BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of Proposed Amendments	)	
to the Commission's Ex Parte	)	Case No. AX-2017-0128
and Extra-Record Communications Rule	)	

COMMENTS OF THE
MISSOURI ENERGY DEVELOPMENT ASSOCIATION

COMES NOW the Missouri Energy Development Association ("MEDA"), and on behalf of itself and its members[1] submits the following initial comments.

On December 30, 2016, the Commission caused to be published in the Missouri Register a group of proposed rules[2] which, collectively, will supersede current rule 4 CSR 240-4.020 concerning *ex parte* and extra-record communications. The proposed rules provide for the filing of written comments by February 2, 2017. MEDA is pleased to have the opportunity to present its comments on how the proposed rules represent an improvement over the Commission's current standard of conduct rules and how they may be made to better reflect the principles set forth in the controlling statute (§386.210 RSMo.).

These comments will first provide the Commission with MEDA's view on three overarching principles that MEDA believes should govern any revisions to the existing rule. Additionally, MEDA will offer its views on how the proposed rules can be made to comport with the standards enacted by the Missouri General Assembly.

[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 (inclusive of MGE), Missouri-American Water Company, Liberty Utilities and Summit Natural Gas.
[2] 4 CSR 240-4.015, 4.017, 4.020, 4.030, 4.040 and 4.050.

I. The need to preserve Commission access to information.

The first principle that MEDA believes should be followed in the adoption of the proposed rules 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. Any rule changes should allow for free communication among commissioners, the Missouri Public Service Commission's staff, public utilities and anyone else to the extent that such communication does not address matters being considered in 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.[3]

[3] Subsection 3 provides different standards for communications involving pending cases.

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 input from the public, the advice of subject-matter experts on Staff and 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 so as to facilitate understanding of the difficult and evolving issues faced by utility regulators across the country and to share and 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 only like judges in a court of law misapprehend the powers and duties of the Commission which, by and large, are also 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.

II. 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 ensure 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 ensure 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.

III. 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 in a fair and impartial manner 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.

IV. Comments concerning the proposed rules

The proposed rules, if adopted, would be a significant improvement over the current code of conduct rule that would be rescinded. Importantly, the structure of the proposed rules is

superior to that of the current rule in that they are simpler, better organized and easier to understand. The current rule is difficult to navigate and, by virtue of its complexity, smothers reasonable and necessary dialogue.

The proposed rules better recognize and more effectively apply the supremacy of the public policy embodied in §386.210 RSMo., except for the notice provisions of Section 4.017(1) and the associated use of the term "noticed contested case," as defined in Section 4.015(8), all as discussed below. Other than these provisions, the definitions of "ex parte communication" and "extra-record communication" in 4 CSR 240-4.015 make a meaningful implicit 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 of developments that are not the subject of a contested case. These distinctions are in general accord with the standards set forth in §386.210, RSMo.

While MEDA supports the distinction implicit in the proposed rules between adjudications (contested cases) and 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 isolate itself and be 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.

MEDA applauds the more even-handedness application of the proposed rules to all parties in contested proceedings. This is a much needed and long overdue change from the current rule which completely fails to achieve a proper balance. While the current rule echoes

some of the same terms used in §386.210 RSMo., in practice it unfairly restricts the communications of utility representatives while permitting all 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.

The critical exception to the improvements of the proposed rule over the current rule is proposed rule 4 CSR 240-4.017. Proposed rule 4.017(1) not only retains the current unfair and unlawful sixty (60) day pre-filing notice requirement for an anticipated contested case[4], but it would add a 90-day reach-back disclosure requirement for prior communications. It is unnecessary or inappropriate to delay a party's right to initiate a case by imposing a notice period because it can be fairly perceived as an infringement on the statutory rights of utilities to file tariffs or rate schedules as provided by law. *See*, §393.150 RSMo., (Supp. 2013).

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 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 of time prior to the filing or, alternatively, disclosing the nature of communications that have occurred that might bear on the merits of the filing. A disclosure period of 30-60 days should be adequate.

[4] The Missouri Constitution grants to citizens *the right to petition their government for redress of grievances*. **Mo. Const.** Art. 1 §9 (*emphasis added*). Further, pursuant to Section 14 of Article 1 of the Missouri Constitution, "right and justice shall be administered without sale, denial or *delay*. (*emphasis added*). Consistent with those fundamental rights, the Supreme Court of Missouri found unconstitutional a procedural precondition to access the courts. ***State ex rel. Cardinal Glennon Memorial Hospital v. Gaertner***, 583 S.W. 2d 107, 110 (Mo. banc 1979). MEDA asserts that the notice period imposes an arbitrary delay of its members' right to access the Commission and for that reason is unauthorized by law.

For the foregoing reasons, MEDA suggests that the Commission eliminate section (1) of the proposed rule 4.017 other than to include a general requirement for disclosure by a filing party with respect to any communications about substantive issues within a reasonable (i.e., 30 to 60 day) timeframe prior to the date of filing. This should be accompanied by a corresponding change to proposed rule 4 CSR 240-4.015 by removing the subsection (8) definition for the term "noticed contested case" and all other references to the term throughout the proposed rules. These changes would also comport with and further the objectives of the Governor's Executive Order 17-03, requiring agencies to consider less restrictive alternatives when adopting regulations.

The proposed rule at 4 CSR 240-4.040 does not include the specific safe harbor communication exclusions found in the current rule at 4 CSR 240-4.020(10)(A). The existing safe harbors have not been controversial or problematic in practice. If these communications are not prohibited by or subject to the disclosure and notice requirements of the proposed *ex parte* rule according to the general provision at 4 CSR 240-4.017(4), an explicit listing may not be necessary. Otherwise, the Commission should consider including specific categories of communications that are not subject to the restrictions contained in the proposed rules as currently is the case.

Respectfully submitted,

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