BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of a Review of the Missouri Public Service Commission's Standard of Conduct Rules and Conflicts of Interest Policies.	)))	Case No. AO-2008-0192

SUPPLEMENTAL COMMENTS OF THE MISSOURI ENERGY DEVELOPMENT ASSOCIATION

COMES NOW the Missouri Energy Development Association ("MEDA"), and on behalf of itself and its members[1] submits the following supplemental comments:

INTRODUCTION

On December 13, 2007, the Chairman of the Commission initiated this proceeding by issuing an order scheduling on January 7, 2008, a Roundtable Discussion to consider potential enhancement of the Commission's Standard of Conduct Rules and Conflicts of Interest policies. The order required that notice of this proceeding be provided to various entities, and that any prepared statements, comments and presentation materials be filed by January 3, 2008. On December 19, 2007, the Regulatory Law Judge assigned to this proceeding (Judge Stearley) issued a second order that clarified, among other things, that materials concerning this docket may be submitted at any time before, during or after the Roundtable Discussion, and that materials filed prior to the Roundtable Discussion need not follow any particular format.

During the Roundtable Discussion, Judge Stearley indicated that while this docket was slated to remain open until January 31, 2008, a report might be issued before January 31. Judge Stearley also indicated that those additional comments would be accepted until

[1] MEDA's member companies consist of 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

that time and could be incorporated in a supplemental report to be issued after January 31, 2008. (Jan. 7, 2008 Roundtable Discussion Tr., p. 150)

On January 15, 2008, the Chairman issued a Report (the Initial Report) in this docket.[2] These Supplemental Comments are intended to address information presented during the January 7, 2008 Roundtable Discussion, in the Initial Report, and in other post-Roundtable filings made in this docket

A. THREE KEY PRINCIPLES MUST BE OBSERVED

As reflected in its Initial Comments, MEDA approached the Roundtable Discussion on the basis that any changes to existing standards respecting communications with the Commission, if changes are to be made at all, must observe, respect, and maintain three principles in order for the Commission to properly and effectively perform its regulatory function, as follows:

1. the standards must respect the long-standing concept that a vigorous and robust exchange of ideas and information is absolutely critical to the formulation of sound public policy;
2. the standards must maintain parity in the formulation and application of any requirements governing communications between commissioners and any participant in the regulatory process, including the Commission Staff;
3. the standards must recognize the distinction between quasi-judicial proceedings, where certain limitations on

[2] *See The Chairman's Report on a Review of the Missouri Public Service Commission's Standard of Conduct Rules and Conflicts of Interest Statute*.

communications may be appropriate, and quasi-legislative proceedings where such limitations are not appropriate, or in some cases even lawful.[3]

B. THE ROUNDTABLE DISCUSSION STRONGLY SUPPORTS EXISTING COMMISSION RULES AND STATE LAW RESPECTING COMMUNICATIONS WITH COMMISSIONERS.

The Roundtable Discussion largely consisted of presentations or comments from five persons or groups. The presentation of one participant, Ms. Julie Noonan, was driven almost entirely by Ms. Noonan's interest in the South Harper generating unit controversy involving Aquila, Inc. in Cass County, Missouri. Another set of comments was provided by a coalition of consumer groups who are asking the Commission, in a separate rulemaking proceeding, to radically and unwisely change communication standards in a manner that violates all three of the critical principles outlined above.[4] The remaining presenters consisted of two individuals with direct connections to state public utility commissions, and also MEDA.

1. Mr. Hempling's Comments.

One presenter with a direct connection to state public utility commissions was Mr. Scott Hempling, the Executive Director of the National Regulatory Research Institute (NRRI). NRRI is a non-profit corporation which is largely funded by dues from state

[3] The public has the constitutional right "to apply to those invested with the powers of government for redress of grievances". *Mo. Const.* Art I, § 9. This principle is echoed in the Missouri Administrative Procedure Act which states that "any person" may petition an agency for adoption, amendment or repeal of a rule. §536.041 RSMo.

