

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

In the matter of a Repository File for )  
The Collection and Distribution of )  
Documents Pertaining to the Ethics )  
Review at the Missouri Public Service )  
Commission )

**File No. AW-2009-0313**

**PROPOSED REGULATIONS GOVERNING**

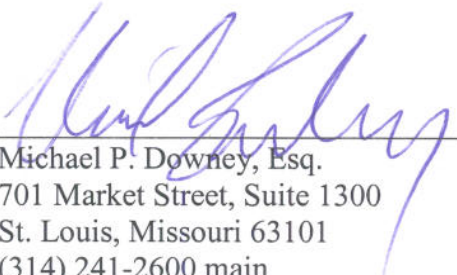
**EX PARTE COMMUNICATIONS**

June 2, 2009

Consultants file the attached as proposed rules to govern ex parte communications. This proposal is the first of at least two proposals. The second is expected to have a broader set of rules that govern a number of areas previously identified as deserving attention during this rulemaking process. Also, this proposal is arranged so that it provides a side-by-side comparison with existing regulations, and so that an explanation of rules and changes is set forth at the end of the proposal.

Respectfully submitted,

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Proposed 4 CSR 240-4.150 Communications.	Limitation on Ex Parte	Mo. Rev. Stat. 386.210
<p>(1) Except for ex parte communications allowed under subsections (3)(A) or (3)(B), it is improper for any person interested in a case before the Commission or a case that is expected to be filed with the Commission within the next 60 days to attempt directly or indirectly outside the hearing process to sway the judgment of the Commission regarding the subject of the pending case or case expected to be filed with the Commission within the next 60 days.</p> <p>(2) A communication with the Commission, Commissioners, the presiding officer assigned to a contested case, or the Commission's advisory staff shall constitute an ex parte communication if:</p> <p>(A) It concerns any issue that is the subject of a case that has been filed with the Commission or that a person having the communication expects to file within the next 60 days;</p> <p>(B) A participant in the communication is or is expected to be a party to the contested case, or direct family, a corporate affiliate, or officer, employee, agent, or attorney of a party; and</p> <p>(C) All parties to the contested case are not participating in the communication either personally or through counsel.</p> <p>(3) The Commission, Commissioners, the presiding officer assigned to a contested case, or the Commission's advisory staff shall not invite, knowingly entertain, or participate in an ex parte communication, unless an evidentiary hearing has not been set in the case and:</p> <p>(A) The communication 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; or</p> <p>(B) The communication is made at a forum where representatives of the public utility affected by the contested case, the Office of Public Counsel, and any other party to the contested case are present; or</p> <p>(C) If made outside such agenda meeting or forum, the communication is subsequently disclosed to the public utility, the Office of the Public Counsel, and any other party to the contested case in accordance with the following procedure:</p> <ol style="list-style-type: none"><li>1. 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 case and serve it upon all parties of record; or</li><li>2. If the communication is oral, the person or party making the oral communication shall no later than the next business day following the</li></ol>	<ol style="list-style-type: none"><li>1. The commission may confer in person, or by correspondence, by attending conventions, or in any other way, with the members of the public, any public utility or similar commission of this and other states and the United States of America, or any official, agency or instrumentality thereof, on any matter relating to the performance of its duties.</li><li>2. Such communications may address any issue that at the time of such communication is not the subject of a case that has been filed with the commission.</li><li>3. Such 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:<ol style="list-style-type: none"><li>(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;</li><li>(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</li><li>(3) If made outside such agenda meeting or forum, is subsequently disclosed to the public utility, the office of the public counsel, and any other party to the case in accordance with the following procedure:<ol style="list-style-type: none"><li>(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;</li><li>(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.</li></ol></li></ol></li><li>4. Nothing in this section or any other provision of law shall be construed as imposing any limitation</li></ol>	



communication file a memorandum in the official case file of the 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.

(4) An attorney for a person or party shall be responsible for making reasonable efforts to ensure that the attorney and the person or party that attorney represents avoid ex parte communications concerning the merits of a contested case other than ex parte communications allowed under subsections (3)(A) and (3)(B) of this Rule or exempted from this Rule under 4 CSR 240-4.160(3).

(5) An attorney for a person or party that makes a communication governed by subsection (3)(C) of this Rule shall make reasonable efforts to ensure that notice of the communication is filed as provided in subsection (3)(C) of this rule. An attorney shall also prepare a notice when requested to do so by the Commission, a Commissioner, the presiding officer assigned to a contested case, or the Commission's advisory staff.

(6) Requests for expeditious treatment of a case before the Commission shall be filed with the secretary of the Commission with copies served upon all other parties to that contested matter.

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 with the provisions of subsection 3 of this section.

...

#### **4 CSR 240-4.020 Conduct During Proceedings**

(2) In all proceedings before the commission, no attorney shall communicate, or cause another to communicate, as to the merits of the cause with any commissioner or examiner before whom proceedings are pending except:

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

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

...

