



Robin Carnahan
Secretary of State

**Administrative Rules Division
Rulemaking Transmittal Receipt**

Rule ID: 13383
Date Printed: 9/28/2011
Rule Number: 4 CSR 240-4.020
Rulemaking Type: Proposed Readoption
Date Submitted to Administrative Rules Division: 9/28/2011
Date Submitted to Joint Committee on Administrative Rules: 9/28/2011

Name of Person to Contact with questions concerning this rule:

Content: Morris Woodruff	Phone: 751-2849	Email: morris.woodruff@psc.mo.gov	Fax: 526-6010
RuleDataEntry:	Phone:	Email:	Fax:

Included with Rulemaking:

Cover Letter	9/28/2011
Affidavit for public cost	9/28/2011

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Robin Carnahan
Secretary of State
Administrative Rules Division

RULE TRANSMITTAL

Administrative Rules Stamp

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SECRETARY OF STATE
ADMINISTRATIVE RULES

COPY

Rule Number 4 CSR 240-4.020

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

Name of person to call with questions about this rule:

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

Email address morris.woodruff@psc.mo.gov

Data Entry same Phone _____ FAX _____

Email address _____

Interagency mailing address Public Service Commission, 9th Fl, Gov.Ofc Bldg, JC, MO

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

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ADMINISTRATIVE RULES



Commissioners

KEVIN GUNN
Chairman

JEFF DAVIS

TERRY M. JARRETT

ROBERT S. KENNEY

VACANT

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
Director of Administration
and Regulatory Policy

STEVEN C. REED
Secretary/General Counsel

CHERLYN D. VOSS
Director of Regulatory Review

September 28, 2011

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

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 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 1.310, RSMo Supp. 2010, regarding user fees.

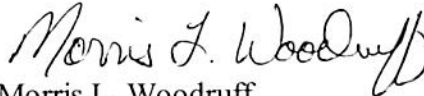
The Public Service Commission has determined and hereby also certifies that this proposed rulemaking complies with the small business requirements of 1.310, RSMo Supp. 2010, in that it does not have an adverse impact on small businesses consisting of fewer than twenty-five full or part-time employees or it is necessary to protect the life, health, or safety of the public, or that this rulemaking complies with 1.310, RSMo Supp 2010, 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: section 386.410

Woodruff
September 28, 2011
Certification of Administrative Rule

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

A handwritten signature in black ink that reads "Morris L. Woodruff". The signature is written in a cursive style with a large, stylized "M" and "W".

Morris L. Woodruff
Chief Regulatory Law Judge

**AFFIDAVIT
PUBLIC COST**

STATE OF MISSOURI)
)
COUNTY OF COLE)

I, David Kerr, Director of the 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.

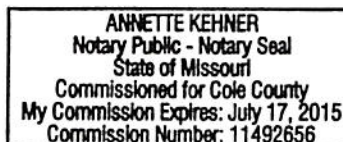


David Kerr
Director
Department of Economic Development

Subscribed and sworn to before me this 26th day of September, 2011, I am commissioned as a notary public within the County of COLE, State of Missouri, and my commission expires on 17 JULY 2015.



Notary Public



Title 4 – DEPARTMENT OF ECONOMIC DEVELOPMENT
Division 240 – Public Service Commission
Chapter 4 – Telecommunications Service

PROPOSED AMENDMENT

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SECRETARY OF STATE
ADMINISTRATIVE RULES

4 CSR 240-4.020 Ex Parte and Extra-Record Communications. The Commission is amending sections (1)(G), (1)(I), (2)(A), (8), (10)(A)(1), (10)(A)(5), (10)(A)(6), (10)(A)(7), (10)(A)(9), (13), (14), (14)(A), (14)(B), (14)(C), and (15), adding a new section (10)(B), renumbering sections (10)(B), (10)(C), (10)(D), (10)(E), (12), and (16), and deleting section (11).

PURPOSE: To reflect the Commission's experience in complying with the 2010 revision of the rule and to improve the operation of the rule.

(1) Definitions.

(A) Anticipated contested case—Any case that a person anticipates, knows, or should know will be filed before the commission within sixty (60) 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 a contested case.

