

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

**FILED<sup>2</sup>**

JAN 29 2008

Missouri Public  
Service Commission

In the Matter of Proposed Revision to  
4 CSR 240-4.020

) Case No. AX-2008-0201  
)

**RESPONSE TO NOTICE OF OPPORTUNITY TO COMMENT**

**COMES NOW** Harold Stearley, attorney and Regulatory Law Judge for the Missouri Public Service Commission, and for his Response to the Notice of Opportunity to Comment to the Motion for Proposed Rulemaking filed herein by the Office of the Public Counsel and several others, states as follows:

1. On December 19, 2007, the Office of the Public Counsel and a group of interested persons filed a Motion for Proposed Rulemaking to amend the Commission's rule concerning *ex parte* communications, specifically Commission Rule 4 CSR 240-4.020, Conduct During Proceedings.<sup>1</sup> As part of that Motion, specific suggestions for changes were filed.

2. On January 23, 2008, the Commission issued Notice stating it was considering the possibility of making revisions to the *ex parte* rule and that the Commission sought information from interested persons about the existing rule. The Commission's

---

<sup>1</sup> Joining Public Counsel are the Midwest Gas Users Association, the Sedalia Industrial Energy Users Association, the Missouri Industrial Energy Consumers, the Missouri Energy Group, AG Processing, Inc., Praxair, Inc., AARP, and the Consumers Council of Missouri. The several members of the first four associations are enumerated on the first page of Public Counsel's Motion for Rulemaking.

Notice also requested that any respondent offer their position with regard to four specific questions. Those questions were:

- a. Is the wording of the current rule sufficiently clear to guide the behavior of all the participants (including Commissioners) in PSC proceedings?
- b. Is the rule, as currently drafted, sufficient in scope? Are activities permitted that should be prohibited? Are activities prohibited that should be permitted?
- c. Is the rule, as currently drafted, consistent with the substance and spirit of the statutes governing *ex parte* communications at the PSC?
- d. Are the present rule and procedures concerning *ex parte* communications sufficient to ensure public confidence in the fairness of proceedings at the PSC?

3. The simple response to each of these questions is "no." Because I believe the rule in question needs to be revised to provide greater clarity, I am attaching a new proposed rule.

4. Additionally, I believe that changes to other Commission rules are required in order to bring those rules into conformity with the revised rule, 4 CSR 240-4.020. Consequently, I have also included with this filing proposed changes for rules 4 CSR 240-2.040 and 4 CSR 240-2.116.

5. Moreover, if the Commission decides that it needs to revise rule 4 CSR 240-4.020, I also believe it would be necessary to adopt a new rule to outline the proper procedural requirements for any motion filed requesting disqualification of a Commissioner in relation to any perceived violations of their Conduct During Proceedings. I have also included in this filing a proposed draft of such a rule, 4 CSR 240-2.121.

6. In addition to these filings, I also wish to direct comments towards the rule changes that were recommended on December 19, 2007, by the interested parties filing

those recommendations. I would first totally concur with the objections raised in the Staff of the Missouri Public Service Commission's response filed on January 4, 2008. I would add that I particularly take exception with paragraph 14 of the filed recommendations. As proposed, this subsection reads as follows:

(14) A commissioner, Regulatory Law Judge or Advisor that makes an *ex parte* communications [sic] or fails to disclose the *ex parte* communication shall immediately recuse from the case.

This provision essentially creates a strict liability standard for mandatory recusal. This standard far exceeds any standard articulated by Missouri courts for judges and would have the effect of holding administrative decisionmakers to a higher standard than any judge in this state.

Furthermore, I see no need to direct rule revisions for the Code of Conduct specifically towards Commissioners, Regulatory Law Judges and Advisors. The Code should cover all contacts, direct or indirect, that target any Commission decisionmaker. This would encompass or capture all persons, groups, entities, and Commission employees or contracted experts without attempting to create a separate definition for select groups of people. No improper communication should be directed to any person, group, entity, etc. that could serve as an indirect means to influence a Commission decisionmaker.

