STATE OF MISSOURI
PUBLIC SERVICE COMMISSION

At a session of the Public Service Commission held at its office in Jefferson City on the 2nd day of January, 2008.

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.	)))))	**Case No. EM-2007-0374**

ORDER DENYING MOTION TO DISMISS

Issue Date: January 2, 2008 Effective Date: January 2, 2008

Syllabus: On December 13, 2007,[1] the Office of the Public Counsel ("OPC") filed a pleading styled "Motion to Dismiss." The gravamen of OPC's motion concerns allegations of bias and prejudgment on the part of three Commissioners presiding over this matter. OPC's allegations are of a very serious nature, and the Commission approaches these allegations with the utmost commitment to thoroughly review and consider these allegations. Bearing this commitment in mind, the Commission must conclude that OPC's analysis of the legal issues identified in its motion is at best incomplete and at worst misleading. OPC fails to accurately cite to the proper controlling law or to any factual evidence to provide a basis for granting its motion. Instead, 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.

[1] All dates throughout this order refer to the year 2007 unless otherwise noted.

The Commission's Quasi-Judicial Authority and Procedural Due Process

The PSC is an administrative body created by statute and has only such powers as are expressly conferred by statute and reasonably incidental thereto.[2] The procedural due process requirement of fair trials by fair tribunals applies to an administrative agency acting in an adjudicative capacity.[3] Thus, administrative decision-makers must be impartial.[4] Officials occupying quasi-judicial positions are held to the same high standard as apply to judicial officers in that they must be free of any interest in the matter to be considered by them.[5] 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.[6] A judge or administrative decision-maker is without jurisdiction, and a writ of prohibition would lie, if the judge or decision-maker failed to disqualify himself on proper application.[7]

The Commission's quasi-judicial power is exercised in "contested cases," meaning proceedings before the agency in which legal rights, duties or privileges of specific parties are required by law to be determined after hearing.[8] It is only when the Commission exercises its quasi-judicial power that full procedural due process

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[2] *State ex rel. AG Processing Inc. v. Thompson*, 100 S.W.3d 915, 919-920 (Mo. App. 2003); *Union Elec. Co. v. Pub. Serv. Comm'n,* 591 S.W.2d 134, 137 (Mo. App. 1979).

[3] *Thompson*, 100 S.W.3d at 919 -920; *Fitzgerald v. City of Maryland Heights,* 796 S.W.2d 52, 59 (Mo. App. 1990) (citing *Withrow v. Larkin,* 421 U.S. 35, 46, 95 S.Ct. 1456, 1464, 43 L.Ed.2d 712, 723 (1975)).

[4] *Id.*

[5] *Thompson*, 100 S.W.3d at 919-920; *Union Elec. Co.,* 591 S.W.2d at 137.

[6] *Thompson*, 100 S.W.3d at 919-920; *Burgdorf v. Bd. of Police Comm'rs,* 936 S.W.2d 227, 234 (Mo. App. 1996).

[7] *Thompson*, 100 S.W.3d at 919-920; *State ex rel. Ladlee v. Aiken,* 46 S.W.3d 676, 678 (Mo. App. 2001); *State ex rel. White v. Shinn,* 903 S.W.2d 194, 196 (Mo. App.1995).

[8] Section 536.010(4), RSMo 2000. An agency decision which acts on a specific set of accrued facts and concludes only them is an adjudication. *Ackerman v. City of Creve Coeur*, 553 S.W.2d 490, 492 (Mo. App. 1977). *Missourians for Separation of Church and State v. Robertson*, 592 S.W.2d 825, 841 (Mo. App. 1979).

protections come into play.[9] "Due process requires an impartial decision maker, but it also presumes the honesty and impartiality of decision makers in the absence of a contrary showing."[10]

"Administrative decisionmakers are expected to have preconceived notions concerning policy issues within the scope of their agency's expertise."[11] "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,"[12] "in the absence of a showing that [the decisionmaker] is not 'capable of judging a particular controversy fairly on the basis of its own circumstances.'"[13] An administrative hearing is not unfair unless the decision makers, prior to the hearing, have determined to reach a particular result regardless of the evidence.[14] "Conversely, any administrative decisionmaker who has made an **unalterable prejudgment of operative adjudicative facts is considered biased**."

