

**BEFORE THE PUBLIC SERVICE COMMISSION  
OF THE 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 ) **Case No. ER-2009-0089**  
Service to Continue the Implementation of its )  
Regulatory Plan )

**PUBLIC COUNSEL’S MOTION TO STRIKE MEDA FILING,  
OR IN THE ALTERNATIVE, RESPONSE TO MEDA FILING,  
AND RESPONSE IN SUPPORT OF MOTION FOR RECUSAL**

COMES NOW the Office of the Public Counsel and in response to the filing made by the Missouri Energy Development Association (MEDA) on February 18, 2009, states as follows:

**Motion to Strike**

1. On September 5, 2008, Kansas City Power & Light Company (KCPL) filed a general rate increase case. On September 12, the Commission issued its Order and Notice, which established an intervention date of October 2, 2008. MEDA did not file an application to intervene before October 2, 2008, nor has it filed one since. MEDA is not a party to this case.

2. On February 18, 2009, MEDA filed a response to the motion to recuse Commissioner Davis filed by Praxair, Inc. and the Midwest Energy Users’ Association (“Industrial Intervenors”). MEDA should not be allowed to insert itself into any issue in any proceeding that suits its interest. If it has a genuine interest in a particular case, it should be required to demonstrate that interest and seek intervention. Unless and until MEDA seeks and is granted intervention in this case, the Commission should strike any pleadings that MEDA files in it.

### **Response to MEDA**

3. If the Commission decides that it will consider the MEDA filing, Public Counsel makes the following response.

4. Most of the MEDA filing is based on wishful thinking and fabrication, and MEDA leads off with one of its most outrageous arguments. MEDA asserts that seeking recusal of a sitting Commissioner amounts to bullying and intimidation. If parties to Commission cases are not free to seek recusal of a Commissioner who has violated the Commission's rules and Missouri statutes, how does MEDA suggest parties should address such conduct? Obviously MEDA and its members would prefer that consumer representatives simply tolerate whatever Commissioners do, but taking action by filing a motion does not – by any stretch of the imagination – amount to bullying.

4. Next MEDA argues, with absolutely no support, that Executive Director Henderson is part of the same division of the Commission as Commissioner Davis. Although that is patently false, if it were true, it would raise significant concerns. Mr. Henderson participates in settlement discussions in cases pending before the Commission; if he were part of the Commissioners rather than part of the Staff, such participation would undermine the whole settlement process. Mr. Henderson is in almost constant communication with utilities, even while cases are set for hearing, which would be a violation of the *ex parte* rules if he were part of the Commissioners rather than part of the Staff. But these concerns do not arise, because MEDA mischaracterizes the Executive Director as being part of the Commissioners. None of the PSC

organizational charts group the Executive Director with the Commissioners.<sup>1</sup> This is simply another argument MEDA throws in with little thought and no support.

5. At paragraphs 4, 9 and 10, MEDA asserts that, contrary to Section 386.210 RSMo Cum. Supp. 2006, a prohibited *ex parte* contact cannot occur until after the list of contested issues is filed. Put another way, MEDA believes that any communication about any issue is permissible up until the point the issue is finally listed as a contested issue. This argument is just silly. If the cut-off for communications really should be when a list of issues is filed, why does the statute set the cut-off at the date on which a case is set for hearing? In Case No. EM-2007-0374, MEDA members pounded on the notion that the communications complained of in that case occurred before the case was filed. Deprived of that argument here, MEDA simply moves the cut-off point to a more convenient point in the future, and ignores the plain statutory language. Apparently the appropriate cut-off, from MEDA's perspective, always happens to be sometime after the communications occurred, whenever that may have been.

6. Furthermore, MEDA's "head in the sand" attitude about what may be contested in this case strains credibility. KCPL is well aware, as are all MEDA members, that return on equity is almost universally the biggest issue in every rate case. Unless a case settles in its entirety, rate of return will be a contested issue. KCPL is also well aware, as are all of the MEDA members that are electric utilities, that off-system sales margins is a big issue in every rate case. It was a contested issue in at least KCPL's last two rate cases (ER-2006-0314 and ER-2007-0291). For MEDA to argue, as it does in paragraph 9, that the communication at issue here

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<sup>1</sup> See Attachments 1-4. See also <http://www.psc.mo.gov/about-the-psc/division-descriptions>, which describes the Executive Division without reference to Commissioners, and <http://www.psc.mo.gov/the-commissioners>, which describes the Commissioners without reference to the Executive Director.

is permissible because “the specific issues to be heard in the subject rate case are not even known at this time,” is just not plausible.

