

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

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In the Matter of the Proposed Adoption
of Rules of the Minnesota Public
Utilities Commission Relating to Ex
Parte Communications

Docket No: U-999/R-86-79

STATEMENT OF NEED AND REASONABLENESS

INTRODUCTION

Prohibitions against ex parte communications can arise implicitly or explicitly from statutory provisions or from constitutional protections. The Minnesota Public Utilities Commission was directed by Minn. Laws 1986, Ch. 409, section 5, subd. 1 adopt rules governing ex parte communications. The proposed rules which the Statement of Need and Reasonableness supports and explains are patterned, in large part, after the Federal Communication Commission's ex parte communication rules, 47 C.F.R. 1.200 to 1.216.

The perceived need for the adoption of formal ex parte rules arose in response to recent controversies that developed concerning ex-parte communications between Commissioners, Commission decision-making personnel and employees and representatives of regulated utility companies during the pendency of Commission proceedings involving those same utility companies. Questions arose as to the propriety of those ex parte communications.

Minnesota administrative law demands that the Commission decision-making process be fair and open and that it must afford all participants an even-handed resolution of the matters under consideration. Additional authority for prohibiting ex parte contacts is found at Minn. Stat. § 14.60, subd. 2 (1984), which states that "no factual information or evidence shall be considered in the determination of the case unless it is part of the record." Similarly, Minn. Stat. § 14.62 (1984) requires that every decision and order rendered by an agency shall be based upon the record.

The due process clause of the U.S. and Minnesota constitutions also recognizes and requires that an agency or commission provide persons appearing before it with an opportunity to present factual or legal claims supporting their positions, including an opportunity to respond to claims or arguments made by their opposition. The record developed by an agency should also contain all claims and presentations made by the parties to allow a reviewing court to base its review on the same record as that relied on by the agency.

The proposed rules are intended to address the problem of the potential for negative influences on the Commission's decision-making process and the bias to influence Commissioners that exists because of the occurrence of ex parte communications. The rule recognizes, however, that not all ex parte communications are undesirable, and that the occurrence of beneficial ex parte communications promotes openness and facilitates the decision-making process. The concern is to prohibit only those ex parte communications that have the potential to unduly influence the decision-making process.

The procedures established in the proposed rules to handle ex parte communications are necessary to ensure that the Commission's decision-making process remains open, to prevent undue influence and to provide a fair opportunity for all parties to be heard. The proposed rules balance the Commission's need for flexibility when obtaining information and evidence with the need for an open and fair decision-making process.

This Statement of Need and Reasonableness is designed to comply with Minnesota Rules, part 2000.0400 and the proposed rules of the Office of the Attorney General, Minnesota Rules, part 2010.0700. It contains a summary of the evidence and argument which the Commission intends to present and rely upon in support of these proposed rules.

In the Commission's opinion, this Statement supports the need for the proposed rules and the reasonableness thereof.

SMALL BUSINESS CONSIDERATIONS

Minn. Stat. § 14.115 (1984) requires a state agency to mitigate the effects of new rules or amendments to existing rules on small businesses and to aid the small business in participating in the rulemaking process. The Commission has considered a number of factors in determining whether Minn. Stat. 14.115 (1984) applies to this rulemaking procedure.

The Commission notes that in Minn. Stat. Ch. 216B and 237, it has been authorized by the legislature to regulate gas and electric utilities and telephone companies. Some of the basic tenets of utility regulation are: utilities are affected with a deep public interest; utilities are obligated to provide satisfactory service to the entire public on demand; utilities are obligated to charge fair, non-discriminatory rates. A general freedom from substantial direct competition and the opportunity to make a fair return on investment are among the benefits utilities receive from regulation. Given this regulatory scheme, it is clear that the legislature views utilities and telephone companies differently from other concerns defined as small businesses. The degree of government intervention in the operations of a public utility or telephone company is considerably higher than in other types of businesses.

Even if some small utilities or telephone companies could be viewed as "small businesses" as that term is defined, they, nevertheless, would be excepted from this statute.

