

**Robin Carnahan**  
Secretary of State  
Administrative Rules Division  
  
**RULE TRANSMITTAL**

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NOV 04 2009

SECRETARY OF STATE  
ADMINISTRATIVE RULES

Rule Number 4 CSR 240-4.020 Ex Parte and Extra-Record Communications

Use a "SEPARATE" rule transmittal sheet for EACH individual rulemaking.

Name of person to call with questions about this rule:

Content Morris L. Woodruff Phone 573-751-2849 FAX 573-526-6010

Email address morris.woodruff@psc.mo.gov

Data Entry Morris Woodruff Phone 573-751-2849 FAX 573-526-6010

Email address morris.woodruff@psc.mo.gov

Interagency mailing address PSC, Ste 900, Gov. Ofc. Bldg., Jefferson City, MO 65102

TYPE OF RULEMAKING ACTION TO BE TAKEN

☐ Emergency rulemaking, include effective date

☒ Proposed Rulemaking

☐ Withdrawal ☐ Rule Action Notice ☐ In Addition ☐ Rule Under Consideration

☐ Order of Rulemaking

Effective Date for the Order \_\_\_\_\_

☐ Statutory 30 days OR Specific date \_\_\_\_\_

Does the Order of Rulemaking contain changes to the rule text? ☐ NO

☐ YES—LIST THE SECTIONS WITH CHANGES, including any deleted rule text:

Small Business Regulatory  
Fairness Board (DED) Stamp  
  
SMALL BUSINESS  
REGULATORY FAIRNESS BOARD

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JOINT COMMITTEE ON

NOV 04 2009

ADMINISTRATIVE RULES



Commissioners  
ROBERT M. CLAYTON III  
Chairman

JEFF DAVIS  
TERRY M. JARRETT  
KEVIN GUNN  
ROBERT S. KENNEY

## *Missouri Public Service Commission*

POST OFFICE BOX 360  
JEFFERSON CITY MISSOURI 65102  
573-751-3234  
573-751-1847 (Fax Number)  
<http://www.psc.mo.gov>

WESS A. HENDERSON  
Executive Director  
DANA K. JOYCE  
Director, Administration and  
Regulatory Policy  
ROBERT SCHALLENBERG  
Director, Utility Services  
NATELLE DIETRICH  
Director, Utility Operations  
STEVEN C. REED  
Secretary/General Counsel  
KEVIN A. THOMPSON  
Chief Staff Counsel

November 4, 2009

Robin Carnahan  
Secretary of State  
Administrative Rules Division  
600 West Main Street  
Jefferson City, Missouri 65101

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SECRETARY OF STATE  
ADMINISTRATIVE RULES

Re: 4 CSR 240-4.020 Ex Parte and Extra-Record Communications

Dear Secretary Carnahan,

### CERTIFICATION OF ADMINISTRATIVE RULE

I do hereby certify that the attached is an accurate and complete copy of the proposed rulemaking lawfully submitted by the Missouri Public Service Commission.

The Public Service Commission has determined and hereby certifies that this proposed rulemaking will not have an economic impact on small businesses. The Public Service Commission further certifies that it has conducted an analysis of whether or not there has been a taking of real property pursuant to section 536.017, RSMo 2000, that the proposed rulemaking does not constitute a taking of real property under relevant state and federal law, and that the proposed rulemaking conforms to the requirements of HB 191, Section 1, regarding user fees.

The Public Service Commission has determined and hereby also certifies that this proposed rulemaking complies with the small business requirements of HB 191, Section 1, in that it does not have an adverse impact on small businesses consisting of fewer than twenty-five full or part-time employees or it is necessary to protect the life, health, or safety of the public, or that this rulemaking complies with HB 191, by exempting any small business consisting of fewer than twenty-five full or part-time employees from its coverage, by implementing a federal mandate, or by implementing a federal program administered by the state or an act of the general assembly.

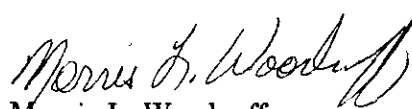
Statutory Authority: sections 386.410, RSMo 2000

Robin Carnahan  
Secretary of State  
November 4, 2009  
Page Two

If there are any questions regarding the content of this proposed rulemaking, please contact:

Morris L. Woodruff, Chief Regulatory Law Judge  
Missouri Public Service Commission  
200 Madison Street  
P.O. Box 360  
Jefferson City, MO 65102  
(573) 751-2849  
morris.woodruff@psc.mo.gov

Sincerely,

A handwritten signature in dark ink, appearing to read "Morris L. Woodruff", with a stylized flourish at the end.

