

**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            )

**MOTION TO RECUSE**

COME NOW Praxair, Inc. and the Midwest Energy Users' Association ("Industrial Intervenors") and for their Motion to Recuse respectfully state as follows:

1. On February 3, 2009, Commissioner Davis filed a Notice of Ex Parte Contact (Attachment 1). The Notice explicitly states that he affirmatively solicited certain information regarding Great Plains Energy/Kansas City Power & Light earnings from the Executive Director of the Commission's independent Staff. After receiving extra-record information he had affirmatively solicited, Commissioner Davis then filed a Notice of Ex Parte Contact. Although the information that was solicited and received appears to be directly related to Kansas City Power & Light, Commissioner Davis filed his Notice in the KCPL – Greater Missouri Operations rate proceeding, Case No. ER-2009-0090.

2. The Notice solicits the following information: "(1) What was KCP&L's actual return on equity earned in Calendar Year 2007? and (2) What was KCP&L's net off-systems margins for the period of Calendar Year 2007?" The Notice also states, at the end, that "the Commission is bound by its *ex parte* rule, and, I am therefore giving notice to the parties this communication has been received." A copy of the e-mail affirmatively soliciting the information from the Staff's Executive Director is attached.

The response to Commissioner Davis' request was then posted, along with his solicitation, in a redacted form and also a non-redacted form on the Commission's EFIS system, thereby further disseminating the information to the other Commissioners.

3. In 4 CSR 240-4.020, the Commission promulgated rules respecting the Conduct During Proceedings. As the Commission recognizes in the purpose statement, that rule was created so "that there is no question as to [the Commission's] impartiality in reaching a decision on the whole record developed during open hearings." Consistent with that purpose, the rule provides an explicit prohibition against a commissioner soliciting *ex parte* information.<sup>1</sup>

No member of the commission, presiding officer or employee of the commission shall invite or knowingly entertain any prohibited *ex parte* communication, or make any such communication to any party or counsel or agent of a party, or any other person who s/he has reason to know may transmit that communication to a party or party's agent.<sup>2</sup>

This rule is consistent with a statute enacted approximately thirty years later. Section 386.210 permits certain communications with the commission, but only when "no evidentiary hearing has been scheduled."<sup>3</sup> Despite the explicit prohibition against the solicitation of *ex parte* information contained in the statute and the Commission's Rules, Commissioner Davis nevertheless actively solicited *ex parte* information from the Commission's Staff, an active party to the pending rate proceeding. It is inconceivable that the question of the present earnings of Great Plains Energy would not be an issue in the pending rate cases, both for KCPL (Case No. ER-2009-0089), for its GMO operations

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<sup>1</sup> 4 CSR 240-4.020(7). It is unquestioned that the prohibitions contained in the Commission's rule are applicable given that this matter has been set for hearing. Indeed, Commissioner Davis in the context of his Notice of Ex Parte Contact recognizes the applicability of such rules ("The Commission is bound by its *ex parte* rule.").

<sup>2</sup> 4 CSR 240-4.020(6)

<sup>3</sup> Section 386.210.3

as the former Aquila Inc. (ER-2009-0090) and for the related steam rate case (Case No. HR-2009-0092).

4. 4 CSR 240-4.020(8) does provide a procedure by which “inadvertent” ex parte communications may be effectively excused by the presentation of certain information to the parties to this case. As Commissioner Davis recognizes in his Notice, this safe harbor only applies to inadvertent communications (i.e., unsolicited communications from members of the public and members of the legislature). The communication in question was neither inadvertent, nor from an individual outside this case to a commissioner. Rather, the communications in question was deliberate and initiated by a commissioner to the Executive Director of an active party in this case, and seeking to obtain information provided to the Commission Staff in its official capacity through “surveillance” reports. Such communications do not fall within the safe harbor of the inadvertent communication, but rather fall within the explicit prohibition contained in 4 CSR 240-4.020(6).

