

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

In the matter of a Repository File for )  
The Collection and Distribution of )  
Documents Pertaining to the Ethics ) Case No. AW-2009-0313  
Review at the Missouri Public Service )  
Commission )

**COMMENTS OF COMMISSIONER KEVIN GUNN ON THE  
PROPOSED REVISIONS TO 4 CSR 240-4**

The following comments should be taken as the sole comments of Commissioner Kevin Gunn and do not necessarily reflect the opinion of any other Commissioner or the entire Commission.

## **Proposed 4 CSR 240-4.100**

Does the use of the word “obligated” in Section 1 create additional duties or responsibilities that are not contained in any Missouri statute? I am concerned that the sentence “The Commission is obligated to promote the public interest and maintain public confidence in its integrity and impartiality” contains a hard requirement but a soft standard. While I believe that the statement is true, the wording should be carefully reviewed to ensure that we are not creating a new, unattainable standard.

## Proposed 4 CSR 240-4.110

The definition section creates a new term “Director of the Commission” which is only referenced once more in Proposed 4 CSR 240-4.300 (2)(A). I think the definition may create confusion as the definition is much broader than the Executive Director of the Commission but it may be mistaken solely for the

Executive Director. The titles that make up the “Director” definition may be specifically enumerated if necessary in Proposed 4 CSR 240-4.300 (2)(A) while the shorthand may create confusion.

**Proposed 4 CSR 240-4.120 through 4.140**

These sections set up a very complex set of rules that deal with practices that are specifically banned by statute.<sup>1</sup> They should be eliminated. The system that has been set up that deals with gratuities works well and should be preserved. There are bright line tests for whether something can be accepted or not and those tests should remain.

**Proposed Section 4 CSR 240-4.150**

This section fails to distinguish between “extra-record” communications and “ex parte” communications. Both types of communications can be appropriate or inappropriate depending upon the content and context. However, communications between a non-party and a decision maker are “extra record” but not ex parte. For a communication to be “ex parte” it must be between a party and a decision maker.

The section also loosely refers to “interested in a contested case or anticipated contested case.” Interested would easily apply to a union, customer or even a competitive power supplier, such as a propane dealer. However, it

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<sup>1</sup> Section 386.200 RSMo 2006, prohibits any public utility, corporation and person, and every officer, attorney, agent and employee thereof, from offering to any Commissioner, the public counsel, or to any person employed by the Commission or public counsel, “any free pass or transportation or any reduction in fare to which the public generally are not entitled or free carriage for property or any present, gift, entertainment or gratuity of any kind.”

could also apply to many other people or legal entities, such as anti-nuclear groups, having no direct pecuniary interest in a case.

This subsection states that ALL requests for expedited treatment must be filed. Although this mirrors the current rule, it is too restrictive. Parties often come to the judge with procedural issues that need to be addressed expeditiously. Most of such requests are unanimous. Parties to a case should always be allowed to contact the presiding judge concerning uncontested procedural issues.

#### **Proposed Section 4 CSR 240-4.160**

The inclusion of an exceptions section is troubling, because it implies that any conversation not listed, irrespective of how innocuous, may be a violation. Further, subsection 4.160(3) makes an exception for notification of unanticipated power outages, but not for planned outages.

Subsection (1) refers to communications by the General Assembly or other governmental official. This section is problematic for a several reasons. First, the General Assembly is not a party to a case and their comments would not be ex parte and therefore no exception was necessary. However, some government officials such as the Director of the Department of Natural Resources may be a party to a case and comments would be ex parte and should not be subject to an exception.

The Commission is already required to keep copies of all records, financial statements and public documents for a minimum of five years pursuant to Section 386.145 RSMo 2006.

In subsection (2) there are repeated references to “the Commission’s advisory staff,” and that phrase is also used interchangeably with “Commission staff.” Each of these references should be changed to “the Commission’s technical advisory staff,” as defined in Section 386.135 RSMo (2008 Cum Supp) to avoid confusion with general Commission staff members.

This section also requires ex parte notices be retained under the name of the “public utility” or person making the communication. First, this is duplicative data retention. Each notice should simply be filed in each applicable case.

However, if such an additional and duplicative data retention system is established, there are additional issues with the draft language. First, “public utility” is inadequate and should be replaced with “person and/or legal entity,” because there are many non-utility individuals and legal entities that participate in contested Commission cases. For example, the Commission has jurisdiction over not only public utilities, but manufacturers and dealers of manufactured homes and modular units. Further, there are many non-utility parties in contested Commission cases. These parties can include industrial companies and groups, government agencies, cities, public interest groups, the Office of the Public Counsel, and the Commission’s Staff. Any of these parties could make an ex parte communication.

