BEFORE THE PUBLIC SERVICE COMMISSION
STATE OF MISSOURI

In the Matter of the Application of Kansas City Power & Light Company for Approval to Make Certain Changes in its Charges for Electric Service to Implement its Regulatory Plan.	))))	**Case No. ER-2009-0089**

STAFF'S RESPONSE TO INDUSTRIAL INTERVENORS' MOTION TO RECUSE

COMES NOW the Staff of the Missouri Public Service Commission, by and through the Commission's General Counsel pursuant to § 386.071, RSMo 2000,[1] and Rule 4 CSR 240-2.040(1), and for its Response to the Industrial Intervenors' Motion to Recuse, states as follows:

Introduction

On February 13, 2009, Stuart Conrad and David Woodsmall, counsel for Praxair, Inc., and the Midwest Energy Users' Association, the self-described "Industrial Intervenors," filed their Motion to Recuse. That motion is directed at Commissioner Jeff Davis, who filed a Notice of Ex Parte Contact on February 3, 2009, in Case No. ER-2009-0090, stating:

> 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 parle* rule, and, I am therefore giving notice to the parties this communication has been received.[2]

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[1] All statutory references herein are, unless otherwise specified, to the Revised Statutes of Missouri (RSMo), revision of 2000.

[2] The Notice was originally filed in Case No. ER-2009-0090, ***In the Matter of the Application of KCP&L Greater Missouri Operations Company for Approval to Make Certain Changes in its Charges for Electric Service,*** a companion case to this case. A substantially similar notice was filed in this case on February 17, 2009.

The questions referred to in the Notice were:

> (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?

On the same day, Mr. Henderson provided the requested information to Commissioner Davis by return e-mail.[3]

The Motion to Recuse asserts that Commissioner Davis violated Commission Rule 4 CSR 240-4.020, "Conduct During Proceedings," § 386.210, RSMo Supp. 2008, and several of the Canons of Judicial Ethics; that there is both an appearance of impropriety and actual impropriety; and that "[t]he judicial canons and common law expressly indicate that the remedy for such actions is recusal."[4]

On February 24, 2008, Public Counsel joined in the Motion to Recuse. Staff responds now in order to address certain errors of law and fact in the Motion to Recuse.[5]

Argument

1. The members of the Missouri Public Service Commission are not subject to the Canons of Judicial Ethics.

The Commission has previously seen the mistaken assertion that its

[3] Mr. Henderson's response was filed with the Notice of Ex Parte Contact in both public and highly confidential versions.

[4] Motion to Recuse, p. 8.

[5] Staff notes that a Response to the Motion to Recuse was also filed by the Missouri Energy Development Association (MEDA) on February 18, 2009.

members are subject to the Canons of Judicial Ethics.[6] In fact, they are not,[7] nor can they be under the constitutional doctrine of the separation of powers.[8] As 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.[9]

The Industrial Intervenors rely on a misreading of a decision of the Missouri Court of Appeals concerning Commissioner Alberta Slavin.[10] In ***Slavin,*** the court stated, "[h]owever, the courts in this state have held officials occupying quasi-judicial positions to the same high standard as apply to judicial officers by insisting that such officials be free of any interest in the matter to be considered by them."[11] The court did not mean -- and did not say -- that the Judicial Canons apply to administrative officers. What the ***Slavin*** court did say was this: "It is clear . . . that the same standards and rules apply to quasi-judicial officers as to judicial officers. This means that members of the Public Service Commission

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[6] *See* ***In the Matter of the Joint Application of Great Plains Energy Incorporated, Kansas City Power & Light Company, and Aquila, Inc. for Approval of the Merger of Aquila, Inc. with a Subsidiary of Great Plains Energy Incorporated and for Other Related Relief,*** Case No. EM-2007-0374 (***Public Counsel's Motion to Dismiss,*** filed December 13, 2007) at ¶ 18. Public Counsel renews this assertion in his pleading of February 24, 2009, in this case, at ¶ 9. Frequent repetition, however, does not serve to make an erroneous proposition true.

