

**Robin Carnahan**

Secretary of State  
Administrative Rules Division

**RULE TRANSMITTAL**

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APR 21 2010

SECRETARY OF STATE  
ADMINISTRATIVE RULES

Rule Number 4 CSR 240-4.020

**COPYED**

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

APR 22 2010

Name of person to call with questions about this rule:

Content Nancy Dippell Phone 573-751-4393 FAX

Missouri Public  
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Data Entry same

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

**TYPE OF RULEMAKING ACTION TO BE TAKEN**

☐ Emergency rulemaking, include effective date

☐ Proposed Rulemaking

☐ Withdrawal

☐ Rule Action Notice

☐ In Addition

☐ Rule Under Consideration

☒ Order of Rulemaking

Effective Date for the Order

☒ Statutory 30 days OR Specific date

Does the Order of Rulemaking contain changes to the rule text? ☐ NO

☒ YES—LIST THE SECTIONS WITH CHANGES, including any deleted rule text:

Changes have been made to sections (1), (3), (4), (5), (6), (7), (8), (9), (10), and (11).

Sections (1)(N), (4)(A), and (4)(C) have been deleted.

See attached sheet for additional changes.

Small Business Regulatory  
Fairness Board (DED) Stamp

SMALL BUSINESS  
REGULATORY FAIRNESS BOARD

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JOINT COMMITTEE ON

MAR 22 2010

ADMINISTRATIVE RULES

Rule Transmittal

Additional Changes to Rule 4 CSR 240-4.020:

Section (2) has moved to (3)(A).

Section (3) has moved to (3)(B).

Section (4) has moved to (10).

Section (5) has moved to (7).

Section (6) has moved to (4).

Section (7) has moved to (5).

Section (8) has moved to (6).

Section (9) has moved to (15).

Section (10) has moved to (3)(D).

Section (11) has moved to (14).

Sections (1)(I), (2), (3)(C), (8), (9), (10)(A), (10)(E), (11), (12), (13), (14)(F)&(G), and (16) have been added.



**Commissioners**

**ROBERT M. CLAYTON III**  
Chairman

**JEFF DAVIS**

**TERRY M. JARRETT**

**KEVIN GUNN**

**ROBERT S. KENNEY**

**Missouri Public Service Commission**

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**ROBERT SCHALLENBERG**  
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**NATELLE DIETRICH**  
Director, Utility Operations

**STEVEN C. REED**  
Secretary/General Counsel

**KEVIN A. THOMPSON**  
Chief Staff Counsel

*Apr. 12, 2010*  
March 22, 2010

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

Dear Secretary Carnahan:

**Re: 4 CSR 240-4.020 Ex parte and Extra-Record Communications**

**CERTIFICATION OF ADMINISTRATIVE RULE**

I do hereby certify that the attached is an accurate and complete copy of the order of rulemaking lawfully submitted by the Missouri Public Service Commission for filing.

Statutory Authority: Sections 386.250, RSMo 2000.

If there are any questions, please contact: Nancy Dippell, Deputy Chief Regulatory Law Judge  
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*Nancy Dippell*  
Nancy Dippell  
Deputy Chief Regulatory Law Judge

**Title 4 – DEPARTMENT OF ECONOMIC DEVELOPMENT  
Division 240 – Public Service Commission  
Chapter 4—Standards of Conduct**

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APR 21 2010

**ORDER OF RULEMAKING**

SECRETARY OF STATE  
ADMINISTRATIVE RULES

By the authority vested in the Public Service Commission under section 386.410, RSMo 2000, the Commission adopts a rule as follows:

**4 CSR 240-4.020 is adopted.**

**COPY**

A notice of proposed rulemaking containing the text of the proposed rule was published in the *Missouri Register* on December 15, 2009 (34 MoReg 2590). Relevant portions of those sections with changes are reprinted here. This proposed rule will become effective thirty (30) days after publication in the *Code of State Regulations*.

**SUMMARY OF COMMENTS:** The public comment period ended January 21, 2010, and a public hearing on the proposed rule was held January 22, 2010. Timely written comments were received from Southwestern Bell Telephone Company, d/b/a AT&T Missouri; The Missouri Energy Development Association (MEDA); CenturyLink; the Office of the Public Counsel, and the Secretary/General Counsel of the Missouri Public Service Commission. In addition, the following witnesses offered testimony at the public hearing on January 22, 2010: Steven C. Reed, Secretary/General Counsel for the Commission; Leo Bub, for AT&T Missouri; Paul Boudreau for MEDA; Becky Kilpatrick for CenturyLink; Lewis Mills, Public Counsel; John Coffman for AARP and the Consumers Council of Missouri; and Stephen Kidwell for AmerenUE. The testimony and comments generally supported the adoption of the rule, but offered specific recommendations for changes in the rule.

**COMMENT 1:** AT&T, CenturyLink, AmerenUE, and MEDA urge the commission to make the rule consistent with section 386.210.1, RSMo, Supp. 2009, by adding a provision that specifically excepts from the ban on ex parte communications those communications that occur outside an agenda meeting or public forum that must be disclosed under Section 386.210.3(3). Centurylink and MEDA also comment that the scope of the rule should be no narrower than the statute.

