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	)	Case No. ER-2009-0089
Certain Changes in its Charges for Electric	)	
Service to Implement its Regulatory Plan	)	

REPLY TO RESPONSES OF STAFF AND MEDA TO MOTION TO RECUSE

COME NOW Praxair, Inc. and the Midwest Energy Users' Association ("Industrial Intervenors") and for their Reply to the Responses of Staff, filed February 25, and the Missouri Energy Development Association ("MEDA"), filed February 26, respectfully state as follows:

RESPONSE TO STAFF

1. It is not surprising that the Commission's General Counsel, while claiming to represent the Staff, would attempt to ride in and provide justification for ***individual*** Commissioner Davis' unlawful conduct. The General Counsel's statutory duty is not to the Staff, but rather to represent ***the Commission***. Section 386.071 RSMo. 2000. Under that statute, the General Counsel's duties include:

a) Represent and appear ***for the commission*** in all actions and proceedings involving any question under this or any other law;

b) Commence and prosecute in the name of the state all actions and proceedings, authorized by law and directed or authorized ***by the commission***;

c) Advise the commission and each commissioner, when so requested, in regard to all matters in connection with the powers and duties of the commission; and

d) Perform all duties and services as attorney and counsel to the commission which ***the commission*** may reasonably require of him.

Recognizing that: (1) the General Counsel serves at the "pleasure of the Commission;" (2) the General Counsel's compensation is fixed by the Commission; and (3) the General Counsel's sole statutory responsibilities are to the Commission, it is apparent that his representation of the Staff (if appropriate at all), is purely ancillary to his role as attorney and counselor to the Commission. As such, where as here, the General Counsel portends to represent the Staff in a matter involving the questionable legal conduct of a commissioner while simultaneously representing the Staff in the pending contested case, one must necessarily ask who is the General Counsel truly representing? It would doubtless represent career suicide for an individual with these responsibilities to support a motion alleging illegal actions of a commissioner. Given the obvious and inherent conflict in these roles, one cannot truly claim that this position represents that of an objective counselor. Moreover, filing this response, apparently on behalf of either the Commission as a whole, or the Staff, while simultaneously continuing to represent a party-litigant before the Commission appears to us to have placed the General Counsel in an untenable ethical position that is ethically inconsistent with his continuation in either of those roles.[1]

2. Nevertheless, as one reads the Response filed purportedly on behalf of Staff, one is immediately struck with the question, to what motion was the Response responding? The Response claims that the Industrial Intervenors' Motion is "legally unsound,"[2] but never challenges the fundamental legal premise of the Industrial

[1] *State v. Planned Parenthood, et. al., 66 S.W.3d 16* (Mo. 2002).
[2] Staff Response at page 12.

Intervenors' Motion, that Commissioner Davis violated Section 386.210 and Commission Rule 4 CSR 240-4.020(6). The Response then claims that the Industrial Intervenors' Motion is "factually unsound"[3] because there is no showing of bias or prejudice. In fact, the Response asserts that Movants have claimed that Commissioner Davis' actions demonstrate bias and prejudice.[4] Again, it is unclear what Motion the Commission's General Counsel was reading, but nowhere in that Motion do the Industrial Intervenors claim bias or prejudice. This is clearly an example of Staff not liking the claims that they are attempting to rebut, therefore they will imagine a set of facts that they are better able to address.

3. The Response also claims that the Rules of Judicial Canons cannot possibly apply to the Commissioners. Specifically, the Response claims that "[a]s officers of the executive branch, the members of the Commission are ***necessarily*** subject to a set of rules other than the Canons of Judicial Ethics."[5] Such a statement is not only contradicted by the Responses' later proclamations, it also demonstrates a fundamental misunderstanding of the separation of powers doctrine as well as administrative law. For instance, if it is such an absolute legal tenet that judicial rules do not apply to executive employees, then how did we ever end up with the *Slavin* holding?[6] There, the court expressly found that at least one judicial canon, that a person cannot be their own judge, is applicable to "executive employees". This argument was ruled without merit some years ago.[7]

[3] *Id.*
[4] *Id.*
[5] *Id.* at page 3.
[6] *Union Electric Company v. Public Service Commission*, 591 S.W.2d 134 (Mo.App. 1979) ("Slavin").
[7] *Morgan v. United States*, 304 U.S. 1 (1938).