5. Ignorance of the law is not an excuse. At times, however, it can be understood. Asserting ignorance of the statutes, rules and regulations for a Commissioner that has been in his position for approximately five years cannot be understood. In this circumstance, however, Commissioner Davis cannot even claim ignorance. On January 15, 2008, Commissioner Davis issued his Report on a Review of the Missouri Public Service Commissioner’s Standard of Conduct Rules and Conflicts of Interest Statute (“Report”). In that Report, Commissioner Davis claimed that he had “thoroughly reviewed and analyzed the existing law governing communications between

the Commissioners and any entities, persons or interested groups.”<sup>4</sup> In fact, at page 15 of that Report, Commissioner Davis expressly recognized that “matters that are the subject of a pending case in which an evidentiary hearing has been set” may only involve “procedural matters or any matter relating to a unanimous stipulation” and may only be discussed “in a public Agenda meeting.” Despite his claim to have “thoroughly reviewed and analyzed the law,” and despite his apparent grasp of this subject just barely a year ago, Commissioner Davis has, evidenced by his own Notice, violated that law.

6. This is not first time that Commissioner Davis’ “impartiality” has been questioned. In 2007, it was revealed that Commissioner Davis attended private meetings with AmerenUE executives while an UE rate case was pending. Still again, in KCPL’s recent case seeking authority to purchase Aquila, Commissioner Davis recused himself following disclosures of his involvement in prior communications with utility officials that went to the merits of the proceeding.<sup>5</sup> Citing both of these events, the St. Louis Post Dispatch, in an editorial, called on “Mr. Davis to step down from his post.”<sup>6</sup>

The PSC is supposed to act as an honest broker among the interests of regulated utilities and ratepayers. But Mr. Davis has fashioned a more expansive role for himself – one that straddled the executive, legislative and judicial branches of state government. That’s quite a feat for an appointed official who never has been elected to any office. **It’s also a serious conflict of interest. Mr. Davis should step down from his post.**<sup>7</sup>

In response, Commissioner Davis privately met with the Post-Dispatch’s editorial board. As reported by the Post-Dispatch, Commissioner Davis “promised that he would ‘change the way I do business.’” Here, barely a year later, Commissioner Davis, despite statutory

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<sup>4</sup> The Chairman’s Report on a Review of the Missouri Public Service Commissioner’s Standard of Conduct Rules and Conflicts of Interest Statute, issued January 15, 2008, at page 3.

<sup>5</sup> See, Notice of Recusal for Chairman Davis, Case No. EM-2007-0374, filed December 6, 2007.

<sup>6</sup> St. Louis Post Dispatch, dated April 6, 2008.

<sup>7</sup> *Id.* (emphasis added).

and regulatory prohibitions to the contrary, actively solicited, through an *ex parte* communication, certain extra-record information related to this and other connected proceedings. Moreover, he has, through the mechanism of distributing his solicited information to other commissioners, potentially tainted the entire panel by exposing them to extra-record information pertinent to an issue in the case.

7. The Missouri Supreme Court has promulgated several rules regarding the conduct of judicial officers. Missouri courts have found that quasi-judicial officers should be held to the same standards as judicial officers.<sup>8</sup> Therefore, these Judicial Canons have been found to be applicable to the Public Service Commission. In addition to violating the applicable statutes and regulations, Commissioner Davis, by his actions in this case, has violated the following Judicial Canons:

Canon 1: A Judge Shall Uphold the Integrity and Independence of the Judiciary:  
An independent and honorable judiciary is indispensable to justice in our society. A judge shall participate in establishing, maintaining and enforcing high standards of conduct and shall personally observe those standards of conduct so that the integrity and independence of the judiciary will be preserved. The provisions of this Rule 2 are to be construed and applied to further that objective.

In the commentary to that Canon, the Missouri Supreme Court has noted that “[a]lthough judges should be independent, ***they must comply with the law.*** . . . Public confidence in the impartiality of the judiciary is maintained by the adherence of each judge to this responsibility.”

