BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of the Application of Kansas City Power & Light Company for Approval to Make Certain Changes in its Charges for Electric Service to Implement its Regulatory Plan	))))	**Case No. ER-2007-0291**

MOTION FOR RECUSAL OF COMMISSIONER APPLING

COMES NOW the Office of the Public Counsel and for its Motion for Recusal of Commissioner Appling states as follows:

The Office of the Public Counsel respectfully asks that Commissioner Linward Appling recuse himself from further participation in this rate case and from any participation in the Commission's discussion and vote on the case or any issue in the case.[1] Commissioner Appling made a statement in the record evidentiary hearing and asked a question of KCPL witness Chris Giles during the evidentiary hearing on October 1, 2007 that revealed that Commissioner Appling and Mr. Giles discussed disputed substantative issues in this case (in particular KCPL's requested Rate of Return on Equity) during the pendency of this rate case and after it had been scheduled for an evidentiary hearing. The official PSC file does not contain any disclosure of this *ex parte* contact nor has Public Counsel received any notice of this contact.

Ex parte communications between a Commissioner and a witness or representative of the utility during the pendency of a rate case, a contested case, creates a strong appearance of partiality; undisclosed *ex parte* discussions of the Company's preferred rate of return on equity, by far the largest and most important issue in this case, gives the reasonable appearance of partiality and impropriety. Commissioner Appling's

[1] Although this pleading is styled a motion, it is in effect a request that Commissioner Appling recuse himself and not that the Commission as a body recuse him.

recusal is the appropriate and warranted remedy that will promote confidence in the Public Service Commission by avoiding even the appearance of impropriety. Therefore, recusal is warranted under PSC Rule 240-4.020 Conduct During Proceedings, Supreme Court Rule 2, Code of Judicial Conduct, Canon 3 and is appropriate to preserve and protect the public interest.

FACTS

On February 1, 2007, KCP&L filed proposed tariffs, information designed to comply with the Commission's minimum filing requirements, and direct testimony that instituted this general rate case. This rate case was filed just one month after the effective date of the Report and Order in ER-2006-0314, the previous general rate case filed by KCPL. The Commission ordered the procedural schedule for this case on February 6, 2007, including the dates for an evidentiary hearing.[2] Case No. ER-2007-0291 is a contested case as defined by Sections 386.020 and 536.010 RSMo 2000, and case law defining and relating to contested administrative cases and PSC rate cases.

Linward (Lin) Appling is a duly appointed Commissioner of the Public Service Commission of Missouri and is subject to the powers, duties, and restrictions contained in the Missouri Public Service Commission Law (Chapter 386, RSMo 2000, as amended), the statutes related to the regulation of utilities, video franchises, and manufactured housing and those statutes and regulations that apply specifically to the Public Service Commission, its members, and to public officers in general, all as interpreted by the courts. In addition, since the Commission also exercises adjudicatory powers in utility

[2] The February 6 order established a series of days in September 2007 for the evidentiary hearing. A subsequent order, issued April 5, 2007, rescheduled the hearing for October 1 through October 12, 2007.

rate cases, the Commissioners are subject to the Missouri Canons of Judicial Conduct that apply to the judiciary.

Mr. Chris Giles is the Vice President, Regulatory Affairs for KCP&L and a witness for the Company called to testify in this case. Mr. Giles' pre-filed testimony provided an overview of the issues in the case, including defending the Company's requested 11.25 percent return on equity. Mr. Giles also testified at the evidentiary hearing on the return on equity issue. He also testified as a witness in KCPL's prior rate case ER-2006-0314 on the same issue as well as other issues.

