BEFORE THE MISSOURI 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

SUPPLEMENTAL COMMENTS OF THE MISSOURI ENERGY DEVELOPMENT ASSOCIATION

The Missouri Energy Development Association (MEDA), on behalf of itself and its members,[1] submits the following comments concerning the draft ethics rules submitted by the Missouri Public Service Commission's (Commission) consultant, Hinshaw and Culbertson, LLP (Hinshaw) on September 11, 2009.

Context and Background

On March 3 of this year, the Commission opened this working docket to serve as a repository for documents relating to the ethics review project that Hinshaw was retained to complete. Since this working docket was opened, Hinshaw has filed a number of documents, including two different draft rules, one filed on June 3, 2009 and one filed on September 11, 2009. MEDA has actively participated in this workshop docket, including by filing Initial Comments in this docket on May 14, 2009 and by

[1] Union Electric Company, d/b/a AmerenUE, Kansas City Power & Light Company (KCPL), The Empire District Electric Company, KCPL Greater Missouri Operations, Laclede Gas Company, Missouri Gas Energy, Atmos Energy Corporation and Missouri-American Water Company.

attending the two public meetings held by the Commission in relation to Hinshaw's work, the most recent of which was held on September 22, 2009.[2]

While a rulemaking under Chapter 536, RSMo. has not been initiated, the Commission has requested written comments on the September 11 version of the Hinshaw draft rules, asking that any such written comments be filed by September 29, 2009. These Comments, and the redlined draft rule attached hereto,[3] are being submitted by MEDA in response to the Commission's request.

In providing these Comments and the specific revisions reflected in the attached redlined draft, MEDA reiterates its view that possible changes to the Commission's ethics rules (which are sometimes referred to in these Comments as the "Chapter 4 rules") must consider three guiding principles, as follows:

1. *Any revisions must preserve the concept that a vigorous and robust exchange of ideas and information is critical to the formulation of sound public policy* – this concept was amplified in comments filed by Commissioner Jarrett in Case No. AO-2008-0192, where he recognized that "[r]egulators need a healthy dialogue with utilities, the public, customers, and other interested parties.";

2. *Any revisions must be equally applicable to all parties* – this concept was echoed by Commissioner Clayton in his concurring opinion respecting the Commission's Order Denying Motion to Dismiss in Case No. EM-2007-0374[4] ("[A]ll parties should be equally treated with regard to all communications and dealings with Commissioners.");

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[2] MEDA also actively participated in earlier dockets (Case Nos. AO-2008-0192 and AX-2008-0201), which also dealt with the Commission's ethics rules, and more specifically, with communications with the Commission.

[3] The redlined draft rule attached hereto shows suggested improvements to the September 11, 2009 Hinshaw draft rule. For convenience, a clean version of the draft rule that includes MEDA's suggested revisions to the Hinshaw draft is also attached to these Comments.

[4] Case No. EM-2007-0374 is the Great Plains Energy/Aquila, Inc. merger case out of which the initial review of the Commission's Chapter 4 rules arose.

3. *Any revisions must make a meaningful distinction between adjudicative (i.e., contested cases as used in the Hinshaw draft rule) and the Commission's general regulatory role, which is legislative in nature*.

These Comments are also informed by the Commission's thoughtful analysis contained in its Order Denying Motion to Dismiss (and also by Chairman Clayton's concurring opinion related thereto) in the aforementioned Great Plains/Aquila case.

In general terms, the latest Hinshaw draft is structured in a manner that is consistent with guiding principles 2 and 3, and that, with clarifying but important revisions, can be made consistent with guiding principle 1.

Discussion of the Suggested Revisions to the Hinshaw Draft

Any changes to the Chapter 4 rules that are adopted must ensure that the information Commissioners as regulators need to effectively perform their difficult and complex jobs can in fact be obtained by them in the course of their day-to-day duties. Any rules that are adopted must be very clear about what communications can, or cannot take place, and also about any required notices. This clarity is essential so that we do not see a repeat of recent instances where it appears quite clear that litigants used the lack of clarity in the existing Chapter 4 rules as a strategic tool to attempt to advance the parochial interests of their own clients, without regard to the greater public interest about which the Commission, as regulator, must be concerned.[5] This clarity is also essential to remedy the existing situation where important communications that should be occurring are not occurring. Any changes to the Chapter 4 rules that are

