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THE CHAIRMAN'S REPORT ON A REVIEW OF THE MISSOURI PUBLIC SERVICE COMMISSION'S STANDARD OF CONDUCT RULES AND CONFLICTS OF INTEREST STATUTE

Case No. AO-2008-0192

Chairman Jeff Davis
Missouri Public Service Commission

January 15, 2008

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In the Matter of a Review of the Missouri Public Service Commission's Standard of Conduct Rules and Conflicts of Interest Statute	)))	**Case No. AO-2008-0192**

REPORT OF REVIEW AND INQUIRY

Issue Date: January 15, 2008

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EXECUTIVE SUMMARY

Under the investigatory power conferred in Section 386.130, RSMo 2000, the Chairman of the Missouri Public Service Commission, the Honorable Jeff Davis, opened a workshop case to conduct a thorough inquiry and review of the Commission's Standard of Conduct Rules and the Conflicts of Interest Statute. In this Report, Chairman Davis reviews the relevant Commission Rules, State Statutes and Commission Policies regarding the professional standard of conduct for the Commissioners and the Commission's staff and employees. Chairman Davis also discusses his views concerning the various comments, suggestions and proposals to enhance the effectiveness of those standards and practices, which were submitted by interested persons, groups and entities participating in the public forum established to receive them. Chairman Davis makes the following preliminary observations:

1. Citizens served by the Missouri Public Service Commission must enjoy the certainty and confidence that rates for utility services are just and reasonable, and also that processes both during and prior to the filings of cases are handled in a manner that is fair, objective and above reproach.

2. Current laws and regulations speak clearly to communications involving parties to cases before the Commission once those cases are filed and set for hearing.

3. The foremost objective of this docket is to bring a similar and unimpeachable level of confidence to communication occurring before cases are filed, and to do so in ways that maintain the essential and compelling need for Commissioners to be fully versed on issues that come before them by the free and effective exchanges of ideas, issues and concerns

with citizens, ratepayers, interest groups, regulated industries, staff, state lawmakers and other public officials.

4. Effectively meeting this challenge will serve two essential and fundamental purposes:

First, the citizens of Missouri will have comfort and assurance in the understanding that all processes, communication and actions involving the Public Service Commission and others in this state *prior to the filing of any case* serves first the best interest of citizens, and such communication and action is conducted solely in the interest of benefiting the citizens of this state, and;

Second, that the integrity and efficiency of the formal processes of regulatory hearings and dockets through which cases are filed and rates established will be resistant to distraction or compromise by questions regarding communications *prior* to or during the filing of any case. Cases involving the ratemaking process are complex by nature, and ratepayers are best served by the determination of all Commissioners in findings of fact and conclusions of law. The best interest of no party is served by confusion or questions involving communication that occurred before the filing of any case -- communication that is not only allowed, but encouraged by the statutes of Missouri.

5. To that end, I, as Chairman of the Commission, have: (a) thoroughly reviewed and analyzed the existing law governing communications between the Commissioners and any entities, persons, or interested groups, (b) invited, reviewed and given due consideration to the testimony and presentations of all participants to this docket, and, (c) prepared and now present numerous recommendations for action by the Commission that are delineated, in detail, in the Chairman's Recommendation section of this Report. Those

recommendations, appearing on pages 55 through 62 of this Report, include new requirements for scheduling meetings with the Commissioners, new notice and records requirements, ethics training for Commission employees and attorneys practicing before the Commission and Commissioner affirmations of proper participation in cases.

REPORT OF REVIEW AND INQUIRY

Procedural History

Background

On December 13, 2007, out of the desire to affirm the public trust and confidence in the execution of the Missouri Public Service Commission's statutory mandates to promote the public interest, ensure the safe and adequate provision of utility services, and set just and reasonable rates for those services, the Honorable Jeff Davis, Chairman of the Commission, upon his own motion and authority, opened a workshop docket and set a Roundtable Discussion to consider potential enhancement of its Standard of Conduct Rules and Conflicts of Interest policies. The Chairman utilized this forum to review and evaluate the Commission's Standard of Conduct Rules, 4 CSR 240-4.010 et. seq., the Conflicts of Interest Statute, Section 386.200, RSMo 2000, and the Commission's current policies, procedures and practices to determine if modifications were required to prevent any impropriety, or even the appearance of impropriety, with regard to the actions of the Commission.

Notice

All interested persons, and especially groups and entities that routinely practice before the Commission, were invited to submit comments and make presentations at the Roundtable. The Commission's Data Center was directed to electronically serve notice

upon every Commission regulated utility, the Office of the Public Counsel and every member on the Commission's Listserve. The Commission's Public Information Officer was directed to post a press release on the Commission's web page announcing the opening of this docket and the date for the Roundtable Discussion. A total of nine notices were issued in this docket prior to the date of the Roundtable, to ensure that adequate notice was provided and to assist potential participants by providing them with copies of the relevant Commission Rules, State Statutes and Judicial Canons.

Roundtable Discussion

The Chairman scheduled the Roundtable Discussion to be held on January 7, 2008. In order to facilitate the orderly flow of information, the Chairman requested, but did not mandate, that any interested persons, groups and entities wishing to participate in the Roundtable file prepared statements, comments, and presentation materials, as well as an estimated amount of time necessary for each presentation. Instructions for pre-filed materials included: (1) the filing of a summary section providing a concise description of the comments, suggestions, proposals, etc; and, (2) dividing the comments, suggestions, proposals into the following categories: (a) actions the Commission can implement informally; (b) actions requiring formal Commission action, i.e. rulemaking; and (c) recommended statutory changes. All prepared statements, comments, proposals, etc. were to be filed no later than January 3, 2008, to allow all participants an opportunity to review them prior to the Roundtable.

The Roundtable Discussion was held on the record, videotaped and Webcast. Prior to the Roundtable, the Missouri Energy Development Association, Ms. Julie Noonan, and the Commission's Staff filed statements, comments, and/or presentation materials. At the Roundtable, Mr. Scott Hempling, the Executive Director of the National Regulatory

Research Institute, provided written comments outlining his formal presentation.

Forty-one interested persons, groups and entities signed the attendance sheet at Roundtable Discussion; however, many news media personnel were also present, and others may not have signed in.[1] Suffice it to say, there was a large crowd present for the Roundtable. The Chairman welcomed prepared presentations from:

(1) Scott Hempling, Executive Director of the National Regulatory Research Institute;

(2) Lewis Mills, Public Counsel, The Office of the Public Counsel;

(3) Paul A. Boudreau, Legal Counsel for the Missouri Energy Development Association;

(4) Julie Noonan, Missouri Citizen and Member of StopAquila.org; and,

(5) Kevin Thompson, General Counsel for the Missouri Public Service Commission.

These presenters accepted questions from all persons in attendance. Additionally, the floor was opened to all persons in attendance to receive comments, suggestions, and even unplanned presentations.[2] Participants, and all persons viewing the Webcast, were invited to submit additional comments, either by direct filing in this docket, or by use of the Commission's web page links for filing comments.

The docket in this matter is being held open for further comments and filings, and the Chairman anticipates there will be a supplemental report filed once all comments are received and the docket is finally closed. The Chairman has included all current filings by the participants in the Roundtable as exhibits to this Report.[3]

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[1] Roundtable Exhibit 12, Appendix C.

[2] See Transcript, Volume 1, filed in Docket Number AO-2008-0192 on January 9, 2008.

[3] See Appendix C.

The Current State of Missouri Law

While this docket was opened to review the Commission's rules and regulations pertaining to Standards of Conduct and Conflicts of Interest, the Chairman notes the primary focus of this investigation will be a review of what constitutes proper and improper *ex parte* contacts and other external communications with the Commissioners.[4] Indeed, both the Commission's Conflict of Interest Statute (Section 386.200, RSMo 2000), concerning offerings of, or solicitation of, an office, place, position or employment, and the Commission's Rule on Gratuities (4 CSR 240-4.010), concerning the offering of, or solicitation of, gifts, meals, gratuities, goods, services or travel, are very straightforward in terms of what types of contacts are expressly prohibited, regardless if they were made *ex parte* or on the record and in full view of the public. Consequently, it is expedient for this investigation to dedicate the bulk of its review to the examination of what constitutes *ex parte* contact versus other types of communications. In particular, the Chairman will examine what *ex parte* and other types of communications are allowed, authorized and acceptable, and what *ex parte* and other types of communications are improper, impermissible and prohibited.

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[4] This is not a contested case, but rather a workshop case opened for the purpose of receiving comments from the public, the public utility industry as a whole and any other interested entities with regard to the Commission's Standard of Conduct policies and procedures. Consequently, this case is not subject to the same standard applied in contested cases requiring there be findings of fact that are sufficiently definite and certain or specific under the circumstances of the particular case to enable a reviewing court to review the Commission's conclusions of law and its final decision intelligently and ascertain if the facts afford a reasonable basis for the order without resorting to the evidence. *Glasnapp v. State Banking Bd.*, 545 S.W.2d 382, 387 (Mo. App. 1976), *quoting* 2 Am.Jur.2d *Administrative Law* § 455, at 268). The Chairman opened this docket to accept suggestions for enhancing the Commission's current Standard of Conduct Rules, policies, procedures and practices. Implementation of any recommendations calling for legislative action is dependent upon the General Assembly. The Commission is bound to follow the proscribed procedures as currently enacted by the legislature and shall do so until such time as the legislature amends or abrogates its current directives to the Commission.

This is not to say that the Chairman, or the Commission, in any way approves of an improper contact or offer of a gratuity in any form that could occur in the presence of all parties to a matter, or during a time when no pending matter is before the Commission, and thus not fall under the category of being an *ex parte* contact. Rather, the Chairman is merely attempting to promote administrative economy by directing this inquiry to the types of conduct that require public illumination to promote the utmost public confidence in the proceedings occurring before the agency. It is not what happens in the open corridors of the Agency or the public hearing room that creates fear or undermines the process, but rather, closed door dealings involving the promise of privilege or favor that erodes the public trust. Transparency is the cornerstone of public trust.

Ex Parte Contact As It Relates To Procedural Due Process

The PSC is an administrative body created by statute and has only such powers as are expressly conferred by statute and reasonably incidental thereto.[5] The procedural due process requirement of fair trials by fair tribunals applies to an administrative agency acting in an adjudicative capacity.[6] The Commission, however, acts in different capacities, and consequently, not all cases ongoing before the Commission involve adverse parties or involve the determination of individual rights, i.e. cases that would implicate procedural due process protections and bar improper *ex parte* contacts.

"When the Commission . . . promulgates for prospective effect a standard addressed to the public or regulated industry generally, it acts like a lawmaker, and so exercises quasi-

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[5] *State ex rel. AG Processing Inc. v. Thompson*, 100 S.W.3d 915, 919 -920 (Mo. App. 2003); *Union Elec. Co. v. Pub. Serv. Comm'n*, 591 S.W.2d 134, 137 (Mo. App. 1979).

[6] *Thompson*, 100 S.W.3d at 919 -920; *Fitzgerald v. City of Maryland Heights*, 796 S.W.2d 52, 59 (Mo. App. 1990) (citing *Withrow v. Larkin*, 421 U.S. 35, 46, 95 S.Ct. 1456, 1464, 43 L.Ed.2d 712, 723 (1975)).

legislative power."[7] "When the Commission determines facts from disparate evidence and applies the law to come to decision in a particular controversy, it acts as an adjudicator, and so exercises quasi-judicial power."[8]

"Quasi-judicial is a term applied to the action of public administrative officers or bodies, who are required to investigate facts, or ascertain the existence of facts, hold hearings, and draw conclusions from them, as a basis for their official action, and to exercise discretion of a judicial nature."[9] The Commission's quasi-judicial power is exercised in "contested cases," meaning proceedings before the agency in which legal rights, duties or privileges of specific parties are required by law to be determined after hearing.[10] It is only when the Commission exercises its quasi-judicial power that full procedural due process protections come into play.[11] As best articulated by the Missouri

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[7] *State ex rel. Gulf Transport Co. v. Public Service Com'n of State*, 658 S.W.2d 448, 465 (Mo. App. 1983) (Shangler, J., dissenting) (citing *Missouri Southern R. Co. v. Public Service Commission*, 279 Mo. 484, 214 S.W. 379, 380 (1919)). See also *State ex rel. Atmos Energy Corp. v. Public Service Com'n of State of Mo.*, 2001 WL 1806001, 9 (Mo. App. 2001) (superseded on other grounds in *State ex rel. Atmos Energy Corp. v. Public Service Com'n of State of Mo.*, 103 S.W.3d 753 (Mo banc 2003)).

[8] *Gulf Transport Co.*, 658 S.W.2d at 465 (Shangler, J., dissenting) (citing *State Tax Commission v. Administrative Hearing Commission*, 641 S.W.2d 69, 75[10, 11] (Mo. banc 1982); *National Labor Relations Board v. Wyman-Gordon Company*, 394 U.S. 759, 770, 89 S.Ct. 1426, 1432, 22 L.Ed.2d 709 (1969)). See also *State ex rel. Atmos Energy Corp. v. Public Service Com'n of State of Mo.*, 2001 WL 1806001, 9 (Mo. App. 2001) (superseded on other grounds in *State ex rel. Atmos Energy Corp. v. Public Service Com'n of State of Mo.*, 103 S.W.3d 753 (Mo banc 2003)).

[9] *State ex rel. McNary v. Hais*, 670 S.W.2d 494, 496 (Mo. banc 1984) (citing to *Black's Law Dictionary* 1121 (5th ed. 1979); *State ex rel. State Highway Commission v. Weinstein*, 322 S.W.2d 778, 784 (Mo. banc 1959); 1 Am.Jur.2d *Administrative Law* § 161 (1962); 50 C.J.S. *Judicial* 562-65 (1947)). It should be noted that constitutional challenges to the delegation of judicial power to administrative agencies have repetitively failed. See *Percy Kent Bag Co. v, Missouri Com'n on Human Rights*, 632 S.W.2d 480 (Mo. banc 1982).