[7] The Canons are set out in Supreme Court Rule 2. By its express terms, Rule 2 applies *only* to judicial officers. Rule 2.04; ***State ex rel Kramer v. Walker,*** 926 S.W.2d 72, (Mo. App., W.D. 1996).

[8] *See* ***Weinstock v. Holden,*** 995 S.W.2d 408, 410 (Mo. banc 1999) (Missouri Constitution reserves to the Court the power to "establish rules relating to practice, procedure and pleading for all courts," including the "authority to regulate the practices of judges and lawyers in the courts of this state" and thus a legislative act purporting to do so is unconstitutional).

[9] "The executive department shall consist of all state elective and appointive officials and employees except officials and employees of the legislative and judicial departments." Mo. Const., Art. IV, § 12. Rules of conduct applicable to executive branch employees are set out in Chapter 105, RSMo.

[10] ***Union Electric Company v. Public Service Commission,*** 591 S.W.2d 134 (Mo. App. 1979) ("***Slavin***").

[11] *Id.,* at 137.

may not act in cases pending before that body in which they are interested or prejudiced or occupy the status of a party."[12]

Neither ***Slavin*** nor any other reported Missouri case holds that the Canons of Judicial Ethics apply to members of the Missouri Public Service Commission.

2. Commissioner Davis need not recuse because there has been no showing that he is interested, prejudiced, or occupies the status of a party.

Slavin did identify three circumstances in which recusal is necessary. These are (1) where a member of the Commission is a party; (2) where a member of the Commission is interested; and (3) where a member of the Commission is prejudiced.[13] However, none of these circumstances is present here and so recusal is not required.

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[12] *Id.,* at 139. By the phrase "the same standards and rules," the court referred to common law standards and not to the Canons, as is made clear on the same page of the opinion: "Of course, the legislature may desire to provide for the disqualification of members of the Public Service Commission, but absent such statutory provisions, such members are still prohibited by the common law from acting in matters in which they are a party, or are interested, biased or prejudiced." *Accord,* ***State ex rel. Martin-Erb v. Missouri Comm'n on Human Rights,*** 77 S.W.3d 600, 610 (Mo. banc 2002) ("Those occupying quasi-judicial positions, such as the executive director and commissioners in this case, are held 'to the same high standard[s] as apply to judicial officers by insisting that such officials be free of any interest in the matter to be considered by them.' For this reason, every party is entitled to have his or her case considered by an administrative agency consisting only of persons who are not interested or prejudiced in the case or who are not parties to the cause.") (citations omitted); ***State ex rel. AG Processing, Inc. v. Thompson,*** 100 S.W.3d 915, 919 (Mo. App., W.D. 2003) ("The PSC is an administrative body created by statute and has only such powers as are expressly conferred by statute and reasonably incidental thereto. The procedural due process requirement of fair trials by fair tribunals applies to an administrative agency acting in an adjudicative capacity. Thus, administrative decision-makers must be impartial. Officials occupying quasi-judicial positions are held to the same high standard as apply to judicial officers in that they must be free of any interest in the matter to be considered by them. A presumption exists that administrative decision-makers act honestly and impartially, and a party challenging the partiality of the decision-maker has the burden to overcome that presumption. A judge or administrative decision-maker is without jurisdiction, and a writ of prohibition would lie, if the judge or decision-maker failed to disqualify himself on proper application") (citations omitted).

[13] ***Slavin,*** at 139.

It is a rare case in which, as in ***Slavin,*** a member of the Commission is actually a party to a case pending before it. That is not the case here and no one has suggested that it is. Likewise, an administrative officer is "interested" in a matter in which he or she has a tangible, personal stake.[14] No one has asserted that Commissioner Davis is "interested" in this matter. "Prejudice" is "[a] preconceived judgment formed without a factual basis; a strong bias."[15] Prejudice is what is really at issue here.

