BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of a Repository File for The Collection and Distribution of Documents Pertaining to the Ethics Review at the Missouri Public Service Commission	))))))	Case No. AW-2009-0313

Initial Comments of the
Missouri Energy Development Association

The Missouri Energy Development Association (MEDA), on behalf of itself and its members,[1] submits the following preliminary comments concerning the review by the Missouri Public Service Commission (Commission) of its Standards of Conduct rules[2]. The Commission has retained the services of the law firm of Hinshaw and Culbertson LLP (Hinshaw) to advise it with regard to this ethics review and it is MEDA's understanding that Hinshaw will be making a proposal to the Commission, presumably in the form of a suggested revision to Chapter 4 of its rules. Following up on the discussions that took place at the public meeting on April 29, 2009, MEDA offers its general observations and commentary with regard to a topic that is of great importance to the Commission, the companies it regulates and other interested parties.

Context for Review of Chapter 4 Rules

The consideration by the Commission of any revisions to its standard of conduct rules must take into account the manner in which the topic has arisen,

[1] Union Electric Company, d/b/a AmerenUE, Kansas City Power & Light Company, Laclede Gas Company, The Empire District Electric Company, Missouri Gas Energy, Atmos Energy Corporation and Missouri-American Water Company.
[2] 4 CSR 240-4.101 and 4.102.

public policy as embodied in the applicable statutes and statements already made by the Commission and individual commissioners.

Key Statutory Provisions: Where communications with and by members of the Commission are concerned, §386.210 RSMo must be the central guiding light. Likewise, where the role of the Commission Staff is concerned, one must refer to §§386.135 and 386.240 RSMo. No meaningful discussion on the topics being addressed in this workshop can be had without a careful review of these provisions. MEDA will make extensive further reference to these statutes, *infra*.

The Genesis of the Topic: It is equally important to realize that the issue of ethical conduct before and by the Commission arose initially in the hotly contested acquisition by Great Plains Energy (KCPL's parent company) of Aquila. In the context of that case, allegations of improper conduct (specifically, improper communications *prior to* the filing of the application)[3] were lodged against the applicant companies and several of the commissioners. Ultimately, one commissioner recused himself and a subsequent motion to dismiss the case filed by the Office of the Public Counsel (OPC) was pointedly denied by the Commission. In doing so, the Commission characterized OPC's allegations as

[3] The Commission's *ex parte* restrictions only apply after a hearing has been set to be decided on the record. In its January 2, 2008, Order Denying Motion to Dismiss, Case No. EM-2007-0374, the Commission said:

> 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 not 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.

Order at page 17.

founded on "conclusory statements, fractionated legal precepts and innuendo."[4] In a separate concurring opinion, Commissioner Clayton reviewed OPC's allegations in detail and concluded that "there is absolutely no evidence of wrongdoing or inappropriate conduct" and that the meetings of which OPC complained "have been specifically authorized and approved by the Missouri General Assembly." The Hinshaw law firm would be well served by reviewing the Commission's Order Denying Motion to Dismiss and Commissioner Clayton's concurring opinion for some useful guideposts when considering the need for revisions to the Chapter 4 rules.

Since the Great Plains Energy acquisition case, some parties have begun to use unfounded allegations of misconduct as nothing more than a litigation tool. Most recently in the KCPL rate case (Case No. ER-2009-0089), certain parties have filed motions asking one commissioner to recuse himself for having requested that a member of the Commission's staff to provide him with publicly available factual information about the utility even though he promptly filed a full disclosure of the information request as part of the case record. As MEDA stated in a filing made in that case, the motion to recuse was nothing less than an attempt to bully and intimidate one of the members of the Commission and, by extension, every member of the Commission. A subsequent motion has gone so far as to allege that the same commissioner is biased against the Commission Staff because he asked a pointed question of one of the Staff lawyers!