7. At paragraph 10, MEDA asserts – once again incorrectly and once again without any support – that Mr. Henderson’s response contained information which had previously been provided to the Commission and that was available to Commissioner Davis. As KCPL knows, and as MEDA could surely have determined if it had been interested in accuracy, surveillance reports are submitted to the Staff, not to the Commission. The information contained in those reports is not available to a Commissioner unless that Commissioner asks a Staff person for it – exactly as happened here. Indeed, had the information been available to Commissioner Davis as MEDA baselessly asserts, presumably he would have just looked at it rather than asking Staff for it.

8. Also at paragraph 10, MEDA mischaracterizes the prohibited *ex parte* communication that happened here as being like questions from the bench during an evidentiary hearing. When a Commissioner asks a question from the bench, the conversation is on the record, opposing counsel is present, opposing counsel can object to the questions, and opposing counsel can cross-examine the witness after the Commissioner’s questions. Here, an individual Commissioner sought extra-record information from a party to the case, and sought to cure the deliberate, prohibited *ex parte* conduct by following the rules that cover inadvertent *ex parte* contacts. The situation here is not at all like questions from the bench during an evidentiary hearing.

9. MEDA also trots out the tired old argument that because the Slavin case<sup>2</sup> only addressed one aspect of the judicial canons, there is not clear judicial guidance that the other aspects also apply. Public Counsel believes that the opposite is a much more reasonable view of the Slavin case: if one aspect of the judicial canons applies, they all should apply. Public Counsel has addressed this question at length in other cases, and will not belabor it here.<sup>3</sup> But a few simple rhetorical questions help with the perspective: why should a Commissioner deciding issues worth hundreds of millions of dollars be held to a lower ethical standard than a circuit judge deciding a thousand dollar complaint? If one is not allowed to seek out information *ex parte* from a party to a contested case, why should the other?

10. MEDA concludes by noting that the Commission has, and individual Commissioners have, broad supervisory powers over utilities. Public Counsel does not disagree with that general observation, but MEDA goes too far when it states that these general powers are not constrained in any way by “the filing of a rate case or the scheduling of a hearing in a contested case.” MEDA’s approach effectively writes Section 386.210 out of existence. The specific language of Section 386.210 does indeed constrain what the Commission can do when a case is filed and set for hearing. MEDA’s approach is based on wishful thinking rather than sound legal analysis.

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<sup>2</sup> State ex rel. Union Electric Company v. Public Service Commission, 591 S.W.2d 134, (Mo.App. W.D. 1979).

<sup>3</sup> A Commissioner actively seeking information *ex parte* from one party to a contested case that is set for hearing is such a clear violation of the Commission’s rules and Section 386.210 that it is really not necessary to delve too deeply into the judicial canons.

## **Response in Support of Recusal**

11. Public Counsel agrees with the analysis of the Industrial Intervenors that Commissioner Davis' actions violated Section 386.210 and 4 CSR 240-4.020. Because of the prompt filing of the *ex parte* notice, the situation here is not as severe as some that have arisen in the recent past. But Commissioner Davis did violate the statute and the rule, and given his response,<sup>4</sup> it appears that he does not acknowledge the violation and even plans to continue to seek information *ex parte* from the Staff during contested cases. MEDA implies that there is no real harm from these violations because the information was promptly filed. But a party should not be required to demonstrate harm when a Commissioner violates the *ex parte* statute and the *ex parte* rules. These violations are sufficient to undermine trust in the process, even without a showing of specific harm. Accordingly, Public Counsel believes that recusal is appropriate.

WHEREFORE, Public Counsel respectfully requests that the Commission strike or disregard the MEDA filing, and respectfully requests that Commissioner Davis recuse himself from participation in this case.

Respectfully submitted,

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<sup>4</sup> The Kansas City Star reports (<http://www.kansascity.com/business/story/1039815.html>) that "Davis said Tuesday that he had done nothing wrong..." and that because "the commission's staff members work for the regulators, [Commissioner Davis believes he] should be able to ask them for information...."

**CERTIFICATE OF SERVICE**

I hereby certify that copies of the foregoing have been emailed to all parties this 24th day of February 2009.

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