BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of Proposed Revision to 4 CSR 240-4.020	))	**Case No. AX-2008-0201**

COMMENTS OF THE MISSOURI ENERGY DEVELOPMENT ASSOCIATION

The Missouri Energy Development Association ("MEDA"), on behalf of itself and its member companies,[1] hereby submits the following comments in response to the *Notice of Opportunity to Comment* that the Missouri Public Service Commission ("Commission") issued on April 10, 2008 ("Notice"):

1. Response to Specific Questions Posed by the Commission

In its April 10th Notice, the Commission invited interested persons to submit information about three specific questions concerning the proposed rule. MEDA's responses to those three questions are as follows:

a. Should the draft rule include a definition of "*ex parte* communication"? If so, how should it be defined?

MEDA does not believe a definition of "*ex parte* communication" needs to be included in the draft rule. This is true primarily because the suggested changes to the draft rule that MEDA is submitting as Appendix A to these comments propose to delete the phrase "*ex parte* communications" from the rule entirely.

The rule that currently governs conduct during Commission proceedings, 4 CSR 240-4.020, specifically prohibits certain *ex parte* communications and also requires that all inadvertent *ex parte* communications be timely reported to each member of the Commission. In contrast, all communications that are subject of the draft rule are, by

[1] MEDA's member companies are 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.

definition, *ex parte*; that is, they are all communications "done for, in behalf of, or on the application of one party only."[2] The draft rule merely seeks to distinguish and define which such communications do not need to be disclosed and which are prohibited altogether. Such an approach does not require a definition of "*ex parte* communications" because under both the draft rule and the changes being proposed by MEDA it is the circumstances under which a communication is made, and not whether the communication is *ex parte*, that will govern if and how it must subsequently be disclosed or whether it is prohibited altogether.

b. Do you have specific suggestions for changes in the language of the draft rule?

As reflected in Appendix A, and as further explained *infra*, MEDA is suggesting a number of changes to the language of the draft rule.

c. Does the draft rule adequately address the issues surrounding *ex parte* communications at the PSC?

A key principle that must be kept in mind when drafting any rule surrounding *ex parte* communications is the requirement that any such rule be consistent with the statute that governs communications with the Commission, Section 386.210, RSMo. (Cum. Supp. 2007). MEDA believes that, if modified in accordance with the changes proposed in Appendix A and explained herein, the draft rule adequately addresses the issues or concerns that have been raised regarding *ex parte* communications and does so in a manner that is consistent with Section 386.210, RSMo. In addition, changes proposed by MEDA ensures that the Commission will retain the ability to communicate with its staff, consumer groups, and the companies and industries it regulates, thereby allowing the Commission to continue to fulfill its broader mission of providing regulatory oversight and guidance in a manner that is consistent with the public interest.

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[2] *Black's Law Dictionary* 576 (6th ed. 1990).

2. MEDA's Proposed Changes to the Draft Rule

As noted *supra*, MEDA is proposing a number of changes to various sections of the draft rule, each of which is identified in redline format in Appendix A. Many of those changes are largely self-explanatory, as they are designed simply to add clarity to the draft rule. Other proposed changes are more substantive and an explanation for each of those changes is presented *infra*. But before discussing the specific changes, MEDA believes it would be helpful to explain some of the general principles governing the changes that MEDA is proposing herein.

MEDA proposes that subsection (3) be re-named "Communications Not Requiring Disclosure." This title changes is designed to more accurately reflect the content of that subsection, which in both the draft rule and in MEDA's proposed changes do not limit communications but, instead, merely establish when and how those communications must be disclosed.

The most significant changes to the draft rule proposed by MEDA are in subsections (4), (7), and (11). MEDA proposes to delete subsection (4) entirely because it is inconsistent with Section 386.210, RSMo., which already prescribes the points in time when communications would subsequently have to be disclosed and the timeframes within which disclosures must be made. Specifically, Section 386.210.2 expressly allows communications before a case is filed, and Section 386.210.3 provides, in express terms, that only communications made from and after the point in time when an evidentiary hearing has been scheduled must be disclosed. The draft rule simply contravenes the statute by purporting to require communications occurring prior to these statutorily prescribed points in time to also be disclosed.

