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	)	Case No. ER-2009-0089
Service to Implement its Regulatory Plan.	)	

RESPONSE TO MOTION TO RECUSE

COMES NOW the Missouri Energy Development Association ("MEDA"), by and through counsel, and respectfully responds as follows regarding the Motion to Recuse filed on behalf of intervenors Praxair, Inc. and the Midwest Energy Users' Association ("Industrial Intervenors"). MEDA seeks to file this response herein although MEDA is not a party to this proceeding, because the incredibly misguided premise underlying the pleading and request for relief contained therein has implications well beyond the confines of the subject rate case proceeding.

1. Viewed most charitably, the Industrial Intervenors' motion seeks to effectively hamstring the Missouri Public Service Commission ("Commission") in the performance of its statutory duties, including one of the most important aspects of those duties – the gathering of information. Viewed more realistically, the Industrial Intervenors' motion seems designed to bully and intimidate at least one commissioner and, by extension, all commissioners, from participating as decision makers in cases before the Commission. Such an outcome is not only prejudicial to the interests of the Commission as an institution, but also comes dangerously close to being a violation of the very rules that the Motion to Recuse is allegedly based on – rules which prohibit parties from attempting to sway the Commission by bringing undue pressure or influence to bear outside of the hearing process. *See* 4 CSR 240-4.020(4).

2. It is MEDA's understanding, based upon filings in this case, that at approximately 9:15 a.m. on February 3, 2009, Commissioner Davis sent an e-mail communication to Wess Henderson, Executive Director of the Commission, asking two questions regarding return on equity and off-system sales for calendar year 2007 for Kansas City Power & Light Company ("KCPL").

3. At the Commission agenda meeting on May 19, 2005, the Commissioners voted to name Wess Henderson as Executive Director. Contrary to the assertion of the Industrial Intervenors, it is MEDA's understanding and belief that Mr. Henderson is not the "Executive Director of the Commission's independent Staff." (*See* Motion to Recuse, ¶1) Instead, it appears that Mr. Henderson is the Executive Director *of the Commission*. Like Commissioner Davis, Mr. Henderson is part of the Executive Division of the Commission.

4. The purpose of Commissioner Davis' information request was not stated, and one cannot read the mind of Commissioner Davis and discern the use, if any, to which he intended to put the requested information. What is known, however, is that the list of issues for the subject rate case is not even due to be filed until April 10, 2009, and that, in the e-mail communication from Commissioner Davis, he stated that he would file a notice in the event Mr. Henderson was of the belief that the requested information may relate to issues in the rate case.

5. It is MEDA's understanding, based upon filings in this case, that less than five hours after the initial e-mail communication was sent by Commissioner Davis, Mr. Henderson sent an e-mail communication to Commissioner Davis with information regarding KCPL. This communication indicates that the information was obtained from a surveillance report previously submitted to the Commission by KCPL. Monthly surveillance reports and annual reports containing a wealth of information on the reporting utility are submitted to the Commission as

part of the Commission's ongoing obligation to monitor the operations of public utilities subject to its jurisdiction.[1]

6. On the same date of the initial communication, February 3, 2009, Commissioner Davis prepared a Notice of *Ex Parte* Contact regarding the e-mail communications discussed above. This Notice of *Ex Parte* Contact was filed in EFIS in Commission Case No. ER-2009-0090 (a companion case), with notification sent to all parties in said case, on February 3, 2009, at approximately 4:35 p.m. A similar Notice of *Ex Parte* Contact was filed in the subject rate case (ER-2009-0089) on February 17, 2009.

7. Direct testimony was filed by the Staff of the Commission in the subject rate case on February 11, 2009. The evidentiary hearing in this proceeding is scheduled to begin on April 20, 2009. Staff filed direct testimony in Case No. ER-2009-0090 on February 13, 2009, and the evidentiary hearing in that matter is scheduled to begin on May 11, 2009. To MEDA's knowledge, Mr. Henderson has not filed any testimony in the subject proceeding, nor in Case No. ER-2009-0090, and does not intend to be a witness in either proceeding.