Canon 2: A Judge Shall Avoid Impropriety and the Appearance of Impropriety in All of the Judge’s Activities: A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

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<sup>8</sup> *State ex rel. Union Electric Co. v. Public Service Commission*, 591 S.W.2d 134 (Mo.App. 1979).

In the commentary to this Canon, the Missouri Supreme Court has pointed out that “[p]ublic confidence in the judiciary is eroded by irresponsible or improper conduct by judges. . . Actual improprieties under this standard include violations of law.”

Canon 3: A Judge Shall Perform the Duties of Judicial Office Impartially and Dilligently: (B) Adjudicative Responsibilities: (2) A judge shall be faithful to the law and maintain professional competence in it; (7) A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding.

Moreover, Canon 3E(1) makes clear that a judge shall recuse in a proceeding in which his partiality might be reasonably questioned. In addition, Canon 3B(7) provides that a judge must not independently investigate facts in a case and must consider only the evidence presented.

8. In *Moore v. Moore*,<sup>9</sup> a family court Commissioner without notice to the parties directed an independent investigation and report and used this *ex parte* communication made outside the presence of the parties as a basis of his decision regarding child custody. The appeals court emphasized the importance of the appearance of impropriety. While the Commissioner thought he was impartial, it was the appearance of impartiality that governs recusal. Litigants are entitled to a trial which is not only fair and impartial, but which also appears fair and impartial. The test for recusal is not whether the judge is actually biased or prejudiced, but rather, whether a reasonable person would have a legitimate basis to find an appearance of impropriety and thereby doubt the impartiality of the court.

9. Missouri courts have held that the appearance of impartiality is scarcely less important than actual impartiality:

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<sup>9</sup> 134 S.W.3d 110 (Mo.App. 1979).

Acts or conduct which give the appearance of partiality should be avoided with the same degree of zeal as acts or conduct which inexorably bespeak partiality.

As emphasized in State v. Lovelady, 691 S.W.2d 364, 365 (Mo.App. 1985), the law is very jealous of the notion of an impartial arbiter. It is scarcely less important than his actual impartiality that the parties and the public have confidence in the impartiality of the arbiter. Where a judge's freedom from bias or his prejudgment of an issue is called into question, the inquiry is no longer whether he actually is prejudiced; the inquiry is whether an onlooker might on the basis of objective facts reasonably question whether he is so.<sup>10</sup>

10. In Smith by and through Smith v. Armontrout, 632 F.Supp. 503, 507, n.7 (W.D.Mo. 1986), Federal District Judge Scott Wright held that an *ex parte* conversation between a judge sitting on a case and a witness about the issues in the case improper:

[W]hile Gerald Smith's case was pending before the Missouri Supreme Court in January, 1986, one of the judges on that court initiated *ex parte* communications with one of the psychiatrists who had examined Smith. Such *ex parte* contact not only violates that court's own canons of ethics, *see* Mo.S.Ct.R. 2, Canon 3(A)(4) (prohibiting judges from initiating *ex parte* communications concerning pending proceedings), it also strikes at the very heart of the adversarial system. Nothing can undermine the fairness of a judicial proceeding more than when a judge turns his back on the adversary system – where each side has an equal opportunity to test its opponent's evidence by means of cross-examination – and conducts his own *ex parte* investigation of the facts. *See Reserve Mining Co. v. Lord*, 529 F.2d 181, 184-188 (8<sup>th</sup> Cir. 1975). Under these extraordinary circumstances, it clearly appears that the state court's conclusion concerning Smith's competency was not the product of a full and fair hearing.