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[9] "The procedural due process requirement of fair trials by fair tribunals applies to administrative agencies acting in an adjudicative capacity. *Withrow v. Larkin,* 421 U.S. 35, 46, 95 S. Ct. 1456, 1464, 43 L. Ed. 2d 712, 723 (1975). The PSC is not obligated to provide evidentiary procedures at rulemaking hearings other than providing the opportunity to "present evidence." Cross-examination of witnesses and the presentation of rebuttal evidence are procedures employed in contested cases but not rulemaking hearings. *State ex rel. Atmos Energy Corp. v. Public Service Com'n of State*, 103 S.W.3d 753, 759 - 760 (Mo. banc 2003).

[10] *Jamison v. State, Dept. of Social Services, Div. of Family Services*, 218 S.W.3d 399, 413 (Mo. banc 2007). See also *Mueller v. Ruddy,* 617 S.W.2d 466, 475 (Mo. Ct. App. 1981); *Fitzgerald,* 796 S.W.2d at 59.

[11] *Fitzgerald*, 796 S.W.2d at 59; *Hortonville Joint School Dist. No. 1 v. Hortonville Education Assoc.,* 426 U.S. 482, 493, 96 S.Ct. 2308, 2314, 49 L.Ed.2d 1, 9 (1976).

[12] *Fitzgerald*, 796 S.W.2d at 59; *Wilson v. Lincoln Redevelopment Corp.,* 488 F.2d 339, 342-43 (8th Cir. 1973).

[13] *Fitzgerald*, 796 S.W.2d at 59 (Mo. App. 1990); *Hortonvillet,* 96 S.Ct. at 2314.

[14] *Ross v. Robb*, 662 S.W.2d 257, 260 (Mo. banc 1984); *Shepard v. South Harrison R-II School District,* 718 S.W.2d 195, 199 (Mo. App. 1986).

(Emphasis added.)[15] "Because of the risk that a biased decisionmaker may influence other, impartial adjudicators, the participation of such a decisionmaker in an administrative hearing generally violates due process, even if his [or her] vote is not essential to the administrative decision."[16]

OPC's Allegations

OPC alleges that Commissioners Murray, Appling, and Clayton participated in non-public meetings with Michael J. Chesser, Chief Executive Officer of Great Plains Energy, Inc. ("GPE") and Chairman of the Board of both GPE and Kansas City Power & Light Company ("KCPL"), and with William H. Downey, Chief Operating Officer and Member of the Board of Directors for GPE, the holding company of KCPL, and the President and Chief Executive Officer of KCPL. OPC further asserts that the communications in these meetings, that occurred prior to the instant action being filed before the Commission, tainted the process in this proceeding so irreparably that none of these Commissioners should be able to preside over this matter or render a decision with regard to the proposed merger. OPC intimates that the meetings between the executives of the companies and the Commissioners were more than informational in nature and that they were designed to generate support for a favorable decision to support the merger. Finally, OPC claims that with Chairman Davis already being recused from this proceeding,[17] and with only one other commissioner remaining,

[15] *Fitzgerald*, 796 S.W.2d at 59.

[16] *Fitzgerald*, 796 S.W.2d at 59; *State ex rel. Brown v. City of O'Fallon,* 728 S.W.2d 595, 598 (Mo. App. 1987).

[17] Chairman Davis, *sua sponte*, recused himself from this matter on December 6, 2007.

Commissioner Jarrett, that the Commission is prevented, as a body, to even act upon this matter.[18]

Relevant Statutes, Commission Rules, Judicial Canons and Case Law

Section 386.210

The legislature has provided a bright-line law governing external communications with the Commissioners singularly or when sitting en banc. Section 386.210, RSMo Cum. Supp. 2006, 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 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:
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> (a) If the communication is written, the person or party making the communication shall no later than the next business day following the

[18] Commissioner Terry Jarrett was appointed to the Commission for a six-year term on September 11, 2007. Consequently, he was not a member of the Commission during the time period when the communications that are the subject of OPC's motion occurred. As OPC noted in its motion, Commissioner Jarrett is "not implicated in any way in the matter raised" in its motion.

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.

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Commission Rule 4 CSR 240-4.020

Commission Rule 4 CSR 240-4.020, entitled "Conduct During Proceedings," provides:

(1) Any attorney who participates in any proceeding before the commission shall comply with the rules of the commission and shall adhere to the standards of ethical conduct required of attorneys before the courts of Missouri by the provisions of Civil Rule 4, Code of Professional Responsibility, particularly in the following respects:

(A) During the pendency of an administrative proceeding before the commission, an attorney or law firm associated with the attorney shall 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 of 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. His/her 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.