4. The Responses' legal theory is not only contradicted by <u>*Slavin*</u>, it is also contradicted by other statements in the Response. For instance, while claiming that the Canons of Judicial Ethics are "necessarily" not applicable to the Commission, the Response acknowledges that Commissioners ***<u>are bound</u>*** by certain requirements in those Canons. Specifically, Staff admits that judicial conduct requirements related to: (1) interest (Canon 3(E)(1)(b)); (2) prejudice (Canon 3(B)(5)); (3) bias (Canon 3(B)(5)); (4) status as a party (Canon 3(E)(1)(d)); and (5) impartiality (Canon 2) are in fact applicable. Further research reveals that other Canons must, at least, indirectly apply. For instance, Executive Order 92-05 clearly indicates that similar ethical standards related to: (1) the appearance of influence (Canon 2); (2) impartiality (Canon 2); (3) gratuities (Canon 4(D)(3); (4) political participation (Canon 5); (5) equal opportunity (Canon 3(B)(5) and (6)); and (6) applicability of statutes (Canon 2(A)) are applicable to executive agency employees. Thus, while stating unequivocally that that the Judicial Canons must "necessarily" not apply to the Commission, it is apparent that a vast majority of the Canons do actually apply. Given the applicability of all of these Judicial Canons, Commission General Counsel would nevertheless have us believe that canons related to *ex parte* communications must "necessarily" not apply to Commissioners. Commissioners are not free to "pick and choose" which canons are convenient for their purpose and which they can ignore. Ethics is not a buffet lunch.

5. The Responses' suggestion that Executive employees cannot be held to the same code of conduct as judicial officers also misperceives the doctrine of separation of powers and the law surrounding the creation of administrative agencies. As the Missouri Supreme Court has noted:

> The quintessential power of the judiciary is the power to make *final* determinations of questions of law. This *power* is a nondelegable power resting exclusively with the judiciary. The legislature "has no authority to create any other tribunal and invest it with judiciary power." Thus, while the legislature may allow for judicial or quasi-judicial decision-making by legislative or executive (administrative) agencies, it may not preclude judicial review of those decisions. Nor may the legislature alter the principal power of the judiciary to make the *final* review.[8]

Thus, while the Constitution allows for the creation of executive branch agencies operating in a judicial or quasi-judicial role, the exercise of such powers is ***always*** answerable to the judicial branch. One aspect imposed by the judicial branch on the executive use of judicial powers is the notion of procedural due process rights. Included in these due process rights is the guarantee of a fair and impartial decisionmaker.[9] Therefore, while the Commission acts as part of the executive branch, they are clearly subject to the judicial notion of procedural due process and the judicial branch's determination of what constitutes a fair and impartial decisionmaker. Thus, Staff's suggestion that "the members of the Commission are ***necessarily*** subject to a set of rules other than the Canons of Judicial Ethics," is not accurate. The Commission, at least so far as it exercises judicial powers, is always subject to judicial review and those procedural due process requirements that the judicial branch deems appropriate.

6. Ultimately, the applicability of the Judicial Canons is not critical to a disposition of the Industrial Intervenors' Motion. The prohibition against *ex parte* communications is not solely contained within the Judicial Canons, but is also expressly made applicable to the Commission through Missouri statute[10] and the Commission's

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[8] *Asbury v. Lombardi*, 846 S.W.2d 196 (Mo. banc 1993) (emphasis in original) (citations omitted).
[9] *See, Morgan v. U.S., supra.*
[10] Section 386.210.3.

own rules.[11] The Response has neither questioned the applicability of the statute or rule, nor has it challenged the Industrial Intervenors' allegation that Commissioner Davis, by his own admission, has violated both that statute and rule.

7. Finally, the Response appears to argue that, despite the admitted violation of both the statute and the rule, that no remedy is available. The Response claims that recusal is not dictated by either the applicable statute or the Commission's Rule. As such, Commission General Counsel apparently claims that this is an admitted wrong for which there is no remedy. Perhaps, the Response suggests that despite the obvious applicability of the statute and the rule, that the Commissioners are above the law and can repeatedly violate the statute or the rule with impunity. The Industrial Intervenors agree that recusal is not a prescriptive remedy under either the statute or the rule. That said, recusal has been recognized to be an appropriate remedy by the Code of Judicial Canons and would address the immediate concerns of the acknowledged unlawful conduct.[12] Recusal has also been employed by this and other commissioners in prior cases.[13]

8. In the absence of recusal, apparently the Response suggests that removal for misconduct in office, as provided by Section 386.060, is the only remedy to address this situation. Perhaps Commission General Counsel is suggesting that the appropriate approach is a complaint[14] so that the other members of the Commission, and ultimately a reviewing court, can determine whether Commissioner Davis' admitted actions have

[11] 4 CSR 240-4.020(6).
[12] See, Judicial Canon 3.
[13] *In re the Matter of the Acquisition of Aquila, Inc by Great Plains Energy*, Case No. EM-2006-0374.
[14] Section 386.390 clearly allows for any "person" to file a complaint against any "person" alleging any violation of "rule", "regulation", or "law". Noticeably, nothing exempts a sitting Commissioner from such a complaint. Of course, the process for such a complaint must provide for the due process guarantees, including applicable discovery rights, as provided in Section 536.070.

violated Section 386.210 or 4 CSR 240-4.020(6).[15] As a result of that complaint, the remaining members of the Commission could authorize the pursuit of statutory penalties.[16] Surely even Commission General Counsel would agree that recusal is a much cleaner, simpler and proportional remedy than the remedies actually provided by law.