11. As has been shown, by his actions, Commissioner Davis has violated: (1) at least three separate judicial canons; (2) the statute prohibiting communications in a case where a hearing has been scheduled; and (3) the Commission's Rule regarding Conduct During Proceedings. Given these immediate actions as well as his other recent actions evidencing his disregard for applicable canons, statutes and regulations,

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<sup>10</sup> *State v. Garner*, 760 S.W.2d 893, 906 (Mo.App. 1988).

Commissioner Davis has consistently called into question the impartiality of the Commission's proceedings and its decisions. The judicial canons and common law expressly indicate that the remedy for such actions is recusal.

WHEREFORE, the Industrial Intervenors respectfully request that Commissioner Davis recuse himself of any future participation in the above-captioned proceeding.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "David L. Woodsmall". The signature is written in a cursive, somewhat stylized font.

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Stuart W. Conrad, MBE #23966  
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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.

A handwritten signature in black ink, appearing to read "David L. Woodsmall". The signature is written in a cursive, somewhat stylized font.

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David L. Woodsmall

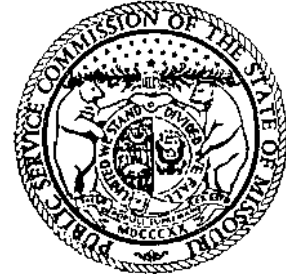
Dated: February 13, 2009

## Notice of *Ex Parte* Contact

TO: Data Center  
All Parties in Case No. ER-2009-0090

FROM: Commissioner Jeff Davis

DATE: February 3, 2009



On February 3, 2009, I asked Wess Henderson to find the answer to two questions regarding Kansas City Power & Light. The questions and responses are in the attached electronic mail message. This case, ER-2009-0090, is a contested case. The Commission is bound by its *ex parte* rule, and, I am therefore giving notice to the parties this communication has been received.

Although communications from members of the public and members of the legislature are always welcome, those communications must be made known to all parties to a contested case so that those parties have the opportunity to respond. According to the Commission's rules (4 CSR 240-4.020(8)), when a communication from any person interested in a case (either oral or written) occurs outside the hearing process, any member of the Commission or Regulatory Law Judge who received the communication shall prepare a written report concerning the communication and submit it to each member of the Commission and the parties to the case. The report shall identify the person(s) who participated in the *ex parte* communication, the circumstances which resulted in the communication, the substance of the communication, and the relationship of the communication to a particular matter at issue before the Commission.

Therefore, we submit this report pursuant to the rules cited above. This will ensure that any party to this case will have notice of the attached information and a full and fair opportunity to respond to the comments contained therein.

cc: Commissioners  
Executive Director  
Secretary/Chief Regulatory Law Judge  
General Counsel

**Gregory, Sheryl**

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**From:** Henderson, Wess  
**Sent:** Tuesday, February 03, 2009 1:46 PM  
**To:** Davis, Jeff  
**Cc:** Gregory, Sheryl  
**Subject:** RE: Quick questions

According to the Surveillance Report, for 2007, KCPL total company ROE was [REDACTED] its "adjusted" rate was [REDACTED] and its MO Juris rate was [REDACTED]. This number is confidential. As to actual off-system sales margins for 2007 [REDACTED]

[REDACTED] The total 2007 off-system sales for KCPL including the bulk firm and non-firm was [REDACTED]. In response to [REDACTED] the net margin of [REDACTED] [highly confidential]. This amount included sale transactions that KCPL proposing being treated below the line in this case- what they refer to as non-asset based sale transactions.

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**From:** Davis, Jeff  
**Sent:** Tuesday, February 03, 2009 9:13 AM  
**To:** Henderson, Wess  
**Cc:** Gregory, Sheryl  
**Subject:** Quick questions

Dear Wess,

I have two quick questions I'm hoping you can help me answer:

- (1) What was KCP&L's actual return on equity earned in Calendar Year 2007?
- (2) What was KCP&L's net off-systems margin for the period of Calendar Year 2007?

If you think these are issues in the rate case, please provide me with this information and I'll file an external communication in the rate case with your response.

Thanks,

JND



NP