8. The Industrial Intervenors point to Commission Rule 4 C.S.R. 240-4.020 and the prohibition against a Commissioner making, inviting, or knowingly entertaining any "prohibited *ex parte* communication" during "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." The Industrial Intervenors, however, fail to demonstrate how Commissioner Davis made, invited, or knowingly

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[1] Commission Rule 4 C.S.R. 240-3.190 contains certain reporting requirements for electric utilities, and subsection (7) of the Rule states that the reports filed pursuant to this Rule, surveillance reports such as are referenced in Mr. Henderson's e-mail, shall be subject to the provisions of RSMo. §386.480. This statute reads as follows (emphasis added): "No information furnished <u>to the commission</u> by a corporation, person or public utility, except such matters as are specifically required to be open to public inspection by the provisions of this chapter, or chapter 610, RSMo, shall be open to public inspection or made public except on order

entertained any <u>prohibited</u> *ex parte* communication. In fact, subsection 4 of §386.210, RSMo., also cited to by the Industrial Intervenors, and, according to the Industrial Intervenors, a statute which is consistent with the Commission Rule, specifically states that any prohibition on commissioner communications shall not "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."[2]

9. There was simply no <u>prohibited</u> communication. First, Commissioner Davis communicated with the Commission's Executive Director – another person belonging to the Commission's Executive Division. He did not solicit or receive information from "members of the public, any public utility or similar commission" as is contemplated by RSMo. §386.210; and he did not solicit or receive information from "any party or counsel or agent of a party" as is contemplated by 4 C.S.R. 240-4.020. Second, even assuming that the statute and rule apply in this instance, Commissioner Davis sought information relating to "general regulatory policy" – not information addressing "the merits of the specific facts, evidence, claims, or positions

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of the commission, or by the commission or a commissioner in the course of a hearing or proceeding.

[2] The Industrial Intervenors state that 4 C.S.R. 240-4.020 is consistent with §386.210, but, if one were to erroneously construe §386.210 as precluding commissioners from soliciting any information from the Staff or other parties once an evidentiary hearing has been scheduled, then one could argue that this statutory provision is violated each time a question is asked by a commissioner at an evidentiary hearing. The statute makes no distinction between a request for information that is made during the course of the evidentiary hearing and a request that has been made for information prior to the evidentiary hearing. MEDA does not believe, of course, that commissioner questions posed at evidentiary hearings violate the statute, but that is the very kind of absurd and completely untenable result that flows from the legal posture taken by the Industrial Intervenors.

presented or taken in a pending case." As noted, the specific issues to be heard in the subject rate case are not even known at this time, with the evidentiary hearing scheduled to begin more than two months after the date of the subject communications between Commissioner Davis and Mr. Henderson. Moreover, the mere request that factual information be provided, particularly where such a request is made without the expression of any opinion or even the solicitation of a opinion as to the relevance, meaning or significance of the information, can hardly be construed as a communication that "addresses the merits" of anything, let alone an issue before the Commission. Third, Mr. Henderson's response to Commissioner Davis contained information which had previously been provided to the Commission by KCPL, as required by the Commission's rules, and was available to Commissioner Davis.[3] Apparently, Commissioner Davis prepared his Notice of *Ex Parte* Contact out of an abundance of caution.

10. In fact, the approach taken by Commissioner Davis in this instance appears to have been exceptionally respectful of the integrity of the Commission's litigation process as well as the due process rights of all parties to be apprised of the facts, issues and contentions that may arise during the course of an evidentiary hearing. The information sought by Commissioner

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[3] It should be noted that RSMo. §386.240 provides that the commission may authorize any person employed by it to do or perform any act, matter or thing which the commission is authorized to do or perform. Moreover, the suggestion that it was improper for Commissioner Davis to exercise this power begs the question of exactly what information a commissioner may obtain when a contested case is pending and an evidentiary hearing has been scheduled. Would it have been impermissible for Commissioner Davis to ask a Staff member to retrieve and provide him with the case file from KCPL's last general rate case proceeding or run out portions of the record from EFIS that are available to anyone with a computer? Would it have been unlawful for him to have the Staff procure a copy of KCPL's annual and very public SEC filing or any of the other intermittent SEC filings that are regularly made by public companies, including utilities. Should Staff be banned from providing commissioners with copies of Electric Perspective, Gas Daily, Public Utilities Fortnightly, and other industry publications because there is always some case before the Commission that might have issues that are directly or indirectly touched upon in such publications? Just how rigid and complete is the barrier between commissioners and information regarding the world they regulate supposed to be? And how on