By "prejudice" the courts mean more than familiarity with the facts of the case, which is all that is at issue here. It is well-established, for example, that "[a]dministrative decisionmakers are expected to have preconceived notions concerning policy issues within the scope of their agency's expertise."[16] Indeed, administrative officers may permissibly have not only "preconceived notions concerning policy issues" and familiarity with the actual facts of a case, but are allowed to have even reached a "tentative conclusion":

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[14] "Interest . . . advantage or profit, esp. of a financial nature[.]" ***Black's Law Dictionary*** 816 (7th ed. 1999). *See* § 105.464.1, RSMo, which applies to persons exercising judicial and quasi-judicial authority, and provides that "[n]o person serving in a judicial or quasi-judicial capacity shall participate in such capacity in any proceeding in which the person knows that a party is any of the following: the person or the person's great-grandparent, grandparent, parent, stepparent, guardian, foster parent, spouse, former spouse, child, stepchild, foster child, ward, niece, nephew, brother, sister, uncle, aunt, or cousin." Sections 105.452, 105.454, RSMo Supp. 2007, and 105.462 contain various rules of conduct applicable, in the case of § 105.452, to all state employees, in the case of § 105.454, RSMo Supp. 2008, only to state employees "serving in an executive or administrative capacity," and, in the case of § 105.462, applicable only to persons exercising rulemaking authority. All of these provisions apply to PSC Commissioners and prohibit the exercise of governmental power to enrich oneself or one's family; they also prohibit bribery, the improper use of confidential information, and certain activities after the termination of state employment.

[15] ***Black's,*** *supra,* 1198.

[16] ***Hortonville Joint School District No. 1 v. Hortonville Education Association,*** 426 U.S. 482, 493, 96 S.Ct. 2308, 2314, 49 L.Ed.2d 1, 9 (1976); ***Fitzgerald v. City of Maryland Heights,*** 796 S.W.2d 52, 59 (Mo. App. E.D.1990).

> Familiarity with the 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 decisionmaker, "in the absence of a showing that [the decisionmaker] is not 'capable of judging a particular controversy fairly on the basis of its own circumstances.'"[17]

It is not unusual in administrative proceedings for the members of the agency to have familiarity with the facts of a particular case and the issues presented by it prior to the evidentiary hearing. It is common, for example, in the area of the regulation of licensed professionals that the appropriate board or commission both authorizes the initiation of disciplinary proceedings and, after the determination of the Administrative Hearing Commission that discipline is appropriate, imposes sanctions upon the erring licensee. Indeed, it is not *per se* objectionable where the board both initiates the prosecution and tries the case:

> Where the charge is general medical incompetency rather than specific medical misconduct, the Board [of Healing Arts] serves as investigator, prosecutor, judge, and jury. Although a neutral decisionmaker is preferable, the mere fact that the Board both initiates a charge and then tries it, does not, by itself, violate due process.[18]

Under ***Fitzgerald,*** recusal for prejudice is required only on a showing that a Commissioner "is not 'capable of judging a particular controversy fairly on the basis of its own circumstances."[19] Put another way, recusal is required where an "administrative decisionmaker . . . has made an unalterable prejudgment of

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[17] ***Fitzgerald,*** *supra* (citations omitted); quoting ***Hortonville Joint School District,*** *supra,* 426 U.S. at ___, 96 S.Ct. at 2314, 49 L.Ed.2d at ___.

[18] ***Artman v. State Board of Registration for the Healing Arts,*** 918 S.W.2d 247, 250 (Mo. banc 1996), citing ***Rose v. State Board of Registration for the Healing Arts,*** 397 S.W.2d 570 (Mo. 1965).

