

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

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

**NOTICE OF FILING**

At the request of the Commission, the undersigned consultant files the attached Exhibit A to outline additional issues that might be included as new rules in 4 CSR 240-4.

Respectfully submitted,

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## Assessment of Issues for Further Rulemaking

### I. Purpose and scope section.

*The consultant believes a purpose and scope should only be included as part of a larger, more comprehensive set of ethics rules.*

#### **Proposed 4 CSR 240-4.100 Purpose and Scope.**

(1) The Commission is obligated to promote the public interest and maintain public confidence in its integrity and impartiality. This Chapter prescribes measures to prohibit practices that possess a potential of wrongdoing or that may undermine the public interest or public confidence in the integrity and impartiality of the Commission.

(2) The rules stated in this Chapter are designed to provide guidance to the Commission, its staff and presiding officers, and persons appearing before the Commission. The purposes of these rules can be subverted, however, when they are invoked by parties in a contested case as procedural weapons. That a rule prohibits or discourages certain conduct does not necessarily imply that a party to a contested case has standing to seek enforcement of the rule or to sue for breach of the rule.

### II. Application of Executive Order 92-04.

*The consultant believes that a restatement of the Executive Order in a rule is useful. Further, paragraph (2) is useful because it specifies that the commission has the power and responsibility to enforce the Executive Order.*

#### **Proposed 4 CSR 240-4.115 Application of Executive Order 92-04.**

(1) Executive Order 92-04 dated January 31, 1992, sets forth a standard of conduct for appointed officials and state employees including the Commissioners, Commission staff, and presiding officers.

(2) The Commission shall be responsible for the enforcement of applicable statutes, the provisions of Executive Order 92-04, and these rules by the sanction, suspension or discharge of employees violating the same.

### III. Prohibition on Gratuities.

*The commission has previously indicated that it has a clear prohibition against receiving gratuities. In light of such regulations, the consultant believes further regulation on such issues is likely unnecessary, unless the commission sees value in including such a rule as part of a larger, more comprehensive set of ethics rules – in particular if other rules allow receipt of benefits in certain limited circumstances, such as during educational trips.*

#### **Proposed 4 CSR 240-4.120 Prohibition on Gratuities.**

(1) Except as provided in 4 CSR 240-4.125 and 4 CSR 240-4.130, all persons subject to the jurisdiction of the Commission shall be prohibited from offering to the Commission, a Commissioner, Commission staff, and presiding officers, and all Commissioners, Commission staff, and presiding officers shall be prohibited from accepting, directly or indirectly, any gifts, meals, gratuities, goods, services, travel, or other benefits. This prohibition applies regardless of the value of the gifts, meals, gratuities, goods, services, travel, or other benefits.

(2) All companies, corporations or individuals subject to the jurisdiction of this Commission, as well as the attorneys and representatives of the foregoing, and the Commission, a Commissioner, Commission staff, or presiding officer shall immediately file with the Chairman and each commissioner, a report of any direct or indirect gifts, meals, gratuities, goods, services, travel, or other benefits given or received and the identity and value of same and the purpose for which given or received, except where the item is covered under 4 CSR 240-4.125 or 4 CSR 240-4.130 and those provisions do not require reporting.

### IV. Regulation on Site Visits.

*The commission has previously indicated that it has a clear prohibition against receiving free or discounted benefits from any regulated entity, including in connection with site visits. The consultant believes it would be useful to further clarify this practice, and to make clear that a violation of such rules may result in sanctions both for the party supplying and the party accepting the item of value. The rule will likely be considerably shorter than the consultant's original proposal, which incorrectly allowed receipt of certain de minimis benefits during site visits.*

#### **Proposed 4 CSR 240-4.125 Visits to Sites Impacted by Commission Regulations.**

(1) The power of the Commission to confer under § 386.210.1 RSMo. includes the power of the Commission, or a Commissioner, or Commission staff to review and inspect sites related to the performance of Commission duties.

(2) The Commission, a Commissioner, or Commission staff may receive free, discounted, or reimbursed meals, travel, or other goods or services from a person other than the Commission when those meals, travel, or other goods or services

are directly related to the conducting of a review or inspection of a site related to the performance of Commission duties and the Commission, Commissioner, or Commission staff complies with the remainder of this rule. Failure to comply with the remainder of this rule when receiving free, discounted, or reimbursed meals, travel, or other goods or services shall constitute a violation of the Commission ethics rules, unless a Commissioner or staff receives prior approval from the Commission.