[5] Any changes to the Chapter 4 rules that are adopted should avoid creating the opportunity for parties to raise legal arguments about Commission communications that are, in the Commissions own words, "at best incomplete and at worst misleading," and should avoid creating the opportunity for parties to seek commissioner disqualification based upon "conclusory statements, fractionated legal precepts and innuendo . . .." *Order Denying Motion to Dismiss*, Case No. EM-2007-0374, p. 1.

adopted must also recognize the unique role of a commissioner, who is not a judge but rather exercises administrative powers delegated by the Legislature,[6] and who, as the courts and the Commission itself have recognized, are expected to have a level of knowledge about the facts of a particular case that a member of the judicial branch would not have.[7]

While MEDA believes the Hinshaw draft was intended to achieve these objectives, it can benefit from and needs additional clarity. Also, certain potential inconsistencies in the Hinshaw draft must be removed because those inconsistencies themselves contribute to a lack of clarity. The attached redline is MEDA's attempt to provide that additional clarity, while remaining faithful to the guiding principles listed above and also to the courts' and the Commission's prior statements on the issues that

[6] *See State ex rel. Missouri Southern R. Co. v. Pub. Serv. Comm'n*, 168 S.W. 1156 (Mo. 1914), wherein the Missouri Supreme Court construed the very nature and authority of the Commission in an early rate case initiated shortly after the Public Service Commission law was enacted. With regard to the nature of the Commission, the Supreme Court had this to say, which makes clear that Commissioners are not judges, and thus are not subject to the same standards that apply to judges: "In this state all judicial power is vested in the courts (section 1, art. 6, Const.) and legislative power is vested in the general assembly (section 1, art 4, Const.). So respondent [the Commission] claims only administrative powers. That claim is justified." *Id.* at 1164. Indeed, even when rates are set, the Commission does not exercise judicial power, but rather, acts in a legislative capacity, as stated by the Missouri Supreme Court in *State ex rel. Kansas City et al v. Pub. Serv. Comm'n*, 228 S.W.2d 738 (Mo. 1950) ("The Public Service Commission is not a court and it has *no judicial power*. The orders which it issues are not judgments or adjudications. It has been described as an `administrative arm' of the Legislature. In approving or fixing rates of public utilities which come under its supervision, it exercises a *legislative power"* (emphasis added)).

[7] "`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.'" *Id.* (*quoting Fitzgerald v. City of Maryland Heights*, 796 S.W.2d 52, 59 (Mo. App. 1990)). Moreover, it is only when an administrative decisionmaker has "made an unalterable prejudgment of operative adjudicative facts" that an administrative decisionmaker is considered biased such that the administrative hearing at issue becomes unfair. *Id.* (*quoting Fitzgerald*, 796 S.W.2d at 59).

have been raised regarding communications with the Commission. What follows is a discussion of the changes reflected in MEDA's redline of the Hinshaw draft rule.

Definitions

MEDA recommends deleting three of the eight definitions, as follows:

- the definition of a "discussed case," because that definition is unnecessary and potentially confusing;
- the definition of "general regulatory policy," because the language in the statute from which that definition was taken has, where appropriate, been incorporated into the definitions of "ex parte communication" and "extra record communication;" and
- the definition of "anticipated party," because that definition is not necessary given the clarifications discussed below, which make clear that an "ex parte communication" can only occur while a contested case is pending.

MEDA has also expanded the definition of "person," to ensure that groups or entities that are often interested in or parties to Commission cases are in fact covered by the rule.

With respect to the remaining definitions, MEDA suggests the following three basic changes to the definitions of "ex parte communications" and "extra record communications," none of which materially alter the meaning of those terms but simply clarify what was initially drafted by Hinshaw: [8]

- First, because the "hearing process" does not include other meetings of the Commission where the merits of a contested case may be addressed (such as an Agenda meeting), MEDA recommends including the language

[8] MEDA is also suggesting a couple of other minor edits that are in the nature of grammatical changes, and has also addressed a concern raised about the potential narrowness of the term "agent" by broadening the language to include a "representative" of a party as well.

"or outside a properly noticed meeting of the commission" in both definitions.