Public Counsel also commented about how to make the rule consistent with section 386.210. The commenters disagree, however, about the language in subsection 386.210.1, which protects the authority of the Commission to confer "with the members of the public, any public utility or similar commission of this and other states." AT&T reads that clause as if there were a comma behind public utility, such that the statute would protect the Commission's ability to

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confer with members of the public, any public utility, or a similar commission of this and other states. AT&T is thus concerned that the proposed rule does not protect the statutory "right" of a utility to communicate with the Commission so long as the communication is subsequently disclosed. It therefore asks the Commission to add such an exception to the proposed rule. Public Counsel reads the statute more narrowly as protecting the Commission's authority to confer with members of the public and other public utility or similar type commissions, without giving any special protection to the Commission's communications with public utilities. It contends that aspect of the proposed rule should not be changed.

**RESPONSE AND EXPLANATION OF CHANGE:** Whatever the correct interpretation of the statute, the disagreement between AT&T and Public Counsel is largely irrelevant. The statute does not exclude a public utility from the broader "public" and the Commission would have the same ability to communicate with a public utility as any other entity under that statute. Since the proposed rule specifically excepts other communications allowed under Section 386.210.3 from the prohibition against ex parte communications, the Commission will make the regulation consistent with the statute by adding a new subsection (3)(C) which creates a method for ex parte communications to be disclosed. In addition, the Commission will add a new subsection (10)(E) creating an exception for disclosed communications allowed by Section 386.210.3(3).

The Commission also determined that providing a window in which cases could be discussed in a post mortem fashion, especially with its own staff, would be needed. Therefore, the Commission added a new section (13) allowing this communication to take place within thirty days of a case being finally adjudicated. So that there is not confusion about that deadline, the Commission added the definition of "finally adjudicated" in new subsection (1)(I). Because of this change the remaining subsections in section (1) are renumbered.

While making these changes the Commission determined that certain organizational changes would make the rule more understandable. Thus, old sections (2) and (3) were combined as new section (3), and new section (3) was titled "Ex Parte Communications." In addition, proposed section (10) was moved to become new subsection (3)(D) since it relates to ex parte communications specifically.

Because of this reorganization and others explained below, old sections (2) and (3) and their subsections and paragraphs are renumbered as follows: the first sentence of (2) becomes (3)(A); the first and second sentences of (3) become (3)(B); (3)(A)-(C) become (3)(B)1-3. Also, old section: (5) becomes (7); (6)-(8) become (4)-(6); (9) becomes (15); and (11) becomes (14). All references to these sections throughout the rule are amended accordingly. Finally, paragraph (3)(B)3 relates only to ex parte communications and therefore should only refer to the reporting provisions of newly numbered section (4) and not to the other section which is deleted.

**COMMENT 2:** AT&T expressed concern that the proposed rule is unclear about who has the duty to provide notice of an extra-record communication that is unrelated to the pending case, when the communication is initiated by a commissioner, judge, or advisory staff. In particular, section (4)(B) as proposed allows extra record communications between the Commission and a utility regarding problems related to utility service, but requires the person initiating the communication to disclose that communication as required by proposed sections (6), (7), and (8) as applicable.

**RESPONSE AND EXPLANATION OF CHANGE:** Proposed sections (6), (7), and (8) require the person initiating the extra-record communication to provide notice of that communication. Those sections would apply to communications initiated by someone at the Commission the same as they would apply to communications initiated by someone outside the Commission. No change to those sections is made as a result of the comment. Upon review of the rule, however, the Commission determines that other changes to the extra-record portions of the rule would help its clarity.

The reference to disclosure under proposed subsections (4)(A) and (B) is confusing. The commission intends for that section to set out communications which are not considered ex parte communications even though they fall under the definition in subsection (1)(G). Thus, the Commission will delete the second sentence of proposed section (4) and add the clause "if they would otherwise be an ex parte communication" in its place.

The reporting provisions relating to extra-record communications are intended to apply to communications by individuals, not communications that are made by parties or regulated utilities. Because the term "person" is defined as including many different types of entities and parties, the Commission clarifies the definition of "extra-record communication" by replacing the word "person" with the word "individual." This change makes proposed subsection (4)(A) unnecessary in that a communication from a member of the general assembly or other governmental official would be an individual making an extra-record communication under the definition in subsection (1)(G).

Proposed section (4) has numerous changes described elsewhere in this order, and therefore, the Commission has renumbered this section as section (10). Also, the subsections are relettered so that former subsections (B), (D), (E), and (F) become subsections (A), (B), (C), and (D), respectively. Also to clarify between whom the communications have occurred, the Commission makes the first word "Communication" plural in newly numbered subsections (10)(C) and (10)(D) and inserts after it the phrase "between the commission, a commissioner, member of the technical advisory staff or presiding officer and a party or anticipated party." The commission also clarifies that "all" parties must be present and not just any one party under subsection (10)(D) and thus changes "any other party" to "all other parties." In addition, the Commission makes plural and capitalizes "Communications" in new subsection (10)(A) and removes a period at the end of paragraph (10)(A)3. The Commission also

removes the words "that is not a pending case" from newly numbered section (5) because it is confusing to reference a "pending" anticipated case.

**COMMENT 3:** Public Counsel suggests the 30-day prior restriction on communications regarding anticipated contested cases should be expanded to at least 120 days so that parties and the public will be notified of communications that occur well before the filing of such a contested case to prevent the appearance of improper lobbying shortly before the filing. Public Counsel generally comments also that the rule should not prevent communication but should be more inclusive of what is to be reported and made open to the public.