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#### **V. Regulation on Participation in Educational Programs.**

*The commission has previously indicated that it has a clear prohibition against receiving free or discounted benefits from any regulated entity, including in conjunction with educational programs. The proposed rule on ex parte and extra record communications should afford additional safeguards on this issue, but the consultant believes this issue may still deserve additional attention. The public has demonstrated strong concern in other contexts that interest groups are “educating” policymakers in a manner designed to gain the policymaker’s support for a group’s interests. The original rule allowed regulated entities to participate, a practice which should not be permitted. Nevertheless, the consultant believes further clarification on this point would be appropriate both to fill a gap in present regulations and to address an issue of public concern.*

#### **Proposed Rule 4 CSR 240-4.130 Attendance at Educational Conventions and Seminars.**

(1) The power of the Commission to confer under 386.210.1 RSMo. includes the power of the Commission, or a Commissioner, or Commission staff to speak or be a guest at a conference, convention or association meeting related to the performance of Commission duties.

(2) The Commission, a Commissioner or Commission staff may receive free, discounted, or reimbursed meals, travel, or other goods or services from a person other than the Commission, unless that person may not participate in offering free, discounted, or reimbursed meals, travel, or other goods or services under section (6) of this rule, to speak or be a guest at a conference, convention or association meeting related to the performance of Commission duties as long as such meals, travel, or other goods or services are offered to similarly situated persons who are speaking or guests at the conference, convention, or association meeting, and the Commission, Commissioner, or Commission staff complies with the remainder of this rule. Failure to do so shall constitute a violation of the Commission ethics rules, unless the Commissioner or staff receives prior approval from the Commission or its designate.

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## **VI. Communications with the Media on Pending Cases.**

*During initial meetings, members of the regulated community expressed concern that current limitations on communications with the media about pending matters were not sufficient. Based largely upon such comments, the consultant believes it is appropriate to clarify such limitations, particularly through inclusion of an ethics rule. Such a rule would also provide the commission with a means of enforcement, which the commission will lack if it attempts to rely primarily on Missouri Rule of Professional Conduct 3.6.*

### **Proposed 4 CSR 240-4.170 Extra-Record Statements Regarding Contested Case.**

- (1) As stated in 4 CSR 240-4.150, it is improper for any person interested in a contested case or anticipated contested case to attempt to sway the judgment of the Commission, a Commissioner, or a presiding officer by undertaking, directly or indirectly, an ex parte communication prohibited by 4 CSR 240-4.150 or 240-4.160 or an extra-record communication prohibited by this section.
- (2) A contested case constitutes an adjudicative proceeding under Missouri Supreme Court Rule 4-3.6, as that rule may be amended. Accordingly, any attorney who participates in any contested case before the Commission shall comply with Missouri Supreme Court Rule 4-3.6 regarding extra-record statements made about the proceeding . . . .

## **VII. Rule on Financial Conflicts of Interest.**

*Initially the consultant believed additional clarification of the conflict of interest rules may be appropriate, particularly as the present system for analyzing whether a commission should recuse relies upon (a) self-reflective judgment of a commissioner followed by (b) judicial review. Some commissioners appear to believe present law is adequate to guide their judgment on such issues; accordingly, further rulemaking on such issues likely is not necessary unless the commission sees value in including a financial conflict of interest rule as part of a larger, more comprehensive set of ethics rules.*

*Also, the original draft rule contained a provision that allowed consultation with the chief administrative law judge. Information suggests this may already occur, and that the attempt to provide some confidentiality to such communications may result in unnecessary complications in light of the Missouri Sunshine Act.*

### **Proposed 4 CSR 240-4.200 Financial Conflicts of Interest.**

- (1) A Commissioner, Commission staff, or presiding officer appointed to preside over a contested case shall have a disqualifying conflict and shall recuse from a contested case when a reasonable person would doubt the Commissioner, Commission staff, or presiding officer can make a fair and impartial decision in that contested case. The following are a list of circumstances when such a

disqualifying conflict occurs:

- (A) When the Commissioner, Commission staff, or presiding officer has a personal bias or prejudice concerning a party or its representative, or has prejudged a disputed evidentiary fact involved in a contested case prior to its resolution. For the purposes of this subsection, “personal bias or prejudice” means a predisposition toward a party based on a previous or ongoing relationship, including a professional, personal, familial or other intimate relationship, that renders the Commissioner, Commission staff, or presiding officer unable to exercise judgment or other functions impartially;
- (B) When the Commissioner, Commission staff, or presiding officer has a pecuniary interest in the outcome of the contested case other than as a customer of a party;
- (C) When in previous employment the Commissioner, Commission staff, or presiding officer served as an attorney, adviser, consultant or witness in the contested case, or otherwise provided professional services regarding the same contested case; or
- (D) When, prior to serving as a Commissioner or Commission staff, the Commissioner, Commission staff, or presiding officer made statements concerning the contested case or a factual issue in the contested case.