(B) An attorney shall exercise reasonable care to prevent employees and associates from making an extra-record statement as s/he is prohibited from making; and

(C) These restrictions do not preclude an attorney from replying to charges of misconduct publicly made against him/her, or from participating in the proceedings of legislative, administrative or other investigative bodies.

(2) In all proceedings before the commission, no attorney shall communicate, or cause another to communicate, as to the merits of the cause with any commissioner or examiner before whom proceedings are pending except:

(A) In the course of official proceedings in the cause; and

(B) In writing directed to the secretary of the commission with copies served upon all other counsel of record and participants without intervention.

(3) No person who has served as a commissioner or as an employee of the commission, after termination of service or employment, shall appear before the commission in relation to any case, proceeding or application with respect to which s/he was directly involved and in which s/he personally participated or had substantial responsibility in during the period of service or employment with the commission.

(4) 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 staff or the presiding officer assigned to the proceeding. (5) Requests for expeditious treatment of matters pending with the commission are improper except when filed with the secretary and copies served upon all other parties.
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> (6) No member of the commission, presiding officer or employee of the commission shall invite or knowingly entertain any prohibited *ex parte* communication, or make any such communication to any party or counsel or agent of a party, or any other person who s/he has reason to know may transmit that communication to a party or party's agent.
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> (7) These prohibitions apply from the time an on-the-record proceeding is set for hearing by the commission until the proceeding is terminated by final order of the commission. An on-the-record proceeding means a proceeding where a hearing is set and to be decided solely upon the record made in a commission hearing.
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> (8) As *ex parte* communications (either oral or written) may occur inadvertently, any member of the commission, hearing examiner or employee of the commission who receives that communication shall immediately prepare a written report concerning the communication and submit it to the chairman and each member of the commission. The report shall identify the employee and the person(s) who participated in the *ex parte* communication, the circumstances which resulted in the communication, the substance of the communication, and the relationship of the communication to a particular matter at issue before the commission.

The operative words of the Commission's rule is "conduct during proceedings." Subsection 7 of the rule makes clear that the prohibitions outlined in the rule apply only after a hearing is set to be decided upon the record made in that commission hearing.

The Judicial Canons

It is arguable as to whether the Judicial Canons apply to the Commissioners of administrative agencies.[19] Without addressing that issue directly, the Commission still

[19] The arguments on this put forth by the Commission's Staff and by GPE, KCPL and Aquila regarding whether the judicial canons apply are persuasive, but as the remainder of this order demonstrates, even if the Commission assumes, *arguendo*, that the canons do apply, this does little to rescue OPC's position. The standard for recusal is defined by case law, and that standard applies regardless of the wording of the judicial canons, and it is that standard that controls. The arguments herein referenced may be found

finds that several provisions of the Code of Judicial Conduct are illuminating. Canon 3(B)(5) provides that a judge, in the performance of judicial duties, shall not by words or conduct manifest bias or prejudice. More on point with the issues surrounding the external communications between corporate officers and the Commissioners that are raised by OPC in its motion is Canon 3(B)(7), which provides:

> (7) A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law. A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding except that:
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> (a) Where circumstances require, ex parte communications for scheduling, administrative purposes or emergencies that do not deal with substantive matters or issues on the merits are authorized; provided:
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> (i) the judge reasonably believes that no party will gain a procedural or tactical advantage as a result of the ex parte communication, and
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> (ii) the judge makes provision promptly to notify all other parties of the substance of the ex parte communication and allows an opportunity to respond.
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> (b) A judge may obtain the advice of a disinterested expert on the law applicable to a proceeding before the judge if the judge gives notice to the parties of the person consulted and the substance of the advice and affords the parties reasonable opportunity to respond.
>
> (c) A judge may consult with court personnel whose function is to aid the judge in carrying out the judge's adjudicative responsibilities or with other judges.
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> (d) A judge may, with the consent of the parties, confer separately with the parties and their lawyers in an effort to mediate or settle matters pending before the judge.
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> **(e) A judge may initiate or consider any ex parte communications when expressly authorized by law to do so.** (Emphasis added.)

