

**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)	<u>File No. AW-2009-0313</u>
Review at the Missouri Public Service)	
Commission)	

NOTICE OF FILING

At the request of the Commission, the consultants file for consideration the following document which notes and explains changes made between the September 11 and October 13, 2009, proposed rules.

Respectfully submitted,

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EXHIBIT A

Proposed Rule Governing Ex Parte and Extra Record Communications

Definitions – For the purposes of this rule the following terms mean:

Anticipated Contested Case – Any case that a person anticipates, knows or should know will be filed before the commission within 30 days and that such person ~~actually~~ anticipates or should anticipate will be or become a contested case.

Comments were received suggesting that the regulation of “anticipated contested cases” be removed from this rule, and also that the period for anticipated cases be extended to 60 days. This division of opinion suggested to the consultant that a thirty-day window for anticipated cases was likely appropriate. However, the word “actually” was deemed unnecessary and removed.

Anticipated Party – A person who anticipates, knows or should know that such person will be a party to an anticipated contested case.

Contested Case - Any proceeding before the commission in which legal rights, duties or privileges of specific parties are required by law to be determined after hearing. ~~This includes --~~
..

No suggestions were received for wording on examples of contested cases. Suspecting this indicated no definition was necessary and not qualified to write such a definition without assistance, the consultant removed this language.

Discussed Case – Each ~~Any~~ contested case or anticipated contested case ~~the~~ whose merits, facts, evidence, claims, or positions ~~of which~~ are the subject of an extra record communication regulated under this rule.

This was a minor grammatical change intended to clarify the language.

Ex Parte Communication - Any communication outside of the hearing process between (a) the commission, a commissioner, a member of the technical advisory staff, or the presiding officer assigned to the proceeding and (b) any party or anticipated party, or the agent or representative of a party or anticipated party, regarding any substantive issue ~~the merits, specific facts, evidence, claims, or positions that have arisen or is reasonably likely to arise in a contested case or anticipated contested case.~~ Ex parte communications shall not include a communication regarding general regulatory policy allowed under Missouri Revised Statute § 386.210.4.

Extra Record Communication – Any communication outside of the hearing process between (a) the commission, a commissioner, a member of the technical advisory staff, or the presiding officer assigned to the proceeding and (b) any person interested in a contested case or anticipated

contested case regarding ~~any substantive issue the merits, specific facts, evidence, claims, or positions that have arisen or is reasonably likely to arise in a contested case or anticipated contested case.~~ Extra record communications shall not include a communication regarding general regulatory policy allowed under Missouri Revised Statute § 386.210.4.

During the hearing on September 22, 2009, numerous comments indicated concern that the proposed rule did not expressly allow purely procedural comments, at least those procedural matters that would not likely affect the outcome of a matter. The consultant also noted that a defined term might simplify both the definition of “ex parte communication” and the definition of “extra record communication.” The definition of “substantive issue” was added below, and the proposed definitions of “ex parte rule” and “extra record communication” were modified based upon that proposed definition.

General Regulatory Policy – Shall have the same meaning as in Missouri Revised Statute § 386.210.4.

Party - Any applicant, complainant, petitioner, respondent, or intervenor in a contested case before the commission. Commission staff and the public counsel are also parties unless they file a notice of their intention not to participate in the relevant proceeding within the period of time established for interventions by commission rule or order.

Person - Any individual, partnership, company, corporation, cooperative, association, political subdivision, public utility, party, or other entity or body that could become a party to a contested case.

This definition was broadened based upon written comments received from MEDA.

Rate Case – A proceeding before the commission regarding revenue modification and request to change the schedule of rates on a utility’s total cost of providing service. A rate case shall include a “reverse rate case,” i.e., a complaint case alleging over-earnings or an actual cost adjustment case.

During the hearing on September 22, 2009, representatives of regulated entities expressed concern about the application of the “investigative powers” exception to anticipatory case notice contained in section 3 to reverse rate cases. This definition of “rate case” was then added to simplify the amendment made to section 3.

Substantive Issue – The merits, specific facts, evidence, claims, or positions that have arisen or are reasonably likely to arise in a contested case or anticipated contested case. The term substantive issue does not include merely procedural issues, unless those procedural issues are contested or likely to materially impact the outcome of a contested case.

