

BEFORE THE PUBLIC SERVICE COMMISSION  
OF THE STATE OF MISSOURI

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

**MOTION FOR PROPOSED RULEMAKING**

COME NOW, the Office of the Public Counsel, Praxair, Inc., AG Processing, Inc., the Midwest Gas Users Association,<sup>1</sup> the Sedalia Energy Users Association,<sup>2</sup> the Missouri Industrial Energy Consumers,<sup>3</sup> the Missouri Energy Group,<sup>4</sup> AARP, and the Consumers Council of Missouri (collectively referred to as "Petitioners"), by and through their undersigned counsel, and for their Motion For Proposed Rulemaking, respectfully state as follows:

1. Recent events that have occurred in Case Nos. ER-2007-0291 and EM-2007-0374 have raised issues regarding improprieties associated with *ex parte* communications between utility executives and Commissioners. Indeed, in response to

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<sup>1</sup> The Midwest Gas Users Association ("MGUA") members are EnerSys Inc., ThyssenKrupp, Stahl Co., Wire Rope Corporation of America, North Kansas City Hospital, Archer Daniels Midland Corporation, AAA Uniform Service, and National Starch and Chemical, a division of ICI Inc.

<sup>2</sup> The Sedalia Energy Users Association ("SIEUA") members are Pittsburgh Corning Corporation, Waterloo Industries, Hayes-Lemmerz International, EnerSys Inc., Alcan Cable Co., Gardner Denver Corporation, American Compressed Steel Corporation, and ThyssenKrupp Stahl Company.

<sup>3</sup> The Missouri Industrial Energy Consumers ("MIEC") are Anheuser-Busch, BioKyowa, The Boeing Company, Cargill, Chrysler, Doe Run, Ford Motor Company, Enbridge, Explorer Pipeline, General Motors, GKN Aerospace, Hussmann Refrigeration, JW Aluminum, Monsanto, National Starch, Nestle Purina, Pfizer, Precoat Metals, Procter & Gamble, and U.S. Silica.

<sup>4</sup> The Missouri Energy Group ("MEG") members are Barnes-Jewish Hospital, Buzzi Unicem USA, Inc., Holcim US, Inc., and SSM HealthCare.

the appearance of impropriety, the Governor has called upon the Commission "to review their policies on conflicts of interest."

2. Modifications to the Commission's current rule, 4 CSR 240-4.020, should help clarify the procedures by which the Commission may engage in communications with parties or those companies and individuals that are likely to seek Commission action. By making these changes to the current rule, the Commission, consistent with the Governor's request, can ensure that utility matters are being decided "fairly and impartially."

3. Consistent with these goals, the parties have proposed the attached modifications to 4 CSR 240-4.020.

4. Pursuant to 4 CSR 240-2.180(3)(A)4, Petitioners state that the Commission has authority under Sections 386.250 and 386.410 RSMo 2000 to adopt the proposed amendments. Pursuant to 4 CSR 240-2.180(3)(A)5, Petitioners state that there will be no fiscal impacts to any entities from the proposed amendments.

WHEREFORE, Petitioners respectfully request that the Commission institute a rulemaking for the purpose of making the following modifications to Commission Rule 4 CSR 240-4.020.

Respectfully submitted,

**/s/ Lewis R. Mills, Jr.**

By: 

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AG Processing, Inc., MGUA and SIEUA

#### 4 CSR 240-4.020 Code of Conduct During Proceedings

*PURPOSE: The commission must insure that there is no question as to its impartiality in reaching a decision on the whole record developed during open hearings. This rule prohibits activities which would tend to exercise influence on the commission and which are not part of the record.*

(1) The following definitions shall apply in this rule:

(A) "ex parte communication" is any communication, written or oral, that concerns any matter that is pending before the Commission for decision or can reasonably be foreseen to come before the Commission for decision. Communications about purely procedural matters are not "ex parte communications."

(B) "Advisor" means the personal advisor of a Commissioner or any person assigned to the "Commission's advisory staff" and includes employees and contractor experts.

(42) Any attorney who participates in any proceeding 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 by the provisions of Civil Rule 4, Code of Professional Responsibility, particularly in the following respects:

(A) During the pendency of an administrative 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 to 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:

1. Evidence regarding the occurrence of transaction involved;
2. The character, credibility or criminal record of a party, witness or prospective witness
3. Physical evidence, the performance or results of any examinations or tests or the refusal or failure of a party to submit to examinations or tests;
4. His/her opinion as to the merits of the claims, defenses or positions of any interested person; and
5. Any other matter which is reasonably likely to interfere with a fair hearing.

(B) An attorney shall exercise reasonable care to prevent employees and associates from making an extra-record statement as s/he is prohibited from making; and

(C) These restrictions do not preclude an attorney from replying to charges of misconduct publicly made against him/her, or from participating in the proceedings of legislative, administrative or other investigative bodies.

(23) In all proceedings before the commission, no attorney shall communicate, or cause another to communicate, as to the merits of the cause with any commissioner or examiner



before whom proceedings are pending except:

(A) In the course of official proceedings in the cause; and

(B) In writing directed to the secretary of the commission with copies served upon all other counsel of record and participants without intervention.

(4) An attorney shall exercise reasonable care to prevent employees and officers of his client from communicating with any Commissioner, Regulatory Law Judge or Advisor as to the merits of the cause.

(35) 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 s/he was directly involved and in which s/he personally participated or had substantial responsibility in during the period of service or employment with the commission.