- Second, as the comments at the last public meeting made clear (and as had been suggested by Chairman Clayton as well), the definition of "ex parte communication" should only apply to a contested case (not an anticipated contested case). In fact, the very nature of the term "ex parte" requires that a communication occur between a *party* and an adjudicator – there are no "parties" until a contested case is in fact pending. Consequently, references to an "anticipated contested case" should be removed from the definition of "ex parte communications."

- Third, the reference to "general regulatory policy" was incomplete, because it omitted the language in Missouri Revised Statute § 386.210.4 that follows that phrase. Moreover, for the reasons discussed earlier, clarity in the rules is critically important, which is why MEDA suggests making absolutely clear, by explicit statement, that communications that do <u>not</u> address the merits, specific facts, evidence, claims or positions presented or taken or that are reasonably likely to be presented or taken do not fall within the terms of the rule.

Substantive Provisions

<u>Sections (1) and (2)</u> remain unchanged, except to again make clear that an ex parte communication can only take place in a contested case (while an extra record communication, which includes an ex parte communication, can occur prior to the initiation of the contested case).

MEDA has clarified and supplemented <u>original Section (3) to</u> achieve the critically important clarity about communications that are permissible that is necessary for the rules as a whole, as discussed earlier. This makes clear the kind of communications that need to take place without restriction because they are central to the Commission's day-to-day administrative role and entirely or almost entirely fall outside a discussion of the merits, specific facts, evidence, claims or positions in a contested case, in addition to other communications not on the list enumerated in Section (3) that are permitted

because they do not concern the merits, specific facts, evidence, claims or positions in a contested case and thus do not fall within the definitions of "ex parte communication" or "extra record communication" at all.

This Section also ensures that communications regarding purely procedural matters (that do not involve scheduling that could harm other parties' interests) can occur, and also puts the Staff on equal footing with utilities in terms or over-earnings complaint cases or another investigation that could materially affect the finances of the party under investigation, while also otherwise preserving the Staff's investigative functions.

With respect to Section (4), MEDA has added language to clarify that an extra record communication does not become "disqualified" from potentially becoming a part of the evidentiary record in a contested case just because the communication was made outside the record.[9] Instead whether it becomes part of the evidentiary record will depend upon whether a party properly offers it into evidence and whether the Commission admits it into evidence.

Regarding Section (5), MEDA has clarified that this provision could only come into play if an ex parte communication that should not be taking place at all ends up taking place. MEDA has also removed the potentially confusing "discussed case" definition. Finally, MEDA has substantially supplemented the information that must be filed if an ex parte communication occurs. MEDA's language requires great specificity, including the substance of the communication, the date and time it occurred, its location and duration, the identification of all participants, and a specification of how the

[9] This addresses a concern raised by Commissioner Gunn at the September 22, 2009 meeting.

communication took place. This information will provide any party who has concerns about the communication having taken place with all information needed to conduct any further discovery needed to ensure that those who were not party to the communication are afforded all process that is due respecting the communication. MEDA has also included this same level of disclosure with respect to extra record communications regarding anticipated contested cases – see Section (6). Effectively, this approach would require a detailed disclosure of communications concerning an "anticipated contested case" that occur within 30 days of a filing and that it be made within a very short period of time (five business days) after the matter becomes a formal proceeding. This is similar to the Federal Communications Commission "permit but disclose" practice. Such an approach eliminates the need to anticipate filing dates and to manage artificial "black-out" periods while providing for the necessary transparency and due process interests of all parties.

MEDA's changes to Sections (8) and (9) are self-explanatory.

Chairman Clayton's Comments

The Commission's September 22 Order solicited comments regarding the draft ethics rules, and referred to the Hinshaw draft. However, Chairman Clayton has himself submitted some suggested edits to the Hinshaw draft, some of which were discussed during the September 22 meeting held at the Commission's offices. Consequently, MEDA addresses the Chairman's edits herein.

As noted earlier, the Chairman properly recognized that an ex parte communication, by definition, only occurs during a contested case, and MEDA has

incorporated edits that are the same as or similar to those submitted by the Chairman respecting this issue.

For several reasons, MEDA disagrees with the Chairman's other substantive suggestion, that is, the Chairman's suggested Section (11), which imposes unique requirements on larger utilities. As noted earlier in these Comments, the Chairman has stated that "[A]ll parties should be equally treated with regard to all communications and dealings with Commissioners."[10] Moreover, the Commission has stated (in an Order joined in by the Chairman) that the assertion that "utility companies have access to Commissioners not available to ratepayers and thus undue influence over the Commission is a flat misrepresentation."[11] Moreover, in the same Order the Commission stated that the "communications" [occurring before the subject case was filed] between the Commissioners and corporate executives were fully authorized and sanctioned by Missouri's General Assembly …."[12] Section (11) is inconsistent with all of these statements, and in fact is inconsistent with the guiding principles outlined near the beginning of these Comments.