**WHEREFORE**, on account of all the foregoing, Harold Stearley prays that: (1) the Commission will not promulgate the amendments to Rule 4 CSR 240-4.020 proposed herein this docket by the Office of the Public Counsel; (2) the Commission will consider the recommended changes proposed herein this response; and (3) the Commission will grant such other and further relief as is just in the circumstances.

Respectfully submitted,  
**/s/ Harold Stearley**  
Harold Stearley  
Missouri Bar No. 49900

P. O. Box 360  
Jefferson City, MO 65102  
(573) 522-8459 (Telephone)  
(573) 526-6010 (Facsimile)  
harold.stearley@psc.mo.gov

**Certificate of Service**

I hereby certify that copies of the foregoing have been electronically mailed to all counsel of record on this **29th day of January, 2008**.

**/s/ Harold Stearley**

## Proposed Amendments to Rule 4 CSR 240-4.020:

### 4 CSR 240-4.020 Code of Conduct During Proceedings

*PURPOSE: The commission must insure that there is no question as to its impartiality in reaching a decision on the whole record developed during open hearings. This rule prohibits activities which would tend to exercise influence on the commission and which are not part of the record. The legitimate purpose of this rule, however, would be subverted if it were improperly invoked by parties, attorneys or non-party participants for mere tactical advantage in a proceeding, or to harass or cause unnecessary delay or needless increase in the cost of litigation, or in an attempt to bring any improper pressure, whether public or private, or direct or indirect, to bear on the commission and its decision making process.*

(1) The following definitions shall apply in this rule:

(A) "ex parte communication" is any communication, written or oral, that is in any form, that concerns the substantive merits of any matter that is actually filed in an official docket-numbered case that is actively pending before the Commission, as further defined in subsection(1)(G), for decision.

(B) "prohibited" "ex parte communication" is any ex parte communication attempting to sway the judgment of a commission decisionmaker by undertaking, directly or indirectly, outside the hearing process to bring pressure or influence, of any type, to bear upon any commission decisionmaker.

(C) "non-prejudicial" or "non-prohibited" ex parte communication – communications about purely procedural matters, even if falling under the definition of "ex parte communications" in subsection (1)(A), that do not concern the substantive merits of any matter are not prejudicial and not prohibited ex parte communications.

(D) "authorized communications" – all communications authorized in Section 386.210, RSMo, even if falling under the definition of "ex parte communications" in subsection (1)(A), if in conformity with the statute's requirements, are not prohibited ex parte communications.

(E) "commission decisionmaker" – any commissioner, regulatory law judge or commission appointed Arbitrator that renders a final decision in a contested case, as defined in Section 536.010(4), RSMo, meaning proceedings before the public service commission in which legal rights, duties or privileges of specific parties are required by law to be determined after hearing.

(F) "non-party participants" – any person, group or entity, not a party to an action filed and pending before the commission as defined in subsection (1)(G), that has properly received leave to file and has filed a brief as an *amicus curiae*, or has participated in an action filed and pending before the commission, as defined in

subsection (1)(G), in some other capacity at the request of, or at the leave of the Commission.

(G) "action," "on-going action," "actively pending matter," "proceeding," "official proceedings," "proceeding before the commission," "administrative proceeding," "matter," "pending matter," "matters pending," "matters pending with the commission," "matter at issue," "cause," "case," and "pending case" – all of these terms, as used throughout this rule refer to any filed official docket-numbered case that is an actively pending matter before the commission that has become a contested case, as defined in Section 536.010(4), RSMo, meaning proceedings before the agency in which legal rights, duties or privileges of specific parties are required by law to be determined after hearing.

~~(7)(2)~~ These prohibitions in this rule apply from the time an on-the-record proceeding is set for hearing by the commission until the proceeding is terminated by final order of the commission. An on-the-record proceeding means a proceeding where a hearing is set and to be decided solely upon the record made in a commission hearing. any filed official docket-numbered case that is an actively pending matter before the commission becomes a contested case as defined in Section 536.010(4), RSMo, meaning proceedings before the agency in which legal rights, duties or privileges of specific parties are required by law to be determined after hearing. This rule shall not apply to any workshop dockets or rulemaking dockets.

