

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

In the matter of a Repository File for	)	
The Collection and Distribution of	)	File No. AW-2009-0313
Documents Pertaining to the Ethics Review	)	
at the Missouri Public Service Commission	)	

**COMMENTS OF COMMISSIONER TERRY M. JARRETT**

The workshops that have been a part of this process have provided valuable feedback with regard to this rule review from those that are regulated by this Commission, their representatives, as well as the public. As I stated in AO-2008-0192<sup>1</sup> “public trust and confidence in the regulatory process is paramount. As such, this Commission must act in ways that reinforce the public trust and confidence. By doing so, the public can be assured that the Commission is fair and impartial in deciding matters that come before it.” I still believe this to be true.

While I believe the draft rules<sup>2</sup> presented to the Commission by the consultant, Hinshaw and Culbertson, on September 11, 2009 are an improvement over the prior draft submitted on June 3, 2009<sup>3</sup> I believe additional changes should be made. This is a serious matter that deserves to be given appropriate time and consideration, and time should not prejudice the interests of those wishing to provide comments on the consultant’s review, or thwart the efforts of this Commission in achieving the best result possible. I want to commend everyone who has participated in this process for their dedicated and thoughtful efforts. We should continue to maintain that approach as we

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<sup>1</sup> *In the Matter of a Review of the Missouri Public Service Commission’s Standard of Conduct Rules and Conflicts of Interest Statute*, File No. AO-2008-0192.

<sup>2</sup> *Notice of Proposed Rules*.

<sup>3</sup> *Proposed Regulations Governing Ex Parte Communication*.

enter the homestretch in working toward a draft rule which will ultimately be considered for rulemaking by the Commission.

The law has established the starting point—section 386.210 RSMo (Supp. 2008)<sup>4</sup>—as the foundation for any rules governing communications. The statute allows communications between commissioners, commission employees and stakeholders and interested persons. Commission rules cannot limit communications allowed by the statute; however, nothing in the statute prohibits more robust reporting requirements to allow for transparency.

In my opinion, a draft rule must have section 386.210 as its starting point. To approach this from any other point of view risks a draft rule that conflicts with existing law and creates new uncertainties for all involved. One concern I have with the consultant's proposed draft rule is that it places a tremendous focus upon people and cases instead of *ideas, views and information*, as discussed in section 386.210.4 . This Commission's role is not just about adjudicating contested cases, but also about setting public policy. That is why *ex parte* rules that focus only on the adjudicative role of the Commission may have the unintended consequence of hampering the Commission's ability to meet its other statutory obligations.

In keeping with the law, any new *ex parte* rule should avoid the creation of constraints and develop a process to protect due process, and in which communication can flow. In my opinion, the new *ex parte* rule should embrace simple, easy to manage and administer reporting requirements that give parties to cases notice that a communication has occurred.

To that end, section 386.210 generally governs three types of *communications*:

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<sup>4</sup> Section 386.210 references contained herein are to RSMo (Supp. 2008).

1. Communications before a case is filed before the Commission. These types of communications have no limitations and may address any issue.
2. Communications after a case is filed but before an evidentiary hearing has been scheduled. Communications that relate to matters of general regulatory policy and do not address the merits of the specific facts, evidence, claims, or positions presented or taken in a pending case are permitted. Communications may also address substantive or procedural matters that are the subject of a pending filing or case in which no evidentiary hearing has been scheduled, provided that the communication:
  - (1) Is made at a public agenda meeting of the commission where such matter has been posted in advance as an item for discussion or decision;
  - (2) Is made at a forum where representatives of the public utility affected thereby, the office of public counsel, and any other party to the case are present; or
  - (3) If made outside such agenda meeting or forum, is subsequently disclosed to the public utility,<sup>5</sup> the office of the public counsel, and any other party to the case in accordance with the following procedure:
    - (a) If the communication is written, the person or party making the communication shall no later than the next business day following the communication file a copy of the written communication in the official case file of the pending filing or case and serve it upon all parties of record;
    - (b) If the communication is oral, the party making the oral communication shall no later than the next business day following the communication file a memorandum in the official case file of the pending case disclosing the communication and serve such memorandum on all parties of record. The memorandum must contain a summary of the substance of the communication and not merely a listing of the subjects covered.
3. Communications after an evidentiary hearing has been set in a pending case. Communications that relate to matters of general regulatory policy and do not address the merits of the specific facts, evidence, claims, or positions presented or taken in a pending case are permitted. Communications relating to substantive matters are prohibited, except for a few limited exceptions (such as communicating with legislators).

