agencies cannot engage in this type of rulemaking by an adjudicated order. *Greenbriar Hills Country Club v. Director of Revenue*, 47 S.W.3d 346, 357 (Mo. banc 2001). Rules or amendments made in contravention of the rulemaking process are void. Mo. Rev. Stat. § 536.021. If the Commission cannot effect a general policy change in an order, no reasonable person could credibly suggest the Commission can effect general policy through secret meetings with utility representatives.

25. Importantly, policy changes undertaken by the Commission through the formal rulemaking process permits the legislature, via the General Assembly's Joint Committee on Administrative Rules ("JCAR"), to review the policies being adopted by executive agencies and ensure such policies are within the statutory authority delegated to the agency. The impact of JCAR's review was made clear when the Commission attempted to create a geographic sourcing rule related to renewable energy credits.

26. Second, the Commission can make policy recommendations in its annual report. Section 386.380.1 RSMo., requires the Commission:

> make and submit to the governor on or before the second Monday in January in each year a report containing a full and complete account of its transactions and proceedings for the preceding fiscal year, together with such other facts, **suggestions and recommendations as it may deem of value to the people of the state**, which report shall be laid before the next succeeding legislature.

(emphasis added) Section 386.380.1 RSMo. Notably, this report is due in time for the policy recommendations to be considered by members of the General Assembly in each new legislative session. If an individual member of the legislature or other public official seeks information the Commission should make such communications publicly available as the Commission discussed in 2013 (*See* Agenda 3/27/2013).

27. Third, Section 386.380.2 RSMo, provides if directed to do so by the Governor or the legislature "[t]he commission shall conduct a hearing and take testimony relative to any pending legislation." The same section explains the commission "may also recommend the enactment of such legislation with respect to any matter within its jurisdiction as it deems wise or necessary in the public interest." Section 386.380.2 RSMo. If not responding directly to a legislator, the best way to make such recommendations is to include them in the Commission's annual report.

28. None of the foregoing means to enact regulatory policy can be accomplished in undisclosed private meetings with regulatory stakeholders. Importantly, if these private meetings are helpful to commissioners in learning policy or understanding industry trends, there is no doubt it would be informative to others as well. Publicly broadcasting and recording all meetings between Commissioners and regulatory stakeholders makes the information available to all.

III. Due Process concerns

29. Weakening the Commission's *ex parte* rules creates due process concerns. The Supreme Court has held "'[t]he procedural due process requirement of fair trials by fair tribunals applies to an administrative agency acting in an adjudicative capacity.'" *Praxair* 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*. The Commission's proposal will make it more difficult for any party to overcome that presumption and is problematic because the underlying action is less likely to ever be discovered.

30. As explained above, in section II.B.ii, the Commission cannot effectuate policy change through undisclosed private meetings. Nor can the Commission implement its own desired policy objectives by administrative fiat. Missouri courts have held that the Commission has no authority to manage the utilities that it regulates: "The Commission's authority to regulate does not include the right to dictate the manner in which the company shall conduct its business." *State* ex rel. *Kansas City Transit, Inc. v. Public Service Commission*, 406 S.W.2d 5, 11 (Mo. 1966). The Commission is, however, given the broad power to set just and reasonable rates; a task which includes authority to exclude imprudent costs from rates charged to customers.

31. If the Commission's draft rule is eventually adopted, the ensuing undisclosed private meetings cannot create generally applicable policies. At those meetings, Commissioners cannot dictate the manner in which the company can conduct business. The discussions, then, will likely involve utility representatives offering a specific perspective on how certain policies would impact the particular utility or the actions the utility could take to implement those policies. A party cannot know what is discussed if they were unaware of a meeting. Undisclosed private

discussions result in the appearance that the Commission has prejudged the prudence of a utility's planned actions or is otherwise improperly biased. All parties excluded are left to wonder whether the Commission is acting honestly and impartially; an undesired situation in a democratic process.

32. Proving actual bias is a high burden for a party to meet. The Commission's draft rule removing existing notice and disclosure requirements makes it impossible. Such a proposition may be appealing to a party wishing to exert undue influence without being subject to public scrutiny. That cannot be the approach taken by public officials; doing so would violate the public trust.

33. 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.

IV. Conclusion

34. 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 or desire to do so in the future. Rather than weakening the standards, this Commission should elevate the standards to which it and future Commissioners must adhere.

35. For the reasons described herein Public Counsel requests the Commission, if it still believes a rule change is necessary, to convene workshops so that the issues the Commission wishes to address can be identified and resolved in a collaborative manner.

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

Respectfully,

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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 6th day of October 2016:

/s/ Tim Opitz