

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

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

COMMENTS OF COMMISSIONER TERRY M. JARRETT

On October 21, 2009 at 3:31 P.M. the consultant, Hinshaw and Culbertson, filed a document which explains changes made between September 11, 2009 and October 13, 2009 regarding proposed rules. I provide here my limited comments as to these changes as set out in "Exhibit A" filed on October 21, 2009 by the consultant.

My silence on any issue or matter should not be interpreted to mean I endorse or support any proposal or draft language.

Respectfully submitted,



Terry M. Jarrett, Commissioner

Submitted this 27th day of October, 2009.

Attachments

Redline Version of Revisions
Clean Version of Revisions

Title 4 – DEPARTMENT OF ECONOMIC DEVELOPMENT

DIVISION 240 – Public Service Commission

Chapter 4– Standards of Conduct

PROPOSED RULE

REVISIONS PROPOSED BY COMMISSIONER TERRY M. JARRETT

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

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 _____, and should include a reference to Commission Case No. AX-2010-0---. 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 _____ at _____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.

Title 4 – DEPARTMENT OF ECONOMIC DEVELOPMENT

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

PROPOSED RULE

REVISIONS PROPOSED BY COMMISSIONER TERRY M. JARRETT

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

PURPOSE: ~~The Commission must ensure that there is no question as to its impartiality in reaching a decision on the whole record developed during open hearings. This rule prohibits activities that would tend to influence the commission and that are not part of the record.~~ 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 – ~~Any proceeding before the commission in which legal rights, duties or privileges of specific parties are required by law to be determined after hearing.~~ 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~~D) Discussed Case – Each contested case or anticipated contested case whose substantive issues ~~merits, facts, evidence, claims, or positions~~ are the subject of an extra record communication regulated under this rule.
- (~~G~~E) 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~~F) 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~~G) General Regulatory Policy – Shall have the same meaning as in Missouri Revised Statute § 386.210.4.
- (~~J~~H) 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~~I) 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~~J) 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.
~~shall include a “reverse rate case,” i.e., a complaint case alleging over earnings or an actual cost adjustment case.~~
- (~~O~~K) Substantive Issue – The merits, specific facts, evidence, claims, or positions presented or taken ~~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.

(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 ~~ex parte~~ communication;
- (B) Immediately ~~withdraws from or ends~~ terminates 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 terminate ~~withdraw from or end~~ 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; ~~or~~

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.

(DE) ~~A~~e~~C~~ommunications 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 ~~including~~ as established ~~recognized under in~~ Missouri Revised Statutes Chapters 386, ~~or~~ 393 and 700. ~~If~~ Where the communications ~~concerns~~ an anticipated rate case, ~~however~~, notice shall be given in accordance with section (7) upon the filing of the rate case.

(ED) ~~A~~e~~C~~ommunication 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.

(FE) ~~A~~e~~C~~ommunication 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 _____, and should include a reference to Commission Case No. AX-2010-0---. 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 _____ at _____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.