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<sup>5</sup> Consideration should be given to replacing the reference to “public utility” to ensure that the provisions of the draft rule reach all matters which are regulated by the Commission, e.g., manufactured housing, gas pipeline safety, among others.

Under the first type of communication, I suggest a “permit but report” rule that would require a party, if a communication occurred sixty days or less prior to a case being filed, to file a report in the case when such case is filed. The report would disclose that a communication took place, to whom the communication was delivered, and set out the contents of the communication.

Under the second type of communication, I propose the same type of “permit but report” rule described above for communications involving general regulatory policy. Added transparency protections, such as a court reporter transcribing the communication, should be used if practicable. For communications involving substantive or procedural issues in a pending case, the statute already sets out reporting requirements, so if Commission rules are even necessary, then they need to be consistent with the statute. Again, additional transparency protections should be utilized if practicable.

Under the third type of communication, since communications relating to general regulatory policy are permitted, then I suggest the same type of “permit but report” rules described above. Added transparency protections, such as a court reporter transcribing the communication, should be used if practicable. Communications involving substantive matters in a case should be prohibited except as permitted by section 386.210, and those which are permitted should also be subject to the “permit but report” rule.

Any revised draft must be consistent with the law. Any conflict between a rule and existing statute will not add certainty to the process with regard to *ex parte* contact and communication but instead create uncertainty. The legislature understood the Commission’s broad regulatory scope by ***affirmatively mandating*** that no law shall be construed as “imposing any limitation on the free exchange of ideas, views, and

information between any person and the commission or any commissioner provided that such communications relate to matters of general regulatory policy and do not address the merits of the specific facts, evidence, claims or positions presented or taken in a pending case unless such communications comply”<sup>6</sup> with other provisions of section 386.210. No draft rule should conflict with this legislative mandate.

In addition to these suggestions, in AO-2008-0192 I highlighted three concepts which I believe are valuable and will add transparency to the process. None of these concepts have been incorporated into the consultant’s draft rules. As such, I again renew my suggestions: (1) each filing made with the Commission shall be accompanied by an affirmation that the submitting person has read and understands the Commission’s *ex parte* communication and conflict of interests rules and with respect to the filing being made that no intentional violations have occurred; (2) the Commission consider adding an additional screen in the current electronic filing and information system (EFIS) which will require, prior to any electronic filing, acknowledgment by the submitting person that they are acting in compliance with all Commission *ex parte* communication and conflict of interest rules in making the filing; and (3) that the Commission file in all relative electronic dockets existing in the electronic filing and information system (EFIS) notice that the Commission has scheduled a matter pertaining to a particular case for discussion at a Commission agenda meeting, thereby providing notice to interested persons that the Commission may discuss a matter in a particular case.

The suggestions provided here, as well as those outlined in AO-2008-0192, allow for a balancing of interests while creating a system for increased transparency at the Commission. The public deserves to know that this Commission will be open and

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<sup>6</sup> Section 386.210.4 RSMo. (Supp. 2008).

accountable to the people, and I sincerely hope that the consultant will consider my comments in drafting a rule for this Commission's consideration.

  
Terry M. Jarrett, Commissioner

Submitted this 29<sup>th</sup> day of September, 2009.