

BEFORE THE PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI

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 Commissioner Connie Murray, and for her 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.¹ 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.

3. The existing rule is adequate to prohibit activities which would tend to exercise influence on the commission and which are not part of the record. However,

¹ 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.,

additional clarification to existing rules and the addition of certain provisions that could provide greater clarity and transparency would not be inadvisable. I have included with this filing a draft revision to rule 4 CSR 240-2.020 which addresses conduct during a proceeding.

4. Additionally, I believe that separate rules should govern conduct during proceedings and conduct outside of proceedings. Consequently, I have also included with this filing a draft rule 4 CSR 240-2.030 to specifically address conduct outside of a proceeding.

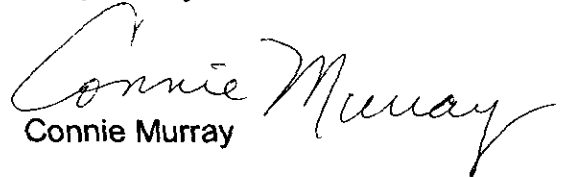
5. I also believe that a rule should be adopted in regard to the process of asking for the recusal of a commissioner for cause. Judge Stearley, in his January 29, 2007 filing, sets forth a draft rule 4 CSR 240-2.121 which addresses this concept and should be carefully considered by the Commission. If such a rule is adopted a provision such as the following should be considered.

A recusal based upon an *ex parte* communication involving a personal advisor to a commissioner does not require the recusal of his/her commissioner, provided the commissioner and personal advisor do not confer as to the merits of the pending case following the recusal. The recusal based upon an *ex parte* communication involving a commissioner does not require the recusal of his/her personal advisor, provided the commissioner and personal advisor do not confer as to the merits of the pending case following the recusal.

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.

WHEREFORE, on account of all the foregoing, Commissioner Connie Murray offers the draft language proposed herein as a substitute for the amendment to rule 4 CSR 240-4.020 proposed by the Office of Public Counsel.

Respectfully submitted,


Connie Murray

Dated at Jefferson City, Missouri
on this 1st day of February 2008.

4 CSR 240-4.020 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.

(1) As used in this rule, the following terms mean:

(A) "Advisor" the personal advisor to a Commissioner or any person assigned to the "Commission's advisory staff."

(B) "ex parte communication" any communication, written or oral, between a commissioner, regulatory law judge or advisor and a party to the contested case that concerns any matter in the case that is pending before the commission for decision. The following shall not be considered ex parte communications:

1. A communication concerning a purely procedural matter;
2. Information that directly relates to an emergency in which the safety of life is endangered or substantial loss of property is threatened, provided that, if not otherwise submitted for the record, the disclosing party shall promptly place the information or a summary of the information in the record and disclose it to other parties as appropriate;
3. Information from a local, state or federal agency or branch or its staff involving a matter over which such governmental unit has jurisdiction provided that, any new factual information obtained through such information that is relied on by the commission in its decision-making process will, if not otherwise submitted for the record, be disclosed by the commission no later than at the time of the release of the commission's decision;
4. A communication concerning an informal investigation;
5. A communication concerning a rulemaking;
6. A communication concerning a tariff filing where no party has moved for suspension or rejection;
7. A communication concerning an informal complaint proceeding;
8. A communication allowed by statute or rule;
8. If written, communications that are served on the parties to the proceeding; and
9. If oral, communications made with advance notice to the parties and opportunity to be present.

(C) "party" any person or entity that has entered an appearance in the case or could be reasonably foreseen to intervene in the case.

(2) 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 the provisions of 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 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 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. His/her 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.

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

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

(23) In all ~~proceedings~~ contested cases before the commission, no attorney person shall communicate, or cause another to communicate, as to the merits of the cause with any commissioner regulatory law judge assigned to the case or advisor ~~or examiner~~ before whom proceedings are pending except:

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

(B) In writing directed to the secretary of the commission with copies served upon all other counsel of record ~~and participants without intervention.~~

(4) An attorney shall exercise reasonable care to prevent employees and officials of his/her clients from engaging in *ex parte* communications with any commissioner, regulatory law judge assigned to the case or advisor.

(35) 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 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.

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

(57) 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.

(68) ~~No member of the commission, presiding officer or employee of the commission~~ commissioner, regulatory law judge assigned to the case or advisor 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 has reason to know may transmit that communication to a party or party's agent.

(79) ~~These prohibitions apply~~ This rule applies from the time an on-the-record proceeding is set for hearing by the commission a contested case is filed 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.

