

**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI**

In the Matter of a Working Case Regarding)	
Amendments to the Commission's Ex Parte)	Case No. AW-2016-0312
and Extra-Record Communications Rule)	

**INITIAL COMMENTS OF THE
MISSOURI ENERGY DEVELOPMENT ASSOCIATION**

COMES NOW the Missouri Energy Development Association ("MEDA"), and on behalf of itself and its members¹ submits the following initial comments.

By order dated June 8, 2016, the Commission invited comments of interested parties concerning possible revisions to the Commission's current *ex parte* and extra record communication rule (4 CSR 240-4.020). MEDA is pleased to have the opportunity to present its initial views on how the Commission's standard of conduct rules and conflict of interest policies might be improved. These initial comments are intended to provide the Commission and other participating stakeholders with MEDA's view on three overarching principles that MEDA believes should govern any revisions to the existing standards. Additionally, MEDA will offer its preliminary views on the discussion draft of new code of conduct rules attached to the Commission's initial order in this case.

The need to preserve Commission access to information.

The first principle that MEDA believes should be followed and evaluating any potential revisions in this area is the long-standing notion that a vigorous and robust exchange of ideas and information is absolutely critical to the formulation of sound public policy. In the context of this proceeding, this means that any rule changes should allow for free communication among

¹ MEDA's member companies participating in this docket consist of Union Electric Company, d/b/a Ameren Missouri, Kansas City Power & Light Company (inclusive of KCP&L Greater Missouri Operations), The Empire District Electric Company, Laclede Gas Company, Missouri Gas Energy, Missouri-American Water Company, Liberty Utilities and Summit Natural Gas.

commissioners, the Missouri Public Service Commission's staff ("Staff"), public utilities and anyone else to the extent that such communication does not address a pending contested case.

The Missouri General Assembly has made it clear that such communications are not prohibited, but instead encouraged. Specifically, §386.210.1 RSMo (Supp. 2013) provides that:

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 any other states in 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. 2013) provides:

Such communications may address any issue that at the time of such communication is not subject of a case that has been filed with the commission.

Similarly, §386.210.4 RSMo (Supp. 2013) provides:

Nothing in this section or any other provision of the 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.²

The free exchange of information contemplated by the Missouri Legislature is absolutely essential if the Commission is to properly discharge its duties. If the Commission is to effectively carry out its complex regulatory responsibilities on a reasonably well-informed basis, it must have access to input from the public, to the expertise of Staff and to the views of customer groups and utilities that are directly affected by its decisions. Similarly, it is essential that commissioners remain free to attend seminars, NARUC meetings and other, similar forums

² Subsection 3 provides different standards for communications involving pending cases.

so as to facilitate understanding of the difficult and evolving issues faced by regulators across the country and to compare ideas with regulators from other jurisdictions. It is also important that commissioners remain free to discuss issues with other stakeholders, including utilities, public advocates, and large industrial customers – so long as those communications do not address non-procedural issues that are the subject of a pending contested case.

This statutory endorsement of open and free communications that has been entrusted to the Commission's jurisdiction is part and parcel of the breadth and scope of the Commission's regulatory responsibilities and the tools the Commission needs to carry out those expansive responsibilities in a well-informed way. Those who would contend that commissioners should act and conduct themselves just like judges in a court of law misapprehend the powers and duties of the Commission which, by and large, are exercised on a forward-looking basis akin to legislation. It also shows a lack of faith in the independence and trustworthiness of the commissioners to objectively and without bias gather information, attend meetings and have discussions with various stakeholders in order to obtain that necessary background and familiarity with the ever evolving and complex world of utility regulation.

Need for parity in the application of the code of conduct rules

A second overarching principle that MEDA believes should be followed involves the need to insure parity in the formulation and application of any requirements governing communications between commissioners and participants in the regulatory process. In other words, should the Commission determine that restrictions on communications need to be imposed (to insure fairness in a pending proceeding, for example), then such restrictions must be imposed equally on all parties appearing before the Commission. This is a matter of fundamental fairness and due process.

Exclusion for rulemaking and other generic proceedings

Another overarching principle is that any restrictions the Commission adopts should continue to recognize the distinction between contested cases and rulemaking, and other generic, proceedings. Due in large part to the Commission's own arguments before the courts of this state, it has been recognized that the Commission exercises quasi-legislative powers when it engages in rulemaking and that the full range of procedural protections afforded in contested hearings do not apply. *State ex rel. Atmos Energy Corporation v. Public Service Commission*, 103 S.W.3d 753, 759-760 (Mo. App. 2003). Like the legislature, the Commission should therefore not be restricted from communicating with stakeholders when it formulates policies of general applicability during the rulemaking process or when it takes up matters concerning bills introduced in the Missouri General Assembly, or discusses issues that are not the subject of a pending contested case.

