

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

In the Matter of a Proposed Amendment)
to the Commission's Rule Regarding)
Ex Parte and Extra Record Communications)

Case No. AX-2012-0072

COMMENTS OF THE OFFICE OF THE PUBLIC COUNSEL

The Office of the Public Counsel offers the following comments on the Proposed Rules:

1. In Case No. EM-2007-0374, information surfaced during discovery that Commissioners had met secretly with representatives of the two utilities seeking Commission authorization of the acquisition that was the subject of that case. Those meetings, along with other instances of Commissioner contacts with utilities that resulted in recusals, created a widespread belief that the Commission's *ex parte* and ethics rules needed to be reviewed and revised.

2. In response, then-Governor Blunt issued a press release calling for the PSC to examine its policies regarding communications with utilities, then-Senator Maida Coleman called for Senate hearings, and then-Attorney General Nixon sent a letter to Public Counsel asking the Public Counsel seek recusal of any commissioner that had improper communications. The legislature added money to the PSC budget for ethics training, and the St. Louis Post and the Kansas City Star published numerous articles condemning the PSC. The PSC docketed four separate cases to examine *ex parte* communications.¹

3. Finally, after years of very public effort, including many workshops, on-the-

¹ Case Nos. AO-2008-0192, AX-2008-0201, AW-2009-0313, and AX-1010-0128.

record sessions, presentations by ethics experts, the Commission adopted new ethics and *ex parte* rules effective in mid-2010.

4. On September 7, 2011 – **barely a year after adopting new rules** – the Commission opened this case by issuing a notice that merely stated: “The Commission finds that the subject amendment is necessary to reflect the Commission’s experience with the 2010 revision to the rule and to improve the operation of the rule.” In the Commission’s November 30 Agenda meeting, the Commission noted that the proposed changes were intended to make it easier to conduct *post mortem* discussions about closed cases with its Staff.² The Commission did not discuss that it proposed to entirely eliminate the subsection that prevents the kind of secret meetings that created such an uproar when they came to light in Case No. EM-2007-0374.

5. That subsection, 4 CSR 240-4.020(11), provides that:

(11) No person who is likely to be a party to a future case before the commission shall attempt to communicate with any commissioner or member of the technical advisory staff regarding any substantive issue that is likely to be an issue within a future contested case, unless otherwise allowed under this rule. Should such a communication occur, the person involved in the communication shall file a notice with the secretary of the commission. Such notice shall provide the information required in section (4) of this rule. Once such a case has been filed, the secretary shall promptly file any such notices in the official case file for each discussed case.

In contrast to the open and lengthy process that lead to the promulgation of this provision, the Commission’s efforts to wipe it out have been remarkably understated. The Commission has given – at best – the bare minimum of notice required by Chapter 536. The Commission seeks to eliminate a rule provision that was intended to alleviate a lack of confidence in the Commission raised by the governor, the attorney general, members of the Senate, the press, and members of the utility bar by stating that the Commission wants “to reflect the Commission’s experience with the 2010 revision to the rule and to improve the operation of the rule.”

² Public Counsel has no objection to those changes.

6. Public Counsel opposes the repeal of subsection (11). There is no reason that Commissioners need to get information in secret about issues that are likely to come before them for decision. If information about a “substantive issue that is likely to be an issue within a future contested case” must be communicated to Commissioners, such information can be provided in a filing or at an Agenda meeting so that potentially affected entities and the public will know what information about substantive issues is being given to Commissioners. Subsection (11) does not operate to keep Commissioners from getting information they need to do their jobs; it operates to keep persons who are likely to present substantive issues to the Commission for decision from giving information about those issues to Commissioners without anyone knowing what information was given or how Commissioners reacted to the information. It is a simple principle of fairness and it should not be repealed.

Respectfully submitted,

Office of the Public Counsel

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