**RESPONSE AND EXPLANATION OF CHANGE:** The commission is mindful of the concern expressed by Public Counsel to have as much public notification as possible. The Commission will expand the definition of "anticipated contested case" found in subsection 1(A) from 30 days to 60 days to include more time before the case is filed. Further, the Commission believes that there should almost never be communications regarding utility specific substantive issues with any potential party. In the rare circumstances where a communication is required, the rule provides for full disclosure to be made. The commission has included section (11) to prohibit such communications. Additionally, section (8) provides notice of communications concerning regulatory issues that are not specific to a single utility, with regulated entities outside of the anticipated contested case or contested case period of time. The Commission also deletes the word "anticipated" from subsection (1)(B) to clarify that an anticipated party is a potential party to a contested case.

Because the reporting requirements for anticipated contested cases are limited to the 60-day window in the definition, the Commission has amended the definition of "substantive issue" in subsection (1)(O) by deleting the words "or anticipated contested case" and adding the words "which have been or are likely to be" in the first sentence. This change will broaden the scope of filings that should be submitted after a communication about a substantive issue so that those reports are not limited to the 60 days prior to the case being filed.

The definition of "extra record communication" in subsection 1(H) has also been modified so that general regulatory policy issues are not exempt from disclosure requirements unless purely de minimis or immaterial. This change will include more communications under the disclosure provisions. The commission also adds the word, "contested" to clarify that extra-record communications are not intended to include communications related to case filings and other communications which are in the record of the case but may not necessarily be presented at a hearing.

In addition, the Commission expands the definition of person in subsection (1)(L) to include "any entity regulated by the commission" as opposed to just public utilities and expands the restrictions on ex parte communications to include those involving "anticipated contested cases" which is added in new subsection (3)(B).

The Commission has also amended the definition of general regulatory policy in newly numbered subsection (1)(J) by giving it a specific definition. The

proposed definition pointed to section 386.210.4, RSMo, however that statute does not define general regulatory policy. Because the new definition is more specific it was necessary for the Commission to include the words "an issue or case" in place of "case" under new subsection (3)(B).

The Commission also removes the word "rate" in new subsection (3)(B) so that the rule consistently refers to all cases. Because of that change the Commission deletes the definition of "rate case" in proposed subsection (1)(N) as it is no longer necessary.

Further, the Commission adds a new section (2) which provides that a regulated entity that intends to file a case likely to be a contested case file a notice describing the type of case and the issues likely to be presented to the Commission at least 60 days before filing the case. Any case filed without having first filed the required notice is to be rejected by the Commission unless the Commission waives the rule for good cause shown.

To eliminate some of the redundancy and burden on the parties filing notices, the Commission has removed the physical service requirements under newly numbered subsections (4)(A) and (B). This requirement is no longer necessary with the Commission's electronic filing and information system (EFIS). With that system the parties to the official case will receive electronic notice of these filings.

**COMMENT 4:** Section (6)(B) of the proposed rule requires the person who initiates an extra-record communication to file a memorandum disclosing and describing the communication. As an alternative, the rule allows a recording or transcription of the conversation to be filed. Public Counsel commented that the requirement should be flipped so that a recording or transcription would be the default and a descriptive memorandum would be allowed only if no recording or transcription were available. Public Counsel suggests that a few hand-held tape recorders should be available to the commissioners to facilitate such recordings.

**RESPONSE AND EXPLANATION OF CHANGE:** This rule attempts to balance the need for openness against the need for the Commission and commissioners to conduct commission business. It is not reasonable to expect the commissioners and other commission employees to record or transcribe every extra-record communication that may occur. The commission determines, however, that the rule should provide additional information to the public about how it conducts its business, and specifically what contacts it has with regulated entities. Therefore, the Commission will add new sections (8) and (9).

New section (9) provides that the commissioners will have public electronic calendars on the Commission's website detailing their relevant communications. New section (8) details which communications shall be reported and the method for reporting those communications. The additions of these sections should provide maximum openness to the public while not being so cumbersome that the commissioners cannot conduct commission business.

While reviewing the rule and these comments the Commission also determined that the words "for ensuring the public trust" in the Purpose Clause of



the rule are not accurate as the Commission cannot in fact "ensure" the public trust. The commission determines that "to promote the public trust" is a more accurate representation of the purpose of the rule and therefore, the Commission has made that amendment to the Purpose Clause.

**COMMENT 5:** Public Counsel suggests the rule include a provision making the commissioner's electronic calendars and appointments more accessible to the public.

**RESPONSE AND EXPLANATION OF CHANGE:** The commission agrees with the comment of Public Counsel and has included new sections (8) and (9) as described above. In addition, so that the rule is consistent, the Commission added "(8)" in the text of new (10), (14)(B) and (C), and (15).

**COMMENT 6:** Public Counsel suggests adding a provision to the rule that would require commissioners, the presiding officer, or technical advisory staff to file a disclosure of an extra-record communication if the initiating party fails to do so.

**RESPONSE AND EXPLANATION OF CHANGE:** Proposed sections (6)-(8) deal with the issue of reporting extra-record communications. Those sections have been renumbered and are now sections (4)-(6). New sections (4) and (5) provide for the person who initiates an extra-record communication to give notice of the communication. New section (6) provides for the commissioner, technical advisory staff, or the presiding officer to give notice of the extra-record communication related to a pending case when the person initiating the communication does not do so. The Commission is not changing new section (6) substantially, but determines that it should specify that the person filing the notice do so as soon as practicable.

While reviewing these sections pursuant to this comment, the Commission determined that the requirement in new section (4) that an extra-record communication "shall be filed on the next business day following" the communication, may not be practical. Therefore, the Commission determines that the time for filing should be changed to "within three business days." In addition, for consistency the Commission will change "within five business days" to "within three business days" for the filing in new section (5). Finally, the Commission notes that the end of the last sentence in new section (5) is redundant and the Commission shall delete "and shall also include all information regarding the communication that [proposed] subsections (6)(A) and (B) require."

