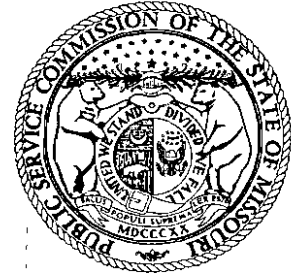


Ex Parte Communication Report

TO: Chairman Robert Clayton III
Commissioner Connie Murray
Commissioner Jeff Davis
Commissioner Kevin Gunn

FROM: Commissioner Terry Jarrett *TJM*

DATE: March 19, 2009



According to the Commission rules (4 CSR 240-4.020(8)), when an *ex parte* communication (either oral or written) occurs, any member of the commission, hearing examiner (Regulatory Law Judge) or employee of the commission who receives that communication shall immediately prepare a written report concerning the communication and submit it to the chairman and each member of the commission. The report shall identify the employee and the person(s) who participated in the *ex parte* communication, the circumstances which resulted in the communication, the substance of the communication, and the relationship of the communication to a particular matter at issue before the commission.

On March 17, 2009, I received an e-mail from David Woodsmall with an attached letter signed by Stuart W. Conrad. A copy of the e-mail and letter is attached.

Because this letter clearly indicates that it is in regard to Case No. ER-2009-0089, and it possibly also relates Cases ER-2009-0090 and HR-2009-0092, I am also filing this report in those cases, pursuant to the rule cited above.

cc: Case No. ER-2009-0089
Case No. ER-2009-0090
Case No. HR-2009-0092

Jarrett, Terry

From: David Woodsmall [dwoodsmall@fcplaw.com]
Sent: Tuesday, March 17, 2009 4:59 PM
To: Carafeno, Dawn; GCO Internet Service; opcservice@ded.mo.gov; shidler@smizak-law.com; jim@smizak-law.com; 'Mark Comley'; 'Diana C. Carter'; trackers@brydonlaw.com; 'Arthur Bruder'; 'Lewis Campbell'; 'James M. Fischer'; 'Larry Dority'; bill.riggins@kcpl.com; 'Karl Zobrist'; 'Roger W. Steiner'; 'Curtis Blanc'; 'Stuart W. Conrad'; Woods, Shelley; dmvuylsteke@bryancave.com; dkincheloe@mpua.org; Stewart499@aol.com; 'Jeffrey A. Keevil'; lowery@smithlewis.com; AmerenUEService@ameren.com; Williams, Nathan; Kliethermes, Sarah; Clayton, Robert; Murray, Connie; Davis, Jeff; Jarrett, Terry; Gunn, Kevin
Subject: ER-2009-0089: Electronic Service
Attachments: recusal letter.pdf

The attached correspondence was filed today in Case No. ER-2009-0089.



ATTORNEYS AND
COUNSELORS AT LAW

JEREMIAH FINNIGAN, P.C.
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March 17, 2009

Hon. Jefferson Davis, Commissioner
Missouri Public Service Commission
P. O. Box 360
Jefferson City, MO 65101

Re: In the Matter of Kansas City Power & Light Co., ER-2009-
0089

Dear Commissioner Davis:

It is with reluctance that I find it necessary to write this letter. Nevertheless, as distasteful as it is on a personal basis, it is made necessary by responsibility to my clients and to the canons of ethics governing the practice of law. Further, an item concerning this case and the procedural schedule for it appears on the commission's agenda for discussion or for decision and possible voting tomorrow.

On February 13, 2009, more than a month ago, my clients filed a motion to request that you recuse from further activities in this case, the grounds for which were well stated in that motion and need not be repeated here and the facts of which are indisputable. Several responses have been filed but no action has been taken by you to either recuse from further participation in this case or refuse to do so.