[10] Section 536.010(4), RSMo 2000. An agency decision which acts on a specific set of accrued facts and concludes only them is an Adjudication. *Missourians for Separation of Church and State v. Robertson*, 592 S.W.2d 825, 841 (Mo. App. 1979) (citing *Ackerman v. City of Creve Coeur*, 553 S.W.2d 490, 492(2) (Mo. App. 1977)).

[11] "The procedural due process requirement of fair trials by fair tribunals applies to administrative agencies acting in an adjudicative capacity. *Withrow v. Larkin*, 421 U.S. 35, 46, 95 S. Ct. 1456, 1464, 43 L. Ed. 2d 712, 723 (1975). The PSC is not obligated to provide evidentiary procedures at rulemaking hearings other than providing the opportunity to "present evidence." Cross-examination of witnesses and the presentation of rebuttal evidence-are procedures employed in contested cases but not rulemaking hearings. *State ex rel.*

Supreme Court in *Jamison v. State, Dept. of Social Services, Div. of Family Services*:

> The due process clauses of the United States and Missouri constitutions prohibit the taking of life, liberty or property without due process of law. The United States Supreme Court has long recognized that this prohibition "imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests." In determining what process is due in a particular case, a court first determines whether the plaintiff has been deprived of a constitutionally protected liberty or property interest. If so, a court then examines whether the procedures attendant upon the deprivation of that interest were constitutionally sufficient.
>
> Under both the federal and state constitutions, "[t]he fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" This does not mean that the same type of process is required in every instance; rather, "due process is flexible and calls for such procedural protections as the particular situation demands." Three factors must be considered in determining what procedures are constitutionally sufficient:
>
> [1] First, the private interest that will be affected by the official action; [2] second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and [3] finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.
>
> The United States Supreme Court has consistently held "that some form of hearing is required before an individual is finally deprived of a [protectable] interest" because "the right to be heard before being condemned to suffer grievous loss of any kind ... is a principle basic to our society.'" When this hearing must be held and what procedural protections must accompany this hearing will vary depending on the interest at stake. (Citations omitted).[12]

The Court further, and most importantly, stated: "Due process requires an impartial decisionmaker, but it also presumes the honesty and impartiality of decision makers in the

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Atmos Energy Corp. v. Public Service Com'n of State, 103 S.W.3d 753, 759 -760 (Mo. banc 2003). See also Section 386.250(6).

[12] *Jamison v. State, Dept. of Social Services, Div. of Family Services*, 218 S.W.3d 399, 405 -406 (Mo. banc 2007) (internal citations omitted). Missouri's due process provision parallels its federal counterpart, and the Missouri Supreme Court has treated the state and federal due process clauses as equivalent. Const. amend. XIV, sec. 1; Mo. Const. art. I, sec. 10. *See also, State v. Rushing*, 935 S.W.2d 30, 34 (Mo. banc 1996) (Missouri constitutional provisions cannot provide less protection than comparable federal ones); *Belton v. Bd. of Police Comm'rs*, 708 S.W.2d 131, 135 (Mo. banc 1986) (equivalent).

absence of a contrary showing."[13]

Thus, administrative decisionmakers must be impartial.[14] Officials occupying quasi-judicial positions are held to the same high standard as apply to judicial officers in that they must be free of any interest in the matter to be considered by them.[15] A presumption exists that administrative decisionmakers act honestly and impartially, and a party challenging the partiality of the decisionmaker has the burden to overcome that presumption.[16] A judge or administrative decisionmaker is without jurisdiction, and a writ of prohibition would lie, if the judge or decisionmaker failed to disqualify himself on proper application.[17]

"Administrative decisionmakers *are expected to have* preconceived notions concerning policy issues within the scope of their agency's expertise."[18] "Familiarity with the adjudicative facts of a particular case, even to the point of having reached a tentative conclusion prior to the hearing, does not necessarily disqualify an administrative decisionmaker, in the absence of a showing that the decisionmaker is not capable of judging a particular controversy fairly on the basis of its own circumstances."[19] An

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[13] *Jamison*, 218 S.W.3d at 413 (internal citation omitted). See also *Mueller v. Ruddy*, 617 S.W.2d 466, 475 (Mo. Ct. App. 1981); *Fitzgerald*, 796 S.W.2d at 59. Due process demands impartiality on the part of those who function in judicial or quasi-judicial capacities. *Schweiker* v. *McClure*, 456 U.S. 188, 195, 102 S. Ct. 1665, 1670 (U.S. Cal. 1982), *E.g., Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242-243, and n. 2, 100 S.Ct. 1610, 1613, and n. 2, 64 L.Ed.2d 182 (1980). "[D]ue Process is flexible and calls for such procedural protections as the particular situation demands." *Id.*; *Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S.Ct. 2593, 2600, 33 L.Ed.2d 484 (1972).

[14] *Id.*

[15] *Thompson*, 100 S.W.3d at 919-920; *Union Elec. Co.*, 591 S.W.2d at 137.

[16] *Thompson*, 100 S.W.3d at 919-920; *Burgdorf v. Bd. of Police Comm'rs*, 936 S.W.2d 227, 234 (Mo. App. 1996).

[17] *Thompson*, 100 S.W.3d at 919-920; *State ex rel. Ladlee v. Aiken*, 46 S.W.3d 676, 678 (Mo. App. 2001); *State ex rel. White v. Shinn*, 903 S.W.2d 194, 196 (Mo. App.1995).

[18] *Fitzgerald*, 796 S.W.2d at 59 (emphasis added) (citing *Hortonville Joint School Dist. No. 1 v. Hortonville Education Assoc.*, 426 U.S. 482, 493, 96 S.Ct. 2308, 2314, 49 L.Ed.2d 1, 9 (1976)).

[19] *Fitzgerald*, 796 S.W.2d at 59 (internal citations, quotation marks, and brackets omitted) (citing *Wilson v.*

administrative hearing is not unfair unless the decision makers, prior to the hearing, have determined to reach a particular result regardless of the evidence.[20] "Conversely, any administrative decisionmaker who has made an **unalterable prejudgment of operative adjudicative facts is considered biased.**"[21] "Because of the risk that a biased decisionmaker may influence other, impartial adjudicators, the participation of such a decisionmaker in an administrative hearing generally violates due process, even if his [or her] vote is not essential to the administrative decision."[22]

Inappropriate *Ex Parte* Contact

Black's Law Dictionary defines *ex parte* as meaning: "On one side only; by or for one party; done for, in behalf of, or on the application of, one party only."[23] In order for a contact or action to be associated with one party, there must obviously be a "party" to an action, and there must be an action or case pending. Any contact or communication with an individual, group or entity when there is no existing case, by definition, is not an *ex parte* contact.

Not all ex parte contacts are prohibited or inappropriate. Indeed, even in the context of judicial officers, where such matters are typically litigated, "[t]he mere opportunity to receive information outside the courtroom which has the potential to affect considerations in

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Lincoln Redevelopment Corp., 488 F.2d 339, 342-43 (8th Cir. 1973)); *Hortonvillet,* 96 S.Ct. at 2314.

[20] *Ross v. Robb*, 662 S.W.2d 257, 260 (Mo. banc 1984) (administrative hearing not unfair absent a record showing that the decisionmaker "heard the evidence with an unbendable or preconceived notion" of the ultimate outcome); *Shepard v. South Harrison R-II School District,* 718 S.W.2d 195, 199 (Mo. App. 1986) (no unfairness unless the administrative decisionmaker "is prejudiced, so that it has predetermined to reach a particular result no matter what the evidence").

[21] *Fitzgerald*, 796 S.W.2d at 59 (emphasis added).

[22] *Fitzgerald*, 796 S.W.2d at 59 (citing *State ex rel. Brown v. City of O'Fallon,* 728 S.W.2d 595, 598 (Mo. App. 1987)).

[23] *Black's Law Dictionary*, 6th Ed., West Publishing Company, 1990, p. 576.

a case is no basis to require a judge to disqualify himself."[24] "If the record discloses an opportunity to obtain information that would disqualify the judge, it may also disclose facts that negate any reasonable question concerning the trial judge's impartiality."[25] Communications relating only to procedural matters, absent any discussion of the merits of a case, especially in light of no suggestion to the contrary, serve to dispel any further question of impropriety.[26]

Commission Rule 4 CSR 240-4.020(4) generally defines what constitutes improper ex parte contact and it provides that once an on-the-record proceeding is set for hearing:

> 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 staff or the presiding officer assigned to the proceeding.[27]

An on-the-record proceeding is defined as a proceeding where a hearing is set and to be decided solely upon the record made in a commission hearing, and the prohibition on improper *ex parte* contact is in effect until the proceeding is terminated by final order of the Commission.[28]

Commission Rules 4 CSR 240-4.020(1) and (2) provide specific prohibitions for attorneys with regard to communications that could interfere with a fair hearing, however, generally speaking those communications fall under the same restrains of subsection 4's

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[24] *VonSande v. VonSande*, 858 S.W.2d 233, 237 (Mo. App. 1993); *J & H Gibbar Const. Co., Inc. v. Adams*, 750 S.W.2d 580, 583 (Mo. App. 1988); *Berry v. Berry*, 654 S.W.2d 155, 159 (Mo. App. 1983).

[25] *Id.*

[26] *Id.*

[27] Commission Rule 4 CSR 240-4.020(4) & (7). It should be noted that even the Commission's advisory staff is subject to any applicable *ex parte* or conflict of interest rule requirements to the same degree as any Commissioner. See RSMo Section 386.135.6

[28] Commission Rule 4 CSR 240-4.020(7).

dictate that no communication shall be made in attempt to influence the judgment of the Commission.

The Commission's decisions are subject to judicial review.[29] The scope of judicial review of an administrative determination includes an inquiry into whether the agency decision "[i]s made upon unlawful procedure or without a fair trial."[30] Any party alleging that improper *ex parte* communications have violated their right to full procedural due process or that such communications have rendered the Commission's decision unlawful because of bias or because that party believes the case has been pre-judged, has the burden to overcome the legal presumption that decisions rendered by an administrative body are valid.[31] Any proper party alleging unfairness in the proceedings relating to *ex parte* communications, even if the communications were improper, must demonstrate that there was improper influence on the adjudicatory processes of a given Commissioner or of the Commission *en banc*.[32] An administrative hearing is not unfair unless the decision makers, prior to the hearing, have determined to reach a particular result regardless of the evidence.[33] Absent such evidence, a reviewing court will not reverse the agency's decision.[34]

Section 386.210 –Inappropriate v. Authorized Communications

Section 386.210, RSMo Cum. Supp. 2006, which became effective in 2003, is very comprehensive and self-explanatory with regard to what communications it authorizes for

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[29] See Sections 386.510 and 386.540, RSMo 2000.

[30] Section 536.140.2(5), RSMo 2000.

[31] *Mueller,* 617 S.W.2d at 475; *Moore v. Bd. of Educ. of Special School Dist.*, 547 S.W.2d 188, 191-192 (Mo. App. 1977).

[32] *Id.*

[33] *Ross*, 662 S.W.2d at 260; *Shepard,* 718 S.W.2d at 199. See n. 20, *supra.*

the Commissioners. The restrictions delineated in the statue that apply to a Commissioner's discussion of public business depend upon which type of governmental authority is involved and upon (1) what the discussion is about, (2) who the Commissioner is talking to, (3) where the discussion occurs, and (4) when the discussion occurs. To summarize: [35]

> **Section § 386.210** distinguishes between the types of communications that are authorized in matters that are the subject of a pending case and matters that are not. The net result is five sets of rules, as follows:
>
> **(A) Matters that are not the subject of a pending case**
>
> (1) The Commission, or any member thereof, may confer freely with any person or entity, in any location. (Section 386.210.1 and .2).
>
> **(B) Matters that are the subject of a pending case in which no evidentiary hearing has been set**
>
> The Commission, or any member thereof, may confer with any person or entity, concerning **procedural or substantive** issues, so long as the communication is: (Section 386.210.3).
>
> (i) at an Agenda session where prior notice that the case will be discussed has been given;
>
> (ii) at a "forum" where all parties are present; or
>
> (iii) any other place or time and is filed in the case file and served on all parties no later than the next following business day.
>
> **(C) Matters that are the subject of a pending case in which an evidentiary hearing has been set**
>
> The Commission, or any member thereof, may discuss in a public Agenda meeting with parties to a case any **procedural** matter or any matter relating to a **unanimous stipulation or agreement resolving all of the issues** in such case. (Section 386.210.5).

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[34] *Mueller*, 617 S.W.2d at 475; *Moore*, 547 S.W.2d at 191-192.

[35] The full texts of the relevant statutes and Commission rules have been placed in the Appendix to this report. The Chairman has included the full gamut of statutes that place restrictions on state officers and employees in Appendix A.

(D) Discussions with Members of the General Assembly and other Governmental Officials

The Commission, and any member thereof, may advise legislators and other government officials as to the issues and factual allegations in a pending case, so long as the Commission or Commissioner does not express an opinion as to the merits of the case. (Section 386.210.5).

(E) Discussions Concerning General Regulatory Policy

The Commission, and any member thereof, is always free to discuss, with any person, "general regulatory policy," even if the policy is implicated in a pending case, so long as the merits of any pending case are not discussed. (Section 386.210.4).

Quasi-Judicial Officers and the Judicial Canons

A "public office" is the right, authority and duty, created and conferred by law, by which ... an individual is invested with some portion of the sovereign functions of the government, to be exercised by him for the benefit of the public."[36] "The individual so invested is a public officer."[37] A quasi-judicial officer is further distinguished from a public officer as being a person who has public duties to perform, and as such, takes a judicial oath of office and performs public functions.[38] Quasi-judicial officers include: grand jurors, prosecutors, administrative hearing officers, agency officials who decide whom to prosecute, and agency attorneys who actually conduct the prosecution.[39] There is no

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[36] *State ex rel. Howenstine v. Roper*, 155 S.W.3d 747, 752 (Mo. banc 2005).

[37] *Id.*

[38] *Rice v. Gray*, 34 S.W.2d 567, 571 (Mo. App. 1930).