**COMMENT 7:** MEDA is concerned that the proposed rule does not include the old rule's restrictions on attorney and party conduct outside the hearing process. It proposes the old rule's restrictions be incorporated into the new rule. Steve Reed, General Counsel/Secretary of the Commission, filed a comment offering the same suggestion.

**RESPONSE AND EXPLANATION OF CHANGE:** The commission agrees with these comments. The previous rule is being rescinded simultaneously with this rule and certain of its provisions should remain. Therefore, the Commission has included new subsections (F) and (G) to proposed section (11) now renumbered

as section (14). The commission is also including new sections (11) and (12). New subsections (14)(F) and (G) and new section (12) are similar to language from the previous rule. New section (11) is also similar to the language in section (2) of the previous rule, however, the Commission has revised that section so that it applies to all persons, not just attorneys, who are likely to become a party to a future contested case.

In addition, to include an attorney's law firm as provided in the previous rule, the Commission has added "or any law firm the attorney is associated with" to the introductory language of newly numbered section (14). Also, "extra-record" was deleted from new subsection (14)(B) and the specific sections are referenced instead. The words "ex parte" are added in place of "pre-filing extra record" in subsection (14)(D) to make the rule consistent. And to make the rule consistent and provide for the best notice to the public, language necessary to include section (11) was added to new section (15) and subsections (14)(A), (B), and (C). Finally, because new subsections (14)(F) and (G) were added, the word "and" was removed from subsection (14)(D) and the period was replaced with a semicolon in subsection (14)(E).

**COMMENT 8:** MEDA asks the Commission to include some additional "safe harbor" provisions that would expand proposed subsection 4(B)'s list of communications from a utility that are exempted from the definition of an ex parte contact.

**RESPONSE AND EXPLANATION OF CHANGE:** The Commission agrees with MEDA's comment and in response has added and amended the language of the subsection which is now numbered subsection (10)(A). The Commission has amended paragraph (10)(A)4 so that it is more general as to the security or reliability of utility facilities, and not just an imminent threat. The Commission has also added paragraphs 6-9 so that subsection (10)(A) exempts from ex parte communications matters before state and federal agencies and committees, information regarding a regional transmission organization, labor matters not part of a pending case, and matters related to the safety of personnel. Further, the Commission clarified the definition of ex parte communication in subsection (1)(G) so that it does not include the communications exempted in new section (10) or communications that are de minimis or immaterial.

**COMMENT 9:** Steven Reed, General Counsel/Secretary of the Commission, proposed that language in section (4)(D) of the proposed rule concerning the Commission's investigative powers be made more general to avoid limiting any powers the Commission may have beyond the three statutory chapters delineated in the proposed rule.

**RESPONSE AND EXPLANATION OF CHANGE:** The commission has made the change suggested by Mr. Reed. Rather than refer to investigative powers as established in Missouri Revised Statutes Chapters 386, 393 and 700, proposed subsection (4)(D), renumbered subsection (10)(D), now simply refers to investigative powers established by Missouri law. Because of this change, proposed subsection (4)(C) which created an exemption for communications

related to Chapter 700 is no longer necessary, and the Commission has deleted that subsection.

**COMMENT 10:** Steven Reed, General Counsel/Secretary of the Commission, suggested that the new rule should incorporate a provision from the old rule that prohibits appearances by former commissioners or commission employees in a case in which they were directly involved while at the Commission.

**RESPONSE AND EXPLANATION OF CHANGE:** Mr. Reed's suggestion is well taken and the old rule's prohibition has been included in the final rule as new section (16).

**COMMENT 11:** Steven Reed, General Counsel/Secretary of the Commission, suggested that the new rule should include a definition of "Staff" to distinguish the Commission's staff, who are treated as a party that appears before the Commission in a contested case, from the Commission's technical advisory staff, who are held under this rule to the same communication and disclosure standards as the commissioners.

**RESPONSE AND EXPLANATION OF CHANGE:** After reviewing the rule, the Commission determined that rather than include a new definition of staff, the Commission will clarify the rule where necessary. Thus, the Commission has changed the definition of party so that where another rule otherwise defines the role of the staff of the Commission as only advisory, the Commission staff will not be considered a party under this rule. Also, in new subsection (10)(B) the words "any employee of the commission is substituted for "commission staff."

**COMMENT 12:** AARP and the Consumers Council of Missouri also commented jointly through their counsel that they were in agreement with Public Counsel's comments and with those made by MEDA in that the rule should apply equally to all parties and should promote vigorous and robust communication, make a distinction between contested cases and legislative matters, and provide for attorney conduct during proceedings.

**RESPONSE:** The Commission addressed these comments elsewhere in the rule and therefore makes no additional changes in response to this comment.

#### **EXPLANATION OF OTHER NON-SUBSTANTIVE CHANGES:**

As the Commission has reexamined the proposed rule, it has found several instances in which the proposed rule can be made more understandable by making minor language changes and a punctuation change without changing the substance of the rule. Those changes, referring to the current numbering, are: an unnecessary period is removed from subsection (1)(G); in section (7) the word "evidence" replaces the words "the record"; and in section (10) the words "violate section" is removed and the more accurate phrase "be prohibited by or subject to the disclosure and notice requirement of sections" is added.