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in *Staff's Response to Public Counsel's Motion to Dismiss*, filed December 27, 2007 and *Applicants' Opposition to Motion to Dismiss*, filed on December 26, 2007.

Canon 3E(1) provides a judge shall recuse in a proceeding in which the judge's impartiality might reasonably be questioned. Canon 2(A) provides that a judge shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary. The Commentary to Canon 2 provides: The test for appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired.

Legal Standard for Recusal

In *Smulls v. State*,[20] the Missouri Supreme Court articulated the proper legal standard for recusal of a judge for an alleged violation of due process for having prejudged a matter or for being biased. The Court succinctly stated:

> Canon 3(D)(1) of the Missouri Code of Judicial Conduct, Rule 2.03, requires a judge to recuse in a proceeding where a "reasonable person would have a factual basis to doubt the judge's impartiality." *Id.* This standard does not require proof of actual bias, but is an objective standard that recognizes "justice must satisfy the appearance of justice." *Liljeberg v. Health Servs. Acquisition Corp.,* 486 U.S. 847, 865, 108 S.Ct. 2194, 100 L.Ed.2d 855 (1986). Under this standard, a "reasonable person" is one who gives due regard to the presumption "that judges act with honesty and integrity and will not undertake to preside in a trial in which they cannot be impartial." *State v. Kinder,* 942 S.W.2d 313, 321 (Mo. banc 1996). In addition, a "reasonable person" is one "who knows all that has been said and done in the presence of the judge." *Haynes v. State,* 937 S.W.2d 199, 203 (Mo. banc 1996). Finally, as to due process challenges, the Supreme Court has made clear that "only in the most extreme of cases would disqualification on this basis be constitutionally required." *Aetna Life Ins. Co. v. Lavoie,* 475 U.S. 813, 821, 106 S.Ct. 1580, 89 L.Ed.2d 823 (1986); *see also State v. Jones,* 979 S.W.2d 171, 177 (Mo. banc 1998).[21]

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[20] *Smulls v. State*, 71 S.W.3d 138, 145 (Mo. banc 2002).

[21] *Id.*

"To qualify, the bias must come from an extrajudicial source that results in the judge forming an opinion on the merits based on something other than what the judge has learned from participation in the case."[22]

The Supreme Court has discussed, at length, the meaning of this standard in many cases and with regard to the presumption of a judge's impartiality the court has clarified: "that presumption is overcome, and disqualification of a judge is required, however, if a reasonable person, giving due regard to that presumption, would find an appearance of impropriety and doubt the impartiality of the Court."[23] Keeping in mind, of course, that a "reasonable person is one "who knows all that has been said and done in the presence of the judge."[24] The court has further stated: "The judge himself or herself is in the best position to decide whether recusal is necessary."[25] Moreover, "[a] judge has an affirmative duty not to disqualify himself unnecessarily."[26]

Testimony at Hearing, Hearing Exhibits and Deposition Testimony

OPC's Alleged Factual Basis For Its Motion to Dismiss

OPC alleges that on or about January 24, 2007, a series of four or five meetings were held between Commissioners Murray, Appling and Clayton (in groups of one or two commissioners) and Mr. Chesser and Mr. Downey, and that no notice was given to the public or to the OPC about these meetings. OPC, citing to various hearing exhibits, portions of transcripts and deposition passages, claims these discussions with Commissioners were critical to Great Plains moving forward with its plans to finalize a

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[22] *State v. Jones*, 979 S.W.2d 171, 178 (Mo. banc 1998).

[23] *State v. Kinder,* 942 S.W.2d 313, 321 (Mo. banc 1996).

[24] *Smulls*, 71 S.W.3d at145.

[25] *Jones*, 979 S.W.2d at 178.

[26] *State ex rel. Bates v. Rea*, 922 S.W.2d 430, 431 (Mo. App. 1996).

merger with Aquila. Quoting directly from OPC's Motion to Dismiss, OPC notes the following:

> "In a July 19, 2006, memo to the Great Plains board of directors, Terry Bassham, Chief Financial Officer of both Great Plains and KCPL, stated: "The regulators [*sic*] response to this plan and its concepts will be critical to our final evaluation of the transaction. Although it is not timely to speak to the regulators at this point, discussions with them in Phase II will clearly impact our ability to make a final offer." Exhibit 26, page 3. Before it would make a final bid for Aquila, before it would set its final price, before it would publicly announce the deal, Great Plains had to know that no Commissioner had any objection to the three "support mechanisms" (Chesser Deposition, page 39.) that Great Plains would later submit for Commission approval. Great Plains believed that these discussions were so absolutely critical that they were required in Great Plains' Final Bid:
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> "In order to deliver a transaction which will create the immediate and sustainable long term value for Aquila and Great Plains' shareholders, we require informal discussions with regulators prior to the execution of a definitive merger agreement for this transaction. Our bid is subject to holding these discussions concurrent with the negotiation of the definitive Merger Agreement." Exhibit 121, page 2.
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> Great Plains needed these discussions with Commissioners to "yield comfort" (Exhibit 26, page 3) around its ability to get approval consistent with its proposed regulatory treatment. The three support mechanisms or ratemaking treatments discussed with the Commissioners are: 1) a 50/50 split of synergies in the first five years; 2) regulatory amortizations for Aquila; and 3) recovery of the actual cost of Aquila's high cost of debt. (Chesser Deposition, pages 39-40.) Mr. Chesser and Mr. Downey did not just explain the mechanics of the transaction (the Black Hills piece of the deal, the Gregory acquisition subsidiary, etc.) to the Commissioners, they explained in detail what the joint applicants needed the Commission to approve once the issues were before the Commission for a decision.
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> Great Plains needed to not only give the Commissioners this detailed information, but to get something in return. Great Plains wanted to have "conversations" (Exhibit 105, page 11) or "discussions" (Exhibit 101, page 3) with regulators; Mr. Chesser and Mr. Downey were going to lay out "the dimensions of the deal" and "listen for reactions." (Chesser Deposition, pages 63, 125). They wanted to get "indications" (Exhibit 302, page 1) that the Commissioners would approve synergy sharing and regulatory amortizations. Mr. Chesser "felt good" about the reaction of the Commissioners; he understood that Aquila CEO Richard Green did as well. (Chesser Deposition, page 127). After their meetings, Mr. Chesser

> testified that he and Mr. Green "had a general conversation that said that we both had a favorable impression from the meetings." (Chesser Deposition, page 139). Mr. Green went even farther: he said that Mr. Chesser reported back "similar support" from both Kansas and Missouri regulators. (Exhibit 203, page 1).
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> In an email dated November 22, 2006 from Rick Green to the Aquila board, Mr. Green stated:
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> Before signing a definitive agreement, [Great Plains] will seek informal indications from the Missouri Public Service Commission that they will be allowed to retain a "significant" portion of synergies as well as extend their Iatan II regulatory compact to Aquila's Iatan II interest…. (Exhibit 302, page 1).
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> These discussions with regulators were so critically important that they share equal weight with the due diligence efforts:
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> The result of the Phase II due diligence and discussions with regulators could result in one of three outcomes. We could confirm our original bid range and finalize a bid within that range, we could reduce or increase our original bid, or we could decide not to proceed with a final bid submission. (Exhibit 101, page 3).

GPE, KCPL and Aquila's Response to OPC's Motion

Great Plains Energy, Inc.("GPE"), Kansas City Power and Light Company ("KCPL") and Aquila, Inc. ("Aquila") (Collectively "Applicants") immediately observe that the executives of GPE testified under oath that they **"asked for no commitment and we received no commitment from either the Staff or the Commissioners."** (See Michael J. Chesser Deposition at 40. See also William H. Downey Deposition at 42). Applicants further note that the meetings occurred months before this proceeding was filed on April 4, 2007. Applicants, relying on direct quotes from the executives without extrapolation, observe:

> Michael J. Chesser, Chairman of the Board of Directors of Great Plains Energy, testified in his deposition that he advised Commissioners that "we were going to pursue the acquisition of Aquila." (See Chesser Dep. at 39).

Mr. Chesser was accompanied by William H. Downey, Chief Operating Officer of Great Plains Energy and President of KCPL, and Chris Giles, Vice President of Regulatory Affairs for KCPL. (Id. at 38).

Mr. Chesser stated that they informed the Commissioners about three primary "support mechanisms" for the transaction, which included a split of synergies for the first five years, with all additional savings thereafter going to the customer; the ability to recover actual interest costs in future rate case; and the use of an amortization mechanism in view of Aquila's investment requirements and the need to maintain Aquila's expected post-merger investment grade credit rating. (Id. at 39-40).

