



MEDA's Response: The wording of the current rule 4 CSR 240-4.020 "Conduct During Proceedings" is both comprehensive and sufficiently clear to guide the conduct of all participants, including the individual commissioners, in proceedings before the Commission. The rule restricts the making of extra-record statements about a proceeding during its pendency, such as commentary to the press. See, 4 CSR 240-4.020 (1) (A). Communications with a commissioner or a law judge during a proceeding likewise are restricted. See, 4 CSR 240-4.020 (2). There are restrictions on former commissioners or employees participating in a contested case with respect to which they had personal involvement and substantial responsibility. See, 4 CSR 240-4.020 (3). Efforts to bring pressure or influence on policymakers are prohibited and commissioners are prohibited from inviting or entertaining communications about a case from the time a hearing has been set until its conclusion. See, 4 CSR 240-4.020 (6) and (7). Finally, inadvertent *ex parte* communications are required to be disclosed. See, 4 CSR 240-4.020 (7).

This code of conduct has served the Commission well since 1975 and were it not for the conduct of one or more parties the Commission has recently admonished for using the rule for "tactical advantage" and "to arbitrarily obstruct the Commissioners' proper exercise of their quasi-judicial functions" in accordance with express statutory authority<sup>3</sup>, no question about the adequacy of the rule would be presented. Ultimately, it is incumbent on the commissioners, its employees and the various parties to Commission proceedings to use good judgment and comport themselves with professionalism and integrity in

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<sup>3</sup> See, January 2, 2008, Order Denying Motion to Dismiss, Case No. EM-2007-0374, at p. 20.

accordance with the rule's guidelines. That includes not trying one's case in the press, a restriction that seems to have been honored most often in the breach.

**Question 2. Is the rule, as currently drafted, sufficient in scope? Are activities permitted that should be prohibited? Are activities prohibited that should be permitted?**

MEDA's Response: As noted above, the rule is sufficient in scope, particularly in light of the relevant enabling legislation which can be found at §386.210 RSMo. (Supp. 2006). The current rule strikes an appropriate balance between the Commission's need for information about the industries and companies it regulates and fundamental fairness in the regulatory process.

Some clarification would be helpful to limit the application of the rule to contested cases and not to other types of proceedings such as workshops, round tables and rulemakings<sup>4</sup>. Also, public perception and confidence might be enhanced by some limited revisions to the rule that would: (1) update and better align the rule's provisions with the statutory guidelines that appear in §386.210 RSMo (Supp. 2006), (2) 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 parties be determined after a hearing, (3) establish a bright line "blackout" period that precedes a filing that commences a contested proceeding and (4) incorporate those specific recommendations set forth in the Chairman's Initial Report in Case No. AO-2008-0194 that MEDA believe would add greater transparency to Commission

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<sup>4</sup> See, *State ex rel. Atmos Energy Corporation v. Public Service Commission*, 103 S.W.3d 753, 759-760 (Mo. banc 2003).

decisionmaking without unduly restricting the Commission's access to vital information or impairing its ability to discharge its regulatory duties effectively. Attached hereto for the Commission's consideration as Attachment A is a draft of a proposed rule revision identical to that filed by MEDA in Case No. AO-2008-0194 which addresses these and other matters set forth in the Chairman's report in that case.

**Question 3. Is the rule, as currently drafted, consistent with the substance and spirit of the statutes governing *ex parte* communications at the PSC?**

MEDA's Response: The current rule is generally consistent with §386.210 RSMo (Supp. 2006). This statute provides clear guidelines concerning communications with commissioners. Those communications occurring outside the context of a case that has been filed with the Commission are expressly authorized<sup>5</sup> and, consequently, are not *ex parte* communications<sup>6</sup>. The current rule concerning matters that are the subject of a pending filing or case is also generally consistent with the governing legislation in that it imposes certain limitations to ensure transparency and fairness, but does not institute a complete prohibition on communications with commissioners.<sup>7</sup> As shown in the Attachment, however, certain updates to the current rule would be appropriate to incorporate certain procedural requirements in the statute that vary somewhat from those set forth in the rule.

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<sup>5</sup> See, §386.210.1 and .2 RSMo. (Supp. 2006).

<sup>6</sup> **Blacks Law Dictionary** defines an *ex parte* communication as a prohibited communication between counsel and the court when opposing counsel is not present.

<sup>7</sup> See, §386.210.3 RSMo (Supp. 2006).

**Question 4. Are the present rule and procedures concerning *ex parte* communications sufficient to ensure public confidence in the fairness of proceedings at the PSC?**

MEDA's Response: Yes. The current rules are clear and equally applicable to all persons or parties. The commissioners and their employees are not to entertain or invite a communication concerning a pending proceeding and, with respect to inadvertent prohibited communications, a detailed disclosure is required.

Also, parties are prohibited from providing comment or quotations that can reasonably be expected to be published concerning evidence in the case, credibility of witness testimony, physical evidence or results of tests, one's opinion as to the merits of pending issues or "any other matter which is reasonably likely to interfere with a fair hearing".

Concluding Comment: The Commission's current rule governing conduct during proceedings generally, and *ex parte* communications specifically, is clear, fair and reasonable. It has served the Commission well since its adoption in 1975. The concerns raised in the context of Case No. EM-2007-0374 which are the purported justification for Motion for Proposed Rulemaking dealt with communications which were expressly authorized under applicable law as exhaustively explained by the Commission<sup>8</sup>. Consequently, the Commission should not feel compelled to undertake an unnecessary, wholesale rewrite of the Commission's current rule which provides guidelines concerning prohibited

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<sup>8</sup> See, ftnt. #3, *supra*.

communications. To the extent the Commission is of the opinion there is a need for a rulemaking, a few carefully targeted clarifications as noted above under item #2 could be helpful to enhance public confidence in the process. Most importantly, the Commission should not consider adopting a rule, or follow a practice, which nullifies the expressed will of the General Assembly as codified in the Commission's enabling legislation.<sup>9</sup>

Respectfully submitted,

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<sup>9</sup> See, *State ex rel. Springfield Warehouse & Transfer Company v. Public Service Commission*, 225 S.W.2d 792, 793 (Mo. App. 1949).

**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 1<sup>st</sup> day of February, 2008, to the following:

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