[4] It is noteworthy that the most vocal members of that coalition are also the most vocal Commission critics respecting issues that arose in the pending merger case (Case No. EM-2007-0374), involving Aquila and Kansas City Power & Light Company. MEDA would caution the Commission against making knee-jerk changes to time-tested standards governing communications simply because of bare, unproven allegations made in a separate and hotly contested merger proceeding opposed by key members of this coalition. MEDA would also note that at least one of the coalition's principals, Public Counsel, conceded that any changes to the rules that the coalition proposed should apply equally to all parties (Tr. p. 44) (though their proposed rule fails to reflect equal treatment) and should not apply to rulemakings or other non-adjudicated cases (Tr. p. 45) (though their proposed rule does not make that clear).

public utility commissions, including the Missouri Public Service Commission. NRRI's mission includes providing "the research services utility Commissioners and staff need to make regulatory decisions of the highest possible quality."[5] While Mr. Hempling's comments were his own, his comments reflect his belief that standards governing communications should exist to serve regulation's purpose: to lead to high quality regulatory decisions. MEDA submits that it is beyond reasonable dispute that this Commission too has as one of its key goals to achieve regulatory decisions of the highest possible quality.

Mr. Hempling's comments reflect his belief that the kinds of communications on which this docket is primarily focused (those that occur outside a pending contested case proceeding) are a common, useful, and appropriate part of the regulatory process. Indeed, Mr. Hempling's comments are entirely consistent with the three guiding principles outlined above. Mr. Hempling recognizes that commissioners "need full information and . . . objective analysis." (Tr. p. 9). He also recognizes that commissioners need the right person to talk to, at the right time, which may not be a formal witness during the pendency of a contested case. (*Id.*) Mr. Hempling noted that informal communications (i.e., communications outside the formality of a contested case and indeed without involvement of other potential parties to those cases), are desirable because they encourage the acquisition of better information by commissioners who, to be blunt, may be entirely willing to ask "uneducated" (yet critically important) questions in a private meeting, but who understandably may not be willing to do so in a room full of adversaries or potential adversaries in the regulatory process.

Mr. Hempling properly recognizes that the issue here is not whether

[5] *See* NRRI's website, and also Mr. Hempling's comments, Tr. p. 6.

commissioners, who only assume quasi-judicial duties at the point in time a contested case is docketed and an evidentiary record is to be made, obtain knowledge about an issue that may arise in a case that may at some point be before them, or even have some hunch or tentative conclusion about it. The issue is whether a commissioner has, going into a contested case, an unalterable prejudgment about the issue or the case that he or she will be called upon to decide.

This has long been the law in Missouri. "Administrative decisionmakers are *expected* to have preconceived notions concerning policy issues within the scope of their agency's expertise" (emphasis added). *Fitzgerald v. City of Maryland Heights*, 796 S.W.2d 52, 59 (Mo. App. E.D. 1990). 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 decisionmaker." *Id.*

Why does Mr. Hempling hold these views? Why does the law sanction the receipt of knowledge about issues that may later be contested, so long as the decisionmaker does not have an "unalterable prejudgment of operative adjudicative facts?" *Id.* Because, as Mr. Hempling puts it, the regulator's ultimate job is to advance the public interest, not simply to referee something akin to a sports contest where there must be a winner and a loser.[6] To be sure, the regulator must ultimately decide a contested case based upon the *record* before the regulatory agency, consistent with the statutes that govern the regulator's authority, but in preparing to come to the hearing

[6] It is apparent that this is Public Counsel's view because he objects to discussions between Commissioners and other parties (certainly, with utilities) that could help Commissioners gain a greater understanding of issues that at some point may come before them, and apparently doesn't believe Commissioners should "tend to think" a particular way about any particular issue. (Tr. p. 33). This again reflects a fundamental disconnect between the different roles played by a Commissioner, who is a regulatory and a quasi-judicial officer only *when deciding an actual case before the Commission*, and a "real judge," who acts as a judge 24 hours a day, seven days a week.

room to render that judgment, the regulator needs to educate himself or herself in the most effective manner possible, and indeed is encouraged to do so by Missouri law.

That encouragement is reflected in Section 386.210, RSMo. Section 386.210 is a reflection of this State's *policy* to support a vigorous and robust exchange of information, particularly outside the context of a contested case and in some instances, once a contested case has been filed but before an evidentiary hearing is scheduled.

2. Mr. Thompson's Comments.

The other commenter, who has a direct responsibility to assist the Commission in achieving regulation that is effective and in accordance with the Commission's statutory mandate, was Kevin P. Thompson, the Commission's General Counsel. Mr. Thompson's comments were pointed: "no change to the Commission's rules are necessary." (Tr. p. 117). Why? Because, as Mr. Thompson noted and as the *Fitzgerald* case makes clear, administrative decisionmakers are affirmatively *expected* to know something about even the adjudicative facts of matters that may come before them. Indeed, their primary mission is to ascertain the facts necessary to establish sound and intelligent public policy.

