

**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI**

In the Matter of Proposed Amendments)	
to the Commission's Ex Parte and)	Case No. AX-2017-0128
Extra-Record Communications Rule)	

**COMMENTS OF THE MISSOURI INDUSTRIAL ENERGY CONSUMERS AND
THE MIDWEST ENERGY CONSUMERS GROUP**

COME NOW the Missouri Industrial Energy Consumers and the Midwest Energy Consumers Group and for their comments on the proposed rulemakings state as follows:

1. In 2007, after a series of incidents made clear that the Commission's then-effective ex parte rules allowed conduct by Commissioners that severely eroded trust in the institution of the Commission, a group representing a broad range of consumer interests petitioned the Commission to strengthen the ex parte rules. While the details varied from incident to incident, all involved non-public meetings or discussions between a Commissioner and utility representatives that, when discovered, created the appearance of impropriety. In at least two instances, once the nature of the discussions was revealed, the involved Commissioners were forced to recuse themselves from pending cases.

2. The consumer representatives who petitioned for a rule change in 2007 were the Office of the Public Counsel, Praxair, Inc., AG Processing, Inc., the Midwest Gas Users Association, the Sedalia Energy Users Association, the Missouri Industrial Energy Consumers, the Missouri Energy Group, AARP, and the Consumers Council of Missouri. Together, these petitioners represented all of the consumer representatives that regularly appeared before the Commission at that time. The petition was filed on December 19, 2007, and assigned Case Number AX-2008-0201.

3. In addition to these consumer representatives, many others called for reforms to restrict the private communications between Commissioners and utility representatives. Governor Matt Blunt, the General Assembly, the St. Louis Post-Dispatch, the Kansas City Star, and many ordinary citizens joined the outcry. Governor Blunt stated: "Missourians deserve total trust in the members of the commission, and I am calling on the PSC to immediately examine their policies on conflicts of interest including inappropriate contact with executives in cases before the commission." The General Assembly appropriated \$100,000 "for the development of a rule regarding ethics, conduct and conflict of interest...."

4. Although the Commission never took action on the specific rulemaking petition that created Case No AX-2008-0201, it did initiate a number of other proceedings, including a workshop to address the directive of the General Assembly. This workshop was docketed as Case No. AW-2009-0313. While there were opportunities for comment, much of the activity in that case was the creation of model rules by the Commission's ethics consultant. Although those model rules did address ex parte and extra-record communications, they also addressed gratuities, post-employment activities and other such topics. The Commission closed the workshop case without taking any specific action, although it is clear that comments and filings in the workshop ultimately informed the actual rulemaking proceeding.

5. One other case that was created in the years-long study and discussion period leading to the promulgation of the current rules was AO-2008-0192. Docketed just a week before the petition for rulemaking in AX-2008-0201, AO-2008-0192 was effectively another workshop case, created on the motion of then-Chairman Jeff Davis. The initial notice in the case described its purpose as:

Out of the desire to affirm public confidence in the execution of its statutory mandates to promote the public interest, ensure the safe and adequate provision of

utility service and set just and reasonable rates for those services, the Chairman is opening this docket to elicit specific comments and suggestions regarding potential enhancements for Standard of Conduct Rules and Conflicts of Interest policies. The Chairman will utilize this forum to evaluate the Commission's current rules, policies, procedures and practices to determine if any modification or specific enhancement is required to prevent any impropriety, or even the appearance of impropriety, with regard to the actions of the Commission.

There was a lengthy workshop in which interested entities discussed various approaches to regulating ex parte and extra-record communications, and a large number of filings were made concerning those topics. This case, like several others, was also closed without having directed any specific action once the formal rulemaking case commenced.

6. The formal rulemaking case, AX-2010-0128, was docketed on October 29, 2010, almost two years after the consumer representatives initially petitioned the Commission to promulgate a rule. Neither the proposed rules nor the final rules contained all the protections that the consumer groups sought, but they were considerably more fair than the rules they replaced. In particular, they restricted the circumstances in which utility representatives (or representatives of any entity interested in the outcome of contested Commission cases) could meet in private with Commissioners without having other interested entities know about the meeting or the subjects discussed. This restriction was at the core of the revised rules, and it was the result of two years of soul-searching by Commissioners, Commission Staff, utilities, consumers, ethics experts and others. The rules, which became effective July 30, 2010, have worked as intended, and the types of incidents that led to their adoption have disappeared.

7. But on September 7, 2011 – barely a year after adopting new rules – the Commission opened Case No. AX-2012-0072 by issuing a notice that merely stated: “The Commission finds that the subject amendment is necessary to reflect the Commission’s experience with the 2010 revision to the rule and to improve the operation of the rule.” In the

Commission's November 30, 2011 Agenda meeting, the Commission noted that the proposed changes were intended to make it easier to conduct post mortem discussions about closed cases with its Staff. The Commission did not discuss that it proposed to entirely eliminate the subsection that prevents the kind of secret meetings that created such an uproar and that was the genesis for the changes to the rules in the first place. That subsection, 4 CSR 240-4.020(11), provides that:

(11) No person who is likely to be a party to a future case before the commission shall attempt to communicate with any commissioner or member of the technical advisory staff regarding any substantive issue that is likely to be an issue within a future contested case, unless otherwise allowed under this rule. Should such a communication occur, the person involved in the communication shall file a notice with the secretary of the commission. Such notice shall provide the information required in section (4) of this rule. Once such a case has been filed, the secretary shall promptly file any such notices in the official case file for each discussed case.

Comments were filed or made at the rulemaking hearing by consumer representatives against the rescission of that subsection, and by a utility in favor of rescission. The Commission was convinced of the importance of the subsection in protecting against the appearance of impropriety and in maintaining the public trust in the Commission as an institution, and so the Commission withdrew the proposed rescission in an order of rulemaking published on April 12, 2012.

8. Now the Commission is again desirous of eliminating not only this subsection, but also the vast majority of a rule that was two years in the making. The Commission's proposed changes would allow a resumption of the types of meetings that caused such an uproar just a decade ago. The Commission's express purpose for the currently proposed changes, stated at Agenda meetings, is to make it easier for Commissioners to have private meetings with utility representatives. For all the reasons that led to the promulgation of the current rules, and all of

the reasons that stopped the Commission from jettisoning them in 2012, the Commission should abandon this misguided attempt to replace the current rules with the wholly inadequate proposed substitute.

Respectfully submitted,

BRYAN CAVE, LLP

By: /s/ Lewis R. Mills
Lewis R. Mills, # 35275
221 Bolivar Street, Suite 101
Jefferson City, MO 65101
Telephone: (573) 556-6627
Facsimile: (573) 556-7447
E-mail: lewis.mills@bryancave.com

ATTORNEY FOR THE MISSOURI
INDUSTRIAL ENERGY CONSUMERS

By: /s/ David L. Woodsmall
David L. Woodsmall, #40747
308 E. High Street, Suite 204
Jefferson City, Missouri 65101
(573) 636-6006
Facsimile: (573) 636-6007
Internet: david.woodsmall@woodsmallllaw.com

ATTORNEY FOR THE MIDWEST ENERGY
CONSUMERS' GROUP

CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the foregoing document has been emailed this 2nd day of February, 2017, to all parties on the Commission's service list in this case.

/s/ Lewis R. Mills