BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of a Proposed	)	
Rulemaking Regarding Ex Parte	)	Case No. AX-2010-0128
and Extra-Record Communications	)	

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,

Robert M. Clayton III
Chairman

Dated at Jefferson City, Missouri
on this 22nd day of March 2010.