In his deposition Mr. Downey stated that the meetings with commissioners were at a "very high level … just simply there to talk more about the fact that we were going to do this." (See Downey Dep. at 41). He noted that "[w]e didn't hear any major objections to the overall concept," and the only feedback received from Commissioners was "[a]cknowledgment, appreciation for us coming in and briefing them ahead of time." (Id. at 42-43). "We didn't ask for anything, so we wouldn't have gotten a commitment." (Id. at 42). No documents were provided to Commissioners during the meetings. (Id. at 44. See also Chesser Dep. at 42).

During the bidding process Great Plains Energy was not able to implement a collaborative process with Commissioners and Staff as it did with its Comprehensive Energy Plan because of the highly sensitive nature of that process and its negotiations. (Tr. 150-51, 838-39, 875-77). However, after it was selected as the final bidder, Great Plains Energy and Aquila agreed that discussions with the regulators could take place. (Tr. 839, 875-77).

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Contrary to OPC's suggestion, the discussions with "regulators" were always meant to include both Commissioners and Staff.

"Q. You said that we met with regulators. Who was it that met with regulators?

A. I believe it was Bill Downey, myself and Chris Giles.

Q. When was that meeting, let's say with the Missouri commissioners? Or Missouri regulators?

A. I believe it was in mid January.

Q. And who was is that you met with specifically?

A. We met with I believe each of the commissioners and key members of the Missouri staff." (See Chesser Dep. at 38. See also Downey Dep. at 38).

Applicants further noted that: "Several of the documents cited by OPC were created early in this process and do refer to 'informal discussions with regulators.' See Ex. 101 (Dep. Ex. 26) at 3, T. Bassham Memorandum to Great Plains Energy Board of Directors (July 19, 2006); Ex. 121 (Dep. Ex. 5) at 3, M. Chesser Final Non- Binding Bid Letter to Lehman Brothers and Blackstone Group (Nov. 21, 2006)."

> As Mr. Chesser noted, that collaborative process did not occur, and instead simple courtesy visits were paid to the Commissioners. (Tr. 884). At the hearing, Mr. Chesser stated that the "primary purpose" was "to educate the commissioners about what was about to happen" with regard to the announcement of the merger. (See Tr. 842). He stated that while he "wanted to hear if there were any major objections that we were not aware of to this kind of a deal being considered," during the meetings "I heard nothing, we had no conversation around that." (Id.). He stated that Great Plains Energy officials did not communicate to the Commissioners that if they had a problem, they should let them know. (Id. at 843). "I expected if there was a problem, they would make that known to us." Id. at 844. While the Great Plains Energy officials did not hear anything "significantly negative," Mr. Chesser clarified that the "depth of discussion did not go to asking or receiving commitments." (Id. at 141). "We weren't looking for … specific feedback." (Id. at 146).
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> Mr. Downey testified at the hearing as well, noting that "we were there to educate and to listen carefully to see if there were any reactions of a negative nature that we ought to take and keep in mind as we moved forward." (Tr. 911). The meetings were "typical," based upon Mr. Downey's 35-year experience in the industry at KCPL and at Commonwealth Edison Co. (Tr. 936-38). When "you're a regulated utility and you're about to embark on something that will have significant impact on the institution" and "ultimately involve the regulator," "you would let them know" your plans. (Tr. 977-78). Therefore, "we came over here to brief the Commissioners, and we intended in parallel to brief the Staff …." (Id. at 978).
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> At his deposition Mr. Chesser emphasized: "We asked for no commitment and we received no commitment from either the Staff or the Commissioners." (See Chesser Dep. at 40). While Mr. Chesser advised that "we did not get a sense that there were any major objections," "we got into no details, no specifics, we got no commitments." (Id. at 38). He continued: "We got the sense that the devil is in the detail, but conceptually it was a good thing. And conceptually it would be better for

> Aquila to be acquired by a utility from within the state than a utility from outside the state. That is the sense that I got." (Id. at 38).
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> Emphasizing that no commitment was sought or offered at the meetings with Commissioners, Mr. Chesser concluded "that they were going to look at the merits of the deal." (Tr. at 844).

Analysis of Public Counsel's Motion.