The Commission finds that Minn. Stat. § 14.115, subd. 7 (1984) establishes exceptions to the general obligations created by the statute and applies to rules promulgated by the Commission. In pertinent part, it states:

Subd. 7. Applicability. This section does not apply to: (c) service businesses regulated by government bodies, for standards and costs, such as nursing homes, long-term care facilities, hospitals, providers of medical care, daycare centers, group homes and residential care facilities;

The Commission finds that utilities and telephone companies fall within this broad definition. They are certainly service businesses regulated by

government bodies for standards and costs. The words following the phrase "such as" merely provide some examples of government regulated businesses and are not exclusive.

Even assuming that these rules may have a minimal effect on some small businesses, the Commission finds that to the degree the small business will be affected, it will primarily be benefitted. The procedures articulated in these rules ensure that the regulatory process is fair and open to all. By experience, the Commission recognizes that the communications addressed in these rules are primarily made to and by public utilities and telephone companies. Permissible ex parte communications are generally information and data gathering communications and are permissible for all parties. The prohibited ex parte communications are prohibited by statute to all parties and commissioners. To except small businesses from these structures would circumvent statutory intent and undermine the regulatory process. For the foregoing reasons, the Commission finds that Minn. Stat § 14.115 (1984) is not applicable to this rulemaking procedure.

7845.7000 Definitions

Subpart 1. Scope. This subpart is necessary to introduce the definitional section of the ex parte communication rules. This subpart is reasonable because it clearly states that the terms used in parts 7845.7000 through 7845.7600 shall have the meanings given to them in this section.

Subpart 2. Decision-making personnel. This definition is necessary to clarify which Commission personnel, other than the Commissioners, will be subject to the ex parte rules. The term "professional staff" refers to the Commission's financial, legal, rate and statistical analysts. This is a definable group, previously recognized, in that the employees encompassed by this term are all required by Minn. Stat. § 216A.035(c) to file annual Statements of Economic Interest with the State Ethical Practices Board and by Minn. Stat. § 216A.035(a) are prohibited from receiving any income other than dividends or other earnings from a mutual fund or trust if these earnings do not constitute a significant portion of the person's income directly or indirectly from any public utility or other organization subject to regulation by the Commission. Consultants, when hired, are substitutes for professional staff. This definition is reasonable because it encompasses only those Commission personnel whose positions have the potential to involve them in substantive decision-making on material issues pending before the Commission. Decision-making personnel prepare written briefings, recommendations and orders for the Commission, in addition to appearing before the Commission in an advisory capacity. Omitted from this definition are clerical and secretarial support staff personnel who are not subject to the requirements of Minn. Stat. § 216A.035(c).

Subpart 3. Disputed formal petition. This definition is necessary to implement Minn. Laws 1986, Ch. 409, section 5, subd. 1, which prohibits ex parte communications between Commissioners and parties that relate to a material issue in a disputed formal petition.

This definition is reasonable because it clearly explains when a formal petition becomes disputed by listing the four conditions necessary to create a disputed formal petition, thereby giving notice to Commissioners, decision

making personnel and parties when ex parte communications become prohibited under part 7845.7200.

This definition presents the logical sequence of turning a petition into a disputed formal petition. The Commission's Rules of Practice and Procedure Minn. Rules, part 7830.2100, defines petition. Clearly, prior to becoming a disputed formal petition, a formal petition must be filed with the Commission. The petition must address a matter for which a contested case hearing is not required or has not been ordered at the time the investigation begins under Minnesota Statutes §§ 216B.16 or 237.075. The third condition of this definition is that a written statement of dispute must be filed with the Commission. This is clearly necessary to a disputed formal petition. Finally, the Commission must take a final formal procedural step before the ex parte communication prohibition is invoked.

This framework provides the Commission with the flexibility to attempt to resolve disputes raised in formal petitions before taking additional formal procedural steps such as ordering comments, written responses to comments, oral argument, negotiations, settlement conferences, a formal hearing or other procedures. The Commission has followed this approach in the past and has found it to be successful and efficient.