[39] *Edwards v. Gerstein*, 237 S.W.3d 580, 585-586 (Mo. banc 2007) (Judge Stith, concurring in part and dissenting in part). As such, all have absolute immunity from liability when performing their adjudicatory functions. Id. See *also Group Health Plan, Inc. v. State Bd. of Registration,* 787 S.W.2d 745, 750 (Mo. App. 1990) (holding that quasi-judicial immunity protects "[a]gency official responsible for deciding whether to initiate proceedings ... from a suit for damages for their parts in that decision"). Official immunity and quasi-judicial immunity are both common law immunities subject to legislative modification. *Edwards*, 237 S.W.3d at 582 (Judge Teitelman writing for the majority).

A Missouri Division of Employment Security referee is a quasi-judicial officer and he or she "must observe the strictest impartiality and show no favor to either of the parties by [their] conduct, demeanor or statements."

argument that the Commissioners of the Public Service Commission occupy quasi-judicial positions, at least when they are serving in their quasi-judicial roles.[40]

Missouri courts have held that officials occupying quasi-judicial positions are held to the same high standards as apply to judicial officers by insisting that such officials be free of any interest in the matter to be considered by them.[41] "This means that members of the Public Service Commission may not act in cases pending before that body in which they are interested or prejudiced or occupy the status of a party."[42] This is true whether based upon the common law rule that no man may be the judge of his own cause, or upon due process requirements for an impartial decision maker.[43] As the courts have articulately elucidated:

> To a large extent the rights of consumers and regulated companies are determined by the Public Service Commission rather than the courts. To

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Turpin v. Division of Employment Sec., 1997 WL 453193, *6 (Mo. App. 1997) (Not reported in S.W.2d). *Jones v. State Dept. of Public Health and Welfare,* 354 S.W.2d 37, 40 (Mo. App. 1962). Administrative proceedings, like judicial trials, should be conducted in accordance with fundamental principles of justice and fairness. *Id.*

As a quasi-judicial officer, the prosecuting attorney must avoid even 'the appearance of impropriety.' " *State v. Clampitt*, 956 S.W.2d 403, 404 (Mo. App. 1997); *State v. Ross,* 829 S.W.2d 948, 951 (Mo. banc 1992) citing *State v. Boyd,* 560 S.W.2d at 297.

State Department of Public Health and Welfare referee is a quasi-judicial officer. It is elementary that he must observe the strictest impartiality and show no favor to either of the parties by his conduct, demeanor or statements. *Jones*, 354 S.W.2d at 40.

[40] *Central Missouri Plumbing Co. v. Plumbers Local Union*, 35 908 S.W.2d 366, 370 -371 (Mo. App. 1995); *Union Elec. Co. v. Public Service Commission*, 591 S.W.2d 134, 137 (Mo. App. 1979). "The Commissioners of the Labor and Industrial Relations Commission, like the members of the Public Service Commission, occupy quasi-judicial positions. Each one is to bring a particular perspective, representative of a particular constituency, to the Commissioner's determination. But all of them must also, as quasi-judicial officers, strive to conscientiously apply the law. The Commissioners are to uphold the Constitution and laws of the state, pursuing a just and conscientious result in accordance with law." *Central Missouri Plumbing Co. v. Plumbers Local Union* 35, 908 S.W.2d 366, 370-371 (Mo. App. 1995). "It is a maxim of common law, the wisdom and propriety of which will not be questioned, that 'no one should be a judge in his own cause.'" *Id.* See also *State ex rel. Sansone v. Wofford,* 111 Mo. 526, 20 S.W. 236 (1892).

[41] *Union Elec. Co.*, 591 S.W.2d at 137.

[42] *Id.*

[43] *Id.* at 139. " . . .every party is entitled to have his case considered by a public service commission consisting only of persons who are not interested or prejudiced in the cause and who are not parties to the cause and prohibition is available to serve this right." *Id.*

> hold that a member of the Commission may not be disqualified for participating in a case in which that member is shown to be interested, biased, prejudiced or a party would be to deprive most of the citizens of this state of one of the most cherished attributes of our system of justice to have his cause determined by a fair and impartial official. Absent a legislative procedure for disqualification of a member of the Commission, the courts will exercise their power to disqualify a member of the Commission upon a showing that a member is a party to a pending case, or is interested or prejudiced in the case.[44]

While these case law citations are not clear with regard to whether they are equating the "same high standards as judicial officers" with the Judicial Canons, a Family Court Commissioner was held to one of the standards in one of the Judicial Canons. Family Court Commissioners act in a quasi-judicial capacity and are not judges because Section 487.030.1 requires the findings of the Commissioner to be adopted by a court before becoming a judgment of the court; a commissioner is not equivalent to a judge.[45] Nevertheless, in the case *In re K.L.W.*,[46] the Missouri Court of Appeals applied one of the Canons to such a Commissioner stating:

> Family court commissioners are obligated to conduct themselves as judicial officers and to follow established procedural and substantive law. *State ex rel. Kramer v. Walker,* 926 S.W.2d 72, 76 (Mo.App. W.D.1996). "Rule 2, Supreme Court Rules, codifies the standard for judicial conduct," and "Rule 2 and the canon[s] of ethics are as applicable to [c]ommissioners as they are to any other judicial officer." *Id.*
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> "Rule 2, Canon 3 D(1) provides that the judge has a duty to recuse 'in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to' the instances delineated." *Williams v. Reed,* 6 S.W.3d 916, 921 (Mo.App. W.D.1999). " '[A] judge's duty to disqualify is not confined to the factors listed ... but is much broader.' " *McPherson,* 99 S.W.3d at 488 (quoting *State ex rel. Wesolich v. Goeke,* 794 S.W.2d 692, 698 (Mo.App. E.D.1990)). "Under Canon 3(D), the test is not whether actual bias or prejudice exist, but whether a reasonable person would have factual

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[44] *Id.* at 139.

[45] *Bell v. Bell*, WL 759591, 1 -2 (Mo. App. 1997) (Not reported in S.W.2d).

[46] 131 S.W.3d 400, 404-407 (Mo. App. 2004).

> grounds to doubt the impartiality of the judge." *Drumm,* 984 S.W.2d at 557. "Judges must 'err on the side of caution by favoring recusal to remove any reasonable doubt [of] impartiality.' " *McPherson,* 99 S.W.3d at 491 (quoting *Robin Farms, Inc. v. Bartholome,* 989 S.W.2d 238, 247 (Mo.App. W.D.1999)).
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> "The public's confidence in the judicial system is the paramount interest safeguarded by the canon." *Id.* at 488. " 'It is vital to public confidence in the legal system that decisions of the court are not only fair, but also appear fair.' " *State ex rel. Thexton v. Killebrew,* 25 S.W.3d 167, 171 (Mo.App. S.D.2000) (quoting *Goeke,* 794 S.W.2d at 695)." 'Acts or conduct [that] give the appearance of partiality should be avoided with the same degree of zeal as acts or conduct [that] inexorably bespeak partiality.'" *McPherson,* 99 S.W.3d at 489 (quoting *State v. Garner,* 760 S.W.2d 893, 906 (Mo.App. S.D.1988)).
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> "Because litigants who present their disputes to a Missouri court are entitled to a trial which is not only fair and impartial, but which also appears fair and impartial, the test for recusal is not whether the court is actually biased or prejudiced." *Williams,* 6 S.W.3d at 921-22. "Rather, the test for recusal when the judge's impartiality is challenged is 'whether a reasonable person would have a factual basis to find an appearance of impropriety and thereby doubt the impartiality of the court.' " *Id.* at 922 (quoting *State v. Jones,* 979 S.W.2d 171, 178 (Mo. banc 1998) (quoting *State v. Smulls,* 935 S.W.2d 9, 17 (Mo. banc 1996))). "If the record demonstrates that a reasonable person would find an appearance of impropriety, recusal is compulsory." *Drumm,* 984 S.W.2d at 557.[47]

It is important to note that this case was fact specific to Family Court Commissioners, a judicial division, not an administrative agency, and that the decision applied the standard of one Canon, the Canon requiring an impartial decisionmaker. This Canon is based upon due process, which is guaranteed in any adverse proceeding determining the rights of litigants.

The argument that the Judicial Canons do not apply to Administrative Commissioners acting in their quasi-judicial capacity is based upon the separation of powers doctrine. Under the doctrine of separation of powers, the Missouri Supreme Court (the drafters and implementers of the Judicial Canons) cannot make rules governing the

conduct of officers of the Executive Department. In *Weinstock v. Holden,* the Missouri Supreme Court invalidated a statute that prohibited a person serving in a judicial capacity from participating "in such capacity in any proceeding in which . . . [t]he person knows the subject matter is such that the person may receive a direct or indirect financial gain from any potential result of the proceeding."[48] The Supreme Court invalidated the statute because it violated the doctrine of the separation of powers in that the Missouri Constitution reserves to the Court the power to "establish rules relating to practice, procedure and pleading for all courts," including the "authority to regulate the practices of judges and lawyers in the courts of this state."[49] The Court pointed out that "[t]he doctrine of separation of powers, as set forth above in Missouri's constitution, is vital to our form of government because it prevents the abuses that can flow from centralization of power."[50] The Court concluded by stating:

> The goal of preventing conflicts of interest in judicial proceedings certainly is laudable. As discussed above, the judicial branch, through its Code of Judicial Conduct, provides canons to guide judges through possible conflicts of interest, and to require judges to carry out their adjudicatory duties impartially. *Rule 2, Canons 1, 2, and* 3. By establishing these rules for proper judicial conduct, this Court has exercised its powers under article V, sections 4 and 5, and the separation of powers provision in our Constitution prevents the legislature from encroaching on this judicial function. Insofar as section 105.464 violates the separation of powers provision of Missouri Constitution art. II, sec. 1, it is a nullity.[51]

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[47] *In re K.L.W.*, 131 S.W.3d 400, 404 -407 (Mo. App. 2004).

[48] *Weinstock v. Holden,* 995 S.W.2d 408 (Mo. banc 1999).

[49] *Id.* at 410.

[50] *Id.*

[51] *Id.* at 411. The statute in question also referenced persons serving in a quasi-judicial capacity, but the statute was specifically struck down because of its attempt to cover persons acting a judicial capacity.

Consequently, by its own terms and by the Court's proper interpretation of the separation of powers doctrine, Rule 2 applies only to, and could only apply to, judicial officers.[52]

Similarly, in *State Tax Commission v. Jones*,[53] the Missouri Supreme Court invalidated a statute that it interpreted to have conferred judicial powers upon the Administrative Hearing Commission. While not specifically addressing whether the Judicial Canons applied to quasi-judicial administrative officers, the court made abundantly clear that the judicial power of the state is vested in the courts designated in Missouri's Constitution, Article V. Section 1, and it is the courts that declare the law.[54] The argument then flows, if administrative agencies are not courts, and if administrative quasi-judicial officers are not the equivalent of judicial officers, then the Judicial Canons do not apply to the officers or commissioners of administrative agencies.

While not a Missouri case, and while it can only be cited as persuasive authority, the Connecticut Supreme Court's decision in Petrowski *v. Norwich Free Academy*[55] is on point. Its analysis and holding were not ambiguous, and its conclusion is simply that the Judicial Canons do not apply to quasi-judicial officers. The Court eloquently stated:

> The central issue in this case, as correctly posed by the majority opinion below, "becomes what constitutes an impartial hearing panel sufficient to satisfy constitutional due process. Due process requires a fair hearing before a fair tribunal, which principle applies with equal vigor to administrative adjudicatory proceedings. *Gibson v. Berryhill,* 411 U.S. 564, 579, 93 S.Ct. 1689, 1698, 36 L.Ed.2d 488 (1973)." *Petrowski v. Norwich Free Academy,* supra, 2 Conn.App. 554, 481 A.2d 1096.
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> The defendants do not dispute the proposition as stated in the dissenting

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[52] Id.; Supreme Court Rule 2.04; *State ex rel Kramer v. Walker,* 926 S.W.2d 72, (Mo. App. 1996).

[53] *State Tax Commission v. Jones,* 641 S.W.2d 69 (Mo banc 1982).

[54] *Jones*, 641 S.W.2d at 74-75.

[55] 199 Conn. 231, 235-243, 506 A.2d 139,141 - 144 (Conn. 1986).

opinion of the Appellate Court, that "had Tillinghast and Dutton been judges participating in a judicial proceeding, they would have been disqualified, because the relationship between their law firm and the academy would have violated the governing standard for judicial disqualification, which is the reasonable appearance of impropriety." *Petrowski v. Norwich Free Academy,* supra, 566, 481 A.2d 1096 (*Borden, J.,* dissenting); see *Papa v. New Haven Federation of Teachers,* 186 Conn. 725, 746, 444 A.2d 196 (1982). **The claim of the defendants is simply that the Appellate Court erred in equating the due process standards governing disqualification of administrative adjudicators with the principles governing judicial disqualification.**

A due process analysis requires balancing the governmental interest in existing procedures against the risk of erroneous deprivation of a private interest through the use of these procedures. *Mathews v. Eldridge,* 424 U.S. 319, 335, 96 S.Ct. 893, 903, 47 L.Ed.2d 18 (1976). Due process demands, however, the existence of impartiality on the part of those who function in judicial or quasi-judicial capacities. *N.L.R.B. v. Ohio New and Rebuilt Parts, Inc.,* 760 F.2d 1443, 1451 (6th Cir.1985); *236 see, e.g., *Marshall v. Jerrico, Inc.,* 446 U.S. 238, 242-43, 100 S.Ct. 1610, 1613, 64 L.Ed.2d 182 (1980); *Wolkenstein v. Reville,* 694 F.2d 35 (2d Cir.1982), cert. denied, 462 U.S. 1105, 103 S.Ct. 2452, 77 L.Ed.2d 1332 (1983). The courts recognize the presumption that administrators serving as adjudicators are unbiased. See *Withrow v. Larkin,* 421 U.S. 35, 47, 95 S.Ct. 1456, 1464, 43 L.Ed.2d 712 (1975); *United States v. Morgan,* 313 U.S. 409, 421, 61 S.Ct. 999, 1004, 85 L.Ed. 1429 (1940). This presumption can be rebutted by a showing of a conflict of interests; see *Gibson v. Berryhill,* 411 U.S. 564, 578-79, 93 S.Ct. 1689, 1697-98, 36 L.Ed.2d 488 (1973); *Ward v. Monroeville,* 409 U.S. 57, 60, 93 S.Ct. 80, 83, 34 L.Ed.2d 267 (1972); but the burden of establishing a disqualifying interest rests on the party making the contention. *Schweiker v. McClure,* 456 U.S. 188, 102 S.Ct. 1665, 72 L.Ed.2d 1 (1982). The impermissible interest asserted must be realistic and more than "remote." *Marshall v. Jerrico, Inc.,* supra, 446 U.S. 250, 100 S.Ct. at 1617.