~~(4)(3)~~ Any attorney who participates in any proceeding before the commission shall comply with the rules of the commission and shall adhere to the standards of ethical conduct required of attorneys before the courts of Missouri by all of the provisions of Missouri Supreme Court Civil Rule 4, Code of Professional Responsibility, particularly in the following respects:

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

1. Evidence regarding the occurrence of the transaction involved;
- ~~3.~~ 2. Physical evidence, the performance or results of any examinations or tests or the refusal or failure of a party to submit to examinations or tests;
- ~~4.~~ 3. His/her opinion as to the merits of the claims, defenses or positions of any interested person;

2. ~~4.~~ The character, credibility or criminal record of a party, witness or prospective witness;

**5. The character, credibility, honesty or impartiality, of any commission decisionmaker; and,**

~~5.~~ **6.** Any other matter which is reasonably likely to interfere with a fair hearing.

**(Supreme Court Rule 4-3.4 – Fairness to Opposing Party and Counsel; Supreme Court Rule 4-3.5 – Impartiality and Decorum of the Tribunal; Supreme Court Rule 4-3.6 – Trial Publicity)**

(B) An attorney shall exercise reasonable care to prevent employees and associates from making an extra-record statement as that s/he the attorney is prohibited from making; and

(C) These restrictions do not preclude an attorney from replying to charges of misconduct publicly made against him/her that attorney, or from participating in the proceedings of legislative, administrative or other investigative bodies.

~~(2)~~**(4)** In all any proceedings before the commission, no attorney shall communicate, or cause another to communicate, as to the merits of the cause with any ~~commissioner or examiner~~ **commission decisionmaker** before whom proceedings are pending except:

(A) In the course of official proceedings in the cause; and

(B) In writing directed to the secretary of the commission with copies served upon all other counsel of record and non-party participants.

**(C) Any non-party participants to a case pending before the commission, as defined in subsection 1(G), shall file an appropriate entry of appearance and shall define the parameters of their participation in the case.**

**(5) An attorney shall exercise reasonable care to prevent employees, officers and agents of his client from communicating with any commissioner decisionmaker, directly or indirectly, as to the merits of the cause.**

~~(3)~~**(6)** No person who has served as a commissioner or as an employee of the commission, after termination of service or employment, shall appear before the commission, as representative of, or an advocate for any party, in relation to any case, proceeding or application with respect to which s/he was directly involved and in which s/he personally participated or had substantial responsibility in during the period of service or employment

with the commission. This prohibition does not apply to former commission employees that may be summoned to testify as witnesses before the commission in cases in which they would provide sworn testimony and be subject to cross-examination.

(4)(7) It is improper for any person, group, or entity 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 any commission decisionmaker.

(5)(8) Requests for expeditious treatment of matters pending with the commission are improper except when filed with the secretary and copies served upon all other parties.

(6)(9) No member of the commission, ~~presiding officer or employee of the commission~~ commission decisionmaker shall invite or knowingly entertain any prohibited *ex parte* communication, or make any such communication to any party or counsel or agent of a party, or any other person who s/he the commission decisionmaker has reason to know may transmit that communication to a party or party's agent.

(8)(10) As Because prohibited *ex parte* communications (either oral or written) may occur inadvertently, any member of the commission, hearing examiner commission decisionmaker or employee of the commission who receives that communication shall, if required pursuant to section 11, immediately as soon as reasonably possible prepare a written report concerning the communication and submit it to the chairman and each member of the commission make it a public record by filing it in the relevant pending case(s). The report shall identify the employee and the person(s) any person known to have who participated in the ex parte communication, any person known to have witnessed the ex parte communication, and any person known to have drafted or read the ex parte communication (if in written form), the circumstances which resulted in the communication, the substance of the communication, and the relationship of the communication to a the particular matter at issue before the commission.

(11) The person, group or entity initiating the prohibited ex parte communication has the primary obligation to file the ex parte report. However, every person participating in the ex parte communication shall have an obligation to file an ex parte report to ensure that a report is filed. If one participant in the ex parte communication files an ex parte notice, the remaining participants are not required to file an additional notice, unless a remaining participant disagrees with, or wishes to report additional substance with regard to, the prohibited ex parte communication that was not reported in the filed notice.

