

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

In the Matter of a Working Case Regarding Amendments to the Commission’s Ex Parte and Extra-Record Communications Rule	<b>File No. AW-2016-0312</b>
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**COMMENTS OF THE MISSOURI CABLE TELECOMMUNICATIONS  
ASSOCIATION**

Comes now the Missouri Cable Telecommunications Association (the “MCTA”) and submits these Comments in response to the publication in the Missouri Register of proposed revisions to the Missouri Public Service Commission’s (the “Commission”) ex parte and extra-record rule. While largely supportive of the proposed revisions, the MCTA is concerned that certain of the proposed revisions would repeal requirements to disclose the duration of ex parte or extra-record communications and to report certain oral communications about regulated issues. The MCTA also is concerned that the Commission proposes to extend the notice period applicable to filings that initiate contested cases.

**I. THE COMMISSION SHOULD PRESERVE THE REQUIREMENT TO DISCLOSE THE DURATION OF EX PARTE AND EXTRA-RECORD COMMUNICATIONS AND TO DISCLOSE OTHER INFORMATION RELATING TO EXTRA-RECORD COMMUNICATIONS**

The Commission’s revisions in proposed Rule 240-4.020(3)(B) would repeal the requirement that the duration of non-written ex parte communications be stated in the notice of such communications.<sup>1</sup> Similarly, Rule 240-4.030(1)(B), as proposed, would repeal the current

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<sup>1</sup> The changes to the existing rule are as follows (additions are underscoring; deletions are shown as ~~strike-throughs~~):  
If the communication is not written, the initiating person shall file a memorandum disclosing the communication in the official case file for each discussed case and in the central repository. The

requirement that the person initiating a non-written extra-record communication list all participants in the communication and date, time, location, and duration.<sup>2</sup> Instead, the Commission would require the submission, by the member of the office of the commission that is a participant in such communication, of only a summary of a non-written extra-record communication.

The repeal of the requirement to disclose the duration of an ex parte communication adversely affects the Commission's efforts to increase transparency, because information about the length of a communication is intuitively relevant in gauging the overall effect it may have on decision-makers. While the duration of a communication does not always reflect its substantive importance, visibility into the length of an ex parte communication would be lost under the proposed rule revision. More fundamentally, and with respect to extra-record communications as well, the appearance of a lack of transparency is likely to create questions even where no wrongdoing has actually occurred. The MCTA surmises that the Commission may be reluctant to require Commission-related personnel to file detailed reports regarding extra-record communications. However, the MCTA believes that reporting details regarding non-written communications would not be particularly burdensome if the existing rule were retained, including

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memorandum must contain a list of all participants in the communication; the date, time, and location, ~~and duration~~ of the communication; the means by which the communication took place; and a summary of the substance of the communication and not merely a listing of the subjects covered. Alternatively, a recording or transcription of the communication may be filed, as long as that recording or transcription indicates all participants and the date, time, location, duration, and means of communication.

*See also* 4 CSR 240-4.020(3)(C) (incorporating section (4) of the rule by reference).

<sup>2</sup> The changes to the existing rule are as follows:

If the communication is not written, ~~the initiating person shall~~ file a memorandum ~~disclosing~~ summarizing the communication in the official case file for each discussed case and in the central repository. ~~The memorandum must contain a list of all participants in the communication; the date, time, location, and duration of the communication; the means by which the communication took place; and a summary of the substance of the communication and not merely a listing of the subjects covered.~~ Alternatively, a recording or transcription of the communication may be filed, as long as that recording or transcription indicates all participants and the date, time, location, ~~duration~~, and means of communication.

its applicability to persons initiating such communications. For these reasons, the MCTA maintains that the existing ex parte and extra-record communications reporting requirements should not be repealed.

## **II. THE COMMISSION SHOULD PRESERVE THE REQUIREMENT TO DISCLOSE DISCUSSIONS OF GENERAL REGULATORY POLICY AND THE OCCURRENCE OF NON-WRITTEN COMMUNICATIONS, WITHOUT REGARD TO WHETHER A CASE IS CONTESTED OR NOTICED**

The existing definition of “extra-record communication” potentially includes communications regarding “general regulatory policy.” As defined by the existing rules, “general regulatory policy” includes the merits of an administrative rule, a pending rulemaking, or legislation.<sup>3</sup> Existing Rule 240-4.020(8) requires the disclosure of all extra-record communications that include discussion of general regulatory policy.<sup>4</sup> Because the proposed rule changes would repeal the definition of “general regulatory policy” and expressly exempt discussions of general regulatory policy from the definition of extra-record communication, such discussions no longer would be reported. The MCTA maintains that the disclosure of such information remains useful to the public, parties and the regulated industry.

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<sup>3</sup> 4 CSR 240-4.020(1)(J) defines “general regulatory policy” as:

Any topic that is not specific to a single entity regulated by the commission and such topic is not reasonably believed by any person who is a party to the communication to be a subject within a contested case or anticipated contested case of which the person or such person’s principal is or will be a party. Any communication regarding the merits of an administrative rule, whether a concept or a pending rulemaking, or legislation, whether a concept or a pending piece of legislation, shall at all times be considered a communication regarding a general regulatory policy allowed under section 386.210.4, RSMo.