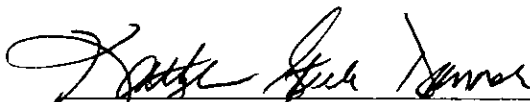
Morris L. Woodruff  
Chief Regulatory Law Judge

**AFFIDAVIT**

**PUBLIC COST**

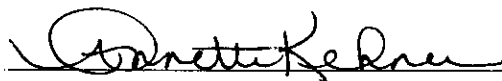
STATE OF MISSOURI     )  
                                      ) ss.  
COUNTY OF COLE     )

I, Kathleen Steele Danner, Interim Director, Missouri Department of Economic Development, first being duly sworn, on my oath, state that it is my opinion that the cost of proposed rule, 4 CSR 240-4.020, is less than five hundred dollars in the aggregate to this agency, any other agency of state government or any political subdivision thereof.



Kathleen Steele Danner  
Interim Director  
Department of Economic Development

Subscribed and sworn to before me this 3<sup>rd</sup> day of November, 2010. I am commissioned as a notary public within the County of Cole, State of Missouri, and my commission expires on 17 JULY 2011.



**Title 4 – DEPARTMENT OF ECONOMIC DEVELOPMENT**

**DIVISION 240 – Public Service Commission  
Chapter 4– Standards of Conduct**

**PROPOSED RULE**

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**NOV 04 2009**

**4 CSR 240-4.020 Ex Parte and Extra-Record Communications**

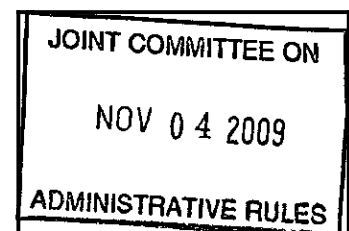
**SECRETARY OF STATE  
ADMINISTRATIVE RULES**

**PURPOSE:**

*To set forth the standards for ensuring the public trust in the Commission with regard to pending filings and cases. This rule regulates communication between the Commission, technical advisory staff and presiding officers, and anticipated parties, parties, agents of parties and interested persons regarding substantive issues that are not part of the evidentiary record.*

**(1) Definitions**

- (A) 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 anticipates or should anticipate will be or become a contested case.
- (B) Anticipated Party – A person who anticipates, knows or should know that such person will be a party to an anticipated contested case.
- (C) Contested Case – Shall have the same meaning as in Missouri Revised Statute § 536.010(4).
- (D) Commission – means the Missouri Public Service Commission as created by Chapter 386 of the Missouri Revised Statutes.
- (E) Commissioner – means one (1) of the members of the commission.
- (F) Discussed Case – Each contested case or anticipated contested case whose substantive issues are the subject of an extra record communication regulated under this rule.
- (G) Ex Parte Communication - Any communication outside of the contested case hearing process between the commission, a commissioner, a member of the technical advisory staff, or the presiding officer assigned to the proceeding and any party or anticipated party, or the agent or representative of a party or anticipated party, regarding any substantive issue. Ex parte communications shall not include a communication regarding general regulatory policy allowed under Missouri Revised Statute § 386.210.4.



- (H) Extra Record Communication – Any communication outside of the hearing process between the commission, a commissioner, a member of the technical advisory staff, or the presiding officer assigned to the proceeding and any person interested in a contested case or anticipated contested case regarding any substantive issue. Extra record communications shall not include a communication regarding general regulatory policy allowed under Missouri Revised Statute § 386.210.4.
  - (I) General Regulatory Policy – Shall have the same meaning as in Missouri Revised Statute § 386.210.4.
  - (J) 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.
  - (K) 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.
  - (L) Presiding Officer – means a commissioner, or a law judge licensed to practice law in the state of Missouri and appointed by the commission to preside over a case.
  - (M) Public Counsel – Shall have the same meaning as in Missouri Revised Statute § 386.700.
  - (N) Rate Case – A proceeding before the commission regarding revenue modification and a request to change the schedule of rates on a utility's total cost of providing service. A rate case for purposes of this rule, shall include a complaint case pursuant to Missouri Revised Statute § 386.390 provided it is regarding revenue modification and a request to change the schedule of rates on a utility's total cost of providing service.
  - (O) Substantive Issue – The merits, specific facts, evidence, claims, or positions presented or taken in a contested case or anticipated contested case. The term substantive issue does not include procedural issues, unless those procedural issues are contested or likely to materially impact the outcome of a contested case.
  - (P) Technical Advisory Staff – Shall have the same meaning as in Missouri Revised Statute § 386.135.
- (2) No party or anticipated party shall initiate, participate in, or undertake, directly or indirectly, an ex parte communication.