[4] *Id.* at page 1. That the Commission was contemptuous of the false claims of improper conduct was made clear by its observation at page 19 of the Order that "[i]t 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."

The use of the Commission's code of conduct for tactical advantage runs the risk of subverting the process and undermining public confidence in the Commission as an institution. It is legitimate in the context of the current discussions to ask whether there is a problem with the rules or whether the problem is how the parties are using the rules.

The Determination of Necessity for a Rulemaking

Generally, MEDA's assessment of the debate about whether and how to address the issue of *ex parte* communications is that clear guidance on how such communications should occur already is provided in §386.210 RSMo. The Commission's existing rule 4 CSR 240-4.020, while not a model of flawless clarity, is and has been a workable framework for many years.[5] There should not be a presumption on the part of the Commission that a rulemaking with regard to these topics in necessary.

On the other hand, MEDA believes that additional clarity may be needed with respect to subsections (1)(A) and (4) of the rule regarding to attorneys making statements for the purpose of public dissemination in the press and/or for the purpose of bringing outside pressure on the Commission in the exercise of its adjudicative function. MEDA is concerned that these provisions often have been overlooked or disregarded.

[5] Commissioner Murray has stated that "[t]he existing rule is adequate to prohibit activities which would tend to exercise influence on the commission and which are not part of the record" while noting some clarification "would not be inadvisable." Response to Notice of Opportunity to Comment, Case No. AX-2008-0201.

Three Guiding Principles for any Rulemaking Addressing Communications by or with the Commission

In previous cases touching on the topic of communications with or by the Commission[6], MEDA has asserted that any rulemaking considered by the Commission must take into consideration three guiding principles. The **first** guiding principle is that any revisions must preserve the concept that a vigorous and robust exchange of ideas and information is absolutely critical to the formulation of sound public policy. Thus, any rule changes should continue to allow for the free flow of information among commissioners, the Commission's staff, the public, regulated utilities and anyone else, *to the extent that such communication does not address a pending adjudication*.

The Missouri General Assembly has made it clear that such communications are not prohibited, but instead encouraged. [7] Specifically, §386.210.1 RSMo. (Supp. 2006) provides:

> The commission may confer in person, or by correspondence, by attending conventions, or in any other way, with 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.

Section 386.210.2 RSMo (Supp. 2006) provides:

> 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.

Similarly, Section 386.210.4 RSMo (Supp. 2006) provides:

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[6] Case Nos. AO-2008-0192 and AX-2008-0201.

[7] The Commission has no power to adopt a rule, or follow a practice, which results in nullifying the expressed will of the General Assembly. ***State ex rel. Springfield Warehouse & Transfer Company v. Public Service Commission***, 225 S.W.2d 792, 793 (Mo. App. 1949).

> 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 subsection 3 of this section.[8]

The timely and free flow of information contemplated by the Missouri General Assembly is absolutely essential if the Commission is to properly discharge its duties. The Commission must have access to input from the public, to the expertise of its Staff and the views of customer groups and utilities that are directly affected by its policy initiatives and decisions.

This view has been echoed by Commissioner Jarrett in comments he filed in Case No. AO-2008-0192[9] on January 30, 2008.

> The current regulatory landscape rightly recognizes the Commission's unique charge as a substitute for market competition through its regulation of monopoly public utilities. In order for utility regulators to perform their responsibilities properly, a vigorous and robust exchange of information and ideas is critical. This unique regulatory characteristic is unlike that of any other agency in the State of Missouri, and necessitates an environment where Commissioners have access to adequate information. Regulators need a healthy dialogue with utilities, the public, customers, and other interested parties.

In particular, MEDA believes that it is essential that the commissioners keep their doors open for periodic trade group briefings on emerging issues and industry developments. These can be excellent sources of general information for use in the formulation of public policy. Utilities also need immediate, direct and unhampered access to commissioners to keep them advised of situational

[8] Subsection 3 provides different standards for communications involving pending cases.
[9] *In the Matter of a Review of the Missouri Public Service Commission's Standard of Conduct Rules and Conflict of Interest Statute*.

updates, such as storm outages or other circumstances affecting the provision of services to the public.