(12) Any commission decisionmaker receiving a prohibited ex parte communication may, in that person's discretion, or the commission en banc, may, by order, direct the person, group or entity initiating the prohibited ex parte communication to file an ex parte report. Failure to comply with such an order is deemed a violation of this



rule.

(13) A commission decisionmaker that receives a prohibited *ex parte* communication shall not consider this communication when deciding the merits of the proceeding.

(14) Because the statutory mandate of Public Counsel's participation in any case before the commission is discretionary pursuant to Sections 386.710.2 and .3, RSMo, and because the commission needs to be apprised of all parties, or non-party participants, that are participating in any matter to properly enforce this rule, Public Counsel shall, within the intervention deadline set by the commission for a pending matter, file a pleading with the commission affirmatively declaring if it will be a participant in the matter or affirmatively declaring if it will not participate in the matter. If Public Counsel initially declares it is not participating in a matter, late intervention or participation by Public Counsel may be granted by leave of the commission upon the filing of a proper motion stating good cause for Public Counsel's change in position. (\*\* This section could also be added to the Commission's rule on pleadings, 4 CSR 240-2-080.)

(15) Pursuant to its own investigatory power, and at its discretion, the commission's staff, with or without direct authorization from the commissioners, or any individual commission decisionmaker, or group of commission decisionmakers, or the commissioners *en banc*, may investigate any party alleged to have violated this rule or perceived to be in violation of this rule. That investigation may include, but is not limited to, the investigation of any party, any party's officers, agents, employees or witnesses, or any attorney or law firm representing a party, or any non-party participant or the law firm or attorney representing that participant.

(16) If a prohibited *ex parte* communication is made by a party, its officers, agents or employees, or any attorney or law firm representing any proper party to an on-going action before the commission, or any non-party participant or the law firm or attorney representing that participant, the commission, may, at its discretion, require the party, the party's officers, agents or employees, or any attorney or law firm representing any proper party to an on-going action before the commission, or any non-party participant or the law firm or attorney representing that participant, to show cause why it or its claims, interests, defenses, requests, demands, objections or contentions or pleadings seeking any action or relief of any type in any proceeding should not be dismissed, denied, disregarded, or otherwise adversely affected on account of the violation(s).

(17) In addition to any direct violation of any subsection of this rule, any proper party to an on-going action before the commission or any of the party's officers, agents or employees, or any attorney or law firm representing any proper party to an on-going action before the commission, or any non-party participant or the law firm or attorney representing that participant to an on-going action before the commission, who is found to have invoked this rule, or any subdivision of this rule, in any written pleading or filing, or in any oral motion, request, demand, contention or objection, of

any kind, for any improper purpose, including, but not limited to, to harass, cause unreasonable delay, gain tactical advantage or otherwise impair or interfere with the proceeding, shall be deemed to be in violation of this rule. The term "on-going action," as used in this subsection includes not only contested cases, but also non-contested actions or proceeding before the commission,

(18) The commission may, at its discretion, upon a finding of any violation of this rule, impose upon any person or entity as described in sections (16) and (17) of this rule, any sanction or penalty pursuant to its authority deemed appropriate.

(19) Sanctions and penalties imposed for violating this rule may include, but are not limited to: authorizing its Staff to pursue a contempt proceeding with the circuit court; striking any party's or participant's pleadings, filings or testimony from the proceeding; disqualifying any of the party's officers, agents, employees or witnesses from participation in the proceeding; disqualifying an attorney from participation in the proceeding; disqualifying any non-party participant from participation in the proceeding; or dismissing any party from the proceeding or dismissing or denying any or all of a party's claims, interests, defenses, requests, demands, objections or contentions or pleadings seeking any action or relief of any type from the commission.

(20) Because the statutory mandate of Public Counsel's participation precludes the Commission from imposing a sanction of completely disqualifying Public Counsel as a party, if, in any pending proceeding before the Commission in which Public Counsel has affirmatively declared its participation, pursuant to section 14, an individual attorney assigned by Public Counsel to participate on its behalf is found to have violated any part of this rule, including section 17, the Commission may, in its discretion, disqualify that attorney as a participant in the matter and Public Counsel shall assign a different attorney to continue its participation.