[19] *Id.*

operative adjudicative facts[.]"[20] Where such an "unalterable prejudgment" exists, the administrative officer in question may not participate in the proceedings.[21]

A presumption exists that administrative decision-makers act honestly and impartially and a party challenging the partiality of the decision-maker has the burden to overcome that presumption.[22] Because the Public Service Commission Law places the PSC Commissioners in the position of adjudicators making findings of fact and conclusions of law, "the determination of the existence of their impartiality should be reviewed using the same standard used to review a judge's determination of his or her challenged impartiality."[23] The inquiry is an objective one and must be based upon the whole record and not solely on the basis of the judge's conviction of his own impartiality.[24] The relevant inquiry is whether, on the whole record, a reasonable person would have factual grounds to doubt the officer's impartiality.[25]

All that has been shown in this case is that Commissioner Davis addressed two questions to the Executive Director of the Commission and, upon

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[20] *Id.*

[21] ***State ex rel. Brown v. City of O'Fallon,*** 728 S.W.2d 595, (Mo. App., E.D. 1987); ***In re Weston Benefit Assessment Special Road District of Platte County,*** 294 S.W.2d 353, (Mo. App., W.D. 1956).

[22] ***AG Processing,*** *supra,* at 920; ***Orion,*** *supra;* ***Burgdorf v. Bd. of Police Comm'rs,*** 936 S.W.2d 227, 234 (Mo. App., E.D.1996); ***Wagner v. Jackson County Board of Zoning Adjustment,*** 857 S.W.2d 285, 289 (Mo. App., W.D. 1993).

[23] ***Orion Security, Inc. v. Board of Police Commissioners of Kansas City,*** 90 S.W.3d 157, 164 (Mo. App., W.D. 2002).

[24] ***Orion,*** *supra; see* ***Fitzgerald,*** 796 S.W.2d at 59; *see also* ***In re Marriage of Burroughs,*** 691 S.W.2d 470, 474 (Mo. App.1985).

[25] ***Fitzgerald,*** *supra,* 796 S.W.2d at 59-60.

receiving the answers, immediately disclosed the whole affair by filing a notice in the case and serving it upon all parties. That constitutes, in the words of ***Fitzgerald,*** "familiarity with the adjudicative facts of a particular case."[26] It does not show prejudice or bias; nor does it show any "unalterable prejudgment."[27] On this record, no reasonable person has any grounds to doubt Mr. Davis' impartiality. Consequently, recusal is not required under the pertinent decisions of Missouri courts.

3. Neither § 386.210, RSMo Supp. 2008, nor Commission Rule 4 CSR 240-4.020 requires Commissioner Davis to recuse.

Movants also assert that Commissioner Davis has violated § 386.210, RSMo Supp. 2008, and Commission Rule 4 CSR 240-4.020, and that the remedy for this violation is recusal.[28] In fact, the Movants are again mistaken.

Section 386.210, RSMo Supp. 2008, provides in pertinent part:

> 1. The commission may confer in person, or by correspondence, by attending conventions, or in any other way, with the members of the public, any public utility or similar commission of this and other states and the United States of America, or any official, agency or instrumentality thereof, on any matter relating to the performance of its duties.
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> 2. Such communications may address any issue that at the time of such communication is not the subject of a case that has been filed with the commission.
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> 3. Such communications may also address substantive or procedural matters that are the subject of a pending filing or case in

[26] *See* Note 16, *supra.*

[27] ***Artman,*** *supra,* 918 S.W.2d at 250.

[28] Public Counsel joins the Industrial Intervenors in asserting that Commissioner Davis violated § 386.210, RSMo Supp. 2008, and Rule 4 CSR 240-4.020; however, he does not contend that those provisions require recusal. ¶ 11.

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 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.

4. Nothing in this section or any other provision of 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 unless such communications comply with the provisions of subsection 3 of this section.

5. The commission and any commissioner may also advise any member of the general assembly or other governmental official of the issues or factual allegations that are the subject of a pending case, provided that the commission or commissioner does not express an opinion as to the merits of such issues or allegations,

> and may discuss in a public agenda meeting with parties to a case in which an evidentiary hearing has been scheduled, any procedural matter in such case or any matter relating to a unanimous stipulation or agreement resolving all of the issues in such case.
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> * * *

Commission Rule 4 CSR 240-4.020, "Conduct During Proceedings," provides in pertinent part:

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> (6) 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.
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> (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.
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> (8) As *ex parte* communications (either oral or written) may occur inadvertently, any member of the commission, hearing examiner or employee of the commission who receives that communication shall immediately prepare a written report concerning the communication and submit it to the chairman and each member of the commission. The report shall identify the employee and 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.