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

*PURPOSE: To set forth the standards to promote the public trust in the commission with regard to pending filings and cases. This rule regulates communication between the commission, technical advisory staff, and presiding officers, and anticipated parties, parties, agents of parties, and interested persons regarding substantive issues that are not part of the evidentiary record.*

**(1) Definitions.**

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

(B) Anticipated party—A person who anticipates, knows, or should know that such person will be a party to a contested case.

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

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

(E) Commissioner—Means one (1) of the members of the commission.

(F) Discussed case—Each contested case or anticipated contested case whose substantive issues are the subject of an extra-record communication regulated under this rule.

(G) Ex parte communication—Any communication outside of the contested case hearing process between the commission, a commissioner, a member of the technical advisory staff, or the presiding officer assigned to the proceeding and any party or anticipated party, or the agent or representative of a party or anticipated party, regarding any substantive issue. Ex parte communications shall not include a communication regarding general regulatory policy allowed under section 386.210.4, RSMo, communications listed in section (3) of this rule, or communications that are de minimis or immaterial.

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

(I) Finally adjudicated—A decision of the commission in a contested case which is no longer subject to appeal.

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

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

(K) Party—Any applicant, complainant, petitioner, respondent, or intervenor in a contested case before the commission. Commission staff and the public counsel are also parties unless they file a notice of their intention not to participate in the relevant proceeding within the period of time established for interventions by commission rule or order, or where staff serves in an advisory capacity pursuant to any commission rule.

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

(M) Presiding officer—means a commissioner, or a law judge licensed to practice law in the state of Missouri and appointed by the commission to preside over a case.

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

(O) Substantive issue—The merits, specific facts, evidence, claims, or positions which have been or are likely to be presented or taken in a contested case. The term substantive issue does not include procedural issues, unless those procedural issues are contested or likely to materially impact the outcome of a contested case.

(P) Technical advisory staff—Shall have the same meaning as in section 386.135, RSMo.

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

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

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

### (3) Ex Parte Communications

(A) No party or anticipated party shall initiate, participate in, or undertake, directly or indirectly, an ex parte communication.

(B) A commissioner, technical advisory staff, or the presiding officer assigned to a proceeding shall not initiate, participate in, or undertake, directly or indirectly, an ex parte communication regarding a contested case or anticipated contested case. However, it shall not constitute participation in or undertaking an ex parte communication if such person:

1. Does not initiate the communication;
2. Immediately terminates the communication, or immediately alerts the initiating person that the communication is not proper outside the

hearing process and makes a reasonable effort to terminate the communication; and

3. Files notice in accordance with section (4) of this rule, as applicable.

(C) Should an ex parte communication occur, the party or anticipated party involved in such communication shall file a notice in the case file if such exists or if not, with the secretary of the commission. Such notice shall provide the information required in section (4) of this rule.

(D) The secretary of the commission shall create a repository for any notice of ex parte communication filed in advance of an anticipated contested case. Once such a case has been filed, the secretary shall promptly file any such notices in the official case file for each discussed case.

(4) A person who initiates an extra-record communication regarding a pending case shall within three (3) business days following such communication give notice of that communication as follows:

(A) If the communication is written, the initiating person or party shall file a copy of the written communication in the official case file for each discussed case; or

(B) If the communication is not written, the initiating person shall file a memorandum disclosing the communication in the official case file for each discussed case. The memorandum must contain a list of all participants in the communication; the date, time, location, and duration of the communication; the means by which the communication took place; and a summary of the substance of the communication and not merely a listing of the subjects covered. Alternatively, a recording or transcription of the communication may be filed, as long as that recording or transcription indicates all participants and the date, time, location, duration, and means of communication.

(5) A person who initiates an extra-record communication regarding an anticipated contested case shall within three (3) business days of the later of becoming a party to the contested case or the conversion of the case to a contested case, give notice of the extra record communication. The notice shall be made in the manner set forth in subsections (4)(A) and (B).

(6) In addition to sections (4) or (5) of this rule, if an extra-record communication regarding a pending case is initiated by a person not a party to the discussed case, the commissioner, the technical advisory staff, or the presiding officer assigned to the discussed case shall give notice of the extra-record communication in the manner set forth in subsections (4)(A) and (B) as soon as practicable after learning of the person's failure to file such notice.

(7) Unless properly admitted into evidence in subsequent proceedings, an extra-record communication shall not be considered as part of the record on which a decision is reached by the commission, a commissioner, or presiding officer in a contested case.

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

(A) If the communication is written:

1. If no contested case or anticipated contested case is pending, no notice is required; or

2. If a contested case or anticipated contested case is pending, notice of extra record communication shall be filed in accordance with section (4) of this rule. However, any information which is designated by the communicator as highly confidential or proprietary, under federal or state law, or commission rule, shall not be subject to disclosure.

(B) If the communication is oral:

1. If no contested case or anticipated contested case is pending, the regulated entity shall provide a document to such commissioner or technical advisory staff detailing the participants in the communication, date, approximate time, location, means by which the communication took place and the subjects covered; or

2. If a contested case or anticipated contested case is pending, notice shall be filed in the case file and posted on the commissioner's public calendar forty-eight (48) hours prior to such conversation. A representative of the office of the public counsel shall be provided an opportunity to attend the meeting in person or by other reasonable means.

A. Following such communication, a notice of extra record communication shall be filed by the person who initiated the communication in accordance with section (4) of this rule; and

B. Inadvertent communication, or any communication which becomes subject to this subparagraph, shall be terminated immediately and a notice of extra record communication shall be filed by the person initiating the communication in accordance with section (4) of this rule.