On October 1, 2007, in the first day of the evidentiary hearing in this case, Mr. Giles testified on behalf of KCP&L. On that date, the following exchange occurred on the record between Commissioner Appling and Mr. Giles:

Q Describe for me in about two minutes, if you can, what is KCPL looking for here? I know what your ROE is. We've been talking about it all morning. But give me just a touch-down of what you're looking for that's going to do you some good, the big numbers, okay?
A In this particular case we're --
Q This particular case. Yes.
A You mean in terms of dollars or --
Q Dollars.
A Somewhere in the neighborhood of 26, $28 million.
Q And this is to run through to next year?
A Actually, run through the next year and about three months of the following year. We -- our next case that we will file is to include the cost of IATAN II environmental equipment.
Q Uh-huh.
A And due to outage scheduling, we scheduled that outage to occur in December of 2008. So in order to get that investment in the test year true-up period, we'll have to file our next case of April of '09.
Q Last year, we --
A Well, pardon me.
Q Last year, we gave you 11.25, correct?

A Correct.
Q And that's what you're asking for again this year?
A Correct.
Q Is that going -- is that going to do what you need to do? Is that going to give you what you need for this next year?
A Yeah. If --
Q You and I talked a lot about this when I visited the plant up there three or four months ago. We walked the whole thing, and we talked about a lot of things. What I'm trying to get in my own mind, what did you -- what did you find there, you know? Go ahead.
A The -- the rate of return is all dependent upon the adjustments that are made to the data in this case of whether you -- we will actually ever be able to achieve that return.[3]

The Commission's official case file of this case does not contain any notice of communication concerning this discussion between Commissioner Appling and Mr. Giles

[3] Transcript, pages 100-101 from an ASCII file in Amicus format for the Public Service Hearing held on October 1, 2007, provided by Midwest Litigation Services/Midwest Trial Services. The following is a transcription made by the undersigned from an audio-visual CD of the first day of the hearing provided by the Commission on October 2, 2007:

> Q: [By Commissioner Appling] Last year, we gave you 11.25, correct?
> A: [By witness Giles] Correct.
> Q: And that's what you're asking for again this year, correct?
> A: Correct.
> Q: Is that gonna do what you need to do, or is that gonna give you more than you need to do what you need to do?
> A: You know, if….
> Q: You and I talked a lot about this when I visited the plant up there three or four months ago. We walked the whole thing, and we asked and talked about a lot of things up there. But, uh, what I'm trying to get in my own mind – what did you – what did you find there, you know?
> A: The….
> Q: Yeah, go ahead.
> A: The, uh, the rate of return is all dependent on the adjustments that are made to the data in this case on whether we will actually ever achieve that return.

While there are some minor differences, both the transcript and the Commission's recording agree on the most important point: that Commissioner Appling and KCPL witness Giles "talked a lot about" return on equity during the pendency of this case.

regarding KCPL's rate of return about three to four months ago (June or July, 2007), or at any time during the pendency of this case.

The transcript reveals evidence of an undisclosed *ex parte* communication between the Commissioner and Mr. Giles on rate of return while KCPL's rate case was pending that could cause a reasonable person to question the propriety and integrity of the Commission's process, procedures, and decisions. A reasonable person could view this undisclosed *ex parte* discussion of a substantial issue in the rate case, which Commissioner Appling will review and vote on, as an indication of partiality toward the utility's position. An observer could come to the conclusion that the Commissioner is willing to consider the utility's statements made outside of the record out of the presence of other parties. Whether or not there is any intent to violate any *ex parte* regulation, or any intent to consider evidence not in the record, or any inclination to partiality toward the utility, or any bias toward the company or antagonism toward any party, it is the appearance of partiality or impropriety that is the basis for recusal.

STATEMENT OF THE LAW

A Public Service Commissioner exercises quasi-judicial power and is subject to the same rules of conduct that apply to the judiciary.[4]

Supreme Court Rule 2, Code of Judicial Conduct, Canon 3B(7)[5] requires a judge to accord to every person legally interested in a proceeding or his lawyer a full right to be heard according to the law and, except as authorized by law, to neither initiate nor

[4] "[T]he courts in this state have held officials occupying quasi-judicial positions to the same high standard as apply to judicial officers by insisting that such officials be free of any interest in the matter to be considered by them." Union Electric Co. v. Public Service Com., 591 S.W.2d 134 (Mo. Ct. App. 1979) [the "Slavin case"].