This definition is also reasonable because it clearly specifies the circumstances under which a disputed formal petition ceases to be disputed.

Subpart 4. Ex parte communication. This definition is necessary to implement Minn. Laws 1986, ch. 409, section 5, which prohibits certain ex parte communications between Commissioners and parties, and to provide a clear explanation of the persons and the types of communications affected by these ex parte rules. This definition is modeled on the definition of ex parte communication found at § 6.18, Davis, Administrative Law Treatise, Vol. 1, 2 Ed. The Federal Communication Commission's Rules on Ex Parte Communications and Presentations in Commission Proceedings, 47 C.F.R. § 1.201, were also used for guidance.

This definition is reasonable because it does not attempt to encompass all off-the-record communications but, instead, is limited to only those off-the-record communications which might influence the merits or the outcome of an on-the-record proceeding. This definition, therefore, excludes procedural, scheduling and status inquiries or other inquiries or requests for information which have no bearing on the merits or the outcome of a proceeding.

This definition is also reasonable because it addresses only those off-the-record communications that are made to or by Commissioners or Commission decision-making personnel and does not impose undue restrictions on Commission clerical and secretarial support staff members whose positions do not involve them in the decision-making process concerning material issues pending before the Commission.

Subpart 5. Material Issue. This definition is necessary to implement Minn. Laws 1986, ch. 409, section 5, subd. 1, which prohibits ex parte communications between Commissioners and parties relating to material issues in proceedings, petitions and other matters pending before the Commission. This definition is reasonable because it is narrowly drawn to include only those issues which might have a bearing on the merits or the outcome of a

pending matter. Black's Law Dictionary defines "material" as important; more or less necessary; having influence or effect; going to the merits; having to do with matter as distinguished from form. Representation relating to matter which is so substantial and important as to influence party to whom made is "material." H. C. Black, Black's Law Dictionary 880 (5th ed. 1979). This is a commonly understood, workable definition.

Subpart 6. Party. This definition is necessary to conform with Minn. Laws 1986, ch. 409, section 5, subd. 1, subd. 1, which prohibits certain ex parte communications between Commissioners and parties.

This definition is reasonable because it corresponds with the definition of "party" that appears in the Commission's Rules on Practice and Procedure, Minn. Rules, part 7830.0100, subp. 8, and with the Commission's Rules on Code of Conduct, part 7845.0100, as well as with the definition of "party" that appears in the Minnesota Office of Administrative Hearings' Rules on Rulemaking and Contested Cases, Minn. Rules, part 1400.1500, subp. 7, thereby providing internal consistency and preventing confusion.

This definition is also reasonable because it is limited to those persons who have an interest different from that of the general public, in a matter pending before the Commission and, therefore, implements the broad legislative intent to take precautions to prevent the occurrence of improper ex parte communications that could taint the Commission decision-making process.

7845.7100 Permissible Ex Parte Communications.

This rule is necessary to implement Minn. Laws 1986, ch. 409, section 5, Subdivision 1, which requires the Commission's rules to distinguish between permissible and prohibited ex parte communications since the reporting requirements and sanctions will vary accordingly. This rule is reasonable because it recognizes that certain ex parte communications are valuable and necessary to assist the Commissioners and decision-making personnel in their fact-finding and decision-making functions. The proposed rule recognizes that the Commission has both legislative and quasi-judicial functions pursuant to Minn. Stat. Chapter 216A and that ex parte communications that are not prohibited by statute help the Commission to fulfill those responsibilities. The rule makes clear that ex parte communications are permissible except to the extent that they are listed as prohibited in Minn. Laws 1986, ch. 409, section 5, subd. 1, and as reflected in part 7845.7200.

7845.7200 Prohibited Ex Parte Communications.

This rule is necessary to explain Minn. Laws 1986, ch. 409, section 5, subd. 1, which prohibits certain ex parte communications between Commissioners and parties. In accordance with the statute, Subpart 1, items A through D, of the rule list the circumstances under which ex parte communications are prohibited.

