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

RESPONSE TO PUBLIC COUNSEL'S MOTION TO STRIKE AND REPLY REGARDING PUBLIC COUNSEL'S RESPONSE

COMES NOW the Missouri Energy Development Association ("MEDA"), by and through counsel, and respectfully responds as follows to the Motion to Strike MEDA Filing, or in the Alternative, Response to MEDA Filing and Response in Support of Motion for Recusal filed herein on February 24, 2009 by the Office of the Public Counsel ("Public Counsel"), all with regard to the Motion to Recuse filed herein on February 13, 2009, on behalf of intervenors Praxair, Inc. and the Midwest Energy Users' Association ("Industrial Intervenors").

As indicated in its original filing, MEDA filed its response regarding the Industrial Intervenors' Motion to Recuse, although not a party to this proceeding, because the misguided premise underlying the Motion to Recuse has implications well beyond the confines of the subject rate case proceeding. As noted, the Industrial Intervenors' motion seeks to effectively hamstring the Commissioners in the performance of their statutory duties, including one of the most important aspects of those duties – the gathering of information. The parties seeking and supporting the recusal of a Commissioner herein are, in effect, seeking to strip the Commission of its general regulatory and policy-making functions and relegate the Commission to an adjudicative-only body, ignoring the fact that the Commission's powers are derived solely by delegation from the General Assembly, the paramount policy making body of this state. Public Counsel's February 24th filing, and the gross misstatements contained therein, make it clear that MEDA was justified in making its filing in an effort to support the well established regulatory

process. Although MEDA may not have an interest in the *subject rate case proceeding* which would warrant intervention herein as a party under the Commission's rules, MEDA has a clear interest in the issues addressed in the Industrial Intervenors' Motion to Recuse.

Response to Motion to Strike

Public Counsel seeks to have MEDA's filing stricken because MEDA is not a party to the subject rate case proceeding. The unique procedural circumstances presented here, however, are such that the general conventions (i.e., that filings be limited to parties to a proceeding) should not apply. The Industrial Intervenors' Motion to Recuse sought no relief from the Commission. Instead, it was directed at only one Commissioner and sought individual action on the part of that Commissioner. Additionally, MEDA's filings herein certainly cannot be construed as an attempt to put "evidence" into the record. MEDA's filings contain no sworn factual testimony, no request for relief, nor even a suggestion that any particular action be taken by the Commission.

Just as a member of the public may testify at a public hearing or submit a written comment, MEDA should be permitted in this circumstance to respond to the Industrial Intervenors' Motion to Recuse in the manner it has, particularly in view of the general importance of the issue presented. The alternative, for which the Public Counsel surely does not advocate, would be for MEDA to submit its response to the Motion to Recuse directly to the individual Commissioners, without making a public filing in the subject rate case.

Reply to Public Counsel's Response to MEDA Filing

The majority of Public Counsel's response consists of counterarguments to statements which, in fact, were not made by MEDA in its original filing. For example, in paragraph four of its filing, Public Counsel states that MEDA "mischaracterizes the Executive Director as being part of the Commissioners." MEDA, however, made no such assertion. Instead, MEDA, in

paragraph three of its original filing, stated that "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." In paragraph nine of its original filing, MEDA also stated that "Commissioner Davis communicated with the Commission's Executive Director – another person belonging to the Commission's Executive Division." MEDA felt comfortable relying upon the Commission's website in this regard.[1] Also, as noted in MEDA's original filing, 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. The suggestion that it was improper for Commissioner Davis to exercise this power and obtain factual information involving a regulated utility begs the question of exactly what information a Commissioner may obtain when a contested case is pending and an evidentiary hearing has been scheduled. Public Counsel fails to explain how enforced ignorance contributes to the Commission's ability to formulate informed and sound public policy.

Next, in paragraph five of its filing, Public Counsel states that MEDA made the assertion that a prohibited *ex parte* contact under RSMo. §386.210 "cannot occur until after the list of contested issues is filed." Again, Public Counsel plays fast and loose with the facts, as MEDA

[1] The webpage relied upon by MEDA for the statement that Mr. Henderson is part of the Executive Division of the Commission is attached hereto as Exhibit A. In its filing, however, Public Counsel states that "(n)one of the PSC organizational charts group the Executive Director with the Commissioners." Public Counsel provided four attachments in this regard. Not one of these documents, however, appears to indicate that the Executive Director is part of something other than the Executive Division. In fact, one of the webpages cited to by Public Counsel in footnote one of its pleading describes Executive Director Henderson as the person who directs the "work product of the Missouri Public Service Commission." The webpage also describes Mr. Henderson as being responsible for **the agency's** strategic planning and serving as the "liaison between the commissioners and staff." In contrast, the same webpage describes Bob Schallenberg as the Director of the Utility Services Division – the Division whose employees "express their conclusions and findings in the form of expert testimony and recommendations filed with the commission." The subject webpage is attached hereto as Exhibit B.