RESPONSE TO MEDA

9. In its Response, MEDA claims that the Industrial Intervenors' Motion is "misguided." While claiming that the pleading is "misguided," MEDA focuses the majority of its attention on the implications of the requested recusal. MEDA claims that the recusal will "effectively hamstring the Commissioners in the performance of their statutory duties" and that the parties supporting the recusal seek "to strip the Commission of its general regulatory and policy-making functions."[17] Neither of these considerations can be addressed in the immediate matter. It is unquestioned, by Commissioner Davis' own admissions, that he has violated both Missouri statute and Commission rule. If MEDA believes that the statute and the rule effectively "hamstring" the Commission or "strip" the Commission of its "regulatory and policy-making functions," then it is incumbent upon MEDA to seek statutory and regulatory changes. Especially as it applies to the statutory language, the provisions of that statute are a matter for the consideration of the legislature and, even MEDA would admit, the Commission is powerless to modify

[15] Even Staff must admit, given the holding of the Slavin case, that Commissioner Davis could not participate in the consideration of such a complaint.
[16] See, Section 386.570, 386.590 and 386.600.
[17] MEDA Response, filed February 26, at page 1.

those statutory prohibitions. Until such changes are made, the Commissioners are bound by the provisions of that statute.[18]

10. In its pleadings, MEDA implies, if not expressly states, that the admitted communication does not constitute a prohibited *ex parte* communication because the recipient of the communication is the Commission's Executive Director Wess Henderson. MEDA's claim is based upon the Executive Director being part of the same work unit as the Commissioners themselves. MEDA's argument is only crafty semantics that ignore reality. To those that work within the Commission and its Staff, the issue of Mr. Henderson's duties is very clear. ***First***, despite having been apprised of this argument in MEDA's initial pleading, the Response filed by the Commission's General Counsel noticeably did not support the notion that Mr. Henderson does not direct the Staff. ***Second***, even Commissioner Davis' *ex parte* notice discloses his understanding that Mr. Henderson directs the Staff. Otherwise, his *ex parte* notice would have been unnecessary. Thus, it is clear to the Commission, the Staff, and even to the MEDA member utilities that communicate with Mr. Henderson on a daily basis that, while he may be part of the Commission's Executive Division, he operates on the Staff side of the divide.

[18] Industrial Intervenors doubt whether MEDA is truly concerned with the alleged implications of the *ex parte* rule on the Commission's statutory and regulatory duties. For instance, would MEDA support a more consumer-friendly commissioner discussing issues with non-parties, or is it only acceptable where a particular Commissioner has been very focal and supportive of the utilities agenda? One must wonder whether MEDA's approach is merely a short–term solution designed to save a particular Commissioner. The existence of this rule and its implications was made perfectly clear to MEDA's President when he was called to testify at a hearing on October 9, 2007 as to *ex parte* communications in a previous KCPL case. Ultimately, as a result of those *ex parte* communications, Commissioner Appling recused himself from participating in that case. Thus, MEDA has been intimately aware of the *ex parte* rule and its possible implications for almost 17 months. Nevertheless, in that time, MEDA has not suggested that a statutory or rulemaking change be made to limit the *ex parte* rule and prevent the negative implications it is alleged to have on the Commission's statutory and regulatory duties.

11. Given then, Mr. Henderson's role on the Staff, it is established that this is a prohibited *ex parte* communication. In 1987, the Commission considered a change to the definitions in 4 CSR 240-2.010.[19] One change would modify the definition of "party" to expressly include Staff. In that case, the same law firm which now represents MEDA argued on behalf of 13 large utilities stated that "[w]e believe it should be clearly stated that Staff and Public Counsel are 'parties' for purposes of the Commission's rules."[20] Ultimately, with the support of those utilities, the Commission modified its rule and included Staff as a party. Given that 4 CSR 240-4.020(6) prohibits a Commissioner from inviting or knowingly entertaining an *ex parte* communications with a party, the inclusion of Staff as a party had obvious implications. Nevertheless, the Commission, with the support of its regulated utilities, found that such a change was warranted. Today, MEDA argues, on behalf of many of the same utilities, that Commissioner communications with its Staff should not be prohibited. This schizophrenic attitude certainly undermines MEDA's arguments. That said, the rule and the law are very clear. If MEDA believes that changes are necessary, it is incumbent upon it to suggest such changes and not to merely argue for determinations on a case by case basis where it suits its constituents' interests.

WHEREFORE, the Industrial Intervenors renew their request that Commissioner Davis recuse himself from any further participation in this matter.

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[19] See, Case No. OX-87-166.
[20] *Id.*, comments filed on July 31, 1987.

Respectfully submitted,

Stuart W. Conrad, MBE #23966
David L. Woodsmall, MBE #40747
428 E. Capitol, Suite 300
Jefferson City, Missouri 65101
(573) 635-2700
Facsimile: (573) 635-6998
Internet: dwoodsmall@fcplaw.com

ATTORNEYS FOR PRAXAIR, INC. AND THE MIDWEST ENERGY USERS' ASSOCIATION

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served the foregoing pleading by email, facsimile or First Class United States Mail to all parties by their attorneys of record as provided by the Secretary of the Commission.

David L. Woodsmall

Dated: March 2, 2009