In order for OPC to succeed on its motion it must provide a sufficient factual basis to overcome the presumption that administrative decision-makers act honestly and impartially.[27] To establish actual bias on the part of the Commissioners, OPC must prove that the Commissioners have formulated an "unalterable prejudgment of the operative adjudicative facts of the case."[28] To establish an appearance of impropriety, OPC would have to prove that a reasonable person, giving due regard to the presumption of honesty and impartiality, and who knows all that has been said and done in the presence of the Commissioners would doubt the impartiality of the Commission.[29] Being "impartial" is defined as "favoring neither; disinterested; treating all alike; unbiased; equitable, fair and just."[30]

At various points in OPC's motion it refers to the communications the Commissioners had with the company executives as being either *ex parte* or else some other form of communication. Black's Law Dictionary defines *ex parte* as meaning: "On one side only; by or for one party; done for, in behalf of, or on the application of, one

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[27] *State ex rel. AG Processing Inc. v. Thompson*, 100 S.W.3d 915, 919-920 (Mo. App. 2003); *Burgdorf v. Bd. of Police Comm'rs,* 936 S.W.2d 227, 234 (Mo. App. 1996).

[28] *Fitzgerald v. City of Maryland Heights*, 796 S.W.2d 52, 59 (Mo. App. 1990).

[29] *State v. Kinder,* 942 S.W.2d 313, *321 (Mo. banc 1996).

[30] *Black's Law Dictionary*, 6th Edition, West Publishing Company, 1990, p. 752.

party only."[31] In order for a contact or action to be associated with one party, there must, obviously, be a "party" to an action, and there must be an action or case actually filed and pending, not speculatively looming in the distance. Any contact or communication with an individual, group or entity when there is no existing case, by definition, is not an *ex parte* contact.

Just to be clear, the communications between the Commissioners and the corporate executives that are the subject of OPC's Motion to Dismiss were not *ex parte* contacts. These communications occurred months before the merger case was filed, there was no adversarial or contested proceeding before the Commission at that time, and there were no parties to any action for which there could be a one-sided communication. Consequently, Commission Rule 4 CSR 240-4.020 does not apply to these communications and is, in fact, totally irrelevant to this discussion.[32]

The communications that occurred between the Commissioners and corporate executives were fully authorized and sanctioned by Missouri's General Assembly pursuant to Sections 386.210.1 and .2, RSMo Cum. Supp. 2006. Curiously, OPC implies the communications were somehow illicit without explaining how a statutorily authorized meeting violates any code of conduct, much less the statute authorizing that contact. Notably, the Judicial Canons upon which OPC so heavily relies provides an exception for communications that are expressly authorized by law,[33] and there is no

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[31] *Black's Law Dictionary*, 6th Ed., West Publishing Company, 1990, p. 576.

[32] See 4 CSR 240-4.020(7).

[33] Supreme Court Rule 2.03, Canon 3(B)(7)(e).

question that these types of communications are expressly authorized by Sections 386.210.1 and .2.[34]

Public Counsel apparently asserts that the upbeat recitations concerning the tone of the meetings made by the corporate executives constitutes reliable and credible evidence of unlawful promises by the Commissioners. Each of these witnesses denied under oath that any Commissioner made any representation about the outcome of the merger application prior to the case being filed, or any time thereafter. Indeed, Mr. Chesser and Mr. Downey repetitively testified that they did not seek a prior commitment from the Commissioners, and none was offered by the Commissioners. In the record, it appears that OPC does not challenge the credibility of this testimony. OPC does not point to any prior inconsistent statements on the part of these witnesses. In short, OPC provides no evidence to contradict or diminish the substantial and credible evidence that during the statutorily authorized meetings the corporate officers who participated asked for no commitment and received no commitment from either the Commission's Staff or the Commissioners.

OPC does not provide even a single example of Commissioners Murray, Appling, and Clayton indicating by comment or conduct that she or he was biased or prejudiced in this case. OPC does not assert that any of these Commissioners has an improper interest in the case that would require recusal. OPC does not offer any factual evidence

[34] The Commission does not concede that the Judicial Canons would apply in this instance, however, even if they do apply, OPC fails to provide any evidence that the Canons were violated.

that any of these Commissioners were determined to reach a particular result regardless of the evidence.[35]

It would appear that OPC has taken the depositions, exhibits and testimony in this matter, cut them into small pieces and woven the words of its choosing together with the magic thread of innuendo in order to conclude that something clandestine and prejudicial must have occurred. In short, OPC offers no legitimate factual basis from evidence in the record to support a conclusion of actual bias or prejudgment on the part of the Commissioners.

