

**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)	<u>File No. AW-2009-0313</u>
Review at the Missouri Public Service)	
Commission)	

NOTICE OF FILING

Consultants file for consideration the following 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 included in 4 CSR 240-4.

Consultant expects this proposal will be the focus of discussions at the Notice of Opportunity to Comment set for September 22, 2009.

Respectfully submitted,

HINSHAW & CULBERTSON, LLP

/s/ Michael P. Downey, Esq.

Michael P. Downey, Esq.
701 Market Street, Suite 1300
St. Louis, Missouri 63101
(314) 241-2600 main
(314) 425-2104 direct
mdowney@hinshawlaw.com

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 actually 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. This includes . . . [Does the regulatory community believe examples would be helpful?]

Discussed Case – Any contested case or anticipated contested case the 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, the technical advisory staff, or the presiding officer assigned to the proceeding and (b) a party or anticipated party, or agent of a party or anticipated party, regarding 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. 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, including but not limited to an ex parte communication, between (a) the commission, a commissioner, 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 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. 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, or public utility.

(1) **Prohibition on Ex Parte Communications Regarding Contested or Anticipated Contested Cases** – 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, 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, the technical advisory staff, or the presiding officer assigned to a proceeding and (b) a public utility who is a party to a contested case, or an anticipated party to an anticipated contested case, notifying the commission, commissioner, technical staff, or presiding officer of an anticipated or actual interruption or loss of service or providing an update regarding efforts to restore service after such an interruption or loss of service; or
- c. A communications between (a) the commission, a commissioner, or technical advisory staff and (b) commission staff relating to exercise of the commission's investigative powers including as recognized under Missouri Revised Statute §§ 386.210.7, 386.330, 386.390, or 386.762.

(4) **No Consideration for Extra Record Communications** – 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 of 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 of each discussed case and serve such memorandum on all parties of record in those discussed cases. The memorandum must contain a summary of the substance of the communication and not merely a listing of the subjects covered.

(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 a description of the anticipated contested case discussed in the communication.

(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 person engaging in an ex parte communication in violation of subsection (1) of this rule or a failure to file notice as required under 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 anticipation 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.