Items A and B of Subpart 1 of the rule set forth the time frames established in the Statute for each category of prohibited ex parte communications in an easy to read and understandable format. The time frame during which ex parte communications will be prohibited with regard to

disputed formal petitions, referred to in item C of Subpart 1, is explained in the definitional section, 7845.7000, subp. 3. This is because the definition of a disputed formal petition describes a procedure that establishes a time frame beyond which ex parte communications are prohibited. The time frames specified in the rule are reasonable because they encompass the period during which ex parte communications have the potential to unduly influence the Commission's decision-making process.

Item D of Subpart 1 specifically sets forth three other types of communications that are prohibited by law: offers of employment to Commissioners, Minn. Laws 1986, ch. 409, section 4; discussions with Commissioners concerning past future benefits or compensation, Minn. Laws 1986, ch. 409, section 5, subd. 2; and offers to Commissioners of compensation, gifts, gratuities, favors, entertainment, meals, beverages, loans or other things of monetary value, proposed Minn. Rule 7845.8000. Item D, in conformance with Minn. Laws 1986, ch. 409, section 5, indicates some examples of other communications that are prohibited by law. This item of the rule is reasonable because all of the matters it covers share in common the potential to unduly influence or improperly taint the Commission's decision-making process.

Subpart 2 of the rule clarifies that the prohibitions on ex parte communications mandated by Minn. Laws 1986, ch. 409, section 5, do not apply to Commission decision-making personnel, but only to Commissioners and parties.

7845.7300. Handling Prohibited Ex Parte Communications.

This rule is necessary to implement Minn. Laws 1986, ch. 409, section 5, which prohibits certain ex parte communications. The rule establishes filing and notice procedures for the Commission to follow in the event that prohibited oral or written ex parte communications occur or are attempted. The filing and notice procedures are necessary so that parties and interested members of the general public will have an opportunity to review all actual or attempted prohibited communications, the overall purpose being to prevent the Commission decision-making process from becoming unduly influenced by prohibited ex parte communications. The filing and notice procedures will discourage attempts at improper ex parte communications by making such attempts public. A major harm from such improper contacts is their secretive nature. Removing that secrecy helps remove the harm they do to due process and fundamental fairness.

Subpart 1 of the rule specifies the procedures to be followed when a Commissioner receives a prohibited written ex parte communication. This provision is reasonable because it establishes a procedure that quickly discloses a Commissioner's exposure to prohibited written ex parte communications. The requirement that, when possible, Commissioners forward such communications to the Executive Secretary without reading them, is reasonable because it furthers the purpose of keeping the decision-making process from being negatively influenced by prohibited communications, while at the same time recognizing that it will not always be possible for a Commissioner to avoid seeing a prohibited written ex parte communication before forwarding it to the Executive Secretary. The additional requirement that when a Commissioner sees a prohibited written ex parte communication, he

or she shall prepare a signed statement of the source and circumstances under which the communication was received and read and forward that statement to the Commission's Executive Secretary within 48 hours is reasonable because it prevents the decision-making process from being unduly influenced by calling for complete and speedy disclosure of the prohibited communication, its source and the circumstances under which it was received and read.

Subpart 2 of the rule specifies the procedures to be followed when a party makes or attempts to make a prohibited oral ex parte communication to a Commissioner. As in Subpart 1, this provision acknowledges that situations will arise when parties will have the opportunity to attempt to make or actually make prohibited ex parte communications and provides the Commissioners with a clear and direct response to such prohibited communications or attempted communications. The rule is reasonable because it recognizes that it will not always be possible for a Commissioner to prevent a prohibited oral ex parte communication from taking place and because the recording requirements demand a complete and speedy disclosure that will help prevent the Commissioners' decision-making process from undue influence from the prohibited communications.