(3) 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 communication;
- (B) Immediately terminates the communication, or immediately alerts the initiating person that the communication is not proper outside the hearing process and makes a reasonable effort to terminate the communication; and
- (C) Files notice in accordance with sections (6) and (7) of this Rule, as applicable.

(4) The following communications shall not violate sections (2) or (3) of this rule. However, communications governed by subsections (4)(A) and (4)(B) still must be disclosed as an extra record communication in accordance with sections (6), (7), and (8) as applicable:

- (A) A communication between the commission, a commissioner, a member of the technical advisory staff, or the presiding officer assigned to the proceeding and a member of the general assembly or other governmental official allowed under Missouri Revised Statute § 386.210.5; or
- (B) A communication between the commission, a commissioner, or a member of the technical advisory staff and 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:
  - 1. an anticipated or actual interruption or loss of service;
  - 2. damage to or an incident or operational problems at a utility's facility;
  - 3. an update regarding efforts to restore service after an interruption, loss of service, damages or an incident or problems referred in subsections (4)(B)1 and 2;
  - 4. imminent threats to facility security and responses to such threats;
  - 5. 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; or
- (C) A communication between the commission, a commissioner, or a member of the technical advisory staff and 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 regarding actions taken under the authority granted the Commission under Chapter 700 of the Missouri Revised Statutes.

- (D) Communications between the commission, a commissioner, or a member of the technical advisory staff and commission staff relating to exercise of the commission's investigative powers as established in Missouri Revised Statutes Chapters 386, 393 and 700. If the communication concerns an anticipated rate case notice shall be given in accordance with section (7) upon the filing of the rate case.
  - (E) 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.
  - (F) 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.
- (5) Unless properly admitted into the record in subsequent proceedings, 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.
- (6) 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 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.



(7) 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 becoming a party to the contested case or 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 (6)(A) and (B), and shall also include all information regarding the communication that subsections (6)(A) and (B) require.

(8) In addition to sections (6) or (7) 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 (6)(A) and (B).

(9) 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, engaging in an ex parte communication in violation of subsection (2) of this rule or a failure to file notice or otherwise comply with sections (6) or (7) of this rule. The commission may also issue an order to show cause why sanctions should not be ordered against any attorney who knowingly violates section (11) of this rule.

(10) 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.

(11) 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 (2);
- (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 (6) and (7);
- (C) Prepare a notice in accordance with subsections (6) or (7) 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 (10); and
- (E) Comply with all the Missouri Rules of Professional Conduct.

*AUTHORITY: section 386.410, RSMo 2000. Original rule filed Dec. 19, 1975, effective December 29, 1975. Amended: Filed April 26, 1976, effective Sept. 11, 1976.*

*PUBLIC COST: This proposed rule will not cost affected state agencies or political subdivisions more than \$500 in the aggregate.*

*PRIVATE COST: This proposed rule will not cost affected private entities more than \$500 in the aggregate.*

*NOTICE TO SUBMIT COMMENTS AND NOTICE OF PUBLIC HEARING: Anyone may file comments in support of or in opposition to this proposed rule with the Missouri Public Service Commission, Steven C. Reed, Secretary of the Commission, P.O. Box 360, Jefferson City, MO 65102. To be considered, comments must be received at the Commission's offices on or before January 21, 2010, and should include a reference to Commission Case No. AX-2010-0128. Comments may also be submitted via a filing using the Commission's electronic filing and information system at <http://www.psc.mo.gov/case-filing-information>. A public hearing regarding this proposed rule is scheduled for January 22, 2010, at 9:00 a.m. in Room 305 of the commission's offices in the Governor Office Building, 200 Madison Street, Jefferson City, Missouri. Interested persons may appear at this hearing to submit additional comments and/or testimony in support of or in opposition to this proposed rule, and may be asked to respond to commission questions. Any persons with special needs as addressed by the Americans with Disabilities Act should contact the Missouri Public Service Commission at least ten (10) days prior to the hearing at one (1) of the following numbers: Consumer Services Hotline 1-800-392-4211 (voice) or Relay Missouri at 711.*