"'The fact that [an administrative hearing officer] might have been disqualified as a judge ... does not, either in principle or under the authorities, infect the hearing with a lack of due process.' *Lopez v. Henry Phipps Plaza South, Inc.,* 498 F.2d 937, 944 (2d Cir.1974)." *Petrowski v. Norwich Free Academy,* supra, 2 Conn.App. 567, 481 A.2d 1096 (*Borden, J.,* dissenting); see *Goldberg v. Kelly,* 397 U.S. 254, 271, 90 S.Ct. 1011, 1022, 25 L.Ed.2d 287 (1970). In *Schweiker v. McClure,* supra, the United States Supreme Court reversed a decision of the District Court which had held that the connection between an insurance carrier whose employees initially had denied Medicare claims and the hearing officers appointed by the carrier to review such denials, whose salaries were paid from federal funds, created a constitutionally intolerable risk of bias against Medicare claimants. The lower

court had based its decision, in part, on the judicial canons concerning disqualification. *McClure v. Harris;* 503 F.Supp. 409, 414-15 (N.D.Cal.1980); Code of Judicial Conduct, 3(C)(1)(b). The Supreme Court reversed, finding no basis for a disqualifying interest among the hearing officers and noting that the district court's analogy to judicial canons was not "apt." *Schweiker v. McClure,* supra, 456 U.S. 197 n. 11, 102 S.Ct. 1671 n. 11. **In *Florasynth, Inc. v. Pickholz,* 750 F.2d 171, 173-74 (2d Cir.1984), the Second Circuit Court of Appeals noted that although arbitrators do act in a quasi-judicial capacity, the disqualification standard for judges need not be applied. "The mere appearance of bias that might disqualify a judge will not disqualify an arbitrator."** Id.; see *Morelite Construction Corporation v. Carpenters Benefit Funds,* 748 F.2d 79, 85 (2d Cir.1984); *International Produce, Inc. v. A/S Rosshavet,* 638 F.2d 548, 552 (2d Cir.) cert. denied, 451 U.S. 1017, 101 S.Ct. 3006, 69 L.Ed.2d 389 (1981).

In support of the proposition that due process requires that administrative adjudicators performing quasi-judicial functions be held to judicial standards of conduct, the Appellate Court relied on *Withrow v. Larkin,* 421 U.S. 35, 46-51, 95 S.Ct. 1456, 1464-66, 43 L.Ed.2d 712 (1975). The majority opinion concluded that "[t]he due process requirement of an impartial hearing body in the quasi-judicial realm is equivalent to that requirement in the judicial realm." *Petrowski v. Norwich Free Academy,* supra, 2 Conn.App. 560, 481 A.2d 1096. **An examination of *Withrow v. Larkin,* however, supports only the proposition that conduct by an administrator which would not require disqualification under judicial standards is constitutionally permissible. From this holding it is logical to deduce only that conduct complying with judicial standards also satisfies those applicable to administrative adjudicators. The conclusion of the Appellate Court, equating administrative with judicial standards, assumes that *Withrow* stands also for the converse proposition, that an interest disqualifying a judge would necessarily disqualify an administrator.**

The applicable due process standards for disqualification of administrative adjudicators do not rise to the heights of those prescribed for judicial disqualification. *Schweiker v. McClure,* supra. The canons of judicial ethics go far toward cloistering those who become judges, the ultimate arbiters of constitutional and statutory rights, from all extraneous influences that could even remotely be deemed to affect their decisions. Such a rarefied atmosphere of impartiality cannot practically be achieved where the persons acting as administrative adjudicators, whose decisions are normally subject to judicial review, often have other employment or associations in the community they serve. It would be difficult to find competent people willing to serve, commonly without recompense, upon the numerous boards and commissions in this state if any connection with such agencies, however remotely related to the matters they are called upon

to decide, were deemed to disqualify them. Neither the federal courts nor this court require a standard so difficult to implement as a prerequisite of due process of law for administrative adjudication.

Further, in reference to the plaintiff's broader constitutional claim raised in her preliminary statement of issues, she has simply failed to show that Tillinghast and Dutton had a disqualifying interest sufficient to overcome the "presumption of honesty and integrity" of the board of trustees. *Withrow v. Larkin,* supra, 421 U.S. 47, 95 S.Ct. 1464. **The applicable due process standards for disqualification of officials acting in a judicial or quasi-judicial capacity are detailed in *In re Murchison,* 349 U.S. 133, 137, 75 S.Ct. 623, 625-26, 99 L.Ed. 942 (1955). "A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome." Id., 136, 75 S.Ct. 625.**[56]

Whether or not Missouri courts have affirmatively declared, and whether or not they have the power to declare that the Judicial Canons apply to the Commissioners of the Public Service Commission, the Canons, particularly Canons 3B and 3E, are illuminative with regards to the proper standard of conduct for judicial officers.

Missouri Supreme Court Rule 2.03 -- Canon 3
A Judge Shall Perform the Duties of Judicial Office Impartially and Diligently

B. Adjudicative Responsibilities.

(1) A judge shall hear and decide matters assigned to the judge except those in which disqualification is required.

(2) A judge shall be faithful to the law and maintain professional competence in it. A judge shall not be swayed by partisan interests, public clamor or fear of criticism.

(3) A judge shall require order and decorum in proceedings before the judge.

(4) A judge shall be patient, dignified and courteous to litigants, jurors, witnesses, lawyers and others with whom the judge deals in an official

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[56] *Petrowski v. Norwich Free Academy* , 199 Conn. 231, 235-243, 506 A.2d 139,141-144 (Conn. 1986) (emphasis added).

capacity and shall require similar conduct of lawyers and of staff, court officials and others subject to the judge's direction and control.

COMMENTARY

The duty to hear all proceedings fairly and with patience is not inconsistent with the duty to dispose promptly of the business of the court. Judges can be efficient and businesslike while being patient and deliberate.

(5) A judge shall perform judicial duties without bias or prejudice. A judge, in the performance of judicial duties, shall not by words or conduct manifest bias or prejudice, including but not limited to bias or prejudice based upon race, sex, sexual orientation, religion, national origin, disability or age, and shall not permit staff, court officials and others subject to the judge's direction and control to do so.

COMMENTARY

A judge must perform judicial duties impartially and fairly. A judge who manifests bias or prejudice on any basis in a proceeding impairs the fairness of the proceeding and brings the judiciary into disrepute. Facial expression and body language, in addition to oral communication, can give to parties or lawyers in the proceeding, jurors, the media and others an appearance of judicial bias. A judge must be alert to avoid behavior that may be perceived as prejudicial.

(6) A judge shall require lawyers in open court or in chambers to refrain from manifesting, by words or conduct, bias or prejudice based upon race, sex, sexual orientation, religion, national origin, disability or age against parties, witnesses, counsel or others. This Canon 3B(6) does not preclude legitimate advocacy when race, sex, sexual orientation, religion, national origin, disability or age or other similar factors are issues in the proceeding.

COMMENTARY

Legal interpretations of Title VII of the Civil Rights Act of 1964 provide useful guidance in interpreting the provisions of Canon 3B(5) and (6). Sexual harassment is defined as illegal sex discrimination pursuant to Title VII in the context of employment relationships. A judge must refrain from speech, gestures or other conduct that reasonably could be perceived as sexual harassment and must require the same standard of conduct of others subject to the judge's direction and control. 'Sexual harassment' constitutes misconduct whether the conduct is in an employment relationship or in a nonemployment relationship manifested in the course of the performance of judicial duties.

"Sexual harassment" denotes:

Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when:

(1) submission to that conduct is made, either explicitly or implicitly, a term or condition of an individual's employment;

(2) submission to or rejection of such conduct by an individual is used as a factor in decisions affecting such individual; or

(3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or of creating an intimidating, hostile or offensive environment.

(7) A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law. A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding **except that:**

(a) Where circumstances require, ex parte communications for scheduling, administrative purposes or emergencies that do not deal with substantive matters or issues on the merits are authorized; provided:

(i) the judge reasonably believes that no party will gain a procedural or tactical advantage as a result of the ex parte communication, and

(ii) the judge makes provision promptly to notify all other parties of the substance of the ex parte communication and allows an opportunity to respond.

(b) A judge may obtain the advice of a disinterested expert on the law applicable to a proceeding before the judge if the judge gives notice to the parties of the person consulted and the substance of the advice and affords the parties reasonable opportunity to respond.

(c) A judge may consult with court personnel whose function is to aid the judge in carrying out the judge's adjudicative responsibilities or with other judges.

(d) A judge may, with the consent of the parties, confer separately with the parties and their lawyers in an effort to mediate or settle matters pending before the judge.

(e) A judge may initiate or consider any ex parte communications when expressly authorized by law to do so.

COMMENTARY

The proscription against communications concerning a proceeding includes communications from lawyers, law teachers, and other persons who are not participants in the proceeding, except to the limited extent permitted. To the extent reasonably possible, all parties or their lawyers shall be included in communications with a judge.

Whenever presence of a party or notice to a party is required by Canon 3B(7), it is the party's lawyer, or if the party is underrepresented, the party, who is to be present or to whom notice is to be given. An appropriate and often desirable procedure for a court to obtain the advice of a disinterested expert on legal issues is to invite the expert to file a brief amicus curiae.

Certain ex parte communication is approved by Canon 3B(7) to facilitate scheduling and other administrative purposes and to accommodate emergencies. In general, however, a judge must discourage ex parte communication and allow it only if all the criteria stated in Canon 3B(7) are clearly met. A judge must disclose to all parties all ex parte communications described in Canon 3B(7)(a) and Canon 3B(7)(b) regarding a proceeding pending or impending before the judge.

A judge must not independently investigate facts in a case and must consider only the evidence presented.

A judge may request a party to submit proposed findings of fact and conclusions of law, so long as the other parties are apprised of the request and are given an opportunity to respond to the proposed findings and conclusions.

A judge must make reasonable efforts, including the provision of appropriate supervision, to ensure that Canon 3B(7) is not violated through law clerks or other personnel on the judge's staff.

(8) A judge shall dispose of all judicial matters promptly, efficiently and fairly.

COMMENTARY

In disposing of matters promptly, efficiently and fairly, a judge must demonstrate due regard for the rights of the parties to be heard and to have issues resolved without unnecessary cost or delay. Containing costs while preserving fundamental rights of parties also protects the interests of

witnesses and the general public. A judge should monitor and supervise cases so as to reduce or eliminate dilatory practices, avoidable delays and unnecessary costs. A judge should encourage and seek to facilitate settlement, but parties should not feel coerced into surrendering the right to have their controversy resolved by the courts.

Prompt disposition of the court's business requires a judge to devote adequate time to judicial duties, to be punctual in attending court and expeditious in determining matters under submission, and to insist that court officials, litigants and their lawyers cooperate with the judge to that end.

(9) A judge shall abstain from public comment about a pending or impending proceeding in any court and should require similar abstention on the part of court personnel subject to the judge's direction and control. This subsection does not prohibit judges from making public statements in the course of their official duties or from explaining for public information the procedures of the Court.

COMMENTARY

This requirement continues during any appellate process and until final disposition. This Canon does not prohibit a judge from commenting on proceedings in which the judge is a litigant in a personal capacity, but in cases such as a writ of mandamus where the judge is a litigant in an official capacity, the judge must not comment publicly. The conduct of lawyers relating to trial publicity is governed by Rule 4-3.6.

(10) A judge shall not commend or criticize jurors for their verdict other than in a court order or opinion in a proceeding but may express appreciation to jurors for their service to the judicial system and the community.

COMMENTARY

Commending or criticizing jurors for their verdict may imply a judicial expectation in future cases and may impair a juror's ability to be fair and impartial in a subsequent case.

(11) A judge shall not disclose or use, for any purpose unrelated to judicial duties, nonpublic information acquired in a judicial capacity.

E. Recusal.

(1) A judge shall recuse in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:

COMMENTARY

Under this Canon 3E(1), a judge is disqualified whenever the judge's impartiality might reasonably be question [sic], regardless whether any of the specific rules in Canon 3E(1) apply. For example, if a judge was in the process of negotiating for employment with a law firm, the judge would be disqualified from any matters in which that law firm appeared, unless the disqualification was waived by the parties after disclosure by the judge. A judge should disclose on the record information that the judge believes the parties or their lawyers might consider relevant to the question of disqualification, even if the judge believes there is no real basis for disqualification.

By decisional law, the rule of necessity may override the rule of disqualification. For example, a judge might be required to participate in judicial review of a judicial salary statute or might be the only judge available in a matter requiring immediate judicial action, such as a hearing on probable cause or a temporary restraining order. In the latter case, the judge must disclose on the record the basis for possible disqualification and use reasonable efforts to transfer the matter to another judge as soon as practicable.

A judge ordinarily required to recuse as a result of the proscriptions of this Canon 3E need not do so in a default proceeding.

(a) the judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(b) the judge served as a lawyer in the matter in controversy, or a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter, or the judge has been a material witness concerning it;

COMMENTARY

A lawyer in a government agency does not ordinarily have an association with other lawyers employed by that agency within the meaning of Canon 3E(1)(b); a judge formerly employed by a government agency, however, should disqualify himself or herself in a proceeding if the judge's impartiality might reasonably be questioned because of such association.

