



STATE OF MINNESOTA PUBLIC UTILITIES COMMISSION

May 8, 2009

Legislative Reference Library
645 State Office Building
100 Constitution Avenue
St. Paul, Minnesota 55155

Re: In The Matter of the Proposed Amended Rules of the Public Utilities Commission
Governing *Ex Parte* Communications; Governor's Tracking #AR 370

Dear Librarian:

The Minnesota Public Utilities Commission intends to adopt amended rules governing *ex parte* communications. The proposed changes affect Minnesota Rules, Chapter 7845. We plan to publish a Dual Notice of Intent to Adopt Rules in the May 11, 2009 *State Register*.

The Commission has prepared a Statement of Need and Reasonableness. As required by Minnesota Statutes, sections 14.131 and 14.23, the Commission is sending the Library a copy of the Statement of Need and Reasonableness at the same time we are mailing our Notice of Intent to Adopt Rules.

If you have questions, please contact me at 651-201-2239.

Yours very truly,

A handwritten signature in black ink that reads "Kate Kahlert".

Kate Kahlert
Commission Attorney

Enclosure: Statement of Need and Reasonableness

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BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

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In the Matter of a Possible Rulemaking to
Amend the *Ex Parte* Provisions of Minnesota
Rules Chapter 7845 to Conform With Statutory
Changes

ISSUE DATE: May 11, 2009

DOCKET NO. U-999/R-07-887

STATEMENT OF NEED AND

REASONABLENESS

**I.
INTRODUCTION**

Since 1986, the Minnesota legislature has prohibited certain *ex parte* communications between Commissioners and specific classes of persons involved in Commission proceedings. Minn. Stat. § 216A.037. The statute required the Commission to establish rules governing this and other prohibited conduct. The rules that were established are codified at Minnesota Rules Chapter 7845 and include two distinct parts. The first prescribes a code of conduct and the second governs *ex parte* communications.¹ Since the rules were first written, statutory changes have been made and the Commission decided that rulemaking was the best way to incorporate these changes.

The proposed rules contain four primary changes.

The first extends code of conduct restrictions to telecommunications carriers. Minn. Stat. § 216A.036 prohibits a Commissioner, within one year of leaving the Commission, from accepting employment with a public utility or telephone company that is subject to rate regulation by the Commission. The proposed rules extend the ban to telecommunications carriers.

¹ The Commission adopted the code of conduct rules in 1986 using emergency rulemaking under 216A.037 subd 3. The legislature also directed the Commission to adopt *ex parte* rules and the Commission did so in 1986 under 216A.037 subd. 1.

The second includes the addition of the term *participant* in rule provisions describing to whom *ex parte* rules apply. Recent statutory changes prohibit certain *ex parte* communications between “a commissioner and a participant or party.”² Because the current rules do not include the term *participant*, the proposed rules include it.

The third removes duplicative language that appears in both the *ex parte* and code of conduct rule provisions. This language will be removed from the *ex parte* rule and will remain in the code of conduct where it can be most effectively enforced.

The fourth adds three new rules at the end of the chapter that detail a procedure for handling complaints, conducting investigations, and imposing sanctions for alleged *ex parte* violations. These new rules are a result of a statutory change outlining an investigatory process for complaints seeking sanctions for alleged *ex parte* violations. Minn. Stat. § 216A.037 subd. 4.

II. THIS MATERIAL IS AVAILABLE IN ALTERNATIVE FORMAT

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III. STATUTORY AUTHORITY

The Commission first established *ex parte* rules pursuant to Minn. Stat. § 216A.037 and in accordance with Minnesota’s Administrative Procedure Act, Minn. Stat. Ch. 14. Amendments to the *ex parte* rules will conform the rules to recent statutory changes. Minn. Stat. § 216A.037.

IV. STATEMENT OF NEED

Minnesota’s Administrative Procedure Act, Minn. Stat. Ch. 14, requires the Commission to establish the need for the proposed rules by an affirmative presentation of facts. Minn. Stat. §§ 14.14 subd. 2 and 14.23.

In this case, the proposed rules are needed to comply with recent changes to Minn. Stat. § 216A.037, governing *ex parte* communications.

² This statutory language was passed by the Minnesota Legislature during the 2007 session.

V.
STATEMENT OF REASONABLENESS

The Minnesota Administrative Procedure Act also requires the Commission to establish that the proposed rules are a reasonable solution to the problems they are intended to address, that the Commission relied on evidence in choosing the approach adopted in the rules and that the evidence relied upon is rationally related to the approach the Commission chose to adopt. Minn. Stat. §§ 14.14, subd. 2 and 14.23. Minn. Rules, part 1400.2070, subp. 1.