[5] All citations to Canons herein refer to the Code of Judicial Conduct.

consider *ex parte* or other communications concerning a pending or impending proceeding.

Canon 3E(1) states that a judge shall recuse in a proceeding in which his partiality might reasonably be questioned. Furthermore, that commentary to 3E(1) makes it clear that a judge must disclose on the record information that the judge believes the parties or their lawyers might consider relevant to the question of disqualification, even if the judge believes there is no real basis for disqualification.

Canon 3B(7) outlines the evidence a judge can lawfully hear. Specifically, the rule provides that a judge must not independently investigate facts in a case and must consider only the evidence presented.

In Moore v. Moore, ----S.W. 3rd ---- (Mo App S.D. 2007), a family court Commissioner without notice to the parties directed an independent investigation and report and used this *ex parte* communication made outside the presence of the parties as a basis of his decision regarding child custody. The appeals court emphasized the importance of the appearance of impropriety. While the Commissioner thought he was impartial, it was the appearance of impartiality that governs recusal. Litigants are entitled to a trial which is not only fair and impartial, but which also appears fair and impartial. The test for recusal is not whether the court is actually biased or prejudiced, but rather, whether a reasonable person would have a legitimate basis to find an appearance of impropriety and thereby doubt the impartiality of the court.

PSC Rule 240-4.020 Conduct During Proceedings, provides in pertinent part:

> (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.
>
> (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.
>
> (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.

In McPherson v. United States Physicians Mutual Risk Retention Group, 99 S.W.3d 462 (Mo App W.D. 2003), the Court said "A judge's impartiality might reasonably be questioned if a reasonable person would have a factual basis to doubt the judge's impartiality." Graham v. State, 11 S.W.3d 807, 813 (Mo. App. 1999) The public's confidence in the judicial system is the paramount interest. Canon 3(E)(1) does not limit recusal to instances of actual bias, but is much broader. Robin Farms, Inc. v. Bartholome, 989 S.W.2d 238, 248, 246 (Mo. App. 1999). "'No system of justice can function at its best or maintain broad public confidence if a litigant can be compelled to submit [a] case in a court where the litigant sincerely believes the judge is . . . prejudiced.'" State ex rel. Raack v. Kohn, 720 S.W.2d 941, 943 (Mo. banc 1986) quoting State ex rel. McNary v. Jones, 472 S.W.2d 637, 639 (Mo.App. 1971).

Missouri courts have held that the appearance of impartiality is scarcely less important than actual impartiality:

> Acts or conduct which give the appearance of partiality should be avoided with the same degree of zeal as acts or conduct which inexorably bespeak partiality.
>
> As emphasized in State v. Lovelady, 691 S.W.2d 364, 365[1] (Mo.App. 1985), the law is very jealous of the notion of an impartial arbiter. It is scarcely less important than his actual impartiality that the parties and the public have confidence in the impartiality of the arbiter. Where a judge's freedom from bias or his prejudgment of an issue is called into question, the inquiry is no longer whether he actually is prejudiced; the inquiry is whether an onlooker might on the basis of objective facts reasonably question whether he is so. State v. Garner, 760 S.W.2d 893, 906 (Mo. App. 1988).

Commissioner Appling's comments were made at the first day of the hearing and related to a time three or four months prior to the hearing, after the case was filed and an evidentiary hearing scheduled. The combination of a judge's questions and statements may create an appearance of impropriety. See, Williams v. Reed, 6 S.W.3d 916 (Mo. Ct. App. 1999), at 922-23; McPherson at 490. There may be insufficient evidence of actual bias, but the question is whether the judge's impartiality might reasonably be questioned, not whether the judge was, in fact, biased. Robin Farms, 989 S.W.2d at 247.