Preliminary comments concerning the Discussion Proposal

MEDA's initial observations about the discussion draft of revised rules (proposed rules 4 CSR 240-4.015 through .050)³ governing party conduct will be very general at this early stage of the proceeding. It is anticipated that workshop discussions will follow and there will be an opportunity to offer or respond to specific language proposals for the Commission's consideration before it issues a notice of proposed rulemaking for formal comment. Instead, MEDA will offer its views on whether the Discussion Proposal filed in this case is in line with the three principles noted above.

³ Hereinafter, the "Discussion Proposal."

The Discussion Proposal, if adopted, would be a significant improvement over the current code of conduct rules. It properly recognizes and effectively applies the supremacy of the public policy embodied in §386.210 RSMo. *See*, 4 CSR 240-4.015(6) and (7). In its specifics, the Discussion Proposal makes a meaningful distinction regarding the integrity of the record in a contested case and the need for a robust discussion of public policy issues in a more generic, policy-based context or developments that are not the subject of a contested case. These distinctions are in complete accord with the standards set forth in §386.210, RSMo.

MEDA applauds the even-handedness of the application of the rules to all parties in contested proceedings. This is a much needed and long overdue change from the current rule which fails to achieve a proper balance. While the current rule echoes some of the same terms used in §386.210 RSMo., it in practice unfairly restricts the communications of utility representatives while permitting other participants to freely share their views with the Commission. *See*, 4 CSR 240-4.020 (8) and (9). There is no principled reason to apply one standard to utility conduct in a contested case, or any other context, and a different standard to any other party in the same proceeding.

MEDA also supports the implicit distinction in the Discussion Proposal between adjudications (contested cases), rulemakings and workshops (non-contested cases). Language in a revised rule to make this distinction more explicit may be desirable so that the conduct rules are clear. To reiterate, quasi-legislative activities should not be subject to the same restrictions on communication as in contested cases. The Commission should not be held in an isolation unit and prevented from obtaining an understanding of the context surrounding complicated issues, hearing different viewpoints and generally gaining knowledge, especially in the context of broader regulatory policy matters.

Importantly, the structure of the Discussion Proposal is superior to that of the current rule in that it is simpler, better organized and easier to understand. The current rule is difficult to navigate and, by virtue of its complexity, smothered reasonable and necessary dialogue. A previous General Counsel of the Commission actually found it necessary to create a decision-tree to explain the workings of the rule to the utility bar. If it is necessary to refer to an instruction sheet to comply with a rule, the rule needs to be rewritten.

Without limitation, MEDA offers the following thoughts on certain specific elements of the discussion proposal.

(1) With respect to the proposal to extend the period for filing a notice of intended case filing from sixty (60) to ninety (90) days, there is no explanation for the change, and no apparent reason why the 60-day period has not been sufficient. More fundamentally, the Commission should consider whether it is necessary or appropriate to delay a party's right to initiate a case by imposing a notice period which could be perceived as an infringement on the rights of utilities of file tariffs or rate schedules as provided by law. If the purpose of the notice is to provide a buffer against *ex parte* communications that might occur during the period immediately preceding the filing of a case, MEDA suggests that the goal can be achieved by other means such as requiring a party to submit a declaration with its filing stating that it has not discussed the matter with any commissioner during a specified, reasonable time period or disclosing the nature of communications that have occurred that might bear in the merits of the filing.

(2) The Commission wisely proposes to retain a section dealing with safe harbors (4 CSR 240-4.040). The Discussion Proposal only identifies four categories whereas the current rule contains nine circumstances. While the Discussion Proposal's provisions on general regulatory policy may bridge the difference, further discussion is warranted to insure that the Commission

receives relevant and important information from utilities on a timely basis such that the commissioners do not find themselves surprised, first reading about consequential events in tomorrow's paper.

In summary, MEDA believes the Discussion Proposal provides a positive starting framework for a change to the Commission's code of conduct rule. MEDA and its member companies look forward to discussing these topics with the Staff, Public Counsel and other interested parties.

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, or facsimile on the 22nd day of August, 2016, to the following:

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