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**

RESPONSE TO INITIAL COMMENTS OF THE MISSOURI ENERGY DEVELOPMENT ASSOCIATION

COMES NOW the Office of the Public Counsel and for its Response to Initial Comments of Missouri Energy Development Association (MEDA) states as follows:

1. Public Counsel's[1] biggest concern with the Commission's *ex parte* rules is that some have interpreted them as allowing a private, pre-filing briefing to explain to commissioners issues that the Commission will be called upon to decide. MEDA recognizes that this concern has led to a re-examination the Commission's *ex parte* rules, and ultimately to this case. Public Counsel and MEDA agree that any outcome of this case that does not clarify whether such communications are allowed (and if so, under what circumstance and pursuant to what strictures) falls short of the mark. Nonetheless, Public Counsel disagrees with much of what MEDA argues in its May 14 filing. In particular, this response will address MEDA's defense of such pre-filing meetings, and its discussion of public statements regarding pending matters.

2. MEDA's first "guiding principle" (at page 5 of MEDA's initial comments) appears to be designed to ensure that MEDA members can continue to lobby Commissioners about an impending matter until the matter is formally filed. Nothing in Section 386.210 RSMo

[1] Public Counsel is not alone in having this concern. The petition for a rulemaking in AX-2008-0201 was jointly filed by representatives of all of the usual consumer-side interests.

Cumm. Supp. 2006 even contemplates, much less encourages, such actions. MEDA accurately reproduces Section 386.210.1 RSMo 2000, which states:

> 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.

But MEDA states that, pursuant to this very statute, the Commission must "continue to … [have a] free flow of information … [from] regulated utilities" if no case is pending. MEDA deliberately inserts "regulated utilities" where the legislature deliberately omitted them. The statute allows communication with: 1) members of the public; 2) public utility commissions and similar commissions; and 3) state and federal officials and agencies. That's it. Regulated utilities are not on the list.

3. Section 386.210.4 also neither contemplates nor encourages such pre-filing discussions. Section 386.210.4 is expressly limited to "communications [that] 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…." [Emphasis added.] There are **two** requirements for a "free exchange" pursuant to Section 386.210.4: 1) the communication **must be** about "general regulatory policy;" and 2) the communication **must not be** about specific matters in a pending case. Utility executives – or consumer representatives or any other party – explaining specific issues that will be raised in an upcoming case do not qualify, because they are not "communications [that] relate to matters of general regulatory policy." There is simply no statutory support for private, undisclosed pre-filing briefings. If a party believes that Commissioners must be briefed before a case is filed, such briefings must be done in public and the Commission's rules should so require. In some rare instances, there may be legitimate

reasons (such as SEC concerns) why a pre-filing briefing cannot be public. And there may be a small subset of these rare instances in which the public interest is served by a non-public briefing.[2] To address those rare instances, the Commission's rules should require that any such non-public briefing be recorded and then made available to parties as soon as a case is filed (or sooner, if possible).

4. The second of the points raised by MEDA to which Public Counsel must respond is MEDA's discussion of public statements regarding pending matters. MEDA cites to 4 CSR 240-4.020 as the controlling authority over communications by attorneys involved in particular Commission matters. This rule is in large measure a restatement of portions of Rule 4-3.6 of the Rules of Professional Conduct. Indeed 4 CSR 240-4.020 begins with the acknowledgement that it is taken from the Code of Professional Responsibility (now referred to as the Rules of Professional Conduct):

> (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….

The commentary to Rule 4-3.6 is particularly helpful in determining how strictly a gag rule should apply in the context of a Commission case concerning public utility matters:

> [1] It is difficult to strike a balance between protecting the right to a fair trial and safeguarding the right of free expression. Preserving the right to a fair trial necessarily entails some curtailment of the information that may be disseminated about a party prior to trial, particularly where trial by jury is involved. If there were no such limits, the result would be the practical nullification of the protective effect of the rules of forensic decorum and the exclusionary rules of evidence. On the other hand, there are vital social interests served by the free dissemination of information about events having legal

[2] In most instances, the public interest would be best served by having the Commission learn about the issues in the case through filings and on-the-record communications during the case rather than through secret pre-filing briefings.

consequences and about legal proceedings themselves. The public has a right to know about threats to its safety and measures aimed at assuring its security. It also has a legitimate interest in the conduct of judicial proceedings, particularly in matters of general public concern. Furthermore, the subject matter of legal proceedings is often of direct significance in debate and deliberation over questions of public policy.