In subsection (7), MEDA proposes to delete the second sentence of the draft rule because: (i) that sentence is not necessary, and (ii) the sentence does not accurately state the law regarding the circumstances under which an administrative officer, such as

a commissioner, is required to recuse himself or herself from an adjudicative matter. In Missouri, "[a]dministrative decision makers are *expected* to have preconceived notions concerning policy issues within the scope of their agency's expertise." *Fitzgerald v. City of Maryland Heights*, 796 S.W.2d 52, 59 (Mo. App. E.D. 1990) (emphasis added). Moreover, familiarity even with "adjudicative facts of a particular case, even to the point of having reached a tentative conclusion prior to the hearing, does not necessarily disqualify an administrative decision maker." *Id.*

MEDA proposes to delete subsections (11)(A), (B), and (C) entirely. MEDA's proposal retains, in large part, the principle that is embodied in subsection (11)(A) of the draft rule. But MEDA does not retain the principle embodied in subsections (11)(B) and (C), which singles out the Office of the Public Counsel ("Public Counsel") for special treatment in meetings between the Commission and the companies it regulates or other interested parties.

Public Counsel is not a regulator; it is, instead, just another party whose clients – consumers of regulated services – have their own parochial interests. In addition, more often than not Public Counsel is an adversary of regulated utilities, and sometimes it also is an adversary of other consumer groups, such as those consisting of large commercial and industrial customers. Given these considerations, it would be both unreasonable and unfair to exalt Public Counsel above any or all other party by guaranteeing it, and it alone, a seat in any meeting where the Commission engages in a discussion of regulation or regulatory policy with the companies and industries it regulates. If those discussions occur under circumstances that require disclosure under this rule or otherwise, then Public Counsel will be duly notified and informed – but at the same time and in the same manner as every other party. If, however the discussions take place under circumstances that do not require disclosure, then Public Counsel should not be singled-out for special treatment.

By the same token, it would be no more appropriate for the Commission to require that the companies and industries it regulates be at every meeting that it may have with the Public Counsel, regardless of whether the meeting involves any communications that require disclosure. To the contrary, that kind of rigid requirement would have a chilling effect on the discussions themselves.

All parties affected by regulation benefit if the Commission is free to engage in frank and open discussions with the consumers it serves and the companies and industries it regulates. The General Assembly also understood this when it amended Section 386.210, RSMo, to allow the Commission to confer with public utilities and others.[3] But the General Assembly understood that neither Public Counsel nor utilities need to be present at every meeting, so no such requirement was included in the amendment to the statute. The Commission should not adopt a rule that limits the authority conferred by the General Assembly or that otherwise creates an impediment to the free flow of information that is intended by the statute.

a. 4 CSR 240-4.020(3)

As noted *supra*, because the purpose of the draft rule is to prescribe the circumstances under which *ex parte* communications need to be disclosed and not to limit those communications, MEDA proposes to change the title of subsection (3) from "Unlimited Communications" to "Communications Not Requiring Disclosure."

In addition, because "contested case" is a term defined by statute[4] but "non-contested case" is not, MEDA believes the phrase "non-contested case" should be eliminated wherever it is used in the draft rule. As noted *supra*, the filing of a contested

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[3] Section 386.210.4, RSMo, states the intended scope of this authority as follows: "Nothing in this section or any other provision of the 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 . . .."

[4] Section 536.010(2), RSMo.

case or issuance of an order setting an evidentiary hearing should be the key factors distinguishing cases or matters where disclosure of communications is required from those where it is not. MEDA therefore believes language that makes that distinction clear is preferable to the contested case/non-contested case language used in the draft rule.

MEDA also proposes to modify original subsection (3)(E), which is now (3)(F), because MEDA does not believe communications related to purely procedural issues in a pending case should be restricted. For example, parties should be free to ask a question such as "when may a hearing be scheduled" or "how many copies do you desire be provided" without a formal disclosure requirement. This has been the entirely workable and uncontroversial practice at the Commission for many years.