During the hearing on September 22, 2009, representatives of regulated entities voiced concerns that the new rules did not state what communications are permitted. The consultant also noted that a definition of “substantive issue” might simplify the definitions of “ex parte

communication” and “extra record communication.” This definition was a result of such efforts.

(1) **Prohibition on Ex Parte Communications by Parties or Anticipated Parties**
~~Regarding Contested or Anticipated Contested Cases~~— No party or anticipated party shall initiate, participate in, or undertake, directly or indirectly, an ex parte communication.

Based upon comments during the hearing on September 22, 2009, the consultant modified the title of this section to make it more consistent with the content of the section.

(2) **Ex Parte Communications by Commission** – A commissioner, technical advisory staff, or the presiding officer assigned to a proceeding shall not initiate, participate in, or undertake, directly or indirectly, an ex parte communication regarding a contested case. However, it shall not constitute participation in or undertaking an ex parte communication if such person:

- a. Does not initiate the ex parte communication;
- b. Immediately withdraws from or ends the ex parte communication, or immediately alerts the initiating person that the communication is not proper outside the hearing process and makes a reasonable effort to withdraw from or end the communication; and
- c. Files notice in accordance with sections (5) and (6) of this Rule, as applicable.

(3) **Exclusions from Ex Parte Communications** – The following communications shall not violate sections (1) or (2) of this rule. However, communications governed by subsections (3)(a) and (3)(b) still must be disclosed as an extra record communication in accordance with sections (5), (6), and (7) as applicable:

- a. A communication between (a) the commission, a commissioner, a member of the technical advisory staff, or the presiding officer assigned to the proceeding and (b) a member of the general assembly or other governmental official allowed under Missouri Revised Statute § 386.210.5; or
- b. A communication between (a) the commission, a commissioner, or a member of the technical advisory staff and (b) a public utility or other regulated entity that is a party to a contested case, or an anticipated party to an anticipated contested case, notifying the commission, a commissioner, a member of the technical advisory staff, or the presiding officer assigned to the proceeding of ~~an anticipated or actual interruption or loss of service or providing an update regarding efforts to restore service after such an interruption or loss of service:~~

i. an anticipated or actual interruption or loss of service;

- ii. damage to or an incident or operational problems at a utility's facility;
- iii. an update regarding efforts to restore service after an interruption, loss of service, damages or an incident or problems referred in subsections (3)(b)(i) and (ii);
- iv. imminent threats to facility security and responses to such threats; or
- v. issuance of public communications regarding utility operations, such as the status of utility programs, billing issues, security issuances, or publicly available information about a utility's finances. These communications may also include a copy of the public communication, but should not contain any other communications regarding substantive issues.

These modifications were made largely based upon comments at the hearing on September 22, 2009, and the written comments of MEDA suggesting additional categories of ex parte communications that should be exempted from the prohibition on ex parte communications. MEDA's suggestions were narrowed, however, based upon recommendations of Commission advisory staff. In particular, exceptions for communications regarding "reliability" of utilities' facilities and "labor issues" were omitted, and the exception for "general information" was narrowed from what MEDA suggested.

- c. A communications between (a) the commission, a commissioner, or a member of the technical advisory staff and (b) commission staff relating to exercise of the commission's investigative powers including as recognized under Missouri Revised Statutes Chapters 386 or 393 Statute §§ 386.210.7, 386.330, 386.390, or 386.762. Where the communications concerns an anticipated rate case, however, notice shall be given in accordance with section (6) upon the filing of the rate case.

This section was modified at the suggestion of the Commission's legal counsel to broaden the reference to the Commission's investigative power because the prior suggestion omitted reference to other statutory provisions that served as a basis for the Commission's investigative powers. In addition, based primarily on the comments of regulated parties at the hearing on September 22, 2009, as well as MEDA's written comments, the final sentence was added to require notice where extra record communications with staff occur before a rate case, defined to include so-called reverse rate cases.

- d. A communication concerning a case in which no evidentiary hearing has been scheduled made at a public agenda meeting of the commission where such matter has been posted in advance as an item for discussion or decision.
- e. A communication concerning a case in which no evidentiary hearing has been scheduled made at a forum where representatives of the public utility

affected thereby, the office of public counsel, and any other party to the case are present.

These two sections were added in an attempt to make the proposed rule more consistent with Missouri Revised Statute § 386.210, without altering the principle structure of the proposed rule. The comments received from Commissioner Jarrett and MEDA raised concerns about such consistency with § 386.210, but offered solutions different than what the consultant ultimately offered.