Subpart 3 of the rule is reasonable because it establishes procedures that will ensure a complete and speedy disclosure of prohibited oral and written ex parte communications to parties and the public. The notice procedures provide a logical means for ensuring that parties and the public will have ample opportunity to review such communications.

7845.7400 Handling Permissible Ex Parte Communications

This rule is necessary to implement Minn. Laws 1986, ch. 409, section 5, Subd. 1, which requires the adoption of rules prescribing permissible and impermissible ex parte communications.

Subpart 1 of the rule defines the scope of the documentation that will be required for permissible ex parte communications. The Commission believes that documentation in these limited areas is reasonable because it will benefit the decision making process by maintaining an atmosphere of openness and ensuring that improper influence does not take place, without causing an undue burden to decision-making personnel.

Subpart 2 and 3 of the rule apply to decision-making personnel who receive or generate oral or written ex parte communications that are permissible for them but are prohibited for Commissioners pursuant to Minn. Laws 1986, ch. 409, section 5 and part 7845.7200. Because these types of ex parte communications are prohibited for Commissioners, they are, by their very nature, suspect, even when made by decision-making personnel. Therefore, in order to prevent circumvention of the decision-making process and to maintain the spirit of the rule, Subparts 3 and 4 reasonably require that these permissible ex parte communications be noted and filed in the Commission's public file. The specified time frame for filing is also reasonable because it helps prevent improper influences on the decision-making process and is not unduly burdensome for the affected decision-making personnel.

Subpart 4 applies to both Commissioners and decision-making personnel who receive or generate permissible written or oral ex parte communications

through interaction with a party during the setting of interim rates or the review of compliance filings. The rule recognizes that it is necessary for the Commission's decision-making personnel to gather information to complete its analysis and to assure the accuracy of the Commission's interim rate determinations and compliance orders. However, without a means of monitoring the ex parte communications with decision-making personnel, improper influence could reach into the Commission's decision-making process.

Subpart 4 recognizes that not all communications between decision-making personnel and a party during these stages are in writing. Decision-making personnel have demonstrated a regular need to communicate orally with parties during this time. Decision-making personnel may orally seek additional data and calculation, clarification regarding a party's positions, assurance of feasibility of proposals, and resolution of the timing of the implementation of changes. Oral communications expedite the process which for interim rates is subject to a 60 day time constraint, and increase the accuracy of the Commission determination. However, this information needs to be placed into the public file to avoid the problems of secret government. The rule recognizes this public purpose by requiring that these types of communications be recorded and placed into the public file. If necessary, additional information regarding the communication may then be obtained through the staff members who participated in the communications.

To accommodate both the need for information gathering and the need to ensure that improper influence does not affect the decision-making process, the rule reasonably requires the disclosure of basic information surrounding the ex parte communications. This will protect the decision-making process in interim rates and compliance filings by allowing all affected persons to know of the communications. Furthermore, decision-making at these stages is also reviewable by the courts. For meaningful review to take place, the court must know what was considered by the Commission in its decision-making.

Subpart 5 is reasonable because it furthers the overall intent of the statute to prevent the occurrence of improper influences upon the decision-making process by establishing a procedure whereby parties and the public will have access to review of the ex parte communications that occur in these situations.

7845.7500 Sanctions.

This rule is necessary to implement Minn. Laws 1986, ch. 409, section 5, which prohibits ex parte communications between Commissioners and parties relating to material issues in proceedings, petitions and other matters pending before the Commission and grants the Commission the power to impose sanctions on parties if violations occur. The rule deters parties from engaging in prohibited ex parte communications and corrects abuses of the Commission's decision-making process that cannot be remedied simply by disclosure. Due process requires that these sanctions be imposed subject to notice and opportunity for hearing.

Not all violations need to be remedied by dismissal. Lesser sanctions are appropriate when a violation does not irrevocably taint the Commission's decision-making process so as to make an impartial proceeding impossible. Therefore, under this rule the extent of the sanction is made commensurate

with the degree of the harm. The range of sanctions can be viewed as points along a continuum, with no sanction placed at one end where there has been no harm and dismissal of a proceeding placed at the other end where there has been great and irrevocable harm.