The use of the phrase "of any nature at the commission" in subsection (3)(J) of the draft rule, which is subsection (3)(K) in Appendix A, is both burdensome and unnecessary. It would require a person who wants to communicate with the Commission, an advisor, or a Regulatory Law Judge ("RLJ") to have or acquire comprehensive knowledge of every matter pending before the Commission or risk the consequences of violating the disclosure rules. MEDA believes a better approach would be to make subsection (3)(J) a true "catch-all" provision by simply stating that no disclosure is required for communications "that are not otherwise required to be disclosed by this rule."

b. 4 CSR 240-4.020(4)

For the reason stated previously, MEDA proposes to delete this subsection. In summary, this subsection purports to effectively amend Section 386.210, RSMo., by imposing disclosure requirements on communications made at times when the statute expressly does not require any such disclosure. The Commission, of course, lacks the power to adopt a rule that is inconsistent with a duly-enacted statute of the General Assembly.

c. 4 CSR 240-4.020(5)

The changes that MEDA proposes to subsection (5), which is subsection (4) in Appendix A, are designed to make this subsection consistent with changes that MEDA is proposing elsewhere in the draft rule.

d. 4 CSR 240-4.020(6)

The changes that MEDA proposes to subsection (6), which is subsection (5) in Appendix A, are intended to clarify the rule. Instead of referring to "prohibited *ex parte* communication," which is neither defined nor used elsewhere in the rule, the alternative language proposed by MEDA simply refers to "a communication that violates this rule or applicable law." It also imposes on commissioners, advisors, and RLJs the obligation to disclose prohibited communications in accordance with the rule.

e. 4 CSR 240-4.020(7)

MEDA proposes two changes to subsection (7), which is designated as subsection (6) in Appendix A. As discussed *supra*, MEDA proposes to delete the second sentence of the draft because that sentence does not accurately state parties' reasonable expectations based on the law applicable to the recusal and disqualification of administrative officers in Missouri. Moreover, the sentence should be deleted because the purpose of subsection (7) is merely to advise parties what steps need to be taken to disqualify a commissioner. In addition, MEDA proposes to add language to the last sentence of subsection (7) that allows a party to request that a commissioner voluntarily recuse himself or herself before that party must resort to legal action in the circuit court to force disqualification.

f. 4 CSR 240-4.020(9)

The changes proposed to subsection (9), which is subsection (8) in Appendix A, are intended to conform the language of this subsection to changes proposed elsewhere in the rule and also to specifically state that comments received in correspondence from

the general public shall not be considered evidence in any adjudicative proceeding. The draft rule seems to imply that such correspondence would not be considered as evidence, but MEDA believes specific language stating that intent is preferable to mere implication.

g. 4CSR 240-4.020(11)

MEDA proposes two changes to subsection (11), which is subsection (10) in Appendix A. First, MEDA proposes to delete the phrase "only under the following circumstances." That phrase is rendered meaningless by the other change to subsection (11) that MEDA proposes. But more importantly, the use of that phrase, and the limiting subparts that follow it in the draft rule, combine to deprive the Commission, consumers, the utilities and industries the Commission regulates, and other interested parties of the ability to freely confer and exchange information, as they currently are authorized to do by Section 386.210, RSMo. Under the changes proposed by MEDA, parties who engage in the types of communications that the statute both authorizes and encourages need only be sure that they disclose those communications in accordance with whatever *ex parte* rule the Commission ultimately adopts.

The reasons for other changes proposed by MEDA – the deletion of subsections (11)(A), (B), and (C) in their entirety – were discussed *supra*.

h. 4 CSR 240-4.020(12)

Although the Commission or an RLJ arguably has the authority to order a party to make disclosures required by the rule, an advisor to a Commissioner does not. MEDA therefore proposes to amend subsection (12) of the draft rule, which is designated subsection (11) in Appendix A, to delete the initial reference to "advisor" and also to specify that disclosure of communications, as required by the rule, should be the objective of any order by a commissioner or RLJ and not merely the filing of a notice, as called for in the draft rule.

WHEREFORE, for all of the reasons stated herein, MEDA asks the Commission to amend its draft rule governing *ex parte* communications between the commissioners, their advisors, or the RLJs, on the one hand, and regulated companies and interested outside parties, on the other, as suggested in Appendix A and in these comments.