Davis did not, on its face, address the merits of any issue, was asked and disclosed to all parties months in advance of the evidentiary hearing so that any party would have a reasonable opportunity to review it and, assuming that mere statements of fact can be rebutted, challenge the information during the evidentiary hearing. Given these considerations and given the inquisitive role that commissioners have come to regularly and routinely take in evidentiary hearings held before them, it is simply ludicrous to argue that the approach taken by Commissioner Davis in this instance was not proper.[4]

11. The Industrial Intervenors also point to the Judicial Canons as a basis for their Motion to Recuse. As noted by the Industrial Intervenors, Missouri courts have held that officials occupying quasi-judicial positions should be held to the same high standard as is applied to judicial officers with regard to being "free of any interest in the matter to be considered" and not being "a judge of his own cause." *See State ex rel. Union Electric Company v. Public Service Commission*, 591 S.W.2d 134, 137-38 (Mo.App. W.D. 1979).[5] MEDA, however, is aware of no court decision or other authority which holds that the actual Judicial Canons, in part or in whole, are applicable to the Commission and/or the Commissioners. Instead, the *Union*

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earth does enforced ignorance of that world contribute to the Commission's ability to formulate informed and sound public policy?

[4] The current hearing process allows individual commissioners to ask virtually unlimited questions during evidentiary hearings, all of which are presumably designed to elicit factual information or opinions that have not previously been provided in either the parties' testimony or as a result of cross-examination. At times, this current practice results in parties to Commission hearings responding and reacting to new information with virtually no opportunity to thoughtfully consider the issues, let alone conduct discovery or rebut any factual errors or erroneous opinions that may have been provided. In contrast to this current practice, the information sought by Commissioner Davis did not, on its face, address the merits of any issue, was disclosed to all parties months in advance of the evidentiary hearing so that any party would have a reasonable opportunity to review it and, assuming that mere statements of fact can be rebutted, challenge the information during the evidentiary hearing.

[5] In *Union Electric*, it was held that Alberta Slavin, a member of the Commission, should not participate in a certain proceeding involving the rate design for Union Electric due to the fact that Slavin had acted on behalf of a party (Utility Consumers Council of Missouri, Inc.) in a

Electric court held that members of the Commission "may not act in cases pending before that body in which they are interested or prejudiced or occupy the status of a party." *Id.* at 139. The court also held that, absent a legislative procedure for disqualification of a member of the Commission, "the courts will exercise their power to disqualify a member of the Commission upon a showing that a member is a party to a pending case, or is interested or prejudiced in the case." *Id.* (emphasis added) Quite obviously, Commissioner Davis is not a party to the rate case proceeding, and there has been no showing that Commissioner Davis has an impermissible interest in the case and/or is prejudiced for or against any party to the case.

12. Pursuant to RSMo. §386.250, the Commission has jurisdiction over "all public utility corporations and persons whatsoever" subject to the provisions of Chapter 386, and, pursuant to §393.140, the Commission has "general supervision" over all electrical corporations. Further, the Commission shall examine or investigate the methods employed in manufacturing, distributing and supplying electricity and shall take certain actions to promote the public interest, preserve the public health, and protect utility customers. Section 393.140 further provides that the Commission shall examine all persons and corporations under its supervision and keep informed as to the methods, practices, regulations and property employed by them in the transaction of their business. Section 386.130 also gives each commissioner the explicit power to hold or conduct any investigation, inquiring or hearing that the entire Commission would be entitled to hold or conduct. These rights and obligations of the Commission – and its Commissioners – are not to be disregarded or stayed because of the filing of a rate case or the scheduling of a hearing in a contested case. Commissioner Davis acted in conformity with the general rights and obligations imposed upon him by law with respect to regulated utilities in

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related case. The facts present in *Union Electric* certainly are not present here.

Missouri, and he was well within his rights to seek the requested information regarding KCPL from the Executive Director of the Commission.

WHEREFORE, the Missouri Energy Development Association respectfully files its response to the Motion to Recuse filed on behalf of intervenors Praxair, Inc. and the Midwest Energy Users' Association. The motion is without merit, and, it appears, is nothing more than a misguided and intemperate attempt to both hinder and sensationalize the Commission's rate-making process.

Respectfully submitted,

/s/

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CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing document was sent by electronic transmission to all counsel of record on this 18th day of February, 2009.

/s/