(9) Each commissioner shall include a public calendar on the commission's website which shall provide notice of communications required to be disclosed by section (8), regarding regulatory issues occurring after the effective date of this rule with representatives of entities regulated by the commission, regardless of whether a contested case is pending. However, communications which are de minimis or immaterial are not required to be disclosed. A commissioner's technical advisory staff shall note any such communications he/she is involved in on his/her commissioner's public calendar.

(10) The following communications shall not be prohibited by or subject to the disclosure and notice requirements of section (3) of this rule, if such

communication would otherwise be an ex parte communication, or subject to section (8) of this rule:

(A) Communications between the commission, a commissioner, or a member of the technical advisory staff and a public utility or other regulated entity that is a party to a contested case, or an anticipated party to an anticipated contested case, notifying the commission, a commissioner, a member of the technical advisory staff, or the presiding officer assigned to the proceeding of:

1. An anticipated or actual interruption or loss of service;
2. Damage to or an incident or operational problems at a utility's facility;
3. An update regarding efforts to restore service after an interruption, loss of service, damages, or an incident or problems referred in paragraphs (10)(A)1 and 2;
4. Security or reliability of utility facilities;
5. Issuance of public communications regarding utility operations, such as the status of utility programs, billing issues, security issuances, or publicly available information about a utility's finances. These communications may also include a copy of the public communication, but should not contain any other communications regarding substantive issues;
6. Information regarding matters before state or federal agencies and committees including but not limited to state advisory committees, the Federal Communications Commission, the Federal Energy Regulatory Commission, and the Nuclear Regulatory Commission;
7. Information regarding a regional transmission organization;
8. Labor matters not part of a pending case; or
9. Matters related to the safety of personnel.

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

(C) Communications between the commission, a commissioner, a member of the technical advisory staff or the presiding officer and a party or anticipated party concerning an issue or case in which no evidentiary hearing has been scheduled made at a public agenda meeting of the commission where such matter has been posted in advance as an item for discussion or decision.

(D) Communications between the commission, a commissioner, a member of the technical advisory staff or the presiding officer and a party or anticipated party concerning a case in which no evidentiary hearing has been scheduled made at a forum where representatives of the public utility affected thereby, the office of public counsel, and all other parties to the case are present.

(E) Communications between the commission, a commissioner, a member of the technical advisory staff or the presiding officer and a party or anticipated party concerning a case in which no evidentiary hearing has been scheduled made outside a public agenda meeting or forum where



representatives of the parties are present when disclosed as provided in section 386.210.3(3), RSMo.

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

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

(13) Notwithstanding any provision of this rule to the contrary, once a contested case has been finally adjudicated, the commission, a commissioner, a member of the technical advisory staff, or the presiding officer may communicate with any person regarding any procedural or substantive issues related to such case within thirty (30) days of the case being finally adjudicated, unless the same regulated entity has a contested case or anticipated contested case pending before the commission which includes such issues.

(14) An attorney, or any law firm the attorney is associated with, appearing before the commission shall:

(A) Make reasonable efforts to ensure that the attorney and any person whom the attorney represents avoid initiating, participating in, or undertaking an ex parte communication prohibited by section (3) or a communication prohibited by section (11);

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

(C) Prepare a notice in accordance with sections (4), (5), (8) or (11) when requested to do so by the commission, a commissioner, technical advisory staff, or the presiding officer assigned to a contested case;

(D) Make reasonable efforts to notify the secretary when a notice of ex parte communication is not transferred to a case file as set forth in subsection (3)(D);

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

(F) During the pendency of an administrative proceeding before the commission, not make or participate in making a statement, other than a quotation from or reference to public records, that a reasonable person would

expect to be disseminated by means of public communication if it is made outside the official course of the proceeding and relates to any of the following:

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

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

(15) The commission may issue an order to show cause why sanctions should not be ordered against any party or anticipated party, or the agent or representative of a party or anticipated party, engaging in an ex parte communication in violation of sections (3) or (11) of this rule or a failure to file notice or otherwise comply with sections (4), (5) or (8) of this rule. The commission may also issue an order to show cause why sanctions should not be ordered against any attorney who knowingly violates section (14) of this rule.

(16) No person who has served as a commissioner, presiding officer or commission employee shall, after termination of service or employment with or on the commission, appear before the commission in relation to any case, proceeding, or application with respect to which that person was directly involved or in which that person personally participated or had substantial responsibility during the period of service or employment with the commission.

**REVISED PRIVATE COST:** The cost to private entities may be on average \$5,616.66 annually in the aggregate for the life of the rule rather than the less than \$500 in the aggregate as originally estimated.

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

In the Matter of a Proposed  
Rulemaking Regarding Ex Parte  
and Extra-Record Communications

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Case No. AX-2010-0128

**CONCURRING OPINION OF CHAIRMAN ROBERT M. CLAYTON III**

This Commissioner concurs in the Final Order of Rulemaking implementing a new code of ethics and standard of practice for Commissioners. Unanimously approved by the Commission, this rule takes significant steps toward “regulating” the types of communications that can occur among Commissioners and regulated entities. While this Commissioner believes that additional provisions could have been added to strengthen the rule, this measure assures greater transparency in such communications and further prohibits certain contacts that were previously lawfully conducted. The ultimate goal in adopting this rule is for the Commission to act in a manner that inspires greater public confidence in the difficult decisions we make.