(c) the judge knows that he or she, individually or as a fiduciary, or the judge's spouse, parent or child wherever residing, or any other member of the judge family residing in the judge's household, has an economic interest in the subject matter in controversy or in a party to the proceeding or has any

other more than de minimis interest, that could be substantially affected by the proceeding;

(d) the judge or the judge's spouse, or a person within the third degree of relationship to either of them, or the spouse of such person:

(i) is a party to the proceeding, or an officer, director or trustee of a party;

(ii) is acting as a lawyer in the proceeding;
(iii) is known by the judge to have a more than de minimis interest that could be substantially affected by the proceeding;

(iv) is to the judge's knowledge likely to be a material witness in the proceeding.

COMMENTARY

The fact that a lawyer in a proceeding is affiliated with a law firm with which a relative of the judge is affiliated does not of itself disqualify the judge. Under appropriate circumstances, the fact that 'the judge's impartiality might reasonably be questioned' under Canon 3E(1) or that the relative is known by the judge to have an interest in the law firm that could be 'substantially affected by the outcome of the proceeding' under Canon 3E(1)(d)(iii) may require the judge's disqualification.

(2) A judge shall keep informed about the judge's personal and fiduciary economic interests and make a reasonable effort to keep informed about the personal economic interests of the judge's spouse and minor children residing in the judge's household.

F. Remittal of Disqualification. A judge disqualified by the terms of Canon 3E may disclose on the record the basis of the disqualification. If following disclosure of any basis for disqualification other than personal bias or prejudice concerning a party, the parties and lawyers, without participation by the judge, all agree that the judge should not be disqualified, and the judge is then willing to participate, the judge may participate in the proceeding. The agreement shall be incorporated in the record of the proceeding.

COMMENTARY

A remittal procedure provides the parties an opportunity to proceed without undue delay if they wish to waive the disqualification. To assure that consideration of the question of remittal is made independently of the judge, a judge must not solicit, seek or hear comment on possible remittal or waiver of the disqualification unless the lawyers jointly propose remittal after consultation as provided in this Canon 3F. A party may act through counsel if counsel represents on the record that the party has been consulted and

consents. As a practical matter, a judge may wish to have all parties and their lawyers sign the remittal agreement.

(Adopted Jan. 29, 1998, eff. Jan. 1, 1999. Amended November 25, 2003, eff. January 1, 2004.)

Regardless if the Judicial Canons apply, and regardless if a judicial or a quasi-judicial officer were to violate one of the Canons, one must still look to the legal standard for recusal to determine if a judge, or an quasi-judicial officer must excuse themselves from any particular matter.

Legal Standard for Recusal

In *Smulls v. State*,[57] the Missouri Supreme Court articulated the proper legal standard for recusal of a judge for an alleged violation of due process for having prejudged a matter or for being biased. The Court succinctly stated:

> Canon 3(D)(1) of the Missouri Code of Judicial Conduct, Rule 2.03, requires a judge to recuse in a proceeding where a "reasonable person would have a factual basis to doubt the judge's impartiality." *Id.* This standard does not require proof of actual bias, but is an objective standard that recognizes "justice must satisfy the appearance of justice." *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 865, 108 S.Ct. 2194, 100 L.Ed.2d 855 (1986). Under this standard, a "reasonable person" is one who gives due regard to the presumption "that judges act with honesty and integrity and will not undertake to preside in a trial in which they cannot be impartial." *State v. Kinder,* 942 S.W.2d 313, 321 (Mo. banc 1996). In addition, a "reasonable person" is one "who knows all that has been said and done in the presence of the judge." *Haynes v. State,* 937 S.W.2d 199, 203 (Mo. banc 1996). Finally, as to due process challenges, the Supreme Court has made clear that "only in the most extreme of cases would disqualification on this basis be constitutionally required." *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 821, 106 S.Ct. 1580, 89 L.Ed.2d 823 (1986); *see also State v. Jones,* 979 S.W.2d 171, 177 (Mo. banc 1998).[58]

"To qualify, the bias must come from an extrajudicial source that results in the judge forming an opinion on the merits based on something other than what the judge has

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[57] *Smulls v. State*, 71 S.W.3d 138, 145 (Mo. banc 2002).

learned from participation in the case."[59]

The Missouri Supreme Court has discussed, at length, the meaning of this standard in many cases and with regard to the presumption of a judge's impartiality the court has clarified: "[T]hat presumption is overcome, and disqualification of a judge is required, however, if a reasonable person, giving due regard to that presumption, would find an appearance of impropriety and doubt the impartiality of the Court."[60] Keeping in mind, of course, that a "reasonable person is one "who knows all that has been said and done in the presence of the judge."[61] The court has further stated: "The judge himself or herself is in the best position to decide whether recusal is necessary."[62] Moreover, "[a] judge has an affirmative duty not to disqualify himself unnecessarily."[63]

"The court indulges a strong presumption in favor of the validity of an administrative determination and will not assume that an administrative body was improperly influenced absent clear and convincing evidence to the contrary."[64] Additionally, it is paramount to note that the burden of establishing a disqualifying interest rests on the party making the contention.[65] Consequently, in order for a party to establish a disqualifying interest based upon an alleged appearance of impropriety sufficient enough to overcome the presumption and require recusal, they must have clear and convincing evidence that a reasonable person, giving due regard to presumption of honesty and impartiality, who knows all that

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[58] *Id.*

[59] *State v. Jones*, 979 S.W.2d 171, 178 (Mo. banc 1998).

[60] *State v. Kinder*, 942 S.W.2d 313, 321 (Mo. banc 1996).

[61] *Smulls*, 71 S.W.3d at145.

[62] *Jones*, 979 S.W.2d at 178.

[63] *State ex rel. Bates v. Rea*, 922 S.W.2d 430, 431 (Mo. App. 1996).

[64] *Orion Security, Inc. v. Board of Police Com'rs of Kansas City*, 90 S.W.3d 157, 164 (Mo. App. 2002).

has been said and done in the presence of the adjudicator, would find an appearance of impropriety and doubt the impartiality of the decisionmaker. This same burden of proof, the clear and convincing evidence standard, would also apply to any allegations of actual bias or actual impropriety.

Are Parties in Administrative Proceedings Entitled to Disqualify a Commissioner as a Matter of Right? -- Missouri Supreme Court Rule 51.05 – Not Applicable

Missouri Supreme Court Rule 51.05: (a) provides that "[a] change of judge shall be ordered in any civil action upon the timely filing of a written application therefore by a party" and that "[t]he application need not allege or prove any cause for such change of judge[.]" Pursuant to subsection (e), "[t]he judge promptly shall sustain a timely application for change of judge upon its presentation." The Rule also contains certain specific time limitations.

The rules of civil procedure, specifically Rules 41 through 101, by their terms, are inapplicable to administrative proceedings.[66] These rules only apply to administrative proceedings when specifically authorized by statute.[67] There is no statute expressly extending the application of Rule 51.05 to Commissioners of this agency. Consequently, any party at a proceeding before this Commission wishing to disqualify a Commissioner must show cause pursuant to the standards for recusal; there are no disqualifications as a matter of right in administrative proceedings.[68]

A Brief Review of the Standards Concerning Prejudgment and Bias

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[65] *Schweiker v. McClure,* 456 U.S. 188, 102 S.Ct. 1665, 72 L.Ed.2d 1 (1982); *Orion*, 90 S.W.3d at 164.

[66] *State ex rel. Rosenberg v. Jarrett*, 233 S.W.3d 757, 762 (Mo. App. 2007); *Woodman v. Director of Revenue,* 8 S.W.3d 154, 157 (Mo. App. 1999). *See also Johnson v. Mo. Bd. of Nursing Adm'rs,* 130 S.W.3d 619, 626 (Mo. App. 2004).

[67] *Id.*

[68] Similarly, any party wishing to disqualify a Regulatory Law Judge presiding over a Commission matter must show cause pursuant to Commission Rule 4 CSR 240-2.120(2).

In order for any proper party to succeed on a motion to disqualify a Commissioner on the basis of some form of alleged bias it must provide a sufficient factual basis to overcome the presumption that the administrative decisionmaker acts honestly and impartially.[69] To establish **actual bias** on the part of a Commissioner, the party must prove, with clear and convincing evidence, that the Commissioner has formulated an "unalterable prejudgment of the operative adjudicative facts of the case."[70] To establish the existence of **actual impropriety** on the part of a Commissioner, the party must prove, with clear and convincing evidence, that the Commissioner is interested, (i.e. has a stake in the case) or prejudiced or occupies the status of a party to the matter.[71] To establish an **appearance of impropriety**, the party would have to prove, with clear and convincing evidence, that a reasonable person, giving due regard to the presumption of honesty and impartiality, and who knows all that has been said and done in the presence of the Commissioner would doubt the impartiality of that Commissioner.[72]

Other Statutory Protections

In addition to the statutory and case law protections already discussed, the General Assembly has erected other protections of the public interest in constituting the Public Service Commission. It has provided for nomination by the Governor and confirmation by the Missouri Senate, and it has established six-year terms, staggered to provide

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[69] *Thompson*, 100 S.W.3d at 919 -920; *Burgdorf v. Bd. of Police Comm'rs,* 936 S.W.2d 227, 234 (Mo. App. 1996).

[70] *Fitzgerald*, 796 S.W.2d at 59.

[71] *Union Elec. Co.*, 591 S.W.2d at 137.

[72] *Kinder,* 942 S.W.2d at 321. Being "impartial" is defined as "favoring neither; disinterested; treating all alike; unbiased; equitable, fair and just." *Black's Law Dictionary*, 6th Edition, West Publishing Company, 1990, p. 752.

continuity.[73] It has provided for the independence of the Commission by providing for removal for cause from office by the Governor or a super-majority of each house, only after formal charges and an opportunity for a hearing.[74] It has provided for removal of any Commissioner, officer, agent or employee of the commission for violating the Conflicts of Interest Statute.[75] That same statute also imposed civil and criminal penalties for violations.[76] And finally, and perhaps most importantly, the General Assembly has provided for judicial review of all of the Commission's decisions.[77]

Roundtable Comments, Statements, Suggestions, and Proposals

Prior to the commencement of the Roundtable Discussion, the Chairman encouraged the participants to this inquiry to divide their comments and proposals into three categories: (a) actions the Commission can implement informally; (b) actions requiring formal Commission action, i.e. rulemaking; and (c) recommended statutory changes. The Chairman clarified that no set format was required and that comments, suggestions and proposals could simply be presented at the Roundtable, or even after the Roundtable.

Summary of Initial Comments and Presentations Filed Prior to the Roundtable

In response to the Chairman's directives, four responses were filed prior to, or during, the Roundtable. Additionally, OPC filed a motion to open a rulemaking docket and offered proposed revision to the Commission's current Standard of Conduct Rules. Those

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[73] Section 386.050, RSMo 2000.

[74] Section 386.060, RSMo 2000.

[75] Section 386.200, RSMo 2000.

[76] *Id.*

[77] Section 386.510, and 386.540, RSMo 2000.

responses and filings are summarized below. The full text of those filings and responses appears in Appendix C of this Report.

The Office of the Public Counsel[78]

While the Office of the Public Counsel ("OPC") did not formally file any comments or suggestions in this workshop docket, it did file a motion to open a rulemaking docket, assigned Docket No. AX-2008-0201. In that motion, OPC, *et al.*, seeks revision of the Commission's Standard of Conduct Rules, specifically Commission Rule 4 CSR 240-4.020.

OPC's proposal would revise the current subsections of the rule as well as add seven completely new subsections. OPC's proposal includes, *inter alia*: (1) a provision requiring the recording and transcription of every public meeting the commission holds as public meetings are defined in Chapter 610; (2) a provision requiring mandatory recusal of a Commissioner, Regulatory Law Judge, or Advisor for making any *ex parte* communication or for failing to disclose any *ex parte* communication; and, (3) a provision that allows the Commission, at their discretion, to require a party making an *ex parte* communication to show cause why their claim or interest should not be dismissed or denied.

Scott Hempling, Esq., Executive Director National Regulatory Research Institute[79]

Mr. Hempling focused his discussion on three primary questions: (1) What procedural principles best serve regulation's purposes; (2) can informality co-exist with objectivity; and, (3) is there a trust problem here?

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[78] See Roundtable Exhibit Number 1 in Appendix C.

[79] See Roundtable Exhibit Number 9 in Appendix C. The National Regulatory Research Institute. NRRI is an independent, nonprofit corporation funded primarily through voluntary dues contributed by state public service commissions. Its mission is to provide the research services state utility commissions need to make regulatory decisions of the highest possible quality.

I. What Procedural Principles Best Serve Regulation's Purposes?

Economic regulation seeks to align private behavior with the public interest. For today's regulators, the public interest is becoming difficult to discern: New interest groups, accelerated technological change, higher customer expectations, lower investor patience, and growing instability in corporate and market structures, are combining to blur regulatory vision. Enlarging the problem is the uncertain stature of state commissions. Underfunded and understaffed relative to their responsibilities, they also face a common political dichotomy: citizens support regulation when it protects, but reject regulation when it obstructs.

To preserve its political effectiveness, regulation cannot ignore these pressures. But to preserve its professionalism, regulation cannot succumb to them. Otherwise regulation becomes mere conflict resolution rather than public interest promotion. For the public interest to prevail, regulators have to gather facts, and create opportunities for objective analysis. So, what procedures best carry out these purposes? I have two main thoughts.

A. Shift the focus from the parties' interests to the regulatory interest

The present debate seems focused on parties' behavior: What does the law permit and prohibit parties to say and do? Who said what to whom, when and under what circumstances? Rules on party behavior, like rules in athletic contests, are indispensable because they define boundaries and thus build trust in the outcomes.

Unlike athletic contests, however, regulation is not a forum in which private interests get an opportunity to win; it is a forum in which government officials carry out their obligation to align private behavior with public interest. I suggest, therefore, that we focus more on what regulators need to do their duty.

1. Regulators need full information and objective analysis. Regulators, like all people, gather and absorb information in different ways: Some by listening, some by talking, some by writing, some by reading, some by all of the above. Some learn by causing opposing views to confront each other publicly; others learn by sitting in a room quietly, meeting with one person at a time. Some like to hear from the parties first, then study objective materials. Others prefer to study objective materials first; thus educated, they then turn to the parties. The regulator needs to find the right person to talk to, at the right time. The right person is not necessarily party's designated witness.