Respectfully submitted,

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Title 4 – DEPARTMENT OF ECONOMIC DEVELOPMENT
Division 240 – Public Service Commission
Chapter 4 – Standards of Conduct

4.020 Conduct of Participants in Commission Proceedings

PURPOSE: The commission must ensure its impartiality in reaching decisions. This rule establishes requirements for the behavior of those who participate in commission proceedings. This rule is being amended to clarify areas of confusion and to bring the rule into closer alignment with the statute.

(1) Any attorney who practices before the commission shall comply with the rules of the commission and shall adhere to the standards of ethical conduct required of attorneys before the courts of Missouri. This shall not preclude an attorney or any person participating in a commission case, including commissioners, members of the technical advisory staff (advisors) or regulatory law judges (RLJs) from replying to charges of misconduct publicly made against that person, or from participating in the proceedings of legislative, administrative or other investigative bodies.

(2) Except as provided below, ~~in contested cases before the commission, no~~ party, attorney or other person acting on behalf of a party, shall communicate, or cause another to communicate, about the merits of the case with any commissioner, advisor or RLJ, except for those communications made in the record of the case.

(3) ~~Unlimited~~ Communications Not Requiring Disclosure. The following communications are permitted without ~~limitation~~ any requirement that the substance of those communications be disclosed:

(A) Communications concerning rulemakings;

(B) Communications concerning investigative dockets ~~designated as non-contested cases~~ in which no evidentiary hearing has been set and in which no action can be taken;

(C) Communications concerning a tariff filing where no party has moved for suspension or rejection;

(D) Communications concerning contested cases that have not been set for hearing, which are made in a properly noticed agenda session or other forum at which all parties have the opportunity to be present or represented;

(E) Communications concerning stipulations and agreements in contested cases, which are made in a properly noticed agenda session or other forum at which all parties have the opportunity to be present or represented;

(F) Communications of a purely procedural nature;

~~(E) Communications of a purely procedural nature that affect only the communicating party;~~

(~~F~~G) Communications among the parties and the RLJ in the context of a discovery conference ~~in which all parties have notice and an opportunity to be present~~ is conducted in accordance with 4 CSR 240-2.090(8)(B);

(~~G~~H) Communications between commissioners, advisors ~~and~~ or RLJs and the General Counsel or other attorneys representing the commission on appeals of any of its orders or in any court cases in which the commission is a party, provided that such communication with any given person is reasonably necessary to pursue the matter;

(~~H~~I) Communications between the commission and any other governmental entity~~, provided that, if such information is relied on by the commission in its decision, it will either be included in the record or disclosed by the commission no later than the issuance of the decision~~;

(~~I~~J) Communications publicly conveyed during a presentation at a conference or other forum ~~where such information is widely disseminated to all attendees~~; or

(~~J~~K) Communications concerning a matter that is not the subject of an open docket ~~of any nature at the commission~~.

~~(4)Limited Communications. The following communications are permitted with the condition that the communicator shall, no later than the next business day after the communication or the action that causes the communication to be restricted, file a copy of any written communication or a disclosure statement that specifically describes the circumstances and substance of a verbal communication, in the commission record of the matter:~~

~~(A) Communications concerning a matter that is not the subject of an open docket when the communication is made, but a contested case is opened on the matter within 90 days of the communication;~~

~~(B) Communications concerning an uncontested case that becomes contested (e.g. a motion to suspend is filed), regardless of whether the uncontested case was designated with a docket number or a tracking number;~~

~~(C) Communications concerning a small company rate case proceeding filed under 4 CSR 240-3.050 after the matter is set for hearing;~~

~~(D) Communications concerning matters of procedure that affect more than the communicating party; or~~

~~(E) Communications concerning a matter that is the subject of an open docket that directly relate to an emergency in which the safety of life is endangered or substantial loss of property is threatened.~~

(~~5~~)(4) Prohibited Communications. Communication concerning the merits of any pending ~~commission~~ contested case or any other pending case in which the commission has issued an order setting an evidentiary hearing, ~~made outside the record of that case,~~ may not be made outside the record of that case by any party, attorney or other person acting on behalf of a party to any Commissioner, Advisor or RLJ. A case is no longer pending when the final order in the matter is

effective and no request for rehearing is filed or all requests for rehearing have been denied. In the event a prohibited communication is inadvertently made, the person making the communication shall, as quickly as possible, make the applicable filing as if the communication were a ~~restricted~~ communication that requires disclosure under this rule. If that person fails to do so, another person who is aware of the communication~~, including the recipient,~~ shall make the necessary filing no later than three business days after such person is made aware of the communicator's failure to make the applicable filing.