While this Commissioner will not restate how the Commission has come about this rulemaking or the circumstances which led to legislative inquiries, concerns were raised in previous years which suggested a need for greater clarity on the type of conduct allowed by regulators and the utilities they regulate. Allegations were made against Commissioners relating to communications between Commissioners and regulated utilities which, in this Commissioner’s opinion, greatly damaged the Commission’s reputation for fair decision-making. The communications in question involved contacts prior to the filing of a major case, which was standard practice and remains legal pursuant to section 386.210 RSMo, as well as communications occurring while cases were under consideration. Parties not privy to the

conversations made additional arguments that the communications rose to the level of utilities conducting private, pre-briefing meetings with the intention of "gauging" commissioner reactions to utility proposals outside of the hearing process or even seeking a type of "preapproval" of proposals prior to the case being filed. Opposing parties were not invited to participate in the discussions and most opposing parties were not even aware that the meetings had taken place. Only after the discovery process were parties made aware of the meetings.

Press reports of these activities increased the level of public scrutiny of decisions made at the Public Service Commission. It is this Commissioner's opinion that in light of the multiple allegations made against the Commission, the increased frequency and complexity of the number of difficult cases coming before the Commission, and the sensitivity of the public to the impact of cases, reached a boiling point where the public was simply not believing or trusting the work of the Public Service Commission. Despite the fact that the agency that has been in existence since 1913 and has had the statutory responsibility to regulate utility monopolies for nearly 100 years, most are unaware of the work done, the role played or the rules in which decisions are made at the PSC.

The Commission must do better in explaining the purpose of the PSC, how it functions, the rules of engagement, the nature of the parties that appear before it, the types and extent of the power it wields and the limitations placed upon it. The Commission must do better in explaining to the public the challenges faced in the energy or telecommunications sectors and attempt to advise how the Commission looks at particular issues. Of the utmost of importance, the Commission must operate in a fair, transparent manner that avoids or eliminates any appearance of impropriety. With regard to the specific allegations of improper communications against the

agency, which arguably damaged its reputation, the public has a right to know the timing, the content and reasons for the communications that attempt to influence the decisions we make.

This rule takes several significant steps towards limiting, prohibiting or disclosing communications among regulated entities, utilities or other stakeholders. First, communications relating to matters that are or will become contested case issues in a rate case or other major case are prohibited. A utility no longer has the ability to “gauge” the reaction of a Commissioner in private or to determine whether an “issue” should be pursued or rejected based on a private, one-sided conversation. Current law prohibits these communications while a case is pending. In the rule, these communications are further prohibited prior to the filing of a case. Regardless of a case being filed in 60 days, 120 days or in 1 year, the Commission is taking a stand that “never” is the right time to have a private, non-disclosed conversation regarding a substantive “contested case” issue that will come before the commission for decision.

Secondly, communications that do not relate to a specific contested case but may relate to a General Regulatory Policy, as defined by section (1)(J), or specific issues that are expected to be in a contested case, will now be subject to additional disclosure. These discussions on general policy issues or rulemakings could include policy questions for smart grid technology, energy efficiency or integrated resource planning (each example is pending in a current non-contested workshop docket). If a case is pending or within the preceding 60 days in advance of the filing of the contested case, these discussions can occur only if 48 hours advance notice is given to the public, the public counsel is invited to attend and a complete disclosure of the conversation is added to the potential case. These communications can not be about the contested issues in the case to be filed but rather must be about some other company-specific issue or matters of General Regulatory Policy. Thirdly, Commissioners will be required to maintain a public

calendar that discloses meetings with regulated entities. While a Commissioner's calendar is publicly available, the new calendar will have a link directly connecting this calendar with the Commission's website for easy access by the public and stakeholders.

Fourthly, contacts by non-parties who have an interest in the case will also be required to be disclosed through extra-record communications as they relate to case-specific information involving customers and the public.

Lastly, it was this Commissioner's hope that all communications with regulated entities be subject to the public calendar reporting requirement as mentioned above. The Commission should always err on the side of disclosure and this Commissioner cannot think of an example, other than the concepts in section (10) of the rule, that should not be disclosed in the most basic manner. Unfortunately, that provision was removed during negotiations in open session.

This rule will still provide regulated entities and interested parties the access to the Commission that Missouri law requires and it will continue to provide customers of regulated entities access to the commission that they deserve. However, this rule will require such communications occur in the open rather than in secret. The Commission will have to monitor how this rule is implemented and determine whether future amendments are necessary to promote the public interest. This Commissioner sees this rule as a step in improving the reputation that the Commission has in making challenging decisions.

For the foregoing reasons, this Commission concurs.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Robert M. Clayton III", written over a horizontal line.

Robert M. Clayton III  
Chairman

Dated at Jefferson City, Missouri  
on this 22<sup>nd</sup> day of March 2010.

## REVISED FISCAL NOTE

### PRIVATE COST

#### I. RULE NUMBER

Rule Number and Name	Type of Rulemaking
4 CSR 240-4.020 Rule Governing Ex Parte and Extra Record Communications	Proposed Rule

#### II. SUMMARY OF FISCAL IMPACT

Estimated number of entities that will likely be affected by adoption of the rule.	Types of entities that will likely be affected by adoption of the rule.	Estimated aggregate cost of compliance with the rule by the affected entities.
1000	Entities regulated by the Public Service Commission and Parties to Contested Cases including: twelve (12) large gas, electric, and steam utilities; one (1) large water and sewer utility; seventy-four (74) small water and sewer companies; and other regulated entities.	\$5,616.66 per year for the life of the rule.

