

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 (310) 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~~**determined**—A decision of the commission in a contested case **in which all applications for rehearing and reconsideration are decided and** which is no longer ~~subject to appeal~~ **an active case before the Commission.**

(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.

[The preferred alternative would be to eliminate subsection 2 in its entirety or allow parties to satisfy the requirement by identify any communications they have had with covered personnel during the 60 day period prior to the filing. If that is not possible, this Section should be modified as follows:]

(2) Any regulated **or other** 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) **The commission may reject any filing not in compliance with this section.** *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. **If the filing entity certifies in its application or other filing that it has not engaged in any Ex parte or Extra-record communications within the 60 day period prior to the filing, such certification shall be deemed to be good cause to waive the requirements of this provision.**

[This provision recognizes that the sixty day notice requirement serves no purpose other than to potentially delay the regulatory process in those instances where no covered communications have been made by the filing party in the sixty day period prior to the filing of a probably contested case.]

(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 **a central repository established by the commission for such filing.***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 **central** repository for **filing** 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 **a central repository established by the commission***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 **central repository***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 **person as defined in this rule or entity with an interest in a commission decision** *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; or

(B) If the communication is oral—

1. If no contested case or anticipated contested case is pending, the **person** *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 **central repository** *case file* and posted on the commissioner's public calendar **twenty-four** *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.

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 **public or** 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) **or (4)** 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* **briefing** the commission, a commissioner, a member of the technical advisory staff, or the presiding officer assigned to the proceeding *on*—

1. *An* **Planned outages or maintenance of facilities and** 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 **outages, loss of service**, 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 **and courts**

including but not limited to state advisory committees, **the Department of Natural Resources, the Environmental Protection Agency, the Department of Energy**, the Federal Communications Commission, the Federal Energy Regulatory Commission, and the Nuclear Regulatory Commission;

7. Information regarding a regional transmission organization, **independent system operator, or regional planning organization.**;

8. Labor matters not part of a pending case; *or*

9. Matters related to **customer service**, the safety of personnel, **the safety of facilities and the general public**;

(10) **Presentations, speeches, statements, or discussions made in an open forum such as but not limited to those made to before the National Association of Regulatory Utility Commissioners, the Mid American Regulatory Conference, and other regional or national organizations; or**

(11) **Tours of facilities, introduction of new technologies, and explanatory information necessarily attendant to such an event.; or**

(12) **Any matter that is the subject of a pending rulemaking proceeding.**

[A rulemaking is considered to be a legislative function. It is not a contested case. There is no requirement to intervene as a party, and the Commission may not even hold a hearing. In the legislative arena, communications with legislative officials is permissible and constitutionally protected. So in order to be fair to all, we should clarify that communications regarding rulemakings are not restricted for any persons. Alternatively, the rules should be clarified to provide that communications during rulemakings are restricted for all persons, regardless of whether such persons are ever likely to be a party to a contested case. See also comments in paragraph 12.]

(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; and

(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~~A person who knows or should know that such person will *is likely to* be a party to a future **contested** case before the commission **should not** *shall* attempt to **communicate with** any commissioner or member of the technical advisory staff *with the intent* in a manner that is likely to influence a decision relating to *regarding* any substantive issue that *is* will likely *to* be *an* **contested** issue within *that 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. [Alternative 1 – eliminate this subsection if Alternative 2 to subsection 13 is adopted]

(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. **[Should this rule apply to rulemakings? Or should rulemakings be considered separate and distinct, quasi-legislative actions that are not subject to such restrictions?]**

(133) **[Alternative 1 – permits “case review” communications within limited time frame after case is completed]** Notwithstanding any provision of this rule to the contrary, **within 60 days after** *once* a contested case has been finally **determined***adjudicated*, the commission, a commissioner, a member of the technical advisory staff, or the presiding officer may *communicate with any person regarding* **convene a meeting to discuss** any procedural or substantive issues related to such case. **Reasonable notice of such meeting shall be sent to all parties to the case, and such notice shall be filed in the central repository and posted on the commissioner’s public calendar at least three business days prior to such meeting.** **[Alternative 2 – permits communications at any time up to the time a 60 day contested case notice is filed (assumes elimination of subsection 11)]** Notwithstanding any provision of this rule to the contrary, at any time prior to when a notice of a contested case filing is made, the commission, a commissioner, a member of the technical advisory staff, or the presiding officer may convene a meeting to discuss any procedural or substantive issues related to a prior case or any matter of general regulatory policy. **[Alternative 3 – eliminates this subsection to ensure full implementation of subsection 11]** *When such communications are anticipated to relate to the performance or merit of individual employees, they may be closed pursuant to Chapter 610 RSMo. 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 section (4), (5), (8), or (11);
- (C) Prepare a notice in accordance with section (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.

(155) 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 section (3) or (11) of this rule or a failure to file notice or otherwise comply with section (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.

(166) 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.

*AUTHORITY: section 386.410, RSMo 2000.**

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