<sup>4</sup> Rule 240-4.020(8) states:

Any communication, other than public statements at a public event or de minimis or immaterial communications, between a commissioner or technical advisory staff and any regulated entity regarding regulatory issues, including but not limited to issues of general regulatory policy under subsection 386.210.4, RSMo, if not otherwise disclosed pursuant to this rule, shall be disclosed in the following manner . . . .

The MCTA also is concerned that the Commission proposes to limit the definition of “extra-record communication” to discussions of substantive issues “in or expected to be in [a] pending or noticed contested case.”<sup>5</sup> The occurrence of oral communications between Commissioners or technical advisory staff and a regulated entity concerning regulatory issues should be disclosed to prevent the potential for and the appearance of unfair dealing. The disclosure requirement is particularly important given the proposed repeal of the existing rule that requires a party to an oral extra-record communication to terminate the communication immediately when a contested case or anticipated contested case is pending and no advance notice of the communication has been filed, and where the public counsel is not afforded an opportunity to attend.<sup>6</sup> Moreover, aside from public trust concerns, disclosing communications concerning regulated activities allows similarly-situated regulated entities to obtain notice without the need for formal procedures to obtain such information.

### **III. THE COMMISSION SHOULD NOT INCREASE THE NUMBER OF DAYS THAT A PERSON MUST FILE NOTICE WITH THE COMMISSION IN ADVANCE OF INITIATING A CONTESTED CASE**

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<sup>5</sup> The changes to the existing rule are as follows:

Any communication outside of the contested hearing process between ~~the commission, a commissioner, a member of the technical advisory staff, or the presiding officer assigned to the proceeding and any individual interested in a contested case or anticipated contested case regarding any substantive issue~~ a member of the office of the commission and any person not a party to a pending contested case or noticed contested case regarding any substantive issue in or expected to be in that pending or noticed contested case. Extra-record communications shall not include communications regarding general regulatory policy allowed under section 386.210.4, RSMo, communications with members of the general assembly or other government official allowed under section 386.210.5, RSMo, communications listed in 4 CSR 240-4.040, or communications that are de minimis or immaterial. 4 CSR 240-4.020(1)(H).

<sup>6</sup> Rule 240-4.020(8)(B)2.B states:

Inadvertent communication, or any communication which becomes subject to this subparagraph, shall be terminated immediately, and a notice of extra-record communication shall be filed by the person initiating the communication in accordance with section (4) of this rule. 4 CSR 240-4.020(8)(B)(2)(B).

Rule 240-4.017, as proposed, would amend the existing rule to require that persons intending to initiate a case likely to be contested file a notice with the Commission at least ninety (90) days but not more than one-hundred eighty (180) days before filing a petition or complaint.<sup>7</sup> The present requirement is that such notice be submitted at least sixty (60) days before initiating a contested case.

The MCTA urges the Commission to reconsider the proposed increase in the number of days that a person must file notice in advance of a likely contested case. Although such a rule change would allow the Commission earlier notice of possible subjects of ex parte communications, it is not clear that the benefits of extending the notice period outweigh the detriments to a filing party. The additional notice period would be extremely burdensome for regulated entities that already face the need to expeditiously file complaints or petitions seeking relief, or which may rely on multiple internal departments to timely reach consensus on a course of action before filing such pleadings. The MCTA believes that the existing sixty (60) day period is more than reasonable for the Commission and anticipated parties to a case to be put on notice for the purposes of determining if a communication may be ex parte, without further burdening regulated entities or others that may need to seek immediate relief from the Commission.

## CONCLUSION

The MCTA appreciates the opportunity to participate in this proceeding and the Commission's efforts to simplify and promote consistent application of the Commission's ex parte

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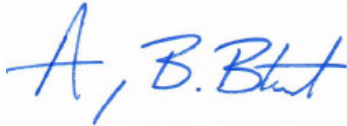
<sup>7</sup> The changes to the existing rule are as follows:

Any ~~regulated entity~~ person that intends to file a case likely to be a contested case shall file a notice with the secretary of the commission a minimum of ~~sixty (60) days~~ ninety (90) days but no more than one hundred eighty (180) days prior to filing such case. Such notice shall detail the type of case and issues likely to be before the commission. The filing of such notice shall initiate a new noticed contested case and be assigned an appropriate case designation an number. If the expected contested case filing is subsequently made, it shall be filed in and become part of the noticed contested case. If the expected contested case filing is not made within one hundred eighty (180) days, the noticed contested case shall close. 4 CSR 240-4.020(2).

and extra-record communication rules. While the MCTA is largely supportive of the proposed revisions, the MCTA cautions the Commission to be mindful not to repeal so much of the rules that the public interest in transparency is adversely affected.

Respectfully submitted this 22<sup>nd</sup> day of August, 2016.

MISSOURI CABLE TELECOMMUNICATIONS  
ASSOCIATION

A handwritten signature in blue ink, appearing to read "A. B. Blunt". The signature is written in a cursive, flowing style.

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