2. Regulators are forced to learn on the job. They are rarely as well educated, in terms of utility regulation, as the professionals coming to meet them. That differential creates opportunities for exploitation. A party who takes advantage of that differential -- by telling only half the story, by omitting contrary arguments, by shading the facts, by oversimplification-through-powerpoint -- contributes to the degradation of the forum and the process. She is being penny wise and pound foolish. In the long run no one benefits from a forum that makes decisions based on self-interest arguments.

B. Find the right mix of formality and informality

Benefits of informality: The author Russell Baker wrote: "An educated person is one who has learned that information almost always turns out to be at best incomplete and very often false, misleading, fictitious, mendacious - just dead wrong." The key to becoming educated is to ask the uneducated question. The great explorers, from Galileo to Edison to Watson and Crick, made their discoveries by asking ignorant questions. So do inexperienced regulators. But they'd rather ask their ignorant questions in private.

In regulation the purpose is not to choose between private party positions, but to advance the public interest. Regulators are not judges; they are policymakers. (Emphasis added.) Sometimes they use adjudication as a procedure to make policy but they make policy for all residents. In an adversarial focus, the focus is on the adversaries. In regulation, the focus must be on the public.

II. Can Informality Co-Exist with Objectivity?

Underlying the legal prohibitions against ex parte contacts and prejudgment is a goal of objectivity. Are there ways to preserve objectivity while allowing informality?

A. Informal, pre-filing conversations -- if handled carefully -- serve useful purposes.

In informal conversations, questions get asked; precision is sought. Here are six simple suggestions to preserve the positives while diminishing the negatives.

1. The purpose should not be to read tea leaves. The Commissioners are barred from expressing an opinion; so seeking an opinion is an invitation to violate the integrity of the process. A party committed to the integrity of the process will not invite a Commissioner to violate it.

2. The purpose should be two-fold: to pay the courtesy of advance notice, and to see what questions or concerns a Commission might have. Why the courtesy of advance notice? So the Commissioners can begin their preparation. They can seek objective reading material, assign assistants to draft briefing papers, determine the necessary staffing, start the process of retaining consultants. Eliciting Commissioner questions and concerns allows parties to focus their submissions on the public interest. Provided a Commissioner makes clear she has no fixed position, where is the prejudgment or impropriety?

3. Commissioners should ask questions but express no final opinions. Probing questions should not be confused with negative conclusions. When two retail monopolies propose to merge, it is reasonable to probe.

4. If the party uses written materials, they should become public within 24 hours.

5. The Commissioner should place notice of the meeting on the public record.

6. Others should have opportunities to discuss the same issues with the same Commissioners.

Implementation of these six ideas seems to be to remove any basis for taint, while preserving the flexibility necessary for clearheaded information-gathering.

B. There is a tendency to confuse unequal access with improper access

Indisputable fact: The major utilities have more regulatory affairs resources than do the intervenors. This asymmetry of access creates opportunities to take advantage. Even a straight, objective presentation creates an advantage: a bond, a reputation for responsiveness, a dependency. That is why people seek face time with Commissioners. The people not present, those with fewer access resources, lack those opportunities and advantages. This asymmetry of access is exacerbated by irony: irony that the asymmetry is funded in part by ratepayers because regulatory relations is a cost of doing business recoverable in rates.

But: unequal access is not improper access. The solution is not to limit access, but to expand it by creating comparable resource bases for the customer side. I see no reason why regulated utilities would not support legislation which grants to the OPC a level of ratepayer-funded regulatory resources bearing some reasonable relation to the utilities' ratepayer-funded resources. That is not the present case. Why not?

C. A few words on prejudgment

We should take care to distinguish bias from hunch. A bias is an inability or unwillingness to examine all facts and reason objectively. A hunch is tentative conclusion, based on education and experience, that a particular set of propositions is more likely to be true than false; and that if true, requires a particular outcome. No one wants a bench saying "my mind is a complete blank." The regulatory mind is not blank; it is full of experiences, prior readings, stray facts both diligently and casually acquired and evaluated. Those stray facts lead to hunches. Hunches are unavoidable and they are useful -- as long as the regulator establishes a systematic, objective method for testing them. And the expression of a hunch, in public or private, is not prejudgment. Expressing a hunch gets a reaction; and commissioners can learn from the reaction. Let's avoid dampening the thought process in the name of unachieavable procedural purity.

D. A few words on appearance of impartiality

The law is clear: the mere fact of a meeting, not ex parte, does not signal partiality. Nor does a flurry of post-meeting emails from the non-Commissioner attendees, about how positive the meeting was.

It is human nature to deceive oneself about a meeting's outcome. I've lost track of the number of lawyers, including me, who left their oral arguments thinking they'd won because the bench was friendlier to their side. It would help if meeting participants characterized their meetings more cautiously. Rather than saying things like "the Commissioner reacted positively," try this: "He asked a lot of questions. More questions than I expected; more questions than I wanted, but good questions. We'd better get to work on the answers."

III. Is There a Trust Problem Here?

The parties have framed their dispute in the language of procedural law. But I wonder if the underlying problem is one of trust. Consider three examples:[80]

1. If one employee says the meeting's purpose was merely courtesy and education, while his boss says its purpose was to gauge the Commissioners' reactions before he signed a multibillion contract, trust diminishes.

i) If a party seeks Commissioner disqualifications, through a motion that (i) ascribes to the Commissioners no act other than attending a lawful meeting, (ii) asserts "appearance of impropriety" on the sole basis that a non-Commissioner participant later characterized the Commissioners' views as favorable, (iii) cites no case supporting the argument that a lawful meeting becomes unlawful solely because a non-Commissioner participant writes hearsay about a Commissioner's position, and (iv) offers no independent evidence of Commissioner prejudgment, trust diminishes.

ii) When after 20 years of continuous merger proposals, there remains in the regulatory community no clear principles on how to measure, compare and allocate merger costs and benefits, trust diminishes.

Distrust breeds rigidity, but regulation requires flexibility.

Conclusion

In an appeal of a Federal Power Commission decision, the U.S. Court of Appeals for Second Circuit wrote:

> "... [T]he Commission has claimed to be the representative of the public interest. This role does not permit it to act as an umpire blandly calling balls and strikes for adversaries appearing before it; the right of the public must receive active and affirmative protection at the hands of the Commission."

Scenic Hudson Preservation Conference v. FPC, 354 F.2d 608, 620 (2d Cir. 1965), *cert. denied sub nom., Consolidated Edison Co. v. Scenic Hudson Preservation Conference*, 384 U.S. 941 (1966).

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[80] These are hypothetical examples only. Any resemblance to the real world is completely coincidental.

If we can design administrative procedures that recognize that the Commission's powers are broader than declaring winners and losers, we have a shot at giving the public the "active and affirmative protection" it deserves.

The Missouri Energy Development Association[81]

The Missouri Energy Development Association ("MEDA") provided comments intended to provide the Commission, and the other participating stakeholders, with MEDA's view on three over-arching principles that MEDA believes should govern any revisions to the existing standards.

The first principle that MEDA believes should be followed in evaluating any potential revisions in this area is the long-standing concept that a vigorous and robust exchange of ideas and information is absolutely critical to the formulation of sound public policy. In the context of this proceeding, this means that any rule changes should continue to allow for free communication among Commissioners, the Commission's staff ("Staff"), the public, utilities and anyone else, *to the extent that such communication does not address a pending case.* The Missouri General Assembly has made it clear that such communications are not prohibited, but instead encouraged. See Section 386.210, RSMo. Cum. Supp.. 2006. Moreover, the Commission has no power to adopt a rule, or follow a practice, which results in nullifying the expressed will of the General Assembly. *State ex rel. Springfield Warehouse & Transfer Company v. Public Service Commission*, 225 S.W.2d 792, 793 (Mo. App. 1949).

The free exchange of information contemplated by the Missouri Legislature is absolutely essential if the Commission is to properly discharge its duties. Unlike a judge

[81] See Roundtable Exhibit Number 2 in Appendix C. MEDA's member companies consist of Union Electric Company, d/b/a AmerenUE, Kansas City Power & Light Company, The Empire District Electric Company, Aquila, Inc., Laclede Gas Company, Missouri Gas Energy, Atmos Energy Corporation, and Missouri-American Water Company.

presiding over a discrete dispute involving private parties, utility commissions have sweeping and ongoing regulatory jurisdiction over the utilities they regulate, *Borron v. Farrenkoph,* 5 S.W.3d 618, 624 (Mo. App. 1999), including powers that are both quasi-judicial and quasi-legislative in nature. And to exercise those powers effectively and fairly, Commissioners must educate themselves on a wide variety of matters affecting the utilities they regulate.

A second over-arching principle that MEDA believes should be followed involves the need to ensure parity in the formulation and application of any requirements governing communications between Commissioners and participants in the regulatory process. In other words, should the Commission determine that it is necessary and appropriate to impose new restrictions on such communications (to ensure fairness in a pending proceeding, for example), then such restrictions must be imposed equally on all parties appearing before the Commission.

A third over-arching principle is that any restrictions that the Commission adopts should continue to recognize the distinction between contested cases and rulemaking proceedings. Due in large part to the Commission's own arguments before the courts of this state, it has been recognized that the Commission exercises quasi-legislative powers when it engages in rulemaking and that the full range of procedural protections afforded in a contested hearing context do not apply. *State ex rel. Atmos Energy Corporation v. Public Service Commission*, 103 S.W.3d 753, 759-760 (Mo. banc 2003). Like the legislature, the Commission should therefore not be restricted from communicating with stakeholders when it properly formulates policies of general applicability during the rulemaking process.

Finally, MEDA would note that it disagrees with certain aspects of the revisions to

the Commission's rules that were recently proposed by Public Counsel and others, primarily because they violate the over-arching principles described above.

Julie Noonan, Missouri Citizen, Member of StopAquila.org[82]

Ms. Noonan submitted specific recommendations for informal Commission action, formal Commission action and for proposed statutory changes that pertain to adherence to existing Missouri State Statutes, Commission Rules, and the Code of Conduct. Ms. Noonan emphasized the need for changes to increase public confidence in the Commission. Her suggestions are summarized as follows:

Recommendations for Actions the Commission can Implement Informally

1) Adopt PSC Standards of Conduct

The Commission establishes and formally adopts Public Service Commission Standards of Conduct (SOC) to provide specific guidance for the conduct of the Commission as it supports Commission business.

2) Implement PSC Standards of Conduct Affidavit

All Commission orders include an affidavit from the Regulatory Law Judge acting as the Hearing Officer that all PSC SOC's were observed and upheld leading up to the issuance of the Commission Order at hand.

3) Affirmation of PSC Constitutional Public Protection

The PSC respects citizens' rights and refuses to condone, reward, or act in collusion with regulated entities who subvert citizen rights granted in United States Amendment XIV and the Missouri Constitution, Article I Bill of Rights.

4) Affirmation of PSC Legal Compliance Intent

PSC honors "the letter of the law and seeks to fulfill the spirit and the intent of the law", as suggested in 4 CSR 240 Executive Order 92-04. PSC also "shall conduct the business of state government in a manner which inspires public confidence and trust" as suggested in the Code of Conduct.

[82] See Roundtable Exhibit Numbers 3 and 4 in Appendix C.

5) Affirmation of PSC Enforcement Pertaining to Site Specific Certificates of Need and Necessity

The PSC affirms and demonstrates that the Commission respects the Missouri Constitution, the Revised Missouri State Statutes, and the direction within the final WD64985 Opinion of the Missouri Court of Appeals that specifies that a utility must secure a Site Specific Certificate of Need and Necessity prior to disturbing the first spadeful of soil when planning to build or expand power generation facilities. The PSC requires that utilities seeking a Site Specific CNN comply with all applicable local laws, and no Site Specific CNN will be awarded unless the utility provides undisputed (by local governments where such facilities are proposed to be located/expanded) proof of compliance with applicable local laws, ordinances, permitting, zoning, etc.

6) Affirmation of Full, Fair, and Impartial Hearings

With the assistance of the Regulatory Law Judge acting as Hearing Officer, the PSC Chairman ensures that all hearings are full, fair, and impartial.

7) Affirmation of Applicant Burden of Proof

The PSC ensures that the burden of proof for Need & Necessity and other requested orders from the PSC is upon the Applicant and NOT on interveners.

8) Affirmation of PSC and/or Independent Evaluation of Applicant Claims

The PSC ensures that staff and/or others independently examine all Applicant claims relative to least cost options and insist upon adherence to least cost options unless there is a competing objective of decreased dependence on generation utilizing fossil fuels.

9) Affirmation of PSC Public Protection in matters of Long Term Planning and Ratemaking

The PSC must ensure that utilities make continual progress toward implementing long term planning to reduce customer exposure to fossil fuel volatility and that reflects appropriate mix between types of power generation.

10) Affirmation of PSC Commitment to Approve Rate Inclusion Limited to Actual Facilities and Generation that are Used and Useful

The PSC only considers and contemplates approval of reasonable expenses for actual facilities that are both used and useful.

11) Affirmation of PSC Regulation of Regulated Utility Asset Disposal

The PSC ensures that no utility is granted an order authorizing it to "sell, assign, lease, transfer, mortgage or otherwise dispose of or encumber the whole or any part of its franchise, works or system, necessary or useful in the performance of its duties to the public, nor by any means, direct or indirect, merge or consolidate such works or system, or franchises, or any part thereof, with any other corporation, person or public utility, without having first secured from the commission an order authorizing it to do so."

12) Affirmation of PSC Freedom from Outside Influence

The PSC avoids any interest or activity which improperly influences, or gives the appearance of improperly influencing, the conduct of official duties. In addition to the familial relationships specified within the law, any Commissioner or Regulatory Law Judge who has a personal relationship with a representative or member of an Applicant recuses themselves from all cases that involve that Applicant in order to ensure fair and impartial decision making by the Commission.