Similarly, no reasonable person with total knowledge of the content of these conversations, the context surrounding the legislatively sanctioned conversations, and the timing of the conversations could conclude the Commissioners were biased or that there was even a remote appearance of impropriety. This is not an extreme case where disqualification is constitutionally required, and the Commissioners have an affirmative duty not to disqualify themselves unnecessarily.[36]

The Commission further notes that OPC's poorly worded and incorrect assertion (Paragraph 19) that utility companies have access to Commissioners not available to ratepayers and thus have undue influence over the Commission is a flat misrepresentation. Commissioners regularly speak with OPC or its employees, legislators, local government officials, the media, environmental advocates, advocates for low-income customers, representatives of industrial customers, and on occasion, individual residential ratepayers.

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[35] *Ross v. Robb*, 662 S.W.2d 257, 260 (Mo. banc 1984); *Shepard v. South Harrison R-II School District,* 718 S.W.2d 195, 199 (Mo. App. 1986).

[36] *Bates*, 922 S.W.2d at 431.

OPC finally asserts, without citation, that the rule of necessity would not require further consideration of the case. The case law demonstrates that OPC is wrong. The Missouri Court of Appeals has held:

> In those instances where the only forum authorized by statute would be unable to proceed, the Rule of Necessity could be invoked to permit a decision to be made by the adjudicating body in spite of its possible bias or self-interest. *United States v. Will*, 449 U.S. 200, 101 S.Ct. 471, 480-481, 66 L.Ed.2d 392 (1980).[37]

In any event, the Rule of Necessity does not even come into play in this instance where none of the Commissioners that are the subject of OPC's Motion are required to recuse. There is a quorum of unbiased Commissioners, who have impeccably maintained their honesty, integrity and impartiality, prior to, and throughout this proceeding.

Conclusion

The Canons of Judicial Conduct and the Commission's Standard of Conduct Rules, are not, and were never intended to be, vehicles for third party control of an agency's agenda. The preamble to the Canons states: "Furthermore, the purpose of this Rule 2 would be subverted if it were invoked by lawyers for mere tactical advantage in a proceeding."[38] The purpose of Commission Rule 4 CSR 240-4.020 is to "insure that there is no question as to [the commission's] impartiality in reaching a decision on the whole record developed through open hearings." The purpose of these standards is not to allow attorneys, parties, corporate officers or their agents to arbitrarily obstruct the Commissioners' proper exercise of their quasi-judicial functions by initiating or

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[37] *State ex rel. Powell v. Wallace*, 718 S.W.2d 545, 548 (Mo. App. 1986); accord, *Stonecipher v. Poplar Bluff R-1 School District*, 205 S.W.3d 325, 328 (Mo. App. 2006); *Fitzgerald*, 796 S.W.2d at 59-61. See also, *Central Missouri Plumbing Co. v. Plumbers Union Local 35*, 908 S.W.2d 366, 369-371 (Mo. App. 1995).

[38] Supreme Court Rule 2.01, Preamble.

entertaining statutorily authorized communications about matters concerning regulatory policy.

As noted above, OPC cites no comment or conduct by Commissioners Murray, Appling, and Clayton that would serve as a basis for recusal, nor is there evidence that the Commission has done anything to diminish public confidence in its work. Lacking any merit to its claims, it appears OPC is attempting to gain an improper tactical advantage by the inappropriate use of the Standard of Conduct Rules. Such action may actually serve more to erode the credibility of OPC before objective commentators and in the eyes of the public, which it is responsible to serve.

The General Assembly has astutely and comprehensively defined permitted communications with the Commission, balancing the Commission's and the public's need to inform themselves with parties' needs for an impartial adjudicator.[39] The Commission and its Commissioners have without question observed the requirements of this law.

IT IS ORDERED THAT:

1. The Office of the Public Counsel's December 13, 2007, Motion to Dismiss is denied as being meritless.

[39] Moreover the General Assembly has provided the additional safeguard of judicial review of all of the Commission's decisions. Section 386.510, and 386.540, RSMo 2000.

2. This order shall become effective on January 2, 2008.

BY THE COMMISSION

Colleen M. Dale
Secretary

(S E A L)

Davis, Chm., abstains
Murray, Clayton, Appling, and
Jarrett, CC., concur.
Clayton, separate concurrence to follow

Stearley, Regulatory Law Judge