(C) Contested case—Shall have the same meaning as in section 536.010(4), RSMo.

(D) Commission—Means the Missouri Public Service Commission as created by Chapter 386, RSMo.

(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 section 386.210.4, RSMo, communications listed in section (/3/10) of this rule, or communications that are de minimis or immaterial.

(H) Extra-record communication—Any communication outside of the contested hearing process between the commission, a commissioner, a member of the technical advisory staff, or the presiding officer assigned to the proceeding and any individual interested in a contested case or anticipated contested case regarding any substantive issue. Extra-record communications shall not include communications that are de minimis or immaterial.

(I) Finally *[adjudicated]* **determined**—A decision of the commission in a contested case **in which all applications for rehearing and reconsideration are decided and** which is no longer *[subject to appeal]* **an active case before the Commission.**

(J) General regulatory policy—Any topic that is not specific to a single entity regulated by the commission and such topic is not reasonably believed by any person who is a party to the communication to be a subject within a contested case or anticipated contested case of which the person or such person's principal is or will be a party. Any communication regarding the merits of an administrative rule, whether a concept or a pending rulemaking, or legislation, whether a

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ADMINISTRATIVE RULES

concept or a pending piece of legislation, shall at all times be considered a communication regarding a general regulatory policy allowed under section 386.210.4, RSMo.

(K) 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, or where staff serves in an advisory capacity pursuant to any commission rule.

(L) Person—Any individual, partnership, company, corporation, cooperative, association, political subdivision, entity regulated by the commission, party, or other entity or body that could become a party to a contested case.

(M) 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.

(N) Public counsel—Shall have the same meaning as in section 386.700, RSMo.

(O) Substantive issue—The merits, specific facts, evidence, claims, or positions which have been or are likely to be presented or taken in a 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 section 386.135, RSMo.

(2) Any regulated entity that intends to file a case likely to be a contested case shall file a notice with the secretary of the commission a minimum of sixty (60) days prior to filing such case. Such notice shall detail the type of case and issues likely to be before the commission.

(A) Any case filed which is not in compliance with this section *[shall not/may]* be permitted and the *[secretary of the/commission]* *[shall/may]* reject any such filing.

(B) A party may request a waiver of this section for good cause.

(8) Any communication, other than public statements *[at a public event]* or de minimis or immaterial communications, between a commissioner or technical advisory staff and any regulated entity regarding regulatory issues, including but not limited to issues of general regulatory policy under subsection 386.210.4, RSMo, if not otherwise disclosed pursuant to this rule, shall be disclosed in the following manner:

(10) The following communications shall not be prohibited by or subject to the disclosure and notice requirements of section (3) of this rule, if such communication would otherwise be an ex parte communication, or subject to section (8) of this rule:

(A) Communications 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]* **Planned outages or maintenance of facilities** and 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 paragraphs (10)(A)1. and 2.;
4. Security or reliability of utility facilities;

5. Issuance of public communications regarding utility operations, such as **outages, loss of service**, 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;

6. Information regarding matters before state or federal agencies and committees **and courts** including but not limited to state advisory committees, **the Department of Natural Resources, the Environmental Protection Agency, the Department of Energy**, the Federal Communications Commission, the Federal Energy Regulatory Commission, and the Nuclear Regulatory Commission;

7. Information regarding a regional transmission organization, **independent system operator, or regional planning organization**;

8. Labor matters not part of a pending case; or

9. Matters related to the safety of personnel, **the safety of facilities, and the general public**;

(B) Presentations, speeches, statements, or discussions made in an open forum such as but not limited to those made before the National Association of Regulatory Utility Commissioners, the Mid American Regulatory Conference, and other regional or national organizations.