#### **Proposed Section 4 CSR 240-4.170**

Subsection (1) does not appear to fit with the rest of the draft rule or even subsection (2). It is titled Extra-Record Statements Regarding Contested Case, but the text of the draft section talks about both ex parte and extra record

communications again without distinguishing between them. Subsection (1) has no independent purpose. It merely creates a new rule violation if a “person” intentionally violates 4.150, 4.160 or subsection (2).

Subsection (2) merely reprints the first half of current rule 4 CSR 240-4.020 which addresses attorney conduct during Commission proceedings. The language in question is basically a reprint of Missouri Supreme Court Rule 4-3.6 regarding extra-record statements made about an adjudicative proceeding. It is unclear why these two sections were combined.

#### **Proposed Section 4 CSR 240-4.200**

This Section appears to hold the Commission to a judicial bias standard verses the standard applicable to an administrative tribunal.

Further, in instances where any allegation of conflict or bias is made subsection (4) would unreasonably shift the burden from the party alleging that conflict or bias to the individual Commissioner against whom such allegation is made. The party alleging bias should have to provide written or testimonial documentation evidencing the conflict or bias. An individual Commissioner should not have to prepare a written explanation to prove he/she does not have a conflict and/or is not biased any and every time any party alleges bias, unless some evidence of a conflict/bias is presented.

#### **Proposed 4 CSR 240-4.220**

Section 105.462 (3) RSMo 2006 prohibits any person with rulemaking authority from attempting to influence the tribunal upon which that person sat regarding rulemaking decisions for one year following termination of his or her

office or employment. This section expressly states that the prohibition does not extend to adversarial proceedings, unless the member in question directly participated in such adversarial proceeding during their term on the board or commission. Accordingly, draft rule section 4 CSR 240-4.220 is not necessary as to the individual Commissioners. Further, not only is there is no justification to extend this limit to any and every employee of the Commission, but, such a restriction would seriously limit the Commission's ability to attract qualified personnel. It is unlikely that a former employee, appearing in a rulemaking/ stakeholder process would exert undue influence over the proceeding or over five independent Commissioners.

**Proposed 4 CSR 240-4.900(1)**

This section appears to inappropriately vest the Commission with legal authority to grant relief in equity. However, it is well-settled law that the Commission cannot grant monetary relief for damages or order a pecuniary reparation or refund.<sup>2</sup> As the court of appeals noted in *State ex rel. GS Technologies Operating Co., Inc. v. Public Service Commission*:

While the "Commission does have exclusive jurisdiction of all utility rates," "when a controversy arises over the construction of a contract or of a rate schedule upon which a contract is based, and a claim of an overcharge is made, only the courts can require an accounting or render a judgment for the overcharge." *Wilshire Constr. Co. v. Union Elec. Co.*, 463 S.W.2d 903, 905 (Mo. 1971). This is so because the Commission "cannot 'enforce, construe nor annul' contracts, nor can it enter a money judgment." *Id.* (quoting *May Dep't Stores Co. v. Union Elec. Light & Power Co.*, 107 S.W.2d 41, 49 (Mo. 1937)). Likewise, the Commission does not have the authority to do equity or grant equitable relief. *Am.*

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<sup>2</sup> *May Dep't Stores Co. v. Union Elec. Light & Power Co.*, 107 S.W.2d 41, 57-58 (Mo. 1937).

*Petroleum Exch. V. Pub Serv. Comm'n*, 172 S.W.2d 952, 955 (Mo. 1943).<sup>3</sup>

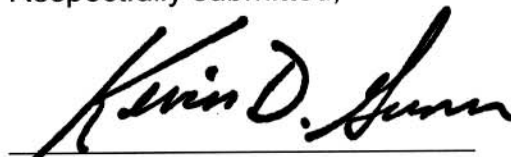
Further, subsection 4.900(1)(E) of the draft rule states that the Commission is authorized to recommend to "the Commission" that an employee in violation of 240-4 be fired or disciplined. This subsection makes no sense and should be removed.

**Proposed 4 CSR 240-4.900(2)**

This subsection inaccurately indicates law judges deliberate and vote on Commission orders. Only Commissioners deliberate or vote on Commission orders. Second, it inaccurately indicates law judges are appointed, rather than simply being employees of the Commission.

Finally, if the rule sets out sanctions, it should also be clear on the process and procedures that will be utilized by the Commission to enforce the sanction provisions. Due Process must be recognized as well as standards set for the imposition of the sanctions.

Respectfully submitted,

A handwritten signature in black ink, reading "Kevin D. Gunn", written over a horizontal line.

Kevin D. Gunn  
Commissioner

Dated at Jefferson City, Missouri  
on this 7<sup>th</sup> day of August, 2009.

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<sup>3</sup> 116 S.W.3d 680, 696 (Mo. App. 2003).