

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

COMES NOW Missouri-American Water Company (MAWC) and provides the following comments concerning the proposed rule amendment that have been filed in this case:

2. On January 31, 2008, MAWC filed comments in a related case (Case No. AO-2008-0192 -- In the Matter of a Review of the Missouri Public Service Commission's Standard of Conduct Rules and Conflicts of Interest Statute). While the proposal in that case is different from the amendments proposed in this case, both cases concern the Commission's ex parte communication rule and some of MAWC's comments are equally relevant to each. Accordingly, MAWC provides these comments for consideration by the Commission.

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S.W.2d 561, 568 (Mo.App.1976). Thus, any promulgation of rules must be consistent with the existing statutes which govern the Commission's activities.

4. For purposes of this inquiry, two statutes should be kept close at hand. First, Section 386.210, RSMo, which was amended as recently as 2003, sets forth a fairly complete statement of permitted, if not encouraged, communications with commissioners. The statute reminds us that the question concerning commissioner communications does not just impact public utilities. It includes communications between commissioners and "members of the public, any public utility or similar commission of this and other states and the United States of America, or any official, agency or instrumentality thereof."

5. It should also be remembered that Section 386.480, RSMo creates criminal liability for those Commission and Office of the Public Counsel (Public Counsel) personnel that divulge information provided by a utility without specific order to do so. This statute is important as it encourages the provision of sensitive information to the Commission and Public Counsel so that they can perform their jobs. Section 386.480, RSMo states:

No information furnished to the commission by a corporation, person or public utility, except such matters as are specifically required to be open to public inspection by the provisions of this chapter, or chapter 610, RSMo, shall be open to public inspection or made public except on order of the commission, or by the commission or a commissioner in the course of a hearing or proceeding. The public counsel shall have full and complete access to public service commission files and records. Any officer or employee of the commission or the public counsel or any employee of the public counsel who, in violation of the provisions of this section, divulges any such information shall be guilty of a misdemeanor.

6. The proposed rule states that all "communications between a representative of a utility and Commissioners shall be a public record and a

public meeting.” Proposed section (10), 4 CSR 240-4.020. It appears that this provision may require an amendment to Section 386.480, RSMo.

7. A further concern is the limitation of this requirement to “a representative of a utility.” Whatever changes may result from this case and/or Case No. AO-2008-0192, should be equally applicable to all parties. The movants stated goal to “ensure that utility matters are being decided ‘fairly and impartially’” demands no less.

8. The proposed definition of “ex parte communication” is extremely broad. It proposes to include “any communication, written or oral, that concerns any matter that is pending before the Commission for decisions or can reasonably be foreseen to come before the Commission for decision.” While communications related to cases pending before the Commission should clearly be a part of the definition, including matters that “can reasonably be foreseen to come before the Commission,” without any limit as to time creates an ambiguous standard. Such an approach is contrary to Section 386.210 and ignores the dual nature of the Commission’s responsibilities as both an adjudication and policy making body.

9. While the Commission may have a need to control and provide notice as to matters that may be adjudicated by it, the Commission has a broad duty to listen to those parties while performing in a regulatory and policy making capacity, such as in matters involving rulemaking, which is an exercise of a legislative function pursuant to authority delegated to it by the Missouri legislature.

10. MAWC would suggest that it would be much easier to understand and apply a “bright line” test related to cases that are ultimately filed with the Commission.

The state of Indiana has such a rule that could be modified for use in this state. 170

Indiana Administrative Code 1-1.5-5, states as follows:

Sec. 5. If, within thirty (30) days before a proceeding begins, a member of the commission, administrative law judge, or technical employee receives a communication, which: (1) would be ex parte if there was a proceeding before the commission; and (2) is intended to persuade or advocate a position; the member or employee of the commission shall disclose the communication as described in section 6 of this rule promptly after the proceeding begins. In addition, a member or employee of the commission who has received a prior communication, which, given its timing and content, that person reasonably believes was intended to circumvent this section may disclose the communication as described in section 6 promptly after the proceeding begins.

11. Use of a similar rule in Missouri would provide the opportunity for the communications encouraged by Section 386.210, RSMo, and provide a simple test for determining what communications prior to the opening of a contested case should be treated as if they are ex parte contacts.

12. This definition of ex parte may also be broad enough to capture any number of other unintended communications. For example, it may include commissioner attendance at a panel presentation at meetings or training programs of the National Association of State Utility Consumer Advocates or the National Association of Regulatory Utility Commissioners, dealing, for example, with low income assistance programs, infrastructure replacement issues, or a host of other substantive regulatory policy issues routinely discussed in educational regulatory forums because those may be matters that “can reasonably be foreseen to come before the Commission.”

CONCLUSION

13. MAWC understands the importance of the public having confidence in the process by which the Commission performs its duties. MAWC also believes that equally important is the Commission's ability to have communications with the various entities that are impacted by the Commission's policies. These interests can be more easily balanced with a "bright line" test such as that proposed herein. The use of the proposed rule amendments, in their current form, would not recognize the importance of the Commission's communications.

WHEREFORE, MAWC requests the Commission consider the comments contained herein.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the foregoing document has been sent by electronic mail this 4th day of February, 2008, to:

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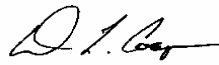
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