([B/C]) Communications between the commission, a commissioner, or a member of the technical advisory staff and any employee of the commission relating to exercise of the commission's investigative powers as established under Missouri law. If the communication concerns an anticipated case, notice shall be given in accordance with section (4) upon the filing of the case;

([C/D]) Communications between the commission, a commissioner, a member of the technical advisory staff, or the presiding officer and a party or anticipated party concerning an issue or 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;

([D/E]) Communications between the commission, a commissioner, a member of the technical advisory staff, or the presiding officer and a party or anticipated party 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 all other parties to the case are present; and

([E/F]) Communications between the commission, a commissioner, a member of the technical advisory staff, or the presiding officer and a party or anticipated party concerning a case in which no evidentiary hearing has been scheduled made outside a public agenda meeting or forum where representatives of the parties are present when disclosed as provided in section 386.210.3(3), RSMo.

[(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.]

(~~12~~/11) It is improper for any person interested in a case before the commission to attempt to sway the judgment of the commission by undertaking, directly or indirectly, outside the hearing process to bring pressure or influence to bear upon the commission, its employees, or the presiding officer assigned to the proceeding.

(~~13~~/12) Notwithstanding any provision of this rule to the contrary, once a contested case has been finally ~~[adjudicated]~~**determined**, the commission, a commissioner, a member of the technical advisory staff, or the presiding officer may communicate with any person regarding any procedural or substantive issues related to such case *[within thirty (30) days of the case being finally adjudicated, unless the same regulated entity has a contested case or anticipated contested case pending before the commission which includes such issues]*. **When such communications are anticipated to relate to the performance or merit of individual employees, they may be closed pursuant to Chapter 610 RSMo.**

(~~14~~/13) An attorney, or any law firm the attorney is associated with, 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 (3) *[for a communication prohibited by section (11)]*;

(B) Make reasonable efforts to ensure that the attorney and any person whom the attorney represents gives notice of any communication as directed in section (4), (5), **or (8)**~~[or (11)]~~;

(C) Prepare a notice in accordance with section (4), (5), **or (8)**~~[or (11)]~~ 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 ex parte communication is not transferred to a case file as set forth in subsection (3)(D);

(E) Comply with all the Missouri Rules of Professional Conduct;

(F) During the pendency of an administrative proceeding before the commission, not make or participate in making a statement, other than a quotation from or reference to public records, that a reasonable person would expect to be disseminated by means of public communication if it is made outside the official course of the proceeding and relates to any of the following:

1. Evidence regarding the occurrence or transaction involved;
2. The character, credibility, or criminal record of a party, witness, or prospective witness;
3. Physical evidence, the performance or results of any examinations or tests, or the refusal or failure of a party to submit to examinations or tests;
4. The attorney's opinion as to the merits of the claims, defenses, or positions of any interested person; and
5. Any other matter which is reasonably likely to interfere with a fair hearing; and

(G) Exercise reasonable care to prevent the client, its employees, and the attorney's associates from making a statement that the attorney is prohibited from making.

(~~15~~/14) 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 section (3) *[or (11)]* of this rule or a

failure to file notice or otherwise comply with section (4), (5), or (8) 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 ([14/13]) of this rule.

([16/15]) No person who has served as a commissioner, presiding officer, or commission employee 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.

AUTHORITY: section 386.410, RSMo 2000. Original rule filed Dec. 19, 1975, effective Dec. 29, 1975. Amended: Filed April 26, 1976, effective Sept. 11, 1976. Rescinded and readopted: Filed Nov. 4, 2009, effective July 30, 2010.*

**Original authority: 386.410, RSMo 1939, amended 1947, 1977, 1996.*

PUBLIC COST: This proposed amendment will not cost state agencies or political subdivisions more than five hundred dollars (\$500) in the aggregate.

PRIVATE COST: This proposed amendment will not cost private entities more than five hundred dollars (\$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 December 1, 2011, and should include a reference to Commission Case No. AX-2012-0072. Comments may also be submitted via a filing using the Commission's electronic filing and information system at <<http://www.psc.mo.gov/efis.asp>>. A public hearing regarding this proposed rule is scheduled for Monday, December 5, 2011 at 10:00 a.m. in 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: 9/9/11

Rule Number: 4 CSR 240-4.020

Name of Agency Preparing Statement: Public Service Commission

Name of Person Preparing Statement: Steve 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.

Involvement of small businesses or entities regulated by the Commission was not necessary for the development of this proposed amendment.

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.