…

[3] Rule 4-3.6 sets forth a basic general prohibition against a lawyer's making statements that the lawyer knows or should know will have a substantial likelihood of materially prejudicing an adjudicative proceeding. Recognizing that the public value of informed commentary is great and the likelihood of prejudice to a proceeding by the commentary of a lawyer who is not involved in the proceeding is small, the rule applies only to lawyers who are, or who have been involved in, the investigation or litigation of a case and their associates.

[4] Rule 4-3.6(b) identifies specific matters about which a lawyer's statements would not ordinarily be considered to present a substantial likelihood of material prejudice and should not in any event be considered prohibited by the general prohibition of Rule 4-3.6(a). Rule 4-3.6(b) is not intended to be an exhaustive listing of the subjects upon which a lawyer may make a statement, but statements on other matters may be subject to Rule 4-3.6(a).

[5] There are, on the other hand, certain subjects that are more likely than not to have a material prejudicial effect on a proceeding, particularly when they refer to a civil matter triable to a jury, a criminal matter, or any other proceeding that could result in incarceration. These subjects relate to:

(1) the character, credibility, reputation, or criminal record of a party, suspect in a criminal investigation, or witness, or the identity of a witness, or the expected testimony of a party or witness;

(2) in a criminal case or proceeding that could result in incarceration, the possibility of a plea of guilty to the offense or the existence or contents of any confession, admission, or statement given by a defendant or suspect or that person's refusal or failure to make a statement;

(3) the performance or results of any examination or test, or the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;

(4) any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration;

(5) information that the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and that would, if disclosed, create a substantial risk of prejudicing an impartial trial; or

(6) the fact that a defendant has been charged with a crime, unless there is included therein a statement explaining that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty.

> [6] Another relevant factor in determining prejudice is the nature of the proceeding involved. Criminal jury trials will be most sensitive to extrajudicial speech. Civil trials may be less sensitive. Non-jury hearings and arbitration proceedings may be even less affected. Rule 4-3.6 will still place limitations on prejudicial comments in these cases, but the likelihood of prejudice may be different depending on the type of proceeding.

Clearly the relevant test of whether a public statement should be prohibited is whether it would "materially prejudice[e] an adjudicative proceeding." Equally clear is the recognition that the type of proceeding affects both the public interest in information about the proceeding and the possibility of materially prejudicing the proceeding. Comment [6] lists a partial hierarchy of types of cases in which prejudice could occur. This hierarchy does not even get down to the level of administrative cases tried before expert administrative bodies; there is little risk of material prejudice in such proceedings. And as utilities continue to seek frequent rate increases, the public interest in utility matters continues to rise. Public Counsel believes that the Commission's current rules on public statements, illuminated by the commentary to the Rules of Professional Conduct, are entirely adequate and need no revisions.

WHEREFORE, Public Counsel respectfully requests that the Commission accept this Response to Response to Initial Comments of Missouri Energy Development Association, and proceed with evaluating and making changes to its rules.

Respectfully submitted,

OFFICE OF THE Public Counsel

By: **/s/ Lewis R. Mills, Jr.**

Lewis R. Mills, Jr. (#35275)
Public Counsel
P O Box 2230
Jefferson City, MO 65102
(573) 751-1304
(573) 751-5562 FAX
lewis.mills@ded.mo.gov

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been emailed to the General Counsel of the Commission this 27th day of May 2009.

General Counsel
Missouri Public Service Commission
200 Madison Street, Suite 800
P.O. Box 360
Jefferson City, MO 65102
GenCounsel@psc.mo.gov

Kevin Thompson
Missouri Public Service Commission
200 Madison Street, Suite 800
P.O. Box 360
Jefferson City, MO 65102
Kevin.Thompson@psc.mo.gov

/s/ Lewis R. Mills, Jr.