13) Affirmation of PSC Compliance with Limitation of Powers

The PSC refrains from extending powers beyond that which are specifically bestowed on the Commission by Missouri State Statutes.

14) Affirmation of PSC Reliance on Established Processes

The PSC relies solely on processes outlined in the law, PSC Rules, and those which are agreed to and understood by all parties in a matter.

Recommended Actions Requiring Formal Commission Action (i.e. Rulemaking)

1) PSC Complaint Support

Create and enforce a rule directing PSC Staff to:

a) Ensure that PSC rules for filing both Informal and Formal Complaints are posted on the PSC web site in conjunction with the complaint form that currently is located at: http://psc.missouri.gov/ComplaintForm.asp.
b) Ensure that the form referenced in a) above does not provide an impression that acceptable complaints are limited to billing or personal utility consumption issues.
c) In addition, the rule directs PSC Staff to offer the same information about rules for filing both Informal and Formal Complaints to anyone who calls or visits the PSC intending to make a complaint.
d) The web site and PSC Staff clearly inform individuals desiring to file an informal complaint that if they are not satisfied with the response, they may file a formal complaint to seek satisfactory resolution.

e) Within the same or in a separate rule, the Commission directs PSC Staff to provide full disclosure, information, and assistance to citizens and other governmental agencies that seek information relevant to the processes, rules, and business and of the PSC.

2) Establishment of Intervener Fund

Create and enforce a rule modeled off of a concept contained within New York State Law that establishes an account funded by the Applicant for the purpose of defraying the cost of representation for local interveners (governmental bodies that are not the applicant and other local parties).

Recommended Statutory Changes

1) PSC Refrains from Sponsoring or Supporting changes that Legalize that which is Illegal

2) Commission Membership and Attendance

Expand the number of Commissioners of the PSC so that committees of Commissioners are assigned to cases before the PSC. In addition to increasing the number of PSC Commissioners, the law or associated rules should include additional provisions which ensure that:

a) A prescribed number of Commissioners (not less than 3) are in physical attendance or are attending via video conference all hearings and meetings related to a case,
b)That the presiding Regulatory Law Judge will call for questions of Commissioners attending via video conference just as if the Commissioner were physically present in the room, and
c)That Commissioners must be in attendance (as indicated in "a") a minimum of XX% of the time expended for all sessions (Pre-hearing Conference, Public Hearings, Hearings, etc) related to a case in order to be eligible to vote upon that case,
d) The presiding Regulatory Law Judge or Court Reporter will make record of all time each Commissioner is in attendance during each part and for the entirety of the case. Records will be reviewed prior to voting on the matter and the Regulatory Law Judge will announce eligibility of each Commissioner to vote on the case.

The Staff of the Missouri Public Service Commission[83]

Staff filed its response to OPC's motion for rulemaking in docket number AX-2008-

[83] See Roundtable Exhibit Number 5 in Appendix C.

0201 in this workshop docket because of the related issues in these two dockets. Staff believes that OPC's request for rulemaking does not satisfy Chapter 536's requirements (Missouri's Administrative Procedures Act), and is not legally authorized or justified. Staff further asserts that OPC's proposed amendments are not necessary and are unworkable and unlawful because they are not the right amendments.

Staff observes that Commissioners are administrative officers of the Executive Branch; they are not judicial officers.[84] Unlike judicial officers, who are expected to know nothing of the controversies brought to them, the PSC Commissioners are expected to be knowledgeable, if not expert, in the area of the utility industry. Unlike judges, the PSC Commissioners have administrative, regulatory and enforcement duties, as well as policy-making and quasi-legislative duties. These points are not controversial or unusual but are a commonplace of administrative law. *See* A.S. Neeley, *Administrative Practice & Procedure,* 20 Missouri Practice § 1.04 (3rd ed., 2001). Yet the Movants (OPC, et al.) propose rule amendments that would needlessly and unlawfully hamper the Commissioners in fulfilling the full range of their statutory responsibilities. Moreover, in essence, the Movants appear to seek to establish a presumption of misconduct on the part of the Commissioners.

It is well-established that administrative rules may only be promulgated within the scope of the authorizing legislation. *State ex rel. Doe Run Company v. Brown,* 918 S.W.2d 303, 306 (Mo. App. 1996). An administrative rule that is contrary to statute is a nullity. "The rules or regulations of a state agency are invalid if ... they attempt to expand or modify statutes. Further, regulations may not conflict with the statutes and if a regulation does, it

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[84] GPE-Aquila Merger Docket, Case No. EM-2007-0374 (Staff's Response to Public Counsel's Motion to

must fail." *Hansen v. State Dept. of Social Services, Family Support Div.*, 226 S.W.3d 137, 144 (Mo. banc 2007), quoting *PharmFlex, Inc. v. Division of Employment Security,* 964 S.W.2d 825, 829 (Mo. App. 1997).

Section 386.210, RSMo Supp. 2007, governs communications between the Commissioners and other persons outside of evidentiary hearings and it is immediately apparent that the amendments proposed by the Movants are contrary to § 386.210, RSMo. Cum. Supp. 2007, or other provisions of law, and are thus unlawful:

> A. At proposed subsection (1)(A), Movants propose to extend the ban on *ex parte* communications to encompass matters that, while not pending before the Commission, "can reasonably be foreseen to come before the Commission for decision." This definition is contrary to established legal usage and, additionally, prohibits communications that are otherwise lawful under § 386.210, RSMo. Supp. 2007.
>
> B. Movants propose deleting present subsection (7) of Rule 4 CSR 240-4.020, which states when the prohibitions on communications in the rule apply, although the subsection restates the timing provisions contained in the statute.
>
> C. Proposed subsection (10) is contrary to both § 386.450 and the provisions of Chapter 610, RSMo, constituting the "Missouri Sunshine Law," and is thus unlawful.
>
> D. Additionally, the proposed amendments are unlawful because they would prevent the Commissioners from discharging their duties under the statutes.

Staff also observes that it is apparent that the proposed amendments are not practicable:

> A. As noted previously, at proposed subsection (1)(A), Movants propose to extend the ban on *ex parte* communications to encompass matters that, while not pending before the Commission, "can reasonably be foreseen to come before the Commission for decision." This definition is so incredibly overly expansive as to effectively prohibit any communication by a Commission member with almost anyone on any matter relating to the business of the Public Service Commission.
>
> B. Proposed subsection (4) does not use the term "ex parte communication" that Movants have carefully (and over-expansively) defined at proposed

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Dismiss, filed on December 27, 2007), p. 7 ff. See Roundtable Exhibits 5 and 6 in Appendix C.

subsection (1)(A) and is thus ambiguous. By referring to "the merits of the cause," do Movants intend this prohibition to apply only to pending cases?

C. Movants propose to amend existing subsection (8) to provide that reports of inadvertent *ex parte* communications must be either filed publicly in the appropriate pending case or, if no case is pending, copies to "each party to the utility's most recent general rate case or earnings complaint case." This proposal imposes an onerous and expensive reporting burden upon the Commission.

D. The language "to an individual Commissioner or to any two Commissioners or to a quorum of the Commission" at proposed subsection (10) is poorly drafted and redundant. Additionally, why should the prohibition in subsection (10) apply only to utilities? Prohibitions should apply to all parties and stakeholders equally.

E. Proposed subsection (11) imposes an expensive obligation upon the Commission that serves no public purpose. Let those who desire transcripts of the Commission's open meetings pay for reporters and copies of transcripts. What public purpose is served by making a verbatim record of the Commission's closed meetings? If a person or entity wants to challenge the Commission's closing of a meeting, the burden is on that person or entity. The Movants appear to seek to establish a presumption of misconduct on the part of the Commissioners. Such a presumption is contrary to settled Missouri law, which presumes that administrative officers act properly and lawfully.

F. Proposed subsection (12) is unworkable. It is inappropriate for the Public Counsel, let alone private parties, to have any investigatory authority with respect to the Commission. The Public Counsel is hardly disinterested and there are no provisions proposed that would prevent the Public Counsel from abusing this authority.

G. Proposed subsection (14) is unworkable. Who will determine that an *ex parte* communication was made?[85]

H. Proposed subsection (15) is unnecessary as it merely restates existing law.

I. Additionally, the proposed amendments are not practicable because they would prevent the Commissioners from discharging their duties under the statutes.

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[85] It is worthy to note that what OPC proposed in subsection (14) of its proposed rule amounts to a mandatory recusal policy based upon strict liability. This standard is higher than any standard imposed upon any member of the judiciary. So while OPC attempts to equate PSC Commissioners with Judges, it also attempts to hold them to a higher standard than the Judicial Canons or Missouri case law prescribes.

Additionally Staff points out that:

> . . . to the extent that any significant change to the existing structure of statutes and rules is deemed absolutely necessary, Staff suggests that some consideration should be given to a change similar to that enacted by the Legislature when similar concerns arose concerning the impartiality of the various boards that regulate the licensed professions. To address that concern, the Legislature removed the adjudicative function from the boards and bestowed it upon a neutral central panel, the Administrative Hearing Commission. In like manner, the Movants' concerns could be better addressed by transferring a measure of the Commission's adjudicative authority to the Commission's cadre of Regulatory Law Judges (RLJs), leaving the Commissioners better able to exercise their policy-making, regulatory and enforcement, and quasi-legislative functions. To allay Movants' concerns, the RLJs – having no function other than the adjudicative – could be made subject to rules similar to the Canons of Judicial Conduct. Staff believes that, while such a restructuring possibly could be accomplished within the present statutory framework, under the authority of § 386.240, RSMo 2000, clearly for such a change after nearly 100 years of the Commission's existence it would be better to seek the blessing and imprimatur of the Legislature, and it is only one of a number of proposals that might be considered.

Staff finally notes that its suggestion, *supra*:

> . . . should not be read to indicate that Staff believes that any such significant restructuring is necessary. Rather, Staff believes that a prudent and thoughtful compliance with existing statutes and rules both protects the rights of the parties and protects the Commission from unfair public criticism. Staff is not saying that the Commission should do nothing. For example, the Commission should consider amending its existing rules to provide more transparency in the Commissioners' day-to-day activity out of the hearing room and the Agenda. Staff is merely suggesting that the Commission and others should not overreact. Failing to overreact just a few years ago to the unlimited promises of retail competition has saved the State from the unlimited detriments now being experienced by those States that did so.

Transcripts – Presentations and Comments Made at the Roundtable[86]

The official Transcript was filed in this docket on January 9, 2008. It is available on the Commission's Electronic Filing and Information System. The presentations and comments at the Roundtable mirrored those that were pre-filed and referenced above.

ADDITIONAL DISCUSSION OF THE ISSUES

Federal quasi-judicial officers are faced with the exact same internal and external communication issues that state quasi-judicial officers must deal with when discharging their duties. Charles Koch, Jr.[87] recently published an enlightened discussion concerning *ex parte* contacts in federal administrative agencies in the Journal of Administrative Law and Practice.[88] Some of Professor Koch's significant conclusions are worth noting:[89]

[1] Adjudication

(a) Communication with those outside the agency.

- Congress enacted the provisions prohibiting *ex parte* communication to ensure that "agency decisions required to be made on a public record are not influenced by private, off-the-record communications from those personally interested in the outcome."

- Congress recognized, however, that not all communications between agency decisionmakers and interested parties would contravene the purpose of the prohibition against *ex parte* communications. Excluded from the proscribed communications were those contacts that do not affect the way a given case is decided. A decisionmaker's disclosure as to the progress or completion of a proceeding is not an illegal *ex parte* communication.

- A number of administrative functions involve meetings and communications with those who deal regularly with the agency. The agency builds experience and expertise through these recurring contacts. The prohibition against *ex parte* communication must be tempered by the need to allow the agency to do its job. In order to build a case for illegal *ex parte* communication, one must show that such contacts would lead a disinterested observer to infer that the contacts will affect the decision. The fact that the agency had recurring, but independent, contacts with an interest which is also party in a pending case is not enough.

- An agency cannot be said to have allowed an illegal *ex parte* communication

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[86] See Transcript, Volume 1, filed in Docket Number AO-2008-0192 on January 9, 2008.

[87] Dudley W. Woodbridge Professor of Law, College of William and Mary, Marshall-Wythe School of Law.

[88] Roundtable Exhibit 11, Appendix C.

[89] Charles H. Koch, Jr., *Section 6.12 Ex Parte, Integrity in the Administrative Process*, 2 Admin. L. & Prac. § 6.12 (2d ed.) (2007).

because information was submitted to it. While disclosure may be required of such communications in general, inconsequential communication may require no special treatment.

- [I]f an *ex parte* consultation would be appropriate at a trial, it should be acceptable in an administrative hearing.

- Official contact with the parties does not usually constitute illegal *ex parte* communication. Thus the fact that an ALJ met with the parties to facilitate a settlement and does not evidence illegal *ex parte* communication.

(b) Communication within the agency.

- Prohibition against *ex parte* communication overlaps with the separation of functions doctrine when the *ex parte* communication comes from inside the agency. However *ex parte* communication from staff not involved in prosecution and investigation are not covered by the separation of functions doctrine. Generally, communication from the agency's nonlitigation staff will not constitute illegal *ex parte* communication.

- "[N]on-record discussions between an agency's decisionmakers and members of the agency's staff are common and proper."

(c) Discovery.

- Building a case in support of a claim of *ex parte* communication may be difficult because, by definition, the illegal contact was secret. Therefore discovery may be necessary in such a challenge. The Ninth Circuit granted judicial discovery in Public Power Council v. Johnson "because of the unusual combination of: (1) the novelty of the issues presented; (2) the need for extremely prompt action under the pertinent statute; and (3) the significance of the questions presented in the petition for review." However, it found that an administrative evidentiary hearing was appropriate where the purposes of the act would not be frustrated or imperiled by allowing the agency to develop the necessary facts and initially determining whether the APA had been violated.

(d) Remedies.

- **The remedy for *ex parte* contacts, unlike bias or combination of functions, cannot be disqualification; otherwise a party could eliminate unfavorable decisionmakers by initiating *ex parte* contacts with them.** (Emphasis added.)