Mr. Thompson is also correct in his observation that many of those seeking changes to the Commission's current standards are basing their recommendations on the mistaken notion that Commissioners are for all purposes judges, like a circuit or appellate court judge in this state.[7] They rely upon an isolated, out-of-context statement, in fact just one word, from *Union Electric Company et al. v. Slavin*, 591 S.W.2d 134 (Mo. App.

[7] They ignore other well-settled principles of law as well. For example, Public Counsel suggested that he should have some special authority to "investigate" if he believes the Commission may be acting improperly, and suggested there is no mechanism available to parties if improper action is suspected. (Tr. p. 36-37; Proposed rule docketed in Case No. AX-2008-0201). The law is clear, however, as evidenced by *Slavin* and *Fitzgerald* and many other cases over many decades, that a party can *voir dire* a Commissioner and can seek appropriate relief in the courts. It is the *courts*, not one litigant among many before the Commission, that has and should have some kind of superintending authority over Commissioners.

W.D. 1979).[8] That one word is "standards." Public Counsel and others argue that the *Slavin* courts use of the word "standards" means that the Code of Judicial, adopted by the Missouri Supreme Court – the Judicial Branch, somehow applies to appointees of the Governor, who of course heads the Executive Branch of this State's government. Not only would such a result be constitutionally impermissible under principles relating to the Separation of Powers, but *Slavin* does not say or even suggest any such absurd result.

The *Slavin* case was decided on one commissioner's conflict of interest in a particular fact situation and not on the general applicability of the Code of Judicial Conduct to members of the Commission. Specifically, it arose when Commissioner Slavin, who had been an actual party to a Union Electric Company rate case before she became a Commissioner, attempted to sit as a Commissioner in the contested rate design phase that arose from that rate case and that would decide how the rate increase that had just been granted would be allocated among the various rate classes. Indeed, then-Commissioner Slavin had already publicly stated that she believed that residential customers were paying too much, indicating that she had already decided that the utility's rate design should move costs from residential customers to industrial customers. The question on appeal was whether the utility and another industrial appellant, ACF Industries, "will be denied due process if Slavin is not prohibited from participating in a case in which she is actually a party." *Id.* at 137.

The Court, citing *common law rules* that prohibit a decisionmaker with an *actual interest* in a case from sitting as a decisionmaker in that case, ordered the circuit court to prohibit Slavin from participating in the case. It is crystal clear that the court's decision rests solely on the common law principle that a decisionmaker cannot judge a case in

[8] *See Public Counsel's Response to Request for Filing,* Case No. AO-2008-0192, filed January 10, 2008.

which the decisionmaker is actually interested or biased. The Court rests its conclusion on the *King's Lake, Forest Hills Utility Company, and American General Insurance* cases cited in the opinion, each of which rest solely on the common law. *Slavin*, 591 S.W.2d at 137-38, 139. In referring to "the same *standards* and rules," the *Slavin* court was citing to those three cases, none of which mention the Code of Judicial Conduct in this or in any other state. Neither does *Slavin* mention or refer to any Code of Judicial Conduct.

Note that Public Counsel, in his January 10 filing in this docket inserted a word "[judicial]" that does not appear in *Slavin* when he attempted to use a quote from *Slavin* for the proposition that Commissioners must follow the judicial canons. Neither the facts of *Slavin*, the context in which it arose, the cases relied upon by the *Slavin* court, or the *Slavin* opinion itself, ever makes one mention of, nor any reference to, any such judicial code. It is, to put it mildly, a colossal stretch for the "coalition"[9] to attempt to turn public service commissioners into full-time judges from the minute a commissioner takes office until the commissioner leaves the Commission.

In summary, those with the most direct interest in promoting sound regulatory policy agree – the Commission's existing rules and existing state law already strike the appropriate balance between the critical need for the Commission to have access to information about the industry and companies it regulates and the need for transparency and public confidence in the regulatory process.

[9] The Roundtable Discussion transcript shows that the attorneys for all coalition members expressed support for the notion that *Slavin* stands for the proposition that commissioners are bound by the canon of judicial ethics.