(4) 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.

(5) 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.

(6) No member of the commission, presiding officer or employee of the commission 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.

(7) These prohibitions apply from the time an on-the-record proceeding is set for hearing by the commission 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.

(8) 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 communication

	<p>shall immediately prepare a written report concerning the communication and submit it to the chairman and each member of the commission. The report shall identify the employee and the person(s) who participated in 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.</p> <p><b>Missouri Revised Statute 386.135</b></p> <p>1. The commission shall have an independent technical advisory staff of up to six full-time employees. The advisory staff shall have expertise in accounting, economics, finance, engineering/utility operations, law, or public policy.</p> <p>...</p> <p>6. Each member of the technical advisory staff shall be subject to any applicable ex parte or conflict of interest requirements in the same manner and to the same degree as any commissioner, provided that neither any person regulated by, appearing before, or employed by the commission shall be permitted to offer such member a different appointment or position during that member's tenure on the technical advisory staff.</p>
<p><b>Proposed 4 CSR 240-4.160 Exceptions from Ex Parte Limitations.</b></p> <p>The following communications shall not constitute ex parte communications under 4 CSR 240-4.150 even if they are with the Commission, Commissioners, the presiding officer assigned to a contested case, or the Commission's advisory staff:</p> <p>(1) A communication with the general assembly or other governmental official when that communication states the issues or factual allegations that are the subject of a contested case, provided that the Commission, Commissioners, the presiding officer assigned to a contested case, or the Commission's advisory staff does not express an opinion as to the merits of such issues or allegations.</p> <p>(2) A communication from one or more members of the public about the Commission, the duties of the Commission, or one or more public utilities as long as (A) through (C) are satisfied.</p> <p>(A) The member of the public making the communication does not indicate in the communication that he or she is an agent or employee of a public utility, or a member of an agent or employee's direct family;</p> <p>(B) The communication does not reference the name or case number of a particular contested case, and does not contain an attempt to describe the factual or legal issues presented in a particular contested case; and</p>	<p><b>Missouri Revised Statute 386.210</b></p> <p>1. The commission may confer in person, or by correspondence, by attending conventions, or in any other way, with the members of the public, any public utility or similar commission of this and other states and the United States of America, or any official, agency or instrumentality thereof, on any matter relating to the performance of its duties.</p> <p>2. Such communications may address any issue that at the time of such communication is not the subject of a case that has been filed with the commission.</p> <p>...</p> <p>4. Nothing in this section or any other provision of 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 with the provisions of subsection 3 of this section.</p> <p>5. The commission and any commissioner may also advise any member of the general assembly or</p>



(C) The communication does not ask the Commission, a Commissioner, the presiding officer assigned to a contested case, or the Commission's advisory staff to take a specific action in a pending contested case.

(D) A communication excluded from regulation 4 CSR 240-4.150 under this subpart shall be filed with the secretary of the Commission in accordance with the following procedure:

1. If the communication is written, the Commission, Commissioner, presiding officer assigned to a contested case, or Commission's advisory staff shall within five business days forward a copy of the communication to the secretary of the Commission, who shall keep such communication organized at minimum by name of the public utility or, if no public utility is named, the name of the person making the communication;

2. If the communication is oral, the Commission, Commissioner, or Commission staff shall within five business days forward a written list of the subject covered to the secretary of the Commission, who shall keep such written list organized at minimum by name of the public utility or, if no public utility is named, the name of the person making the communication.

(3) A communication from a public utility if intended to notify the Commission only of an unanticipated interruption or loss of service or provides an update regarding efforts to restore service after such an interruption or loss of service, as long as the communication or a summary thereof is filed with the secretary of the Commission 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 with the secretary of the Commission, who shall keep such communication organized by name of the public utility; or

(B) If the communication is oral, the person or party making the oral communication shall no later than the next business day following the communication file a written list of the subjects covered to the secretary of the Commission, who shall keep such communication organized by name of the public utility.

(4) The secretary of the Commission shall preserve all notices filed under subsections (2) or (3) of this rule for a minimum period of five years.

other governmental official of the issues or factual allegations that are the subject of a pending case, provided that the commission or commissioner does not express an opinion as to the merits of such issues or allegations, and may discuss in a public agenda meeting with parties to a case in which an evidentiary hearing has been scheduled, any procedural matter in such case or any matter relating to a unanimous stipulation or agreement resolving all of the issues in such case.

...

#### **4 CSR 240-4.020 Conduct During Proceedings**

(2) In all proceedings before the commission, no attorney shall communicate, or cause another to communicate, as to the merits of the cause with any commissioner or examiner before whom proceedings are pending except:

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

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

...

(4) 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.

...

(6) No member of the commission, presiding officer or employee of the commission 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.

(7) These prohibitions apply from the time an on-the-record proceeding is set for hearing by the commission 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.