A. The Process Used to Develop the Rules Facilitated Informed Decision-making and was the Most Efficient Method for Establishing Reasonable Rules

The proposed amended rules are a reasonable means of incorporating recent statutory changes affecting *ex parte* communications. Because the proposed amended rules are not controversial, no advisory task force was established. The Commission notified all persons that could be identified as potentially interested in or affected by the proposed changes of this rulemaking. After issuing a Request for Comments that resulted in recommendations made by stakeholders, the Commission issued an additional notice for comment to further enhance the opportunity for participation by those interested or affected. The Commission considered the comments of those who responded and incorporated changes that were reasonable, responsive to the needs of diverse stakeholders, and that carried out the policy objectives the Commission set forth at the outset of this rulemaking.

B. The Rules' Approach to Implementing Statutory Changes is Reasonable

The Commission has determined that the proposed rules are needed and are the most reasonable way to comply with recent statutory changes. The rules take a reasonable approach to each of the four major areas they address: applying an employment restriction to telecommunications carriers, adding the term *participants*, removing duplicative language, and adding a statutorily prescribed complaint process. The rules' general approach to each area is discussed below; the reasonableness of each rule provision is taken up following that discussion.

1. Employment Ban

Minn. Stat. § 216A.036 (a) prohibits Commissioners from accepting employment with an entity that is subject to rate regulation by the Commission within one year of leaving the Commission. The rules' code of conduct provisions that implement this statutory ban apply it to a telephone company, the definition of which excludes telecommunications carriers. Because, however, telecommunications carriers are subject to rate regulation by the Commission, it is reasonable to amend the rules to explicitly apply the employment ban and other code of conduct restrictions to telecommunications carriers.

2. Participants

Minn. Stat. § 216A.037, subd. 1 prohibits certain *ex parte* communications between Commissioners and a party or a participant. Currently, the rules include only the term *party* and need to be changed to add the term *participant*.

The proposed rules are a reasonable means of complying with recent statutory changes. Because the statute governing *ex parte* communications applies to *participants*, the rules need to be changed to include the use of this term. If not amended to include the term *participant*, the rules would be inaccurate and could be confusing to both the agency applying the rules and persons regulated in determining to whom the rules apply.

3. Duplicative Language

There are two rule parts where duplication should be eliminated.

a. Eliminating Duplication in the *Ex Parte* Rules Section

The proposed rules remove language from an *ex parte* rule provision that inadvertently prohibits certain behavior that is also prohibited in the rule provisions that govern the Commission's code of conduct.

Ex parte communications are generally defined as communications by or to a Commissioner that go to a material issue in a pending case or proceeding. They are different from the offering or acceptance of employment, future benefits or compensation or other kinds of gratuities or favors, which are best regulated in the code of conduct rule provisions. And Chapter 7845 intentionally treats *ex parte* communications matters differently from code of conduct matters.

Maintaining this distinction requires amending an *ex parte* rule provision that inadvertently includes a code of conduct restriction, one that is also found in code of conduct provisions. And because new statutory changes and new rule provisions require alleged *ex parte* violations to be investigated and treated differently than alleged code of conduct violations, it is reasonable to remove the restriction from the *ex parte* rule provision and leave it in the code of conduct provisions.

b. Amending Rule Governing Sanctions

A current rule that lists sanctions for *ex parte* violations will be amended to no longer list these sanctions, but rather, to include a reference to a new rule that lists them. It is unnecessary to list the same sanctions twice in two different rule parts. Avoiding duplication is a reasonable way to implement statutory changes and effectively achieve the intent of the rules, which is to make clear how and when sanctions will be applied.

4. Complaint Process

Minn. Stat. § 216A.037 was recently amended to include subdivision 4, which outlines a complaint process for handling *ex parte* violations. The proposed rules include this process.

The proposed rules are a reasonable means of establishing a complaint procedure for impermissible *ex parte* communications. The proposed rules include the following statutory requirements: require that the complaint be referred to the Office of Administrative Hearings; make binding on the Commission the Administrative Law Judge's (ALJ) findings on whether *ex parte* violations occurred; and, require the ALJ's report to include recommendations on sanctions to the Commission. The proposed rules also include a final provision that requires the Commission to make a determination on sanctions.

VI. ANALYSIS OF INDIVIDUAL RULES

7845.0100 DEFINITIONS

The Commission proposes to amend subpart 6 and add subpart 9 as follows:

Subp. 6. **Telephone company.** "Telephone company" has the meaning given it in Minnesota Statutes, section 237.01, except that for the purposes of this