

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

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

NOTICE OF FILING

Consultants file for consideration the following updated and revised proposed regulations governing ex parte and extra record communications relating to contested matters pending or expected to be filed before the Commission. The proposal, attached as Exhibit A, does not propose section numbers, but is expected to be inserted into 4 CSR 240-4.

Respectfully submitted,

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EXHIBIT A

Proposed Rule Governing Ex Parte and Extra Record Communications

Definitions – For the purposes of this rule the following terms mean:

Anticipated Contested Case – Any case that a person anticipates, knows or should know will be filed before the commission within 30 days and that such person anticipates or should anticipate will be or become a contested case.

Anticipated Party – A person who anticipates, knows or should know that such person will be a party to an anticipated contested case.

Contested Case - Any proceeding before the commission in which legal rights, duties or privileges of specific parties are required by law to be determined after hearing.

Discussed Case – Each contested case or anticipated contested case whose merits, facts, evidence, claims, or positions of which are the subject of an extra record communication regulated under this rule.

Ex Parte Communication - Any communication outside of the hearing process between (a) the commission, a commissioner, a member of the technical advisory staff, or the presiding officer assigned to the proceeding and (b) any party or anticipated party, or the agent or representative of a party or anticipated party, regarding substantive issue that has arisen or is reasonably likely to arise in a contested case or anticipated contested case. Ex parte communications shall not include a communication regarding general regulatory policy allowed under Missouri Revised Statute § 386.210.4.

Extra Record Communication – Any communication outside of the hearing process between (a) the commission, a commissioner, a member of the technical advisory staff, or the presiding officer assigned to the proceeding and (b) any person interested in a contested case or anticipated contested case regarding any substantive issue. Extra record communications shall not include a communication regarding general regulatory policy allowed under Missouri Revised Statute § 386.210.4.

General Regulatory Policy – Shall have the same meaning as in Missouri Revised Statute § 386.210.4.

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.

Person - Any individual, partnership, company, corporation, cooperative, association, political subdivision, public utility, party, or other entity or body that could become a party to a contested case.

Rate Case – A proceeding before the commission regarding revenue modification and request to change the schedule of rates on a utility’s total cost of providing service. A rate case shall include a “reverse rate case,” *i.e.*, a complaint case alleging over-earnings or an actual cost adjustment case.

Substantive Issue – The merits, specific facts, evidence, claims, or positions that have arisen or are reasonably likely to arise in a contested case or anticipated contested case. The term substantive issue does not include merely procedural issues, unless those procedural issues are contested or likely to materially impact the outcome of a contested case.

(1) **Prohibition on Ex Parte Communications by Parties or Anticipated Parties** – No party or anticipated party shall initiate, participate in, or undertake, directly or indirectly, an ex parte communication.

(2) **Ex Parte Communications by Commission** – 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. However, it shall not constitute participation in or undertaking an ex parte communication if such person:

- a. Does not initiate the ex parte communication;
- b. Immediately withdraws from or ends the ex parte communication, or immediately alerts the initiating person that the communication is not proper outside the hearing process and makes a reasonable effort to withdraw from or end the communication; and
- c. Files notice in accordance with sections (5) and (6) of this Rule, as applicable.

(3) **Exclusions from Ex Parte Communications** – The following communications shall not violate sections (1) or (2) of this rule. However, communications governed by subsections (3)(a) and (3)(b) still must be disclosed as an extra record communication in accordance with sections (5), (6), and (7) as applicable:

- a. A communication between (a) the commission, a commissioner, a member of the technical advisory staff, or the presiding officer assigned to the proceeding and (b) a member of the general assembly or other governmental official allowed under Missouri Revised Statute § 386.210.5; or
- b. A communication between (a) the commission, a commissioner, or a member of the technical advisory staff and (b) 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 the commission, a commissioner, a member of the technical advisory staff, or the presiding officer assigned to the proceeding of:

- i. an anticipated or actual interruption or loss of service;
 - ii. damage to or an incident or operational problems at a utility's facility;
 - iii. an update regarding efforts to restore service after an interruption, loss of service, damages or an incident or problems referred in subsections (3)(b)(i) and (ii);
 - iv. imminent threats to facility security and responses to such threats; or
 - v. issuance of public communications regarding utility operations, such as 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.
- c. A communications between (a) the commission, a commissioner, or a member of the technical advisory staff and (b) commission staff relating to exercise of the commission's investigative powers including as recognized under Missouri Revised Chapters 386 or 393. Where the communications concerns an anticipated rate case, however, notice shall be given in accordance with section (6) upon the filing of the rate case.
- d. A communication concerning a 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.
- e. A communication 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 any other party to the case are present.

(4) **No Consideration for Extra Record Communications** – Unless properly admitted into the record 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.

(5) **Notice of Extra Record Communications in Contested Cases** – A person who initiates an extra record communication regarding a pending case shall on the next business day 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 the official case file for each discussed case and serve the copy of the written communication upon all parties of record in those discussed cases; or
- b. If the communication is not written, the initiating person shall file a memorandum disclosing the communication in the official case file for each discussed case and serve such memorandum on all parties of record in those discussed cases. 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.

(6) **Notice of Extra Record Communications in Anticipated Contested Cases** – A person who initiates an extra record communication regarding an anticipated contested case that is not a pending case shall within five business days of the later of (a) becoming a party to the contested case or (b) 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 (5)(a) and (b), and shall also include all information regarding the communication that subsections (5)(a) and (b) require.

(7) **Notice by Commission** – In addition to sections (5) or (6) 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 (5)(a) and (b).

(8) **Sanctions** - 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 subsection (1) of this rule or a failure to file notice or otherwise comply with sections (5) or (6) of this rule. The commission may also issue an order to show cause why sanctions should not be ordered against any attorney who violates section (10) of this rule.

(9) **Collection of Pre-Case Notice Filings** – The secretary of the commission shall create a repository for any extra record 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.

(10) **Attorney Duties** – An attorney 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 (1);
- b. Make reasonable efforts to ensure that the attorney and any person whom the attorney represents gives notice of any extra record communication as directed in sections (5) and (6);
- c. Prepare a notice in accordance with subsections (5) or (6) 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 pre-filing extra record communication is not transferred to a case file as set forth in section (9); and
- e. Comply with all the Missouri Rules of Professional Conduct.

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