(46) 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~~ any Commissioner, Regulatory Law Judge or Advisor.

(57) Requests for expeditious treatment of matters pending with the commission are improper except when filed with the secretary and copies served upon all other parties.

(68) No ~~member of the commission, presiding officer or employee of the commission~~ Commissioner, Regulatory Law Judge or Advisor 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.

(7) ~~These prohibitions apply from the time an on-the-record proceeding is set for hearing by the commission until the proceeding is terminated by final order of the commission. An on-the-record proceeding means a proceeding where a hearing is set and to be decided solely upon the record made in a commission hearing.~~

(89) As *ex parte* communications (either oral or written) may occur inadvertently, any ~~member of the commission, hearing examiner or employee of the commission~~ Commissioner, Regulatory Law Judge or Advisor who receives that communication shall immediately within 24 hours prepare a written report concerning the communication and submit it to the chairman and each member of the commission make it a public record by filing it in the relevant pending case(s), or if no case is pending, provide a copy to each party to the utility's most recent general rate case or earnings complaint case. The report shall identify ~~the employee and the person(s)~~ all persons who participated in the *ex parte*



communication, all persons who witnessed the *ex parte* communication, all persons who are known to have drafted or read 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 or that can reasonably be foreseen to become an issue before the commission. If the *ex parte* report is not timely filed by the Commissioner(s), every person participating in the *ex parte* communication shall have an obligation to file an *ex parte* report.

(A) If the communication is written, the Commissioner, Regulatory Law Judge or Advisor to whom an *ex parte* communication is made shall cease reading the communication immediately upon recognizing it as an *ex parte* communication.

(B) If the communication is oral, the Commissioner, Regulatory Law Judge or Advisor to whom an *ex parte* communication is made shall ask the person making the communication to stop immediately upon recognizing it as an *ex parte* communication.

(10) No representative of a utility shall make an *ex parte* communication to an individual Commissioner or to any two Commissioners or to a quorum of the Commission. Any communication between a representative of a utility and Commissioners shall be a public record and a public meeting pursuant to Chapter 610 of the Revised Statutes of Missouri. In addition to the notice requirements of Chapter 610, RSMO or any other Commission rule, a minimum of 48 hours notice of any meeting between a representative of a utility and Commissioners shall be provided to each party to that utility's most recent general rate case or earnings complaint case.

(11) Every public meeting, as that term is defined by Chapter 610 of the Revised Statutes of Missouri, whether or not closed pursuant to Section 610.021 et seq., shall be recorded and transcribed. Such recording or transcript shall be a public record and filed in the case file or in the Commission records designated for retention of *ex parte* communications, and shall be preserved for at least six years.

(12) Pursuant to Sections 386.710.1(2) and 386.710.4, the Public Counsel shall have the authority to investigate any alleged violations of this rule, and any party to a Commission proceeding may investigate any alleged violations that may affect the proceeding.

(13) If an *ex parte* communication is made, the commission may require a party to show cause why its claim or interest in any proceeding should not be dismissed, denied, disregarded, or otherwise adversely affected on account of such violation.

(14) A commissioner, Regulatory Law Judge or Advisor that makes an *ex parte* communications or fails to disclose the *ex parte* communication shall immediately recuse from the case.

(15) A commissioner, Regulatory Law Judge or Advisor that receives an *ex parte* communications shall not entertain, or consider this communication concerning the merits of the proceeding.

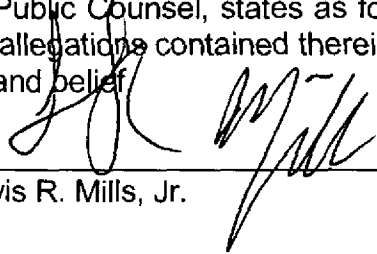
*AUTHORITY: section 386.410, RSMo 1986.\* Original rule filed Dec. 19, 1975, effective Dec. 29, 1975. Amended: Filed April 26, 1976, effective Sept. 11, 1976.*

*\*Original authority: 386.410, RSMo 1939, amended 1947, 1977, 1996.*

## VERIFICATION

STATE OF MISSOURI    )  
                                  )   ss  
COUNTY OF COLE     )

Being first duly sworn, Lewis R. Mills, Jr., Public Counsel, states as follows: that he has read the foregoing petition and the facts and allegations contained therein are true and correct to the best of his knowledge, information and belief.

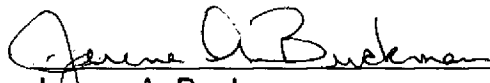


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Lewis R. Mills, Jr.

Subscribed and sworn to me this 18<sup>th</sup> day of December 2007.



JERENE A. BUCKMAN  
My Commission Expires  
August 10, 2009  
Cole County  
Commission #05754036

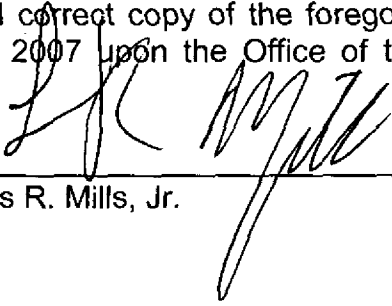


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Jerene A. Buckman  
Notary Public

My commission expires August 10, 2009.

## Certificate of Service

The undersigned certifies that a true and correct copy of the foregoing petition was hand-delivered this 18<sup>th</sup> day of December 2007 upon the Office of the General Counsel.



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Lewis R. Mills, Jr.