made no such assertion. Instead, in paragraph four of its original filing, MEDA noted that one cannot "read the mind of Commissioner Davis and discern the use, if any, to which he intended to put the requested information." MEDA continued by noting that 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." Later in its original filing, MEDA also asserted that, assuming §386.210 and 4 C.S.R. 240-4.020 apply to the situation at hand, Commissioner Davis sought information relating to "general regulatory policy" – not information addressing "the merits of the specific facts, evidence, claims, or positions presented or taken in a pending case." As noted, subsection 4 of §386.210 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 . . ."

Public Counsel's third mischaracterization of MEDA's arguments is contained in paragraph seven of Public Counsel's filing with regard to the filing of surveillance reports. As noted, 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 are at issue, 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 of the commission, or by the commission or a commissioner in the course of a hearing or proceeding." It would be preposterous to argue that the Commissioners do not have access to these surveillance reports – reports submitted to the Commission, through its Staff, to allow the Commission, through its Staff, to properly monitor and regulate Missouri utilities.

Next, Public Counsel argues that obtaining factual information from the Executive Director and preparing an *ex parte* notice the very same day may not be likened to Commissioner questions from the bench. In this regard, Public Counsel argues that questions from the bench are "on the record." Similarly, in the instant situation, however, the e-mail communication to Mr. Henderson and the responsive e-mail communication from Mr. Henderson are filed in the case, and any party may seek to have the same made a part of the evidentiary record. Public Counsel argues that with questions from bench, opposing counsel can object and cross-examine the witness. Similarly, any party may ask a witness in the case about rate of return on equity and off-system sales for calendar year 2007 for Kansas City Power & Light Company. In fact, given the stage of the case, there is still plenty of time to seek discovery regarding the issues.

As noted in paragraph ten of MEDA's original filing, 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 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, [2] it is simply ludicrous to argue that the approach taken by Commissioner Davis in this instance was not proper.[3]

Public Counsel next turns to the Slavin case and argues that if "one aspect of the judicial canons applies, they all should apply." The holding of the Slavin case – *State ex rel. Union Electric Company v. Public Service Commission*, 591 S.W.2d 134 (Mo.App. W.D. 1979) – is quite clear.[4] 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." *Id.* at 137-139. 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.* The standards set out in the Slavin case apply herein, and these standards certainly have not been violated by

[2] 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.

[3] Additionally, as noted in MEDA's original filing, 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.

[4] 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 related case.

Commissioner Davis making a request for factual information from the Commission's Executive Director and providing notice of the same the very same day.

Public Counsel's next mischaracterization of MEDA's arguments is contained in paragraph ten of Public Counsel's filing, wherein Public Counsel incorrectly states that MEDA argued that the Commission's general powers "are not constrained *in any way*" by the filing of a rate case or the scheduling of a hearing. (emphasis added) MEDA made no such statement. Instead, MEDA, at paragraph 12 of its initial filing, argued that the "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." Of course, MEDA acknowledges that certain *ex parte* contacts are prohibited and that an interest of a Commissioner may qualify him or her for disqualification under the standards set out in the Slavin case, but these circumstances are not present here, and the Commission's rights and obligations with regard to regulated utilities cannot be disregarded or wholly put aside upon the filing of a case or the scheduling of a hearing. Commissioner Davis acted in conformity with the general rights and obligations imposed upon him by law with respect to regulated utilities in Missouri, and he was well within his rights to seek the requested information regarding KCPL from the Executive Director of the Commission.

Lastly, in paragraph 11 of its filing, Public Counsel argues that a violation of §386.210 or 4 CSR 240-4.020 warrants disqualification of a Commissioner, because any such violation is "sufficient to undermine trust in the process." First, there does not appear to be any such statutory or rule violation. Second, even if one were to assume a violation occurred because of the communication between Commissioner Davis and Mr. Henderson, a Commissioner will be disqualified only upon "a showing that a member is a party to a pending case, or is interested or

prejudiced in the case." *Union Electric*, 591 S.W.2d at 139. It is nonsensical to argue that a Commissioner seeking factual information from the Commission Staff is tantamount to a showing of an impermissible interest or prejudice.

WHEREFORE, the Missouri Energy Development Association respectfully makes this filing with the Commission.

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 26th day of February, 2009.

/s/