BEFORE THE PUBLIC SERVICE COMMISSION
STATE OF MISSOURI

In the Matter of a Proposed Rulemaking Regarding Ex Parte and Extra-record Communications	)))	File No. AX-2010-0128

COMMENTS OF THE MISSOURI ENERGY DEVEOPMENT ASSOCIATION

The Missouri Energy Development Association ("MEDA"), on behalf of itself and its members,[1] submits the following comments concerning the proposed rescission of Commission Rule 4 CSR 240-4.020 and replacement regarding *ex parte* and extra-record communications.

Introduction

In the context of this proceeding, the Missouri Public Service Commission ("Commission") proposes to take two coordinated actions. First, the Commission proposes to rescind its Rule 4 CSR 240-4.020 entitled "Conduct During Proceedings". Concurrently, the Commission proposes to adopt a new Rule 4 CSR 240-4.020 entitled "Ex Parte and Extra-Record Communications".

MEDA does not oppose a rulemaking that would put in place a new framework for addressing *ex parte* and extra-record communications along the general lines of what has been proposed by the Commission. MEDA does, however, believe the rule will need to be modified in several important respects before being adopted in order to conform it to the requirements of the Commission's enabling legislation. MEDA's general concerns are threefold.

[1] Union Electric Company d/b/a AmerenUE, Kansas City Power & Light Company, The Empire District Electric Company, KCPL Greater Missouri Operations, Laclede Gas Company, Missouri Gas Energy, Atmos Energy Corporation and Missouri-American Water Company.

First, the rule as proposed is impermissibly more restrictive than the enabling legislation embodied in § 386.210, RSMo (Supp. 2008) in that it would prohibit a category of communications expressly authorized by law. Second, the "safe harbor" categories set forth in subsection (4)(B) of the proposed rule are too narrow in scope to facilitate the necessary day-to-day communications with utilities in order to keep the Commission fully and timely informed of circumstances affecting the public and, additionally, the Commission will have exceeded its authority by imposing a public disclosure requirement on such communications. As such, the rule is inconsistent with the intent of § 386.210 RSMo (Supp. 2008). Third, the rescission of the existing Rule 4 CSR 240-4.020 would have the practical affect of eliminating certain needed prohibitions against parties and interested persons attempting to bring improper, outside influence to bear on the Commission, its Staff or the presiding officer. Specifically, Subsections (1) and (4) of the existing rule would be eliminated or substantially watered down.

The Ex Parte And Extra-record Communications Rule As Proposed Would Prohibit A Category Of Communications Expressly Authorized By § 386.210, RSMo (Supp. 2008)

Subsection 3 of § 386.210 RSMo provides as follows:

> Such communications [described in subsection 1] may also address substantive or procedural matters that are the subject of a pending filing or case in which no evidentiary hearing has been scheduled, provided that the communication:
>
> > (1) Is made at a public agenda meeting of the commission where such matter has been posted in advance as an item for discussion or decision;

> (2) Is made at a forum where representatives of the public utility affected thereby, the office of the public counsel, and any other party to the case are present; or
>
> (3) If made outside such agenda meeting or forum, is subsequently disclosed to the public utility, the office of the public counsel and any other party to the case in accordance with the following procedure:
>
> > (a) If the communication is written, the person or party making the communication shall no later than the next business day following the communication file a copy of the written communication in the official case file of the pending filing or case and serve it upon all parties of record;
> >
> > (b) If the communication is oral, the party making the oral communication shall no later than the next business day following the communication file a memorandum in the official case file of the pending case disclosing the communication and serve such memorandum on all parties of record. The memorandum must contain a summary of the substance of the communication and not merely a listing of the subjects covered.

Subsections (1) and (2) of the statute will be accommodated in the proposed rule.[2] Subsection (3) of the statute, on the other hand, has not been accommodated by the proposed rule. In other words, a communication addressing substantive or procedural matters that are the subject of a pending filing or case in which no evidentiary hearing has been scheduled and made other than in a public agenda meeting or other permitted forum are expressly authorized by the statute (so long as specific disclosures are made), but no such communication would be permitted by the language of the proposed rule. This would put the rule in conflict with the statute.

[2] *See*, §§ (4)(E) and (F).

The rule that is ultimately adopted by the Commission cannot restrict communications that are permitted by statute.[3] Consequently, MEDA proposes that a new subsection (4)(G) be added to read as follows:

> Communication concerning a case in which no evidentiary hearing has been scheduled made outside an agenda meeting or forum as contemplated by subsections (4)(E) and (4)(F), provided that:
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> > (1) If the communication is written, the person or party making the communication shall no later than the next business day following the communication file a copy of the written communication in the official case file of the pending filing or case and serve it upon all parties of record; or
> >
> > (2) If the communication is oral, the party making the oral communication shall no later than the next business day following the communication file a memorandum in the official case file of the pending case disclosing the communication and serve such memorandum on all parties of record.

The Proposed Rule's Safe Harbor Provisions Are Inadequate And The Associated Public Disclosures Are Not Authorized By Law

In the context of Case No. AW-2009-0313, MEDA proposed that the Commission specifically exclude from the definition of *ex parte* and extra-record communications the following categories of situational and informational communications:

i. An anticipated or actual interruption or loss of service or damage to or operational problems or incidents at a utility's facilities;

ii. Updates regarding efforts to restore service after an interruption or loss of service or regarding damage, operational problems or incidents at a utility's facilities;

iii. The security or reliability of utility facilities;

[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).

iv. Information regarding Federal Energy Regulatory Commission matters, including regional transmission organization-related matters or regional reliability organization-related matters;

v. Labor matters; and

vi. General information regarding utility operations, such as the status of utility programs, billing issues, security issuances, and publicly available information about the utility's finances.