You should be aware that from and after the date of our February 13 filing, continuing to function as a commissioner, make decisions, and participate in discussions concerning this and related pending rate cases with the result of influencing the decisions made by other commissioners, seriously risks invalidation of those decisions, the contamination of the record and the prejudice of the other Commissioners.¹

¹ *Smith v. Armontrout*, 632 F. Supp. 503, 507 (W.D. Mo. 1986) ("In addition, the Court notes that it has recently come to light that, while Gerald Smith's case was pending before the Missouri Supreme Court in January, 1986, one of the judges on that court initiated ex parte communications with one of the psychiatrists who had examined Smith. Such ex parte contact not only violates that court's own canons of ethics, see Mo.S. Ct.R. 2, Canon 3(A)(4) (prohibiting judges from initiating ex parte communications concerning pending proceedings), it also strikes at the very heart of the adversarial system. Nothing can undermine the fairness of a judicial proceeding more than when a judge turns his back on the adversary system -- where each side has an equal opportunity to test its opponent's evidence by means of cross-examination -- and conducts his own ex parte investigation of the facts. See *Reserve Mining Co. v. Lord*,

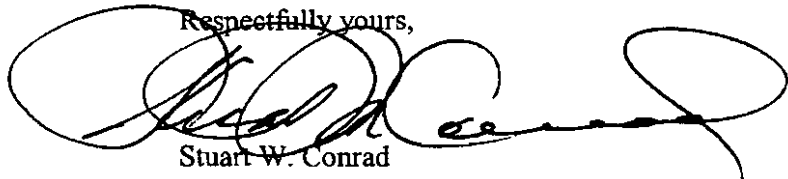
Hon. Jefferson Davis, Commissioner

Page 2

Given that there has been considerable time pass without action by you or the commission on our motion, I am reluctant to advise that if there is no action by you in response to our request within 72 hours of this letter, we will take your failure to act as a refusal to recuse and implement further actions including but not limited to initiation of a complaint regarding violation of commission rules and governing statutes including the initiation of discovery, and requesting extraordinary relief in appropriate forums.

I again state that having to write this letter to you is personally troubling to me. I do not seek to cause personal discomfort, humiliation, or require you to incur expense to engage counsel to advise or defend you with respect to these matters. I believe, however, that I am forced to take steps that I deem consistent with the ethical standards that govern practice before the commission, the practice of law, and my own obligations to my clients. It would be far preferable if you would take the called for action without the need for further compulsion and potential embarrassment.

Respectfully yours,

A handwritten signature in black ink, appearing to read 'Stuart W. Conrad', written over the typed name below.

Stuart W. Conrad

SWC:s

cc: Commissioners
All Parties

529 F.2d 181, 184-88 (8th Cir. 1975). Under these extraordinary circumstances, it clearly appears that the state court's conclusion concerning Smith's competency was not the product of a full and fair hearing; accordingly, this Court is not bound by the state court's resolution of the competency issue."); *see also*, *Briggs v. United States*, 48 F.3d 288 (8th Cir. Minn. 1995) ("Based on information first disclosed in the petition for rehearing and response, Judge Frank J. Magill has concluded that he must withdraw from the panel and recuse himself in this matter. The panel's opinion and judgment of December 28, 1994, are hereby vacated. The pending petition for rehearing and suggestion for rehearing en banc are mooted by this action.").

The *Reserve Mining* case (cited above) is also instructive. "Judge Lord seems to have shed the robe of the judge and to have assumed the mantle of the advocate. The court thus becomes lawyer, witness and judge in the same proceeding, and abandons the greatest virtue of a fair and conscientious judge -- impartiality.

"A judge best serves the administration of justice by remaining detached from the conflict between the parties. As Justice McKenna stated long ago, "Tribunals of the country shall not only be impartial in the controversies submitted to them but shall give assurance that they are impartial . . ." *Berger v. United States*, 255 U.S. 22, 35-36, 65 L. Ed. 481, 41 S. Ct. 230 (1921). When the judge joins sides, the public as well as the litigants become overawed, frightened and confused." *Reserve Mining Co. v. Lord*, 529 F.2d 181, 186 (8th Cir. Minn. 1976).