## Small Business Regulator Fairness Board Small Business Impact Statement

Date: 10/23/09

Rule Number: 4 CSR 240-4.020

Name of Agency Preparing Statement: Public Service Commission

Name of Person Preparing Statement: Steven Reed, Secretary/General Counsel

Phone Number: 751-3015 Email: steven.reed@psc.mo.gov

Name of Person Approving Statement: Steven Reed, Secretary/General Counsel

**Please describe the methods your agency considered or used to reduce the impact on small businesses (examples: consolidation, simplification, differing compliance, differing reporting requirements, less stringent deadlines, performance rather than design standards, exemption, or any other mitigating technique).**

None. There is little impact on small businesses other than a requirement to comply with this ethics rule.

**Please explain how your agency has involved small businesses in the development of the proposed rule.**

All entities regulated by the Commission were allowed an opportunity to participate in the development of this proposed rule.

**Please list the probable monetary costs and benefits to your agency and any other agencies affected. Please include the estimated total amount your agency expects to collect from additionally imposed fees and how the moneys will be used.**

None.

**Please describe small businesses that will be required to comply with the proposed rule and how they may be adversely affected.**

Small businesses such as water and sewer companies, manufactured housing dealers and installers, and law firms will have to comply with this ethics rule. No adverse effect is anticipated.

**Please list direct and indirect costs (in dollars amounts) associated with compliance.**

None.

**Please list types of business that will be directly affected by, bear the cost of, or directly benefit from the proposed rule.**

Small businesses such as water and sewer companies, manufactured housing dealers and installers, and law firms will have to comply with this ethics rule. No monetary cost or benefit is anticipated by the rule.

**Does the proposed rule include provisions that are more stringent than those mandated by comparable or related federal, state, or county standards?**

Yes \_\_\_\_ No XX

**If yes, please explain the reason for imposing a more stringent standard.**

*For further guidance in the completion of this statement, please see §536.300, RSMo.*

## **FISCAL NOTE**

### **PUBLIC COST**

#### **I. RULE NUMBER**

<b>Rule Number and Name</b>	<b>Type of Rulemaking</b>
4 CSR 240-4.020 Rule Governing Ex Parte and Extra Record Communications	Proposed Rule

#### **II. SUMMARY OF FISCAL IMPACT**

<b>State agencies or political subdivisions that will likely be affected by adoption of the proposed rule.</b>	<b>Estimated aggregate cost of compliance with the proposed rule by the affected entities.</b>
Public Service Commission Office of the Public Counsel	Less than \$500.

#### **III. WORKSHEET**

Not Applicable

#### **IV. ASSUMPTIONS**

If adopted, this proposed rule will govern ex parte and extra record communications between the Commissioners and parties to cases before the Commission. The rule defines ex parte and extra record communications, places prohibitions on the timing and content of certain communications, establishes exceptions to prohibited communications, and provides reporting requirements for certain communications.

## FISCAL NOTE

### PRIVATE COST

#### I. RULE NUMBER

Rule Number and Name	Type of Rulemaking
4 CSR 240-4.020 Rule Governing Ex Parte and Extra Record Communications	Proposed Rule

#### II. SUMMARY OF FISCAL IMPACT

Estimated number of entities that will likely be affected by adoption of the rule.	Types of entities that will likely be affected by adoption of the rule.	Estimated aggregate cost of compliance with the rule by the affected entities.
1000	Entities regulated by the Public Service Commission and Parties to Contested Cases	Less than \$500

#### III. WORKSHEET

Not applicable.

#### IV. ASSUMPTIONS

If adopted, this proposed rule will govern ex parte and extra record communications between the Commissioners and parties to cases before the Commission. The rule defines ex parte and extra record communications, places prohibitions on the timing and content of certain communications, establishes exceptions to prohibited communications, and provides reporting requirements for certain communications.