Section (11) is problematic for many reasons, including as follows:

- Not only does it not apply equally to all parties, but it does not even apply equally to all utilities.[13]
- It is discriminatory because it (*see* subsection c) singles out utilities as opposed to, for example, the Public Counsel, or a large industrial group that may be comprised of several large, national or multi-national

[10] *Commissioner Clayton's Opinion and Response to Public Counsel's Motion to* Dismiss, Case No. EM-2007-0374, p. 9.
[11] *Order Denying Motion to Dismiss*, Case No. EM-2007-0374, p. 19.
[12] *Id.*, p. 17.
[13] While Section (11) does not reflect good policy, if it did, it would reflect good policy whether the utility had 7,999 customers or 8,001 customers.

companies (e.g., Anheuser-Busch, Boeing, Monsanto; Praxair, A.G. Processing), or other ratepayer interests such as large retailers (e.g., Wal-Mart, Best Buy).

- It essentially prohibits (except at a commission agenda or during a hearing) the very kinds of communications that have been sanctioned by the Missouri General Assembly to occur outside an agenda or hearing, and which the Commission needs to have to do its day-to-day job. As such, it is an unlawful restriction on the practices of the Commission and the parties to its proceedings.[14] This is cumbersome, impractical, unnecessary, and unwise. All one needs to do is look at some of the kinds of communications listed in Section (3) of MEDA's attached mark-up of the Hinshaw draft rule to see the practical problems with confining a myriad of normal, important communications related to the Commission's administrative dues to formal hearings or agenda sessions.

- It in fact would essentially gut the definition of an extra record communication for large utilities during the prescribed 60-day period, and presumably any time a large utility has a contested case pending. With respect to rate cases, it would effectively turn the rate case process (that is already typically 11 months long – longer than most jurisdictions) into at least a 13-month process.

- It is impractical for other reasons, including as follows: Cases of the type listed will most of the time involve a material event that would require public disclosure under applicable federal securities laws if anticipated parties (e.g., large customer groups who normally participate in a utility's rate or other large cases) are advised of the filing in advance. If those anticipated parties are not advised, then the notice provisions that Section (11) contemplates would not, as a practical matter, apply because they would be unaware of the potential case. There are also often important business and financial reasons why public disclosure of the fact that a case may be filed later would be harmful to the utility's (and ultimately, in many cases, its customers') interests. Moreover, the utility is not always sure if it will in fact file a particular case, or when. For example, a utility contemplating a transaction might not know whether Commission approval will even be needed until the final structure of the transaction is solidified, but that point in time may not come in time to comply with the 60-day

[14] *See, State ex rel. Springfield Warehouse & Transfer Company v. Public Service Commission*, 225 S.W.2d 792, 793 (Mo. App. 1979). [The Commission has no power to adopt a rule, or follow a practice, which results in nullifying the expressed will of the General Assembly.]

> notice provision. Or, circumstances could change respecting a potential case that requires that it be filed earlier than expected, or not filed at all. Or that case could be delayed, which in turn may trigger the need to make more public disclosures, which could confuse or concern the investing public to the detriment of the utility and ultimately its customers.

In summary, the Chairman's proposed Section (11) should not be adopted for the reasons outlined above.

Conclusion

MEDA agrees that revised Chapter 4 rules can achieve the important objective of ensuring the integrity of the Commission's role in contested cases, while also providing the clarity that utilities, customers, other stakeholders, and the Commission itself needs respecting the myriad of communications that are necessary in order for each commissioner to perform the difficult and complex task of serving on the Commission. Revising the suggestions to the Hinshaw draft rule to include the revisions reflected in the attached MEDA mark-up will achieve that important objective, will be consistent with the guiding principles listed earlier in these Comments, and will also be consistent with the Commission's prior orders when the Commission has needed to deal with allegations of improper communications in contested cases.

MEDA appreciates the opportunity to provide these Comments.

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 29TH day of September, 2009, to the following:

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