- The remedy is to place the communication on the public record. The person who knowingly commits an *ex parte* contact, however, may be deprived of the opportunity for a hearing and forfeit the contested interest.

- If the *ex parte* communication is not cured at the agency level the administrative

decision may be overturned on judicial review.

- ❖ In the extreme case, where a person knowingly attempts an illegal ex parte communication, the APA provides that the person may be subject to an adverse decision because of the violation.

- ❖ A challenge of *ex parte* communication must generally be made on the appeal of the final order. A court should presume that the agency process will cure any taint of *ex parte* communication and hence it should not accept interlocutory review of that issue.

[2] Rulemaking

- ❖ The preventive measures for *ex parte* communication are not so strictly applied in rulemaking as they are in adjudication. Rulemaking should be a public process, and any questionable *ex parte* communication need only be added to the rulemaking record to avoid any charge of impropriety. Disclosure should be generally sufficient because disclosure is sufficient even in adjudication.

(a) Outside contacts.

- ❖ The APA provisions controlling ex parte communication do not apply to notice and comment rulemaking (but may apply to formal rulemaking).

- ❖ Communications received prior to issuance of a formal notice of rulemaking do not, in general, have to be put in a public file. Of course, if the information contained in such a communication forms the basis for agency action, under well established principles, that information must be disclosed to the public in some form.

- ❖ Once a notice of proposed rulemaking has been issued, however, any agency official or employee who is or may reasonably be expected to be involved in the decisional process should refuse to discuss the rule with interested persons. If ex parte contacts nonetheless occur, any written document or a summary of any oral communication must be placed in the public file established for each rulemaking docket immediately after the communication is received so that interested parties may comment thereon.

(b) Internal contacts.

- ❖ Whatever limitations are imposed on *ex parte* communications between the decisionmaker and those outside the agency, there are none on *ex parte* communications between the decisionmaker and the agency staff.

- ❖ The separation of functions is not required for rulemaking and hence communication between the decisionmaker and members of the investigative staff are permitted.

[3] State law on *ex parte* communications

(a) Adjudication.

- States vary a good deal with respect to *ex parte* communication in adjudications. However the rule is that *ex parte* communication is prohibited in formal adjudications.

- In Arkansas, in order to violate an *ex parte* communications statute concerning issues of law or fact relating to an adjudicatory proceeding, proof of the existence and content of the alleged communication must be shown.

- The Supreme Court of South Carolina interpreted the purpose of South Carolina Constitution's Article I, § 22 to be to ensure that adjudications are conducted by impartial administrative bodies. The Court further stated that a violation of this constitutional provision would occur if an adjudicator "either has ex parte information as a result of prior investigation[s] or has developed, by prior involvement with the case, a 'will to win.' " The Supreme Court of South Carolina stated that "although the Court condemns ex parte communication, it has refused to adopt a per se rule automatically reversing rulings which result from ex parte communications. Instead, the Court considers whether prejudice results from the ex parte contact."

- The Connecticut Court stated: "Receipt of ex parte evidence merely shifts the burden of proof from the aggrieved party to the applicant to demonstrate that the communication was harmless."

- The Supreme Court of Indiana held that a board of county solid waste management's consideration of a permit application was a function of both adjudication and legislation, and therefore ex parte communications by board members with public citizens regarding the application were proper because the board was a local agency expected to respond to concerns of its constituents. Since it was not a court proceeding, the input could be received in a less formalized manner.

- In North Dakota, ex parte communications are those that do not afford notice and opportunity for all parties to participate. The N.D. APA permits certain ex parte communications in administrative proceedings, but prohibits others. In general, an agency hearing officer may not communicate about any issue in a proceeding with anyone affected by or participating in that hearing while it is pending. There are two exceptions. First, if more than one person is acting as the hearing officer, those persons can communicate with each other about a matter pending before the panel. They may also communicate with their staff assistants if those assistants do not "furnish, augment, diminish, or modify the evidence in the record." Second, if a proceeding is conducted with someone other than the agency head acting as the hearing officer, the administrative agency's counsel and the agency head may communicate on common attorney-client issues without notice and opportunity for other party participation. Except for settlement and negotiation, this second

exception does not extend to communication occurring after recommended findings of fact, conclusions of law, and orders have been issued.

(b) Rulemaking.

- The drafters of the 1981 Model State Administrative Procedure Act (81 MSAPA) placed few restraints on oral *ex parte* communications in rulemaking. They refused to prohibit such communication or even to require that such communications be included in the public record. They were convinced by the scholarly observations from Antonin Scalia. He urged: "An agency will be operating politically blind if it is not permitted to have frank and informal discussions with members of [the legislature] and the vitally concerned interest groups; and it will often be unable to fashion a politically acceptable (and therefore enduring) resolution of regulatory problems without some process of negotiation off the record."

Charles H. Koch, Jr., *Section 6.12 Ex Parte, Integrity in the Administrative Process*, 2 Admin. L. & Prac. § 6.12 (2d ed.) (2007).

CHAIRMAN'S RECOMMENDATIONS

Having reviewed the current requirements of Missouri law, and all of the comments, presentations and filings of the participants to this docket, Chairman Davis makes the following recommendations to be adopted by the Commission:

RECORDS OF MEETINGS & COMMUNICATIONS:

A. That the Commission affirm meeting calendars, telephone logs and email communications of the Public Service Commission are "open" records pursuant to Chapter 610, commonly referred to as "The Missouri Sunshine Law." To this end, meeting records shall be available upon request, as stated in Chapter 610.

B. That beginning February 1, 2008, or as soon as practicable, each public service Commissioner should maintain a "public" calendar and that such calendar should be made available to the public via the Internet and contain the following information:

(1) Identification of any meetings with any parties or their representatives to any current proceeding and any persons known to be a party to any future proceeding.

(2) Such meetings should be posted at least twenty-four hours in advance and there should be some statement identifying the parties in attendance and the purpose of the meeting so that interested persons are reasonably apprised of all issues to be discussed in advance of the meeting. If exigent circumstances exist and the public interest requires the scheduling of a meeting to occur on less than twenty-four hours notice, the Commissioner should notify the Office of Public Counsel in advance of the meeting and post the meeting notice with a statement as to the "good cause" for the meeting to occur.

(3) If the Commissioner is meeting with a party to a case currently pending before the Commission, any party to that case should be invited to attend the meeting.

C. That the Public Service Commission should broadcast all Commission meetings and hearings over the Internet, when technically feasible.

D. That the PSC should retain a court reporter so that the Commission, an individual Commissioner or any Commission employee may, in the event of an emergency affecting the public health safety and welfare of the state or for other good cause identified in the record, transcribe any meeting or phone call with a representative of any regulated utility, the Office of Public Counsel, or any

association or individual who wishes to meet with a Commissioner or Commission employee on less than twenty-four hour notice.

REQUIRED DISCLOSURE OF MEETINGS & COMMUNICATIONS WITH ALL PARTIES TO PENDING CASES:

E. When a case is filed with the Commission, any meetings or communications related to the performance of the Commission's duties that occur between a Commissioner or Commission employee, the Office of Public Counsel or any party, agent or representative of a party to that matter should be disclosed to all parties within 72 hours unless the matter has already been previously disclosed to all the parties. This requirement should apply to all participants in the meeting and regardless of whether or not the matter has been set for hearing.

PRIOR PUBLIC NOTICE OF PSC EMPLOYEE MEETINGS:

F. Prior to meeting with parties to PSC cases or persons likely to become parties to PSC cases or proceedings, all PSC employees, including commissioners, should provide public notice of the scheduled meeting at least twenty-four hours in advance in a manner designed to reasonably inform all interested persons of the meeting, the persons to be present and the purpose of the meeting.

SCHEDULING OF MEETINGS WITH THE COMMISSION:

G. When a regulated utility, the Office of Public Counsel, a party or potential party to any case or matter to be decided by the Commission seeks to schedule a meeting with a majority of the Commissioners for any reason, the person making the request should be required to make the request in the following format:

(1) Meeting requests should be made in writing and shall contain a complete agenda of all matters the party wishes to be

discussed in the meeting. Discussion of topics not listed on the agenda should be prohibited.

(2) All such meeting requests, whether in written or electronic format, should be available for public inspection under Chapter 610, the Missouri Sunshine Law.

(3) All scheduling requests should be made to the Chairman of the Commission who shall place the matter on an agenda for a Commission meeting, raise the matter as a scheduling item in an agenda meeting or reject the request in writing, stating the reasons for his rejection and notifying the other commissioners accordingly.

(4) The contents of discussions in such meetings should be documented by minutes, transcription or other appropriate audio or video recording device. Any materials distributed during the meeting should be designated as "open records" by the Commission unless designated as "highly confidential" by the party. Pursuant to existing statute, the Office of Public Counsel shall have access to all information labeled as "highly confidential" and may appeal that designation.

(5) All attempts to meet with members of the Commission individually in an effort to avoid these disclosure requirements or the application of Chapter 610, the Missouri Sunshine Law, should be prohibited.

H. Where a regulated utility, the Office of Public Counsel, any party to a current proceeding, their agent or assign, or any person or any entity with the intent to be a party in a future proceeding seeks to schedule a meeting with an individual commissioner or any commission employee regarding any matter related to the performance of the Commission's duties, that request should be made in the following format:

(1) Meeting requests should be in writing and shall include a summary of all topics to be discussed at the proposed meeting.

(2) All such meeting requests, whether in written or electronic format, should be available for public inspection under Chapter 610, the Missouri Sunshine Law.

(3) The contents of discussions in such meetings should be documented by minutes, transcription or other appropriate audio or video recording device. Any materials distributed during the meeting should be designated as "open records" by the Commission unless designated as "highly confidential" by the party. Pursuant to existing statute, the Office of Public Counsel shall have access to all information labeled as "highly confidential" and may challenge that designation pursuant to Commission Rule. The minutes or recording of those communications should be disclosed within 72 hours of the meeting.

NOTICE OF "EXTERNAL COMMUNICATIONS":

I. The Public Service Commission should adopt a public "notice" system designed to disclose communications regarding matters that do not fit the definition of "ex parte" communications, but relate to any other substantive policy issue affecting any of the parties in a currently pending proceeding before the Commission. The notice requirements of this provision should apply to all parties to a currently pending case and commissioners alike. Counsel for any party to a currently pending proceeding shall be responsible for insuring the compliance of their respective client or clients.

ETHICS TRAINING REQUIREMENTS FOR PSC EMPLOYEES AND ATTORNEYS PRACTICING BEFORE THE COMMISSION:

J. The Public Service Commission shall develop a three-hour training seminar designed to educate all employees and attorneys practicing before the Commission concerning all state laws, rules and regulations regarding ex-parte communications, gratuities and ethics requirements. This seminar should be approved by the Missouri Bar for CLE credit and offered free of charge to attorneys appearing before the Commission at least twice a year. Every commission employee should be required to complete this training as part of their orientation and to retake the class every three years. The Commission should transmit copies of the course curriculum and any revisions to the designated representatives of the Governor, the Attorney General, the President Pro Tem of the Missouri Senate and the Speaker of the House for their comment.

SECURITIES AND EXCHANGE COMMISSION PROVISION:

K. To assure compliance with Security and Exchange Commission regulations prohibiting the disclosure of forward looking information that could affect the value of company stock, requesting parting will be advised that *any and all* information provided to commissioners in meetings will be considered open records and available for public inspection unless specifically designated as "highly confidential". The party designating such information as "highly confidential" should have the burden of providing the Office of Public Counsel with a copy of the communication prior to, simultaneously or no later than 24 hours after presenting it to the Commissioner or Commission employee.

AFFIRMATION THAT ALL COMMISSIONERS PARTICIPATING IN THE CASES EITHER ATTENDED THE HEARINGS OR READ THE TRANSCRIPT:

L. Commissioners should be required to certify that they are in compliance with Section 536.080, RSMo 2000, prior to rendering or joining in rendering a final decision.

THE GENERAL ASSEMBLY MAY, AT THEIR DISCRETION, WANT TO CONSIDER CODIFYING EXISTING CASE LAW ON THE JUDICIAL DISQUALIFICATION OF PUBLIC SERVICE COMMISSIONERS:

M. To eliminate confusion and litigation, the General Assembly should codify existing case law on the standards necessary to disqualify a Public Service Commissioner in a case.

THE GENERAL ASSEMBLY MAY, AT THEIR DISCRETION, WANT TO CONSIDER REQUIRING ALL PUBLIC SERVICE COMMISSIONERS TO MEET THE SAME BASIC QUALIFICATIONS AS JUDGES AS SET FORTH IN ARTICLE V, SECTION 21 OF THE MISSOURI CONSTITUTION:

O. If Public Service Commissioners are to be held to the same standards as judges, Commissioners should be required to meet the qualifications set out in Article V, Section 21 of the Missouri Constitution.

THE GENERAL ASSEMBLY MAY, AT THEIR DISCRETION, WANT TO CONSIDER THE RECOMMENDATION OF ITS STAFF AND CHANGE THE STRUCTURE OF THE COMMISSION TO THAT SIMILAR TO THAT OF THE ADMINISTRATIVE HEARING COMMISSION:

P. The Legislature has removed the adjudicative function from various boards and bestowed it upon a neutral central panel, the Administrative Hearing Commission. A measure of the Commission's adjudicative authority would be transferred to the Commission's cadre of Regulatory Law Judges ("RLJs"), leaving the Commissioners better able to exercise their policy-making, regulatory and enforcement, and quasi-legislative functions. The RLJs – having no function other than the adjudicative – could be made subject to rules similar to the Canons of Judicial Conduct. Such a restructuring possibly could be accomplished within the present statutory framework, under the authority of § 386.240, RSMo 2000.

CONCLUSION

The Chairman wishes to extend his sincere thanks and appreciation to all participants in this docket, and believes the recommendations in this report will travel far to improve practice before the Commission and resolve concerns and clear up misconceptions about the regulatory process and its many intricacies and challenges.

This docket will remain open until at least January 31, 2008 for parties to file additional responses in regard to this matter, and the Chairman may issue a supplemental report further addressing these recommendations and other relevant matters in relation to this docket.