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#### **VIII. Limitations on Post-Commission Employment.**

*The commission has previously indicated that it has a clear prohibition regarding participation in matters before the commission after employment by the commission. In light of such regulations, the consultant believes further regulation on such issues is likely unnecessary, unless the commission sees value in including a post-commission employment rule as part of a larger, more comprehensive set of ethics rules.*

#### **Proposed 4 CSR 240-4.220 Limitation on Post-Commission Employment.**

- (1) No person who has served as a Commissioner, Commission staff, or a presiding officer shall, after termination of service or employment with or on the Commission, appear before the Commission in relation to any case, proceeding, or application with respect to which that person was directly involved or in which that person personally participated or had substantial responsibility during the period of service or employment with the Commission.
- (2) No person who has served as a Commissioner, Commission staff, or a presiding officer shall, for one year after termination of service or employment

with or on the Commission, appear before the Commission as an attorney or other representative, or otherwise seek to influence the Commission in any rulemaking proceeding.

**IX. Limitations on Use of Commission Property and Equipment.**

*The consultant believes the commission would benefit from a clear rule or other standard on the use of commission property and equipment.*

**Proposed 4 CSR 240-4.300 Limitation on Use of Commission Property and Equipment.**

(1) A Commissioner, Commission staff, or presiding officer shall not use Commission time, property, equipment or other facilities to benefit a personal or financial interest, or the personal or financial interest of direct family. A Commissioner, Commission staff, or presiding officer have a duty to protect and conserve Commission property and equipment, including but not limited to supplies, materials and other items as may be issued or entrusted to that person.

(2) Notwithstanding section (1) of this rule, a Commissioner, Commission staff, or presiding officer may use Commission time, property, equipment, or facilities as follows:

- (A) When the Commission or a Director of the Commission acting with authority authorizes the use of property, equipment or other facility in writing pursuant to a written policy of the Commission or due to emergency circumstances; or
- (B) When the use satisfies the following conditions:
  - (1) The use does not interfere with the performance of public duties;
  - (2) The cost or value related to the use is nominal; and
  - (3) The use does not create the appearance of impropriety.
- (C) The use of Commission telephones or other means of communication if there is no special charge for that use.

## **X. Confidentiality.**

*The commission has previously indicated that it clear limitations on the use of commission information. In light of such regulations, the consultant believes further regulation on such issues is likely unnecessary, unless the commission sees value in including a confidentiality rule as part of a larger, more comprehensive set of ethics rules.*

### **Proposed 4 CSR 240-4.300 Limitation on Use of Commission Property and Equipment.**

(1) A Commissioner, Commission staff, or presiding officer shall not use Commission time, property, equipment or other facilities to benefit a personal or financial interest, or the personal or financial interest of direct family. A Commissioner, Commission staff, or presiding officer have a duty to protect and conserve Commission property and equipment, including but not limited to supplies, materials and other items as may be issued or entrusted to that person.

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- (A) When the Commission or a Director of the Commission acting with authority authorizes the use of property, equipment or other facility in writing pursuant to a written policy of the Commission or due to emergency circumstances; or
- (B) When the use satisfies the following conditions:
  - (1) The use does not interfere with the performance of public duties;
  - (2) The cost or value related to the use is nominal; and
  - (3) The use does not create the appearance of impropriety.
- (C) The use of Commission telephones or other means of communication if there is no special charge for that use.

## **XI. Sanctions.**

*The commission does not presently have regulations that establish exactly what sanctions can be imposed or for what such sanctions will be imposed. The consultant therefore believes such a rule would be appropriate. In addition, the commission may wish to seek additional legislative authority to seek monetary or other sanctions for serious violations of the commission's ethics rules.*



**Proposed 4 CSR 240-4.900 Sanctions for Violations.**

In addition to legal remedies otherwise available, the Commission may upon a finding by a preponderance of the evidence that a person has violated one or more rules set forth in 4 CSR 240-4 impose the following sanctions upon such person:

(1) If the person who has violated the rules of this chapter is Commission staff, then the Commission may:

- (A) Order the person to stop engaging in any official action related to a violation;
- (B) Order divestiture, establishment of a blind trust, restitution, or forfeiture;
- (C) Remove the person from the matter where a violation occurred;
- (D) Order restitution or disgorgement of any ill-gotten gains; or
- (E) Recommend that the Commission take disciplinary action against the employee, including dismissal.

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**XII. Additional Issues Considered for Possible Regulation.**

*In addition to the items discussed above, the following were concerned for regulation, but ultimately were deemed not to require additional rulemaking by the consultant:*

- a. Extraordinary payments from former employers;*
- b. Political activities and fundraising by commissioners and commission staff;*
- c. Teaching by commissioners or commission staff;*
- d. Responsibilities of commissioners for their technical advisory staff;*
- e. Service as an expert or character witness; and*
- f. Prohibition on nepotism.*

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