C. RULE MODIFICATIONS THAT COULD POTENTIALLY ENHANCE PUBLIC CONFIDENCE WITHOUT VIOLATING THE CORE PRINCIPLES FOR ENSURING FAIR AND EFFECTIVE POLICY MAKING.

In light of the foregoing considerations, MEDA believes that there is no justification for the kind of wholesale changes to the Commission's current Conduct During Proceedings rule that some parties and, with respect to a number of recommendations, even the Initial Report, propose. MEDA does, however, believe that there are some limited revisions to those rules that could potentially enhance public confidence in future Commission decisions while still maintaining adherence to the three principles discussed above. For the Commission's convenience, these changes have been set forth in Attachment A to these comments.

As shown in Attachment A, these potential revisions would do several things. First, they would update the Commission's Conduct During Proceedings rule to incorporate the specific provisions of Section 386.210, RSMo., which govern how and when communications with commissioners may take place. Second, the revisions would clarify that the various prohibitions set forth in the rule are applicable to quasi-judicial or contested case proceedings in which the law requires that the rights, duties and obligations of specific parties be determined after a hearing.

Third, the proposed revisions would establish a bright line "cut-off" or "blackout" period for any communications which address issues that are likely to arise in a contested case. This cut-off period would commence thirty days before the contested case filing was made and would remain in place for the duration of the proceeding, subject only to the ability of parties to raise such issues at a public agenda meeting or other forum where

all parties have an opportunity to be present, as provided for in Section 386.210, RSMo. Finally, the proposed revisions would incorporate a number of the recommendations set forth in the Chairman's Report where those recommendations are faithful to the three guiding principles outlined above, all of which were amplified by Messrs. Hempling and Thompson in their Roundtable Discussion Remarks and by Commissioner Jarrett with his January 30, 2008 Comments.[10]

As previously noted, in the event the Commission believes that any changes to its Standards of Conduct rule are needed, MEDA believes that the revisions set forth in Attachment A could be made without running afoul of Section 386.210, RSMo. violating the principles discussed above, or impeding the Commission's ability to effectively discharge its regulatory duties.

D. POTENTIAL RULE REVISIONS THAT WOULD VIOLATE THE PRINCIPLES DISCUSSED HEREIN SHOULD NOT BE ADOPTED.

While many of the recommendations set forth in the Chairman's Initial Report and in Commissioner Jarrett's Comments can be reconciled with the three principles outlined above, a number of others cannot. In fact, several recommendations go well beyond the balance struck by existing law and can be expected to unduly impair the ability of the Commission and other participants in the regulatory process to do their jobs in a fair and effective way.

For example,[11] Recommendations E and F in the Initial Report would establish

[10] The proposed revisions do not include any specific language relevant to Commissioner Jarrett's three recommendations because they are either best addressed in a different rule (see, Commission rule 4 CSR 240-2.080(6) concerning representations in pleadings) or are internal administrative matters for the Commission to implement (an EFIS submission acknowledgement and notification filing) rather than matters with respect to which parties or the commissioners should be expected to conform their conduct.

[11] While these Supplemental Comments will address a few of the recommendations of concern, MEDA has serious concerns about a number of the other recommendations contained in the Initial Report that will not be addressed here. Moreover, as discussed below, MEDA is largely endorsing some of the

certain notice and disclosure requirements for meetings involving parties (as opposed to Commissioners or the Commissioners' Advisors) to Commission proceedings. In fact, these requirements would apply to every person associated with every party and to "persons likely to become parties" to every Commission case.

If such a requirement was adopted and upheld, a utility could no longer meet (pre- or post-filing) with or discuss a matter related to a pending case with either the Staff, Public Counsel, or with another intervenor, without disclosing that communication to every other party. The same would also be true of Public Counsel. No matter how much commonality of interests they might have on a case or an issue within a case, Public Counsel could not sit down with Staff and discuss strategy relating to the handling of that case or that issue, including the myriad of issues that arise in a rate case, without disclosing the communication to the utility. Likewise, the utility could not discuss settling one or more issues with the Staff without involving all other parties, even if that involvement were futile, or would disrupt the settlement process.

