BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of a Review of the Missouri Public Service Commission's Standard of Conduct Rules and Conflicts of Interest Policies.	)))	Case No. AO-2008-0192

INITIAL 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:

INTRODUCTION

On December 13, 2007, the Chairman of the Commission initiated this proceeding by issuing an order scheduling on January 7, 2008, a Roundtable Discussion to consider potential enhancement of the Commission's Standard of Conduct Rules and Conflicts of Interest policies. The order required that notice of this proceeding be provided to various entities, and that any prepared statements, comments and presentation materials be filed by January 3, 2008. On December 19, 2007, the Regulatory Law Judge assigned to this proceeding issued a second order that clarified, among other things, that materials concerning this docket may be submitted at any time before, during or after the Roundtable Discussion, and that materials filed prior to the Roundtable Discussion need not follow any particular format.

MEDA is pleased to have the opportunity to present its views on how the Commission's Standard of Conduct Rules and Conflict of Interest Policies might be improved, and plans to participate, along with its members, in the Roundtable Discussion

[1] MEDA's member companies consist of Union Electric Company, d/b/a AmerenUE, Kansas City Power & Light Company, The Empire District Electric Company, Aquila, Inc., Laclede Gas Company, Missouri Gas Energy, Atmos Energy Corporation, and Missouri-American Water Company.

scheduled for January 7. These initial comments are intended to provide the Commission and the other participating stakeholders with MEDA's view on three (3) over-arching principles that MEDA believes should govern any revisions to the existing standards. MEDA anticipates that it will be in a position to provide more specific comments and suggestions on behalf of its members during and after the Roundtable Discussion.

NEED TO PRESERVE COMMISSION ACCESS TO INFORMATION

The first principle that MEDA believes should be followed in evaluating any potential revisions in this area is the long-standing concept 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 continue to allow for free communication among commissioners, the Commission's staff ("Staff"), the public, utilities and anyone else, *to the extent that such communication does not address a pending case*. The Missouri General Assembly has made it clear that such communications are not prohibited, but instead encouraged. Specifically, Section 386.210.1 RSMo. (Supp. 2006) provides:

> 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.

Section 386.210.2 RSMo (Supp. 2006) provides:

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

Similarly, Section 386.210.4 RSMo (Supp. 2006) provides:

> Nothing in this section or any other provision of 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. In MEDA's view, if the Commission is to fully understand and manage the complexities of utility regulation, it must have access to input from the public, to the expertise of its Staff, and to the views of customer groups and utilities that are directly affected by its policy initiatives and decisions. Similarly, it is essential that commissioners remain free to attend seminars, NARUC meetings and other, similar venues so as to enhance their understanding of the difficult and evolving issues that they must address each day, 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 case.

This statutory endorsement of open and free communications on matters that have been entrusted to the Commission's jurisdiction is part and parcel of a larger legislative recognition of the breadth and scope of the Commission's regulatory responsibilities and the tools the Commission's needs to carry out those expansive responsibilities in an intelligent and informed way. Those who would contend that commissioners should act and conduct themselves just like judges in a civil case misapprehend the different powers and duties of the Commission and do a disservice to both the Commission and the public

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

interest. Unlike a judge presiding over a discrete dispute involving private parties, utility commissions have sweeping and ongoing regulatory jurisdiction over the utilities they regulate, ***Borron v. Farrenkoph,*** 5 S.W.3d 618, 624 (Mo. App. W.D. 1999), including powers that are both quasi-judicial and quasi-legislative in nature. And to exercise those powers effectively and fairly, commissioners must educate themselves on a wide variety of matters affecting the utilities they regulate.

Indeed, in a recent essay, Scott Hempling, the Executive Director of the National Regulatory Research Institute – an affiliate of NARUC – wrote that to be an effective regulator, a commissioner must also be an educated regulator. To do so, the regulator must necessarily amass and digest a huge assortment of industry- and state-specific information on a wide variety of topics, including market structure, pricing, quality of service, physical adequacy of utility facilities, financial structure characteristics and corporate structure issues. Among other things, this means learning what companies are present in a particular industry, what services they sell, at what prices and under what corporate structure, their relevant performance characteristics, their infrastructure and capabilities, the financial conditions within each company and across each industry, and what agencies have jurisdiction over which players and activities.

According to Mr. Hempling, the educated regulator must also gain an understanding of the substantive and constitutional sources and parameters of his or her authority as well as an appreciation for how the actions of other regulatory agencies, whether they be agencies charged with regulating land use, tax, labor, or financial matters, intersect with utility regulation. Moreover, all of these information data points must be constantly updated to reflect rapidly changing market, industry and economic

conditions. The ability to exchange information freely on such matters is absolutely essential to meeting these informational needs of an effective, educated regulator.

Other parties may argue that there should be no communication between the commissioners and any party that might appear before the Commission regarding any issue or matter that might ultimately become the subject of some contested case in the future. MEDA recognizes that some additional requirements or clarifications respecting communications may be appropriate in certain circumstances, provided that such modifications are consistent with enabling legislation.[3] Any wholesale prohibition on discussing matters that might eventually emerge as an issue before the Commission, however, would not only conflict with existing statutes, but also place the commissioners in a cocoon and completely deprive them of the information they need to do their job. Although such an approach might be more convincingly argued for a judge in a civil case, commissioners' day-to-day roles in public utility regulation are far different, and far more dependent on information provided by their Staff, customer advocates, utilities, and members of the public. Cutting off the flow of information among these parties would significantly diminish the ability of the Commission to regulate utilities in Missouri in an informed and effective manner and should not be seriously considered.

NEED FOR PARITY IN APPLICATION OF RULES

A second over-arching 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 it is necessary and

[3] The Commission has no power to adopt a rule, or follow a practice, which results in nullifying the expressed will of the General Assembly. ***State ex rel. Springfield Warehouse & Transfer Company v. Public Service Commission***, 225 S.W.2d 792, 793 (Mo. App. 1949).

appropriate to impose new restrictions on such communications (to ensure fairness in a pending proceeding, for example), then such restrictions must be imposed equally on all parties appearing before the Commission.

Such a result is mandated by the fact that such restrictions would normally be imposed in circumstances where fundamental due process considerations or other similar concerns require that any exchange of information only be done in a manner where all of the procedural protections and safeguards normally afforded by a contested hearing are observed. Since those procedural protections and safeguards undeniably flow to all parties in a contested case, it is clear that where utilities are prohibited from discussing issues with commissioners, Staff, the Office of the Public Counsel ("Public Counsel"), representatives of various utility customer groups, and others must likewise be subject to the same prohibitions.

EXCLUSION FOR RULEMAKING PROCEEDINGS

A third over-arching principle is that any restrictions that the Commission adopts should continue to recognize the distinction between contested cases and rulemaking 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 a contested hearing context do not apply. ***State ex rel. Atmos Energy Corporation v. Public Service Commission***, 103 S.W.3d 753, 759-760 (Mo. banc 2003). Like the legislature, the Commission should therefore not be restricted from communicating with stakeholders when it properly formulates policies of general applicability during the rulemaking process.

Finally, MEDA would note that it disagrees with certain aspects of the revisions to the Commission's rules that were recently proposed by Public Counsel and others, primarily because they violate the over-arching principles described above. MEDA and its members will provide more specific comments if and when the Commission initiates a rulemaking proceeding to consider those proposed revisions.

Respectfully submitted,

Missouri Energy Development Association

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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 3rd day of January, 2008, to the following:

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