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

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

## COMMENTS OF THE MISSOURI TELECOMMUNICATIONS INDUSTRY ASSOCIATON

The Missouri Telecommunications Industry Association ("MTIA") appreciates the opportunity to provide its suggestions and comments regarding the Chairman's Report issued on January 15 in Case No. AO-2008-0192 ("Report") and the Notice of Opportunity to Comment issued on January 23 in Case No. AX-2008-0201 ("Notice"). The subjects of these two proceedings are very important not only to MTIA's membership but also to the public interest generally.

By way of summary, MTIA agrees with a fundamental premise reflected in the Report's premise, that Missourians must have confidence "that processes both during and prior to the filings of cases are handled in a manner that is fair, objective and above reproach." (Report, p. 2). To that end, MTIA submits that current Missouri statutes and Commission rules are sufficiently clear to both guide the behavior of all participants in Commission proceedings and to ensure public confidence in the fairness of Commission proceedings.

While the Report appears to make recommendations intended to foster even greater openness in the way in which the Commission's business is conducted, it is important to note that several of the Report's recommendations would correspondingly hinder some of the most important of the Commission's functions. Some of these functions include the Commission's acting in the capacity of a quasi-legislative body, being kept abreast of important day-to-day developments in regulated industries, and encouraging the efficient disposal of pending adjudications by settlement, stipulation or otherwise narrowing the issues. As explained in greater detail below, it is very important that any final recommendations made should be more finely tuned to accommodate these important functions, and they should also draw upon the experience and rules of other agencies, including the FCC and state commissions.

Brief comments on the Notice close this filing. In our view, there is no need to revise Commission Rule 4.020 (Conduct During Proceedings).

Finally, we strongly urge that if the Commission is at all inclined to move forward with any material changes or additions to its rules, it should first initiate a workshop where representatives from all affected constituencies - the public, regulated industries, practitioners, the Staff, OPC,

Commissioners and others - have a full and fair opportunity to provide input in an open exchange of ideas. By our count, over 40 representatives from all of these constituencies appeared during the January 7 workshop (Report, Exh. 12), a clear indicator of broad-based interest in the potential impacts of any rule changes or additions.

**1 -- The Report could better advance the free exchange of ideas, particularly where the Commission is acting in a quasi-legislative capacity.**

As the report correctly notes, the Commission "acts like a lawmaker" in exercising "quasi-legislative power" when it promulgates for prospective effect a standard or rule directed to the public or regulated industry generally. On the other hand, it "acts as an adjudicator" in exercising "quasi-judicial power" when it determines facts and applies the law in a controversy among particular parties. (Report, pp. 8-9).

Identifying and serving the public interest are the focus when Commissioners act in their quasi-legislative capacity. As noted in the Report, in regulation "the focus must be on the public" while in adjudication "the focus is on the adversaries." Report, p. 38. At the same time, the public interest is increasingly difficult to discern, given accelerated technological change, higher customer expectations, multiple groups of competing interests, changes in market and corporate structures and other circumstances. Report, p. 37. These considerations, taken as a whole, place a high premium on the free and unfettered exchange of ideas in formulating matters of general regulatory policy.

Missouri law, particularly Section 386.210.4, RSMo, expressly encourages the "free exchange of ideas, views and information" regarding matters of "general regulatory policy." This legislative direction, together with Section 386.210.2, which expressly allows communications on "any issue" that is "not the subject of a case," ensures that every stakeholder, whether public or private, and whether an individual, business or other, is permitted a free and open range of expression when the Commission is exercising its quasi-legislative powers.

Unfortunately, the report recommends that the time, names of attendees and the purpose of all meetings with any Commissioner or PSC employees be posted at least 24 hours in advance (Report, pp. 56, 57) and that the "contents of discussions in such meetings should be documented by minutes, transcription or other appropriate audio or video recording device." Report, pp. 58, 59). There is no exception for matters having exclusively to do with general regulatory policy or which are not the subject of a case, or even for communications which the Report suggests are quite desirable (i.e., "to pay the courtesy of advance notice, and to see what questions or concerns a Commission might have"). Report, p. 38.

MTIA also is concerned that such advance-posting, transcribing, recording or other documentation procedures would chill a great number of communications that should, indeed, must occur in order for the Commission to effectively perform its quasi-legislative functions in a meaningful and fully informed way. Moreover, an advance-posting procedure also could be taken as allowing (if not altogether encouraging) uninvited third parties to arrive at the meeting and demand participation in the discussion. Not only would this prove disruptive to invited attendees (who may well have traveled from out-of-town at considerable expense), on a more

fundamental level it would be antithetical to the types of frank discussions that need and should take place.