It is not at all clear that the Commission even has the authority to dictate how and when independent parties may communicate with each other during the course of a Commission proceeding. But even assuming it did, it is highly likely that such a requirement would make it very difficult, if not impossible, for parties to clarify factual differences, settle or narrow issues, explore areas of potential agreement and disagreement, and engage in the kind of informal discussions that are vital to resolving differences. The predictable result would be a huge increase in needless litigation that

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recommendations where they are consistent with the three principles outlined herein, and where they can help promote greater transparency and public confidence in the regulatory process. To the extent a recommendation is not reflected in Attachment A, it is because that recommendation is inconsistent with those three principles, and would impede the Commission's ability to effectively and efficiently regulate the industries subject to its jurisdiction.

runs counter to decades of Commission policies and to long-standing principles of law aimed at encouraging parties to resolve their disputes where such a resolution can be reached consistent with the public interest.[12]

Another particularly problematic recommendation is recommendation H, which would require that advance requests be submitted and transcripts kept of any meetings between a party or potential party and the Commission Staff or between a party and a commissioner. Once again, such a requirement would make it virtually impossible to engage in constructive settlement discussions between the Staff and other parties, and indeed would bring the business of the Commission to a grinding halt. Moreover, such a requirement would directly conflict with the long-standing principle that such discussions are privileged and thus exempt from disclosure.

Having to schedule and transcribe each and every meeting would also vastly complicate the free exchange of information. Since every major utility regulated by the Commission generally has some case open at any given time, or is likely to have an open case in the near future, such a requirement would presumably apply on an ongoing and uninterrupted basis.[13] As a result, every time a utility seeks to advise the Staff of an operational development (e.g., a storm-related outage, the utility's storm response), update the Staff or a commissioner regarding the status of a project, service interruption or other matter of interest, or even furnish information that may have been prompted by a commissioner's question, an effort would have to be made to submit a meeting request in writing, find a court reporter or video equipment operator, and then post the information

[12] The Commission will of course have the opportunity, in considering whether to approve the settlement of a case, to weigh whether the settlement, taken as a whole, is in the public interest.

[13] This is not only true of utilities, but of many other frequent parties to Commission cases, including the Staff, Public Counsel, large industrial customers and groups of industrial customers, and consumer groups, who also are, at any given time, parties or certainly potential parties to a myriad of Commission cases.

within 72 hours. Imagine having to take these steps for the daily communications occurring between the Staff and utilities regulated by the Commission respecting issues too numerous to mention here, including routine tariff changes, resolution of customer complaints, and questions about the many reports utilities submit on an ongoing basis, to name just a few.

The same would be true of any similar effort at communicating undertaken by Public Counsel or any other stakeholder in the regulatory process for that matter. The end result of this exceedingly cumbersome process would be a sharp and destructive curtailment in the free flow of information that is necessary to make the regulatory process work effectively.

Moreover, insofar as it does not appear obvious how Staff could possess its own "highly confidential" information, apparently all such documentation would be open to the public and, in a strange twist, certain information would be available to Public Counsel but not, for example, to the affected utility or industrial customer or other intervenor.

On the other hand, Recommendation D unfairly suggests that when non-Staff parties to a case meet with a Commissioner on less than 24-hours notice, a transcription must be made, but if Staff meets with a Commissioner, a transcription is not required. Not only is this lack of parity unfair, but it may very well run afoul of fundamental legal, including constitutional principles, all of which bind the Commission in both its quasi-legislative and quasi-judicial roles. This is because Staff acts as an adversarial party who may be adverse to the utility, or to Public Counsel, an industrial intervenor or any number

of other parties, in all contested cases before the Commission.[14]

At bottom, the problem with these and a number of the other recommendations in the Initial Report is that they ignore the long-standing principles that MEDA, Mr. Hempling and Mr. Thompson have also cited as vital to the effective discharge of the Commission's regulatory duties. While there are a number of recommendations that can improve the transparency of Commission decisionmaking and potentially enhance public perception – recommendations that MEDA can in good faith support and which are reflected in Attachment A – these kind of measures would be do neither. Instead, they would simply stifle the free and undeniably constructive exchange of information and views that has always been vital to the effective, fair and efficient operation of the regulatory process. Accordingly, they should not be adopted.

Respectfully submitted,

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[14] Many of the Initial Report's recommendations are also unclear respecting whether they would apply to Staff (as opposed to the Commissioners' personal advisors) at all. If not, then the serious questions of fairness, legality and constitutionality noted earlier would certainly arise.

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 31st day of January, 2008, to the following:

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