(8) 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 communication shall immediately prepare a written report concerning the communication and submit it to the chairman and each member of the commission.



	The report shall identify the employee and the person(s) who participated in 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.
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### **Comments on Proposed Rules – General**

These proposed rules attempt to clarify the prohibition against ex parte communications on the subject matter of pending contested cases, and to expand that prohibition to cases that a party expects to file in the next 60 days. These proposed rules also seek to provide more workable methods for dealing with comments from consumers, and to expressly allow utilities to report interruptions of service and the status of efforts to restore service.

Many of the proposed changes attempt to coordinate language in the proposed rule to language in the statute, Missouri Revised Statute § 386.310. For example, § 386.310 uses “subject of a case” while the current rule uses “merits of the case” to describe the subject matter of improper ex parte communications, without explanation regarding whether these phrases are intended to cover the same or different communications

The proposed rules also seek to rectify an unexplained shift in responsibility for filing of notices on ex parte communications. The statute presently requires the person or party making the communication to file notice. The current rule meanwhile requires the Commissioner, Commission staff, or presiding officer to make the notice. The proposed rule would return the obligation for filing notice to the person or party making the communication, but also provide that an attorney shall file a report if requested to do so by a Commissioner, Commission staff or presiding officer. The proposed rule is also intended by its silence to allow but not require a Commissioner, Commission staff, or a presiding officer to file notice, even if an attorney does or could be asked to file a notice. Finally, when the communication comes from a member of the public, who is not a party to a pending case (and thus is unlikely to have legal representation), 4 CSR 240.4-160(2) imposes the burden for filing notice on the Commission, its staff, or presiding officer.

In preparing this proposed rule, it was determined that a system where staff might be designated as assisting the decision-maker in a contested case, and could thus communicate directly with the Commission, would likely be inconsistent with present Missouri statutes. In particular, the Missouri provision addressing independent technical staff, Missouri Revised Statute 386.135.7, requires that an independent technical staff member not work for a regulated company, the Office of Public Counsel, or the commission. This provision supported that it would not be appropriate to designate persons in a similar role on a temporary basis.

The prohibition against appearing before the Commission on matters after a person has served as a commissioner or Commission staff (present section 4 C.S.R. 240-4.020(3)) has been moved to a stand-alone section in the proposed rules. In addition, separate proposed rules regulating site visits and attendance or participation in educational programs are anticipated.

### **Comments on Specific Sections**

#### **Proposed Rule 4 CSR 240-4.150**

The first five sections of this rule are intended to operate as follows:

Subsection (1) essentially adopts the language of 4 CSR 240-4.020(4) and generally prohibits an interested party from attempting to sway the judgment of the Commission outside the hearing process. Consistent with the current rule, this prohibition is not limited to communications or the definition of an ex parte communication set forth in subsection (2).

Subsection (2) defines ex parte communications for use in subsection (3).

Subsection (3) limits when the Commission, Commission staff, and presiding officers assigned to a case may participate in ex parte communications. Its language is largely taken from Missouri Revised Statute § 386.210.3. As presently drafted, subsection (3) prohibits all ex parte communications once an evidentiary hearing is set. This prohibition is intended to clarify an issue on which § 386.310 is silent: § 386.310 fails to mention what ex parte communications are prohibited once an evidentiary hearing is set, but would likely be interpreted to prohibit all ex parte communications – even those at a public agenda or fora where all parties are represented – after an evidentiary hearing is set. The proposed rule may be modified to allow communications about pending cases at public agenda and for a where all parties are represented, even in pending cases where an evidentiary hearing is set, simply by deleting the language “an evidentiary hearing has not been set.”

Subsections (4) and (5) impose obligations for compliance with the prohibition on ex parte communications and notice filing requirements on attorneys for parties. Subsection (5) is necessary because, as previously stated, the proposed rule attempts to conform with § 386.210 and impose the obligation for filing notice of ex parte communications generally on parties, not the Commission, Commission staff, or presiding officers.

Subsection (6) retains a limitation on request for expeditious treatment of matters presently contained in 4 CSR 240-4.020(5). It may no longer be necessary in light of the clarification proposed rule 4 CSR 240-4.150(1) should provide.

#### **Proposed 4 CSR 240-4.160**

This proposed rule includes the exemption for communications with state officials presently contained in Missouri Revised Statute § 386.310.5. It also adds exemptions for two types of



communications that those commenting during the rule-making process have identified as communications that have create strain on the present system, but were likely not intended to be prohibited or regulated as ex parte communications. These exemptions are for (a) communications from the public that do not plainly relate to a pending case, but may address a party or subject of many pending cases, and (b) communications from public utilities regarding an interruption of service or efforts to restore service. The language for these particular exemptions was created solely to address these issues.

The five-year retention requirement for notices filed under this section is intended to be consistent with Missouri Revised Statute 386.145.

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