

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

Comes now the Missouri Energy Development Association (“MEDA”), and on behalf of itself and its members¹, submits the following comments in response to the Missouri Public Service Commission’s (the “Commission”) January 23, 2008, Notice of Opportunity to Comment in the referenced matter. MEDA’s member companies are investor-owned public utilities regulated by the Commission as provided in the Missouri Public Service Commission Act² and, consequently, are frequently before the Commission in various proceedings such as investigations, complaints, rulemakings and rate cases. Each company is intimately familiar with the Commission’s rule governing conduct during proceedings, including those elements of the rule addressing prohibited communications during a pending proceeding, or “*ex parte*” contacts. As such, MEDA is pleased to have the opportunity to respond to the four questions included in the Notice and presents its views as follows:

Question 1. Is the wording of the current rule sufficiently clear to guide the behavior of all the participants (including Commissioners) in PSC proceedings?

¹ Union Electric Company, d/b/a Union Electric Company, 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.

² Chapters 386 and 393 RSMo.

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 authority³, 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

³ 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 rulemakings⁴. 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

⁴ 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 authorized⁵ and, consequently, are not *ex parte* communications⁶. 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.⁷ 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.

⁵ See, §386.210.1 and .2 RSMo. (Supp. 2006).

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

⁷ 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 Commission⁸. Consequently, the Commission should not feel compelled to undertake an unnecessary, wholesale rewrite of the Commission's current rule which provides guidelines concerning prohibited

⁸ 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.⁹.

Respectfully submitted,

Missouri Energy Development
Association

By: /s/ Paul A. Boudreau
Paul A. Boudreau #33155
Brydon, Swearngen & England, P.C.
312 E. Capitol Avenue
P.O. Box 456
Jefferson City, Missouri 65102-0456
Phone: (573) 635-7166
Fax: (573) 635-0427
Email: paulb@brydonlaw.com

⁹ 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 1st day of February, 2008, to the following:

Missouri Public Service Commission
200 Madison Street, Suite 800
P.O. Box 360
Jefferson City, MO 65102-0360
gencounsel@psc.mo.gov

Stuart Conrad
AG Processing, Inc.
3100 Broadway, Suite 1209
Kansas City, MO 64111
stucon@fcplaw.com

Diana M. Vuylsteke
Missouri Industrial Energy Consumers
211 N. Broadway, Suite 3600
St. Louis, MO 63102
dmvuylsteke@bryancave.com

Office of the Public Counsel
Governor Office Building
200 Madison Street, Suite 650
P.O. Box 2230
Jefferson City, MO 65102-2230
opcservice@ded.mo.gov

Lisa C. Langeneckert
Missouri Energy Group
911 Washington Ave., 7th Floor
St. Louis, MO 63101
llangeneckert@stolarlaw.com

John Coffman
Consumers Council of Missouri
871 Tuxedo Blvd.
St. Louis, MO 63119-2044
john@johncoffman.net

/s/ Paul A. Boudreau

Paul A. Boudreau