The proposed rule includes some, but not all, of the safe harbor topics recommended by MEDA. The list of expressly excluded communications proposed by MEDA are reasonable in scope and should be adopted by the Commission. These are precisely the sort of day-to-day matters of which commissioners should be made aware without delays or obstacles. It is highly unlikely that they will be the subject of a "pending filing or case" as that phrase is used in §386.210 RSMo (Supp. 2008).

Additionally, the rule as proposed also imposes stringent disclosure requirements associated with each category of permitted communication which will have the practical effect of discouraging communications which are unrestricted by law.[4] Section 386.210 RSMo (Supp. 2008) only imposes a public disclosure requirement when communications occur with regard to substantive or procedural matters <u>that are the subject of a pending case.</u>[5] Imposing a mandatory public disclosure requirement beyond the circumstance set forth in the controlling legislation exceeds the Commission's statutory authority. The

[4] It does this by imposing subsection (6), (7) and (8) disclosure requirements on all Subsection (4)(A) and (4)(B) communications. *See*, Subsection (4), opening paragraph.
[5] *See*, § 386.210.3 RSMo.

Missouri General Assembly in 2003 established the ground rules where communications by and with the Commission are concerned and those standards may not be modified by the Commission even if the Commission believes the standards established by the General Assembly are too permissive. It is for the General Assembly to establish public policy where regulatory communications are concerned; not the Commission. The only thing left for the Commission to do is to conform its practices to the requirements of the law.

Attempting to impose a detailed public disclosure standard on communications which are permitted by law can have no other practical effect than to discourage the free flow of information envisioned by § 386.210 RSMo. The free flow of information is the default standard except as expressly prohibited or limited by law. The rule as proposed, by way of contrast, seems to have as its starting point the assumption that open lines of communications should be few and discouraged. Ultimately, this will only serve to isolate the Commission and its members and make development of utility policy less responsive and effective.

MEDA believes the adoption of the rule as proposed is not authorized by law. Additionally, it will serve only to hamstring the Commission and will make the job of each commissioner more complex and difficult. Rather them allowing the regulators to have ready and open access to information pertinent to their responsibilities, the rule if adopted in its current form will only serve to isolate them.

The Rule As Proposed Does Not Adequately Address Inappropriate Public Communications By Attorneys And Interested Persons

As noted in MEDA's initial comments in Case No. AW-2009-0313, inappropriate communications also can occur in the form of public statements by parties or their counsel. The existing rule ("Conduct During Proceedings") addresses these circumstances in Subsections (1) [restrictions on attorney comment] and (4) [restrictions on commentary by interested persons].

The proposed rule's Subsection (11) (E) is not an effective replacement for the existing rule's Subsection (1). Incorporation of the Missouri Code of Professional Conduct (specifically Rule 4-3.6 "Trial Publicity") is not an adequate substitute for the existing rule Subsection (1) because the guidelines differ. Civil Rule 4-3.6 is in several respects less restrictive than the Commission's rule and not entirely relevant to the nature of the Commission's proceedings as compared to general litigation in court.

Subsection (11)(E) of the proposed rule should be modified to read as follows:

> Comply with all the Missouri Rules of Professional Conduct, particularly in the following respects:
>
> (1) During the pendency of a proceeding before the commission, an attorney or law firm associated with the attorney shall not make or participate in making a statement, other than a quotation from or reference to public records, that a reasonable person would expect would be disseminated by means of public communication if it is made outside the official course of the proceeding and relates to any of the following:
>
> (a) Evidence regarding the occurrence of the transaction involved;

(b) The character, credibility or criminal record of a party, witness or prospective witness;

(c) Physical evidence, the performance or results of any examinations or tests, or the refusal or failure of a party to submit to examination or tests;

(d) His/her opinion as to the merits of the claims, defenses or positions of any interested person; and

(e) Any other matter which is reasonably likely to interfere with a fair hearing.

(2) An attorney shall exercise a reasonable care to prevent employees and associates from making an extra-record statement as the attorney is prohibited from making. [6]

The added language is identical to that already in place. It has worked reasonably well since the mid-1970's and nothing has come up in the various investigatory or workshop dockets that would indicate a change is needed at this time.

The elimination of Subsection (4) of the exiting rule is even more troubling. This effectively would "green light" conduct by parties having the conscious object of putting outside pressure on the Commission in order to influence the outcome of a contested case. The revocation of this conduct limitation would simply invite trial by dueling press releases and a circus atmosphere likely would attach to many of its cases. Certainly, parties should not be encouraged to engage in conduct outside the hearing process in order to influence the outcome of a contested case.

The Commission should include in the new rule, a new Subsection (12) that reads as follows:

[6] The suggested new language is underlined.

> It is improper for any person interested in a case before the commission to attempt to sway the judgment of the commission by undertaking, directly or indirectly, outside the hearing process to bring pressure or influence to bear upon the commission, its staff or the presiding officer assigned to the proceeding.

Again, this would simply serve to retain the existing conduct restraints.

Conclusion

MEDA has appreciated the numerous opportunities it has been given to comment upon the topic of *ex parte* and extra-record communications in this and a number of predecessor cases.[7] The proposed rule is the end product of a long process and, with only a few targeted (but necessary) modifications should provide a workable framework to address how the Commission can maintain a free flow of information between itself, the regulated industry and other interested parties in a manner consistent with the controlling law and principles of fairness and due process.

Respectfully submitted,

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[7] Case Nos. AO-2008-0192, AX-2008-0201 and AW-2009-0313.

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 21st day of January, 2010, to the following:

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/s/ Paul A. Boudreau___
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