(21) No provision of this rule shall be interpreted to preclude a commission decisionmaker, or the commission as an entity, from publicly replying to charges, allegations, claims, or contentions of misconduct, the appearance of impropriety, actual impropriety or actual bias, publicly made against the commission decisionmaker or the commission as an entity, or from participating in the proceedings of legislative, administrative or other investigative bodies.

*AUTHORITY: section 386.410, RSMo 1986.\* Original rule filed Dec. 19, 1975, effective Dec. 29, 1975. Amended: Filed April 26, 1976, effective Sept. 11, 1976. \*Original authority: 386.410, RSMo 1939, amended 1947, 1977, 1996.*

## **Proposed Amendments to Rule 4 CSR 240-2.040:**

### **4 CSR 240-2.040 Practice Before the Commission**

*PURPOSE: This rule sets forth who may practice as an attorney before the commission.*

(1) The general counsel represents the staff in investigations, contested cases and other proceedings and appears for the commission in all courts and before federal regulatory bodies; and in general performs all duties and services as attorney and counsel to the commission which the commission may reasonably require.

(2) The public counsel represents the interests of the public before the commission.

(3) Attorneys who wish to practice before the commission shall fully comply with its rules and also comply with one (1) of the following criteria:

(A) An attorney who is licensed to practice law in the state of Missouri, and in good standing, may practice before the commission;

(B) A nonresident attorney who is a member of the Missouri Bar in good standing, but who does not maintain an office for the practice of law within the state of Missouri, may appear as in the case of a resident attorney;

(C) Any attorney who is not a member of the Missouri Bar, but who is a member in good standing of the bar of any court of record may petition the commission for leave to be permitted to appear and participate in a particular case under all of the following conditions:

1. The visiting attorney shall file in a separate pleading a statement identifying each court of which that attorney is a member and certifying that neither the visiting attorney nor any member of the attorney's firm is disqualified to appear in any of these courts;

2. The statement shall designate some member in good standing of the Missouri Bar having an office within Missouri as associate counsel; and

3. The designated Missouri attorney shall simultaneously enter an appearance as an attorney of record.

(4) An eligible law student may petition the commission to be allowed to appear. Such application must comply with any applicable rules or statutes.

(5) Practice by Nonattorneys. A natural person may represent himself or herself. Such practice is strictly limited to the appearance of a natural person on his or her own behalf

and shall not be made for any other person or entity.

(6) After an attorney has entered an appearance for any party, the attorney may withdraw only by leave of the commission.

**(7) Any attorney found to be in repetitive violation of the commission's rules, or in singular violation of commission rules 4 CSR 240-4.010 through 4 CSR 240-4.020, or commission rule 4 CSR 240-2.121 (\*\*newly proposed rule\*\*), at the discretion of the commission, may be barred from practice before the commission for any period of time, including indefinitely or permanently, as is found appropriate by the commission.**

*AUTHORITY: section 386.410, RSMo Supp. 1998.\* Original rule filed Dec. 19, 1975, effective Dec. 29, 1975. Amended: Filed Nov. 7, 1984, effective June 15, 1985. Rescinded and readopted: Filed March 10, 1995, effective Nov. 30, 1995. Rescinded and readopted: Filed Aug. 24, 1999, effective April 30, 2000. \*Original authority: 386.410, RSMo 1939, amended 1947, 1977, 1996.*

***Smith v. Public Service Commission***, 336 SW2d 491 (Mo. 1960). Commission Rule 12.07 allowing individual party before commission held not to authorize non-lawyer individual to act as attorney for twenty-five other individuals. See also ***Reed v. Labor and Industrial Relations***, 789 SW2d 19 (Mo. banc 1990) and ***Clark v. Austin***, 340 Mo. 647, 101 SW2d 977 (Mo. 1937).

## **Proposed Amendments to Rule 4 CSR 240-2.116:**

### **4 CSR 240-2.116 Dismissal**

*PURPOSE: This rule prescribes the conditions under which the commission or an initiating party may dismiss a case.*

(1) An applicant or complainant may voluntarily dismiss an application or complaint without an order of the commission at any time before prepared testimony has been filed or oral evidence has been offered, by filing a notice of dismissal with the commission and serving a copy on all parties. Once evidence has been offered or prepared testimony filed, an applicant or complainant may dismiss an action only by leave of the commission, or by written consent of the adverse parties.