(810) ~~As *ex parte* communications (either oral or written) may occur inadvertently, any member of the commission, hearing examiner or employee of the commission who receives that participant in such communication with a commissioner, regulatory law judge assigned to the case or advisor shall immediately within 3 business days of such communication prepare a written report concerning the communication and submit it to the chairman and each member of the commission file it in the relevant pending case(s). The report shall identify the employee and the person(s) all persons who participated in the *ex parte* communication, any commissioners, regulatory law judges assigned to the case or advisors who witnessed the *ex parte* communication, the circumstances which resulted in the communication, the substance of the communication, and the relationship of the communication to a particular matter at issue before the commission. If the *ex parte* report is not timely filed by such person(s) the commissioner, regulatory law judge assigned to the case or advisor participating in the *ex parte* communication shall have an obligation to file an *ex parte* report or issue an order directing the filing within a reasonable period of time. If the *ex parte* communication is written, such communication shall be filed with the *ex parte* report.~~

(11) Where a communication occurs that is allowed by statute or rule that would otherwise be considered an *ex parte* communication under this rule, a report shall be filed by the participant in such communication with a commissioner, regulatory law judge assigned to the case or advisor within 3 business days of such communication in the relevant pending case(s). The report shall identify all persons who participated in the communication, any commissioners, regulatory law judges assigned to the case or advisors who witnessed the communication, the circumstances which resulted in the communication, the substance of the communication, and the relationship of the communication to a particular matter at issue before the commission. If the report is not timely filed by such person(s) the commissioner, regulatory law judge assigned to the case or advisor participating in the communication shall have an obligation to file a report or issue an order directing the filing within a reasonable period of time. If the communication is written, such communication shall be filed with the report.

(12) If service on the parties would be unduly burdensome because the parties to the proceeding are numerous, the commissioner, regulatory law judge assigned to the case or advisor to whom an *ex parte* communication is made may file a notice in the relevant pending case(s). The public notice shall state that a prohibited presentation has been made and may also state that the presentation and related materials are available for public inspection.

(13) If an *ex parte* communication occurs the commission may require the offending party to show cause why its claim or interest in any proceeding should not be dismissed, denied, disregarded, or otherwise adversely affected on account of such violation.

(14) A commissioner, regulatory law judge assigned to the case or advisor that receives an *ex parte* communication shall not entertain, or consider such communication concerning the merits of the proceeding.

(15) Where a contested case precipitates written or electronic correspondence from the general public, such correspondence from non-party entities or individuals shall be placed in the case file and shall be available for public inspection but shall not be required to be served on the parties to the case.

*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.*

4 CSR 240-4.030 Conduct Outside of Proceedings

(1) As used in this rule, the following terms mean:

(A) "entity" a regulated utility, office of public counsel, staff of the commission or any legally recognized group that may intervene.

(C) "meeting" a formal or informal coming together of persons in a physical location or through electronic or telephonic means regarding a subject which can reasonably be foreseen to come before the commission in a contested case where the legal rights, duties or privileges of such entity or the particular entity the meeting addressed are at issue within the next 6 months. The term "meeting" shall not include meetings where information subject to this rule is publicly conveyed during a presentation at a conference or other forum where such information is widely disseminated to all attendees, including but not limited to an official meeting of the commission.

(2) Following any meeting between an entity and a commissioner or commission advisory staff, a meeting notice shall be filed on the commission's website by such entity within three business days of the conclusion of the meeting. Such meeting notice shall state the date, time, location, purpose, a summary of what was discussed, the individuals in attendance, and the name(s) of the entity or entities in attendance.

(3) Notice of any meeting with a commissioner or commission advisory staff which is not subject to the filing of a meeting notice, pursuant to subsection 2 of this section, may be filed on the commission's website by any participant present at the meeting. Such notice shall state the date, purpose and the name(s) of the entity or entities in attendance. Such notice may also state the time, location, a summary of what was discussed, and the individuals in attendance. Any written information that was provided to the commissioner or commission advisory staff at the meeting may be attached to the supplemental meeting notice.

(4) Any written information communicated outside of a meeting to a commissioner or commission advisory staff by an entity regarding a subject which can reasonably be foreseen to come before the commission in a contested case where the legal rights, duties or privileges of such entity or the particular entity the written communication addressed are at issue within the next 6 months shall be filed on the commission's website by such entity within three business days of mailing or presenting such information to the commissioner or commission advisory staff, exclusive of weekends and holidays when the commission is closed.

(5) A commissioner or commission advisory staff may order an entity that communicates with such commissioner or commission advisory staff to file notice in accordance with the reporting requirements of subsection 2 and 4 of this rule on the commission's website.

(6) Unless good cause is shown, no contested case may be filed by any entity that participates in a meeting with or provides written information to a commissioner or commission advisory staff within 45 days of such meeting or written communication concerning a subject communicated during such meeting or written communication.

(7) This section shall not be construed to require the disclosure of any information that is proprietary or highly confidential pursuant to 4 CSR 240-2.010.

(8) This rule applies at all times with the exception of when a contested case is filed until the proceeding is terminated by final order of the commission.