#### III. WORKSHEET

Average cost for a large utility to file a section (2) notice:  $(\$1,000 + \$3750 + \$10,000)/3$   
= \$4,916.66 per year<sup>(3)</sup>

Average cost for a small company to file a section (2) notice:  $\$50 \times 14 = \$700$  per year<sup>(7),(6)</sup>

Total cost per year to private entities:  $\$4,916.66 + \$700 = \$5,616.66$  per year

#### IV. ASSUMPTIONS

If adopted, this proposed rule will govern ex parte and extra record communications between the Commissioners and parties to cases before the Commission. The rule

defines ex parte and extra record communications, places prohibitions on the timing and content of certain communications, establishes exceptions to prohibited communications, and provides reporting requirements for certain communications. Section (2) of the rule would require a filing by a regulated entity 60 days prior to that entity filing a contested case unless a waiver is granted.

- (1) In calculating this fiscal note the Commission assumed that an overwhelming majority of the filings made under section (2) would be made by the large utilities.
- (2) Because of the utility size and complexity of the contested cases filed, the cost for the large utilities will be significantly higher for filing the notice than it would be for small utilities.
- (3) The Commission received the following information from four entities regarding the fiscal cost:
  - a. One large gas utility stated that the cost of complying with the rule would be in excess of \$1000 per year with a majority of the cost arising from section (2).
  - b. Two large electric utilities estimated that the average cost of filing a notice to comply with section (2) would exceed \$300 and that together they would expect to file approximately 25 of these notices. ( $\$300 \times 25 = \$7500/2 = \$3750$ )
  - c. One law firm who represents large utilities estimated that the cost to comply with section (2) would exceed \$500 for the firm to prepare and file. The firm estimates that a large utility would likely file 20 such notices per year. ( $\$500 \times 20 = \$10,000$ )
- (4) Large utilities will file notices at an average cost and number similar to those suggested in the estimates received from those entities.
- (5) Information in the Commission's 2009 Annual Report regarding the number of regulated entities and cases filed will be approximately the same for each fiscal year thereafter.
- (6) Small water and sewer utilities will file only one notice per year required under by section (2) and only approximately 14 of 74 companies per year will be required to file such notices.
- (7) It will cost a small water and sewer utility approximately \$50 to file the notice required in section (2).
- (8) The rule does not require other notices to be filed by private entities if no ex parte or extra record contacts are made. Thus, while the rule affects all regulated utilities, only the large utilities and small water and sewer utilities are likely to have a fiscal impact.
- (9) The cost of filing ex parte or extra record notices is not significant.



**Small Business Regulatory Fairness Board  
Small Business Statement  
(After Public Hearing)**

**Date:** 3/19/10

**Rule Number:** 4 CSR 240-4.020

**Name of Agency Preparing Statement:** Public Service Commission

**Name of Person Preparing Statement:** Nancy Dippell, Deputy Chief Regulatory  
Law Judge

**Phone Number:** 751-4393 **Email:** nancy.dippell@psc.mo.gov

**Name of Person Approving Statement:** Steven Reed, Secretary/General  
Counsel

**Hearing Date:** January 22, 2010

The Commission originally filed this proposed rule and determined there was no fiscal impact on private entities. After comment and hearing the Commission determined certain changes were necessary including an added filing requirement. Because of this added requirement, the Commission determined that private entities and small businesses (small water and sewer companies regulated by the Commission) may have a fiscal impact because of new section (2) of the rule. Therefore, along with its Order of Rulemaking, the Commission is submitting a Revised Private Entity Fiscal Note and a small business impact statement pursuant to section 536.303, RSMo.

**(1) Description of how the opinions or comments from affected small businesses were solicited:**

All entities regulated by the Commission were allowed an opportunity to participate in the development of this proposed rule. Before filing the proposed rule all regulated entities were invited to attend several discussion groups and to file comments in a working docket regarding the rule. Once the proposed rule was published in the Missouri Register, written comments and testimony were solicited from all Commission-regulated entities.

**(2) A summary of the public and small business comments:**

There were no individual or small business comments. There were written comments and testimony given by the Office of the Public Counsel on behalf of the public. Those comments were generally in favor of the rule, but favored making the rule more stringent regarding what must be recorded and reported.

**(3) A summary of the agency's response to those comments:**

In response to the Office of the Public Counsel and other comments, the Commission decided to include more stringent requirements (though not quite as stringent as Public Counsel advocated) for reporting ex parte and extra-record communications. As part of the rule revisions, the Commission adopted new section (2) of the rule. Section (2) will require any regulated entity to file a notice with the Commission 60 days prior to the time it expects to file a contested case or an anticipated contested case, unless a waiver is granted.

**(4) The number of persons who attended the public hearing, testified at the hearing, and submitted written comments.**

Other than the commissioners and their staff, seven people attended the public hearing in person. The hearing was broadcast over the Internet and therefore, the Commission cannot determine the number of people who may have watched or listened to the hearing outside of the hearing room.

Seven people testified at the hearing.

Four entities or organizations filed written comments.

**If a request to change the proposed rule was made at the hearing in a way that affected small business, a statement of the reasons for adopting the proposed rule without the requested change:**

Public Counsel requested that the change made in section (2) of the rule require a notice of a contested case be filed at least 120 days prior to the contested case being filed. The Commission lengthened the filing requirement from 30 days to 60 days in response to the comments determining that this was a more reasonable time period. Including another 60 days in the requirement would have meant more required filings for all Commission-regulated entities and therefore a higher cost to small businesses as well.