(2) Cases may be dismissed for lack of prosecution if no action has occurred in the case for ninety (90) days and no party has filed a pleading requesting a continuance beyond that time.

(3) A party may be dismissed from a case for failure to comply with any order issued by the commission, including failure to appear at any scheduled proceeding such as a public hearing, prehearing conference, hearing, or mediation session.

**(4) The commission may, at its discretion, upon a finding of repetitive violations of the commission's rules, or any singular violation of commission rules 4 CSR 240-4.010 through 4 CSR 240-4.020, dismiss any proper party to an on-going action before the commission.**

**(5) The commission may, at its discretion, upon a finding of any singular violation of commission rule 4 CSR 240-2.121 (\*\*newly proposed rule\*\*), dismiss any proper party to an on-going action before the commission.**

## Newly Proposed Rule 4 CSR 240-2.121:

### 4 CSR 240-2.121 Commissioners as Administrative Decisionmakers

*PURPOSE: This rule states the duties of Commissioners and the procedure for disqualifying them.*

(1) Each commissioner shall have the duty to conduct full, fair and impartial hearings, to take appropriate action to avoid unnecessary delay in the disposition of cases and to maintain order and proper decorum at hearings. Each commissioner may take action as may be necessary and appropriate to the discharge of her or his duties, consistent with the statutory authority or other authorities under which the commission functions and with the rules and policies of the commission.

(2) Each commissioner, at the time of rendering a decision in a contested case, as defined in Section 536.010(4), RSMo, to be proceedings before the agency in which legal rights, duties or privileges of specific parties are required by law to be determined after hearing, shall certify by affidavit that they have complied with Section 536.080(2), RSMo, that prior to rendering their final decision or joining in rendering a final decision, the commissioner has either heard all of the evidence, has read the full record including all the evidence, or has personally considered the portions of the record cited or referred to in the arguments or briefs.

(3) Whenever any proper party to a commission proceeding believes a commissioner, for any reason, should be disqualified or recused from rendering a decision in a particular case, that party may file with the secretary of the commission a motion to disqualify or for recusal with affidavits setting forth the grounds alleged for disqualification or recusal. A copy of the motion shall be served by the commission on the individual commissioner whose removal is sought and the commissioner shall have ten days from the date of service within which to reply.

(4) Any proper party to a commission proceeding filing a motion to disqualify or for recusal shall:

(A) State with particularity the grounds alleged for the disqualification or recusal;

(B) provide competent and substantial evidence in the form of sworn depositions, sworn testimony, authenticated documents, and any other evidence the applicant believes supports its allegations;

(C) provide an affidavit sworn and signed by the movant, and notarized by a commissioned notary public, representing that movant, by presenting or maintaining any claims, allegations, requests, demands, contentions or arguments in the motion for disqualification or recusal, is certifying to, and attesting to, the best of the movant's knowledge,

information, and belief, formed after an inquiry reasonable under the circumstances, that—

1. all claims, allegations, requests, demands, contentions and arguments in the motion for disqualification or recusal are not presented or maintained for any improper purpose, such as to harass, or to cause unnecessary delay or needless increase in the cost of litigation; or in an attempt to bring any improper pressure, whether public or private, or direct or indirect, to bear on the commission and its decision making process;

2. all claims, allegations, requests, demands, contentions and arguments in the motion for disqualification or recusal are warranted by existing law and are nonfrivolous; and

3. all claims, allegations, requests, demands, contentions and arguments and other factual contentions in the motion for disqualification or recusal have competent and substantial evidentiary support and are not based upon hearsay, inference or innuendo.

(5) There is a strong legal presumption that the commissioners act honestly and impartially, and a party seeking disqualification or recusal of a commissioner has the burden to overcome that presumption. The motion for disqualification or recusal must expressly address this presumption and state with particularity the substantial and competent evidence being offered to establish a sufficient factual basis to overcome the presumption. *State ex rel. AG Processing Inc. v. Thompson*, 100 S.W.3d 915, 919-920 (Mo. App. 2003); *Burgdorf v. Bd. of Police Comm'rs*, 936 S.W.2d 227, 234 (Mo. App. 1996).