In Smith by and through Smith v. Armontrout, 632 F.Supp. 503, 507, n.7 (W.D. Mo. 1986), Federal District Judge Scott Wright held that an *ex parte* conversation between a judge sitting on a case and a witness about the issues in the case improper:

> [W]hile Gerald Smith's case was pending before the Missouri Supreme Court in January, 1986, one of the judges on that court initiated *ex parte* communications with one of the psychiatrists who had examined Smith. Such *ex parte* contact not only violates that court's own canons of ethics, *see* Mo.S.Ct.R. 2, Canon 3(A)(4) (prohibiting judges from initiating *ex parte* communications concerning pending proceedings), it also strikes at the very heart of the adversarial system. Nothing can undermine the fairness of a judicial proceeding more than when a judge turns his back on the adversary system -- where each side has an equal opportunity to test its opponent's evidence by means of cross-examination – and conducts his own *ex parte* investigation of the facts. *See Reserve Mining Co. v. Lord*, 529 F.2d 181, 184-88 (8th Cir. 1975). Under these extraordinary circumstances, it clearly appears that the state court's conclusion

concerning Smith's competency was not the product of a full and fair hearing.

Federal rule 28 USCS Section 455(a) provides that: "Any justice, judge, or magistrate [magistrate judge] of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." The relevant consideration under Section 455(a) is the appearance of partiality. Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847, 108 S.Ct. 2194, 100 L.Ed.2d 855, (1988). "The very purpose of 455(a) is to promote confidence in the judiciary by avoiding even the appearance of impropriety whenever possible." Liljeberg, at 2205. If a reasonable man or woman apprised of all of the circumstances would question the judge's impartiality, then an appearance of impartiality is sufficient to trigger recusal and thereby promote confidence in the judiciary by avoiding even the appearance of impropriety. Travelers Ins. Co. v. Liljeberg Enterprises, Inc., 38 F.3d 1404 (5th Cir. 1994).

DISCUSSION

From Commissioner Appling's comments and questions at the evidentiary hearing, it is clear that there was an *ex parte* communication between a commissioner who is hearing and deciding the case and a utility executive and witness outside of the hearing room without the presence or knowledge of other adverse parties and without disclosure as required by PSC regulation and by state law. A reasonable person would understandably believe that this *ex parte* contact on a disputed and very significant issue – plus the commissioner's failure to disclose it – give a strong appearance of impropriety and a serious suggestion of partiality to the utility. Actual bias or partiality is not the issue, nor or is it necessary in determining the appropriateness of recusal. It is the mere appearance of impropriety that commands recusal here.

The more significant and overriding consequences will be the damage done to the public's view of the Public Service Commission and the perception of a ratepayer's ability to obtain fair, just, and impartial hearing on the evidence and law.

If Commissioner Appling does not recuse himself, then any Report and Order issued in this case is subject to a court order remanding the matter for reconsideration "untainted by *ex parte* contact." Hall v. Jennings Sch. Dist., 133 S.W.3d 112 (Mo. Ct. App. 2004). In addition, as the court noted in the Slavin case,[6] because Missouri law does not generally allow for refunds of amounts paid by ratepayers pursuant to a Commission order later found unlawful, a post-decision court ruling that recusal was appropriate will not protect ratepayers from harm. Recusal, rather than remand and reconsideration, is the appropriate course of action.

Commissioner Appling's questions to Mr. Giles during the hearing made it appear that he is interested in deciding this case in a way that is "going to do [KCPL] some good." Other than return on equity, the public has no way of knowing what exactly Commissioner Appling and Mr. Giles talked about during their long *ex parte* discussion about "a lot of things" a few months ago. But the fact that the conversation about return on equity took place, and that it was never disclosed as required, creates at least the appearance of impropriety. To protect the integrity of the Commission as an impartial adjudicatory body and to preserve public trust in the Commission's operation and decisions, recusal of Commissioner Lin Appling is warranted. He should recuse himself from further participation in this case to protect the public interest.

[6] Union Electric Co. v. Public Service Com., 591 S.W.2d 134 (Mo. Ct. App. 1979).

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been mailed, hand-delivered or emailed to all parties this 5th day of October, 2007.

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