**2 -- The Report could better ensure that the Commission and Staff continue to exchange information about utilities' day-to-day operations.**

MTIA's members frequently communicate and correspond with Commission employees about a number of day-to-day operational matters. These contacts are useful and should be encouraged, as they pertain to the companies' delivery of quality services in a timely manner.

It is not unusual, for example, that a member company is inclined to contact Staff to inform it of external conditions that might affect or has affected delivery of service to the public. Examples such as storms, disasters, significant cable cuts, rerouting of network facilities due to construction activities, and "mass calling" events come to mind.

MTIA's experience is that the Staff and Commissioners also appreciate updates and notices of current business conditions, anticipated developments and general telecommunications "news." This is the kind of information that helps educate and inform a regulator and should be encouraged. Additionally, a "heads-up" to Staff of potential tariff filings altering rates, terms and conditions can help Staff to better schedule and size its work load.

Not infrequently, the Staff seeks MTIA member feedback on various approaches the Staff might be considering in connection with developing an industry rule. Such invitations and the responses by MTIA's members to Staff provide it with valuable information the Staff would not otherwise have without turning to the companies themselves. Examples occur in the "social benefit" context, where collaboration between regulators and companies regarding how to best provide benefits to citizens can be very useful (e.g., MoUSF rules and Mo Relay rules).

The Report does not consider these types of interactions. Yet, it does not encourage them, proposing instead that the time, name of attendees and the purposes of every meeting about a matter that is or could be a future proceeding be posted 24 hours in advance and subjected to documentation or recording. (Report, p. 56-57, 59).

**3 -- The Report should take into special consideration parties' communications intended to facilitate settlement or narrowing of the issues.**

Public policy has long encouraged settlement discussions wherever possible, and confidentiality of such discussions is important, though the Report makes no exception for them.[1] The Report should take into account that parties to a case, including Staff, need to be free to engage in such discussions without the need for a request in a prescribed format, public posting in advance, or transcribing, recording or otherwise documenting the discussions. (Report, pp. 57, 59). In a

[1] *See, e.g.*, Mo. Sup. Ct. R. 17.06 (2007) (settlement discussions in alternate dispute resolution matters shall be treated as confidential communications); *see also*, Report, Exhibit 11, p. 2 (referencing the fact that "an ALJ met with the parties to facilitate a settlement").

similar vein, the report should encourage the narrowing of issues in cases, including by "assisting claimants or other parties in any proper manner," and facilitating "stipulations and agreements."[2]

**4 -- The Report could better consider the views of other jurisdictions, including those of the FCC and other state commissions.**

The Commission has long sought to consider the views of other jurisdictions in executing both in rulemakings in which the Commission acts in its quasi-legislative capacity, and in contested cases, in which the Commission acts in its quasi-judicial capacity. There should be no exception here. While the Report cites some decisions from other states, they are limited, and the Report does not at all draw upon the FCC's rules.

Standards and rules used by the FCC and state commissions elsewhere should be more carefully considered. Some examples illustrate that certain modifications to the Report's recommendations could be worthwhile.

- The FCC's "exempted presentations" -- Several oral/written "ex parte" presentations[3] are exempted from prohibitions or disclosure requirements. Examples are when the presentation is authorized by statute; involves the filing of required forms; is made by or to General Counsel and his or her staff regarding judicial review of a Commission-decided matter; is requested by (or made with the advance approval of) the Commission or staff to clarify or adduce evidence, or to resolve issues, including possible settlement, (subject to limitations).[4]

- The FCC's "exempted proceedings" -- Ex parte presentations to or from Commission decision-making personnel are permissible and need not be disclosed with respect to certain proceedings, e.g., a notice of inquiry proceeding, a petition for rulemaking, a tariff proceeding not set for investigation, an informal complaint proceedings).[5]

- The Texas Commission's rules prohibit communications only in contested cases. Its procedural rules state that "members of the commission or administrative law judges assigned to render a decision or to make findings of fact and conclusions of law in a contested case may not communicate, directly or indirectly, in connection with any issue of law or fact with any agency, person, party, or their representatives, except on notice and opportunity for all parties to participate."[6]

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[2] Section 536.060, RSMo.

[3] For purposes of the FCC's rules, an ex parte presentation is any presentation that, if written, is not served on the parties to a proceeding, or, if oral, is made without advance notice to the parties and without opportunity for them to be present. 47 C.F.R. Section 1.1202(b).