(6) The burden is upon the movant to establish by clear and convincing evidence that the appropriate standard for disqualification has been met. The motion for disqualification or recusal must expressly address the burden of proof and state with particularity the substantial and competent evidence being offered satisfy the burden of proof. *Orion Security, Inc. v. Board Of Police Com'rs Of Kansas City*, 90 S.W.3d 157, 164 (Mo. App. 2002).

(7) The appropriate standards for disqualification or recusal, as articulated by the courts of Missouri, are the applicable standards that must be met to sustain a motion for disqualification or recusal of a commissioner. Those standards include:

(A) To establish actual bias on the part of a commissioner, the party must prove that the Commissioner has formulated an "unalterable prejudgment of the operative adjudicative facts of the case." *Fitzgerald v. City of Maryland Heights*, 796 S.W.2d 52, 59 (Mo. App. 1990).

(B) To establish the existence of actual impropriety on the part of a commissioner, the party must prove 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. *Union Elec. Co. v. Pub. Serv. Comm'n*, 591 S.W.2d 134, 137 (Mo. App. 1979).

(C) To establish an appearance of impropriety, the party would have to prove, 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. *State v. Kinder*, 942 S.W.2d 313, 321 (Mo. banc 1996).

(8) Any party filing a motion for disqualification or recusal shall state, with particularity: (a) the specific legal theory that is the basis for the motion; (b) the appropriate standard(s) that are applicable as delineated in subsection (7); and, (c) the substantial and competent evidence being offered meet the appropriate legal standard(s) that would require disqualification or recusal.

(9) No party moving for disqualification or recusal shall direct its motion to the commissioners *en banc*, and shall, as a part of its motion, acknowledge, in a separately numbered paragraph, that the commission *en banc*, has no authority to order the recusal or disqualification of a fellow commissioner as decided in *Union Elec. Co. v. Pub. Serv. Comm'n*, 591 S.W.2d 134 (Mo. App. 1979).

(10) Failure to comply with the procedural requirements for filing a motion to disqualify a commissioner or for requesting recusal shall be separate grounds for denial of the motion.

(11) Any proper party to any on-going action, whether contested or non-contested, before the commission, who is found to have invoked this rule or any subdivision of this rule, in any written pleading or filing, or in any oral motion, request, demand, argument, contention or objection, of any kind, for any improper purpose, including, but not limited to, to harass, cause unreasonable delay, gain tactical advantage or otherwise impair or interfere with the proceeding, shall be deemed to be in violation of this rule.

(12) The commission may, at its discretion and pursuant to its authority, upon a finding of any violation of this rule, impose any sanction or penalty upon the violator that the commission deems appropriate.

(13) Sanctions and penalties imposed for violating this rule may include, but are not limited to: authorizing its Staff to pursue a contempt proceeding with the circuit court; striking any party's or participant's pleadings, filings or testimony from the proceeding; disqualifying any of the party's officers, agents, employees or witnesses



from participation in the proceeding; disqualifying an attorney or law firm from participation in the proceeding; or dismissing any party from the proceeding or dismissing or denying any or all of the party's claims, interests, defenses, requests, demands, arguments, objections or contentions or pleadings seeking any action or relief of any type from the commission.

(14) Because the statutory mandate of Public Counsel's participation precludes the Commission from imposing a sanction of completely disqualifying Public Counsel as a party, if the attorney assigned by Public Counsel to participate in any matter, whether contested or non-contested, for which Public Counsel is found to have violated this rule, the Commission may, in its discretion, disqualify that attorney as a participant in the matter and Public Counsel shall assign a different attorney to continue its participation.

(15) If a motion for disqualification or recusal is denied, the Movant is not required to file a motion or request for reconsideration of the decision prior to seeking a writ of prohibition in a court of competent jurisdiction.

*AUTHORITY: section 386.410, RSMo Supp. 1998. \*Original authority: 386.410, RSMo 1939, amended 1947, 1977, 1996.*