(~~6~~)(5) Each commissioner and RLJ shall conduct fair and impartial hearings, avoid unnecessary delay in the disposition of cases and maintain order and proper decorum at hearings. No commissioner, advisor or RLJ shall invite or knowingly entertain any ~~prohibited *ex parte*~~ communication that violates this rule or applicable law. A commissioner, advisor or RLJ that receives any such ~~an *ex parte*~~ communication shall disclose the communication as required by this rule, and shall not entertain or consider such communication concerning the merits of the proceeding, unless such communication is subsequently admitted into evidence.

(~~7~~)(6) Recusal or Disqualification. The commission lacks jurisdiction to order or otherwise remove a commissioner from any proceeding;~~. However, every party is entitled to have its case considered by a commission consisting only of persons who are not interested or prejudiced in the cause and who are not parties to the cause.~~ therefore, ~~I~~if a party believes that grounds exist that a commissioner is party to a pending case, or is otherwise unduly and unlawfully interested or prejudiced in the case, such party shall be entitled to request such commissioner to voluntarily recuse himself or herself or to seek appropriate relief ~~I~~ in the circuit court.

(~~8~~)(7) It is improper for any person interested in a case before the commission to attempt to sway the judgment of the commission by making a statement or taking any action outside the hearing process to bring pressure or influence to bear on the commission, any commissioner, advisor or RLJ.

(~~9~~)(8) Where a contested case or any other case in which the commission has issued an order setting an evidentiary hearing precipitates written or electronic correspondence from the general public, such correspondence from non-party entities or individuals shall be placed in the comment portion of the case file but shall not be required to be served on the parties to the case and shall not be considered evidence in the case.

(~~10~~)(9) No person who has served as a commissioner or as an employee of the commission, after termination of service or employment, shall appear before the commission in relation to any case, proceeding or application with respect to which that person was directly involved and in which that person personally

participated or had substantial responsibility during the period of service or employment with the commission.

(~~11~~)(10) Meetings with Commissioners. Regulated entities and other interested persons, including the commission staff and the Office of the Public Counsel, may meet with commissioners to discuss matters of regulation and regulatory policy, provided such meetings are conducted in accordance with applicable law and that communications made during those meetings are disclosed as required by this rule. ~~only under the following circumstances:~~

~~(A) The matter to be discussed is not a prohibited communication as set forth above;~~

~~(B) If the substance of the meeting will be discussed with a majority of the commission in multiple meetings, without a quorum of the commission present in any one meeting, Public Counsel shall at the discretion of the attending commissioner(s), be allowed to attend or the person or entity requesting the meetings shall offer to schedule such a meeting with the Public Counsel; and~~

~~(C) If the meeting is located at the facilities of a regulated entity, the Public Counsel shall be notified of and invited to the meeting no later than the next business day after the meeting(s) with the commissioner(s) is scheduled; and~~

(~~12~~)(11) A commissioner~~, advisor~~ or RLJ may order any party, attorney or other person acting on behalf of a party that communicates with ~~such~~ a commissioner, advisor or RLJ to ~~file notice of~~ disclose such communication as required by this rule ~~in the commission record of the matter~~.

(~~13~~)(12) Nothing in this rule shall impose 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 an open contested case. This rule shall not be construed to require the public disclosure of any information that is proprietary or highly confidential.

AUTHORITY: section 386.410, RSMo 1986. Original rule filed Dec. 19, 1975, effective Dec. 29, 1975. Amended: Filed April 26, 1976, effective Sept. 11, 1976. *Original authority: 386.410, RSMo 1939, amended 1947, 1977, 1996.*

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 16th day of April, 2008, to the following:

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