Those who have contended that the commissioners should act and conduct themselves just like judges in civil cases misapprehend the different powers and duties of the Commission and do a disservice to both the Commission and the public interest. Unlike a judge presiding over a discrete dispute involving private parties, utility commissions have sweeping and ongoing regulatory jurisdiction over the utilities they regulate. ***Borron v. Farrenkoph***, 5 S.W.3d 618, 624 (Mo. App. W.D. 1999). These include both quasi-judicial and quasi-legislative powers. To exercise these powers effectively and wisely, commissioners must educate themselves on a wide variety of matters affecting the utilities they regulate.

Where this topic is concerned, a number of parties have asserted that the Commission is bound by the Code of Judicial Conduct (Code) but this is constitutionally flawed thinking. The Code adopted by the Missouri Supreme Court is binding only on the *judicial* branch of government. The principle of separation of powers bars its application to the Governor's *executive* appointees like the commissioners.[10]

The **second** guiding principle is that the rules governing the code of conduct be equally applicable to all parties in adjudicative proceedings before the Commission. Parity in application of the rules is a fundamental principle of due process in contested proceedings where the rights and duties of parties are

[10] Although the Commission has not squarely addressed this topic, it has gone on record for the proposition that the argument presented by MEDA is "persuasive". *See*, January 2, 2008, Order Denying Motion to Dismiss, Case No. EM-2007-0374, page 8, ftnt. #19.

determined. In his concurring opinion in Case No. EM-2007-0374, Commissioner Clayton weighed in on this consideration saying that:

> [A]ll parties should be equally treated with regard to all communications and dealings with the Commissioners. It is disingenuous for movants to demand more disclosure of utility contacts while not suggesting similar treatment for themselves.[11]

Fundamental principles of fairness demand that there should be a level playing field applicable to all parties. The Commission's Staff and OPC should not receive any favored treatment because they too are parties to adjudicative proceedings before the Commission.

The **third** guiding principle is that the provisions of the standards of conduct rule must make a meaningful distinction between adjudicative proceedings and legislative proceedings, such as a rulemaking. Recent case law has recognized that the full range of procedural protections afforded in an adjudicated case do not apply in the context of promulgating rules. ***State ex rel. Atmos Energy Corporation v. Public Service Commission***, 103 S.W.3d 753, 759-760 (Mo. banc) Like the General Assembly, the Commission should not be restricted from communicating with stakeholders when it is formulating policies of general applicability.

Consistent with these three guiding principles, MEDA has previously suggested that targeted refinements to the existing rule could conform it more closely with the language of §386.210 RSMo and provide additional clarity and transparency.

[11] Commissioner Clayton's Opinion and Response to Public Counsel's Motion to Dismiss, p. 9.

Assessment of Particular Alternatives
Under Consideration by the Hinshaw Law Firm

The Commission's April 23, 2009, Notice of Public Meeting and Opportunity for Comment was accompanied by an Agenda in outline form. Elaboration of those topics took place on April 29th. MEDA offers the following general observations and comments with regard to selected matters.[12]

Agenda Item II. A. 1. Clarification of application of limits on ex parte communications

MEDA submits that the Washington and New Hampshire models are not viable options in Missouri. The Washington model is not workable because the Commission Staff is automatically a party to a proceeding unless it opts out; which never happens. The definition of the term "Party" in the Commission's rules provides, in pertinent part, as follows:

> Commission staff and the public counsel are also parties unless they file a notice of their intention not to participate with the period of time established for interventions by commission rule or order.[13]

As such, the Commission Staff is always involved in any investigation or prosecutorial proceeding.