Commissioner Jarrett also suggested a reporting requirement for such communications. The consultant anticipated such a reporting requirement was not necessary, because (a) parties would have advance notice of the public agenda and be required to participate in a forum and (b) in the ordinary course a proper record of communications at a public agenda or forum would be made.

(4) **No Consideration for Extra Record Communications – Unless properly admitted into the record in subsequent proceedings,** ~~a~~An extra record communication shall not be considered as part of the record on which a decision is reached by the commission, a commissioner, or presiding officer in a contested case.

During the hearing on September 22, 2009, Commissioner Gunn voiced concern that the prior draft drafted would bar a party from seeking to admit otherwise admissible ex parte communications. The first clause was added to make clear that the proposed rule sought to exclude consideration of such communications only if they were not otherwise properly admitted into the case. If an extra record communication is properly admitted, this rule should not affect the admissibility or consideration of such a communication.

(5) **Notice of Extra Record Communications in Contested Cases** – A person who initiates an extra record communication regarding a pending case shall on the next business day following such communication give notice of that communication as follows:

- a. If the communication is written, the initiating person or party shall file a copy of the written communication in the official case file for each discussed case and serve the copy of the written communication upon all parties of record in those discussed cases; or
- b. 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 serve such memorandum on all parties of record in those discussed cases. ~~The memorandum must contain a summary of the substance of the communication and not merely a listing of the subjects covered.~~ 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.

This subsection underwent two changes. First, the requirements for a written notice of an extra record communication were broadened consistent with a suggestion in written comments received from MEDA. Second, based upon the written comment of Commissioner Jarrett and oral comments from the Public Counsel during the hearing on September 22, 2009, the final sentence was added to allow transcription or recording of extra record communications. When this sentence was added, it was written to be consistent with MEDA's suggestion for information that a written notice of communication should contain (i.e., the changes made earlier in this subsection).

(6) **Notice of Extra Record Communications in Anticipated Contested Cases** – A person who initiates an extra record communication regarding an anticipated contested case that is not a pending case shall within five business days of the later of (a) becoming a party to the contested case or (b) the conversion of the case to a contested case, give notice of the extra record communication. The notice shall be made in the manner set forth in subsections (5)(a) and (b), and shall also include all information regarding the communication that subsections (5)(a) and (b) require.

(7) **Notice by Commission** – In addition to sections (5) or (6) of this Rule, if an extra record communication regarding a pending case is initiated by a person not a party to the discussed case, the commissioner, the technical advisory staff, or the presiding officer assigned to the discussed case shall give notice of the extra record communication in the manner set forth in subsections (5)(a) and (b).

(8) **Sanctions** - The commission may issue an order to show cause why sanctions should not be ordered against **any party or anticipated party, or the agent or representative of a party or anticipated party**, ~~person~~ engaging in an ex parte communication in violation of subsection (1) of this rule or a failure to file notice or otherwise comply with sections (5) or (6) of this rule. The commission may also issue an order to show cause why sanctions should not be ordered against any attorney who violates section (10) of this rule.

Based primarily upon written comments received from MEDA, the sanction power was modified to clarify that sanctions could be imposed upon a party when that party's representative violated this rule. The prior draft suggested sanctions could be imposed only on the person who had actually committed the violation.

(9) **Collection of Pre-Case Notice Filings** – The secretary of the commission shall create a repository for any extra record communication filed in advance of an anticipated contested case. Once such a case has been filed, the secretary shall promptly file any such notices in the official case file for each discussed case.

(10) **Attorney Duties** – An attorney appearing before the commission shall:

- a. Make reasonable efforts to ensure that the attorney and any person whom the attorney represents avoid initiating, participating in, or undertaking an ex parte communication prohibited by section (1);
- b. Make reasonable efforts to ensure that the attorney and any person whom the attorney represents gives notice of any extra record communication as directed in sections (5) and (6);
- c. Prepare a notice in accordance with subsections (5) or (6) when requested to do so by the commission, a commissioner, technical advisory staff, or the presiding officer assigned to a contested case;
- d. Make reasonable efforts to notify the secretary when a notice of pre-filing extra record communication is not transferred to a case file as set forth in section (9); and
- e. Comply with all the Missouri Rules of Professional Conduct.