The placement of the rule's various sanctions along the continuum is not arbitrary--the sanctions are logical, reasonable and fair and help cure the problem of vagueness that would exist in their absence. The determination as to what sanction is needed in a given situation requires an evaluation of all the standards set forth in items A through D of part 7845.7500. Again, the sanctions range from no adverse action to dismissal of a proceeding.

Item A of the rule is reasonable because dismissal of a proceeding is the only action that will effectively remedy the abuse of the decision-making process that results when a prohibited ex parte communication has so prejudiced the proceeding that the Commission cannot consider it impartially. Dismissal restores the status quo ante where the process has been corrupted by a party's actions. It is a logical and reasonable remedy that has been recognized by the courts where the gravity of the conduct irrevocably taints the integrity of the process and the fairness of the results. WKAT, Inc. v. FCC, 296 F.2d 375 (D.C. Cir. 1961).

At the other end of the continuum is the situation where no harm results from a prohibited ex parte communication. Even so, the fact that a prohibited ex parte communication has occurred generates concern and a need for an examination of the circumstances surrounding its occurrence. Where the ex parte communication has not affected the impartiality of the decision-making process, case law demonstrates that no corrective action is necessary. PATCO v. Federal Labor Relations Authority 685 F.2d 547 (1982).

Clearly, situations will occur where dismissal is not warranted but corrective action is needed. Items B, C and D are logical, fair and reasonable points along the continuum between dismissal and no corrective action. They establish articulable standards for remedies that are commensurate with the degree of harm resulting from the prohibited ex parte communication.

Items B and C of the rule are reasonable because either an adverse ruling on a pending issue that is the subject of a prohibited ex parte communication or the striking of evidence or pleadings that have become negatively influenced by a prohibited ex parte communication will cure the affected proceeding without needing to resort to a complete dismissal and will effectively penalize the parties who have engaged in prohibited ex parte communications, thereby discouraging other attempts to improperly influence the Commission decision-making process.

Item B is particularly effective for parties who did not initiate a proceeding and might benefit from its dismissal. When such parties cause great and irrevocable harm through their ex parte communications with the Commission, dismissal of the party but not of the proceeding will cure the process and protect other innocent parties.

Item D is reasonable because a public statement of censure by the Commission is a practical and effective means of making a party accountable for engaging in either one or a series of prohibited ex parte communications

when mitigating circumstances exist that negate the need for a more severe sanction and the conditions that would justify the imposition of the sanctions set forth in items A, B and C of this rule are not present.

Examples of mitigating circumstances would be when a party voluntarily attempts to correct the harm done by the occurrence of either an intentional or unintentional prohibited ex parte communication by disclosing the communication and the surrounding circumstances, withdrawing the matter under consideration, or by taking other actions that attempt to correct the harm done to the decision-making process.

7845.7600 Violations by Commission and Staff.

This rule is necessary to implement the statutory intent of Minn. Laws 1986, ch. 409, section 5 to prevent the Commission's decision-making process during a pending proceeding from being improperly influenced by the introduction of prohibited ex parte communications. The rule addresses only intentional violations. This limitation is reasonable because to allow Commissioners or decision-making personnel who have intentionally violated these prohibitions to continue to participate in the decision-making process would undermine the purpose of Minn. Laws 1986, ch. 409, section 5 and the accompanying rules. While unintentional violations also have the potential to negatively influence the decision-making process, they are mitigated by disclosure, self-removal or other actions that seek to remove or correct the harmful influence. No one should be able to entrap a Commissioner to force a disqualification from participation in a proceeding.

The restrictions on participation in the decision-making process contained in this rule that are specifically limited to decision-making personnel are also reasonable because they provide the Commissioners with the flexibility to review such situations on a case-by-case basis. The Commission works on statutory deadlines. Flexibility is therefore needed to restrict the intentional offender, while at the same time protecting the ratepaying public. Most staff problems can be handled through the internal staff management process by reassignment.