It is worth noting that the General Assembly has granted the Commission authority to establish a separate advisory staff which is available for direct consultation during the course of any proceeding. *See*, §386.135 RSMo. As such, the separation of roles as between the Commission's general and advisory staff is structural and does not accommodate the Washington model.

[12] MEDA reserves the right to submit additional comments as the issues and procedures are clarified and rule revisions are proposed.
[13] 4 CSR 240-2.010 (11).

For many of the same reasons, the New Hampshire model is not workable. It bears further mentioning that an early effort on the part of the Commission to establish an advisory staff composed of former members of the general staff was shown to be unworkable because it created the situation where a general staff member who had been involved in formulating policy recommendations for staff as a party, ended up advising a commissioner concerning the very same topic during the decision-making phase of the case.

By the process of elimination, the California model (i.e., setting the standards by the nature of the proceeding) would appear to be the only feasible approach.

Agenda Item II. 4.: Limits on public statements regarding pending matters

This topic has two features, that is, public statements by the commissioners and public statements by counsel/parties of record. Where communications by a commissioner are concerned, subsections 4 and 5 of §386.210 RSMo govern.

Where communications by attorneys or parties are concerned, 4 CSR 240-4.020 controls. It provides as follows:

> (1)(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 of 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.
6.

and

(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.

MEDA believes that certain parties and/or practitioners are either unaware of these conduct restrictions or, if aware, have ignored them because case commentary showing up in news publications has become an increasingly common occurrence. As such, additional emphasis on this topic would be helpful.

Agenda Item II. 6. Improvements in systems for responding to and remedying rules violations

Again, this issue has two components, that is, violations by commissioners (or their staff) and violations by attorneys/parties.

It is clear that the Commission cannot disqualify one of its own members for improper conduct and that any disqualification would require an action in prohibition in a circuit court. ***Union Electric Company v. Public Service Commission***, 591 S.W.2d 134, 139-140 (Mo. App. W.D. 1980). A more severe remedy is removal from office by the Governor for "inefficiency, neglect of duty,

or misconduct in office" or by the legislature for "dereliction of duty, or corruption, or incompetency." §386.060 RSMo.

The rules governing standards of conduct applicable to attorneys or parties are of no value if they are not enforced. Failure to address this topic will call into question the efficacy of this entire process. The rules should be something more than just guidelines or recommendations provided by the Commission.

Agenda Issue II. B. 2.: Guidance on permissibility of speaking, writing and teaching.

See, §386.210.4 RSMo.

Agenda Issue II. B. 3.: Limits on political activities and fundraising.

A seat on the Commission is not a non-partisan appointment. To the contrary, members typically have a political party affiliation. Nevertheless, the position is an appointed one and intentionally so to insulate the Commission to some degree from direct political influence or pressures. As such, MEDA believes that overt political activity on the part of commissioners undermines public trust in the fairness of its proceedings. Consequently, the public interest would be served by a self-imposed prohibition on political fundraising or campaigning during the term of office.

Other Topics Identified by the Hinshaw Law Firm

There are many other topics listed on the Agenda outline that MEDA will not address at this time either because they deal with internal governance by the Commission or the scope of the topic is unclear. MEDA reserves the right to address these matters in the future, if and as appropriate.

Conclusion

Where issues of *ex parte* communications or commissioner bias are concerned, they have arisen not because of any violation of statute or rule but because certain parties to Commission proceedings have attempted to gain an advantage in particular proceedings by intimidating members of the commission. As such, there should be no presumption that the rules governing communications with the Commission are inherently flawed or unworkable. On the other hand, there may be some opportunities to better conform the rules to the requirements of and principles embodied in §386.210 RSMo and to put in place some limited, reasonable additional procedural safeguards. It would be helpful for his process to also address and clarify the restrictions on bringing outside pressure to bear on the Commission's deliberations by making critical commentary to the press about pending proceedings.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing document was delivered by first class mail, electronic mail or hand delivery, on the 14th day of May, 2009, to the following:

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