[4] 47 C.F.R. Section 1.1204(a)(1),(2),(10).

[5] 47 C.F.R. Section 1.1204(b)(1),(2),(3),(5).

[6] Texas Commission Procedural Rules, Section 22.3(b)(2). Section 22.2(16) defines a "contested case" as a proceeding "in which the legal rights, duties, or privileges of a party are to be determined by a state agency after an opportunity for adjudicative hearing."

- The Kansas Commission's rules are limited as well: "After the commission has determined and announced that a hearing shall be conducted in a proceeding and before the issuance of a final order, no parties to the proceeding, or their attorneys, shall discuss the merits of the proceeding with the commissioners or the presiding officer unless reasonable notice that allows attendance is given to all parties to the proceeding."[7]

- Federal APA treatment of "status" reports -- The Report correctly notes that communications "relating only to procedural matters, absent any discussion of the merits of a case" raise no "question of impropriety." (Report, p. 13). This observation finds added support in federal laws relating to administrative procedure, in which oral or written communications that occur outside of the public record are not limited where they constitute "requests for status reports" on a matter or proceeding.[8]

- FCC "Permit-but-Disclose proceedings" -- FCC rules specify that disclosure of oral presentations in such proceedings, among other things, applies to "data or arguments not already reflected in that person's written comments, memoranda or other filings in that proceeding" and in such cases a memorandum must be filed after the presentation "which summarizes the new data or arguments." (47 C.F.R. § 1.1206(b)(2)).

In contrast, the Report lists no exception to its broad recommendation that no meeting with any Commissioner or any Commission employee should occur absent a written request accompanied by a written "summary of topics to be discussed" and that the meeting be documented by "minutes, transcription or other appropriate audio or video recording device." Report, p. 59. The Report's recommendations should consider the above approaches, and perhaps others.

While it may be that the public posting of the Commissioners' calendars and the preparation of a journal entry or similar document could serve as a useful record of who met with Commissioners, when, and about what general subject, more stringent requirements should not generally be required other than in a case proceeding, absent a careful review of the above considerations and the others noted in this filing.

**5 -- The Commission's rule governing the conduct of proceedings need not be revised.**

In response to the Commission's Notice, MTIA submits that Commission Rule 4.020,[9] governing Conduct During Proceedings, need not be revised and that the December 19, 2007, Motion for Proposed Rulemaking be denied.[10]

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[7] Kansas Commission's Rules of Practice and procedure, Section 82-1-207.
[8] 5 U.S.C. Section 551(14); *see also*, Report, Exhibit 11, p. 1 (referencing communications regarding "the progress or completion of a proceeding").
[9] 4 CSR 240-4.020.
[10] 4 CSR 240-2.180(3)(B).

The wording of the rule is sufficiently succinct and clear to effectively guide the behavior of all participants in PSC proceedings. While several of the rule's provisions are directed to counsel, the rule also proscribes certain conduct by "any person interested in a case" and by each "member of the [C]omission, presiding judge or employee of the [C]ommission."[11] None of the language in the rule is in need of any clarification.

The rule is also sufficient in scope. The activities permitted by the rule are appropriate and should remain permitted, and those prohibited by the rule inappropriate and should remain prohibited. The rule is likewise consistent with the substance and spirit of the statutes governing ex parte communications at the Commission. As noted earlier, Missouri statutes expressly encourage the "free exchange of ideas, views and information" regarding matters of "general regulatory policy," and they also expressly permit communications with respect to "any issue" that is "not the subject of a case." The rule's application to matters that are the subject of a proceeding is consistent with these statutes. Moreover, as to matters that are the subject of proceedings, the rule is crafted in such a manner so as to well advance its expressly stated purpose, i.e., to ensure "impartiality in reaching a decision on the whole record during open hearings."

For these reasons, MTIA submits that the Commission's rule is sufficient to ensure public confidence in the fairness of proceedings at the Commission. Further support for our view may be found in the exhaustive Code of Conduct applicable to Executive Branch employees which, as the code makes clear, is "intended as a supplement to the provisions in law which govern employee conduct, and in no instance does it decrease the requirements in law."[12]

Nevertheless, to the extent the Commission might conclude that revisions may be in order, we urge that the views and opinions expressed earlier in this filing be taken fully into account.

Respectfully submitted,

Richard Telthorst, CAE
President

[11] 4 CSR 240-4.020(4), (6).
[12] See, Executive Order 92-04, Section 7,C. (reprinted following 4 CSR 240-4.010).