The Movants argue that Commissioner Davis violated § 386.210, RSMo Supp. 2008, because he engaged in a communication addressing a substantive matter that is the subject of a pending case and such a communication is not

permitted at all once an evidentiary hearing has been scheduled.[29] Likewise, the Movants contend that Commissioner Davis violated Rule 4 CSR 240-4.020(6) because he invited a prohibited *ex parte* communication.[30] The Movants also argue that the Notice of Ex Parte Contact filed by Commissioner Davis failed to cure the rule violation because the communication was not inadvertent as expressly required by Rule 4 CSR 240-4.020(8).[31]

It is well-established that a provision of law that lacks a remedy is merely directory in nature. "The general rule in determining whether a statute is mandatory or directory is when a statute provides what results shall follow a failure to comply with its terms, it is mandatory and must be obeyed."[32] If the statute does not prescribe a result for failure to comply, the statute is directory.[33] "The issue of whether a statute is mandatory or directory usually comes up only in the context of whether the failure to do certain acts results in the invalidity of a government measure."[34]

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[29] Motion to Recuse, ¶ 3.

[30] *Id*.

[31] Motion to Recuse, ¶ 4.

[32] ***Rundquist v. Director of Revenue,*** 62 S.W.3d 643, 646 (Mo. App., E.D. 2001).

[33] *Id.; see also* ***Farmers and Merchants Bank and Trust Co. v. Director of Revenue,*** 896 S.W.2d 30, 32-33 (Mo. banc 1995); ***Valli v. Glasgow Enterprises, Inc.,*** 204 S.W.3d 273, 276-77 (Mo. App., E.D. 2006); ***State ex rel. Hunter v. Lippold,*** 142 S.W.3d 241, 244 (Mo. App., W.D. 2004).

[34] ***Hunter,*** *supra,* 142 S.W.3d at 244; s*ee also* ***Kersting v. Director of Revenue,*** 62 S.W.3d 643, 653 (Mo. App., E.D. 1990) (statutory language was directory because there was no result if the court failed to comply with ten-day requirement and the legislative intent was to speed the revocation of driving privileges and not to give procedural protections to defendants); ***Frager v. Director of Revenue,*** 7 S.W.3d 555, 557 (Mo. App., E.D. 1999) (statutory language requiring that the director "shall" issue a final decision within ninety days was directory and not mandatory because there was no sanction for failing to do so).

Neither § 386.210, RSMo Supp. 2008, nor Rule 4 CSR 240-4.020(6) provide any sanction, remedy or penalty for a violation. Therefore, under the rules of construction set out above, they are directory and not mandatory. Consequently, these provisions do not support the Movants' assertion that Commissioner Davis must recuse.

Conclusion

It is Staff's view that the position asserted by the Industrial Intervenors in their Motion to Recuse, and recently adopted by the Public Counsel, is both legally and factually unsound. It is legally unsound, as amply demonstrated herein, because the members of the Public Service Commission are not subject to the Canons of Judicial Ethics; because the conduct in question does not require recusal under any reported Missouri decision; and because § 386.210, RSMo Supp. 2008, and Rule 4 CSR 240-4.020 provide no remedy and are therefore directory in nature. It is factually unsound because the conduct in question simply does not go to bias or prejudice, despite Movants' repeated claims that it does.

If indeed Movants believe that Commissioner Davis is biased, such that he should not sit in determination of this matter, their remedy is not a Motion to Recuse. A Motion to Recuse is not the appropriate forum for the resolution of such questions.

Respectfully submitted,

s/ Kevin A. Thompson_____
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Certificate of Service

I hereby certify that a true and correct copy of the foregoing was served, either electronically or by hand delivery or by First Class United States Mail, postage prepaid, on this **25th day of February, 2009,** on the parties of record as set out on the official Service List maintained by the Data Center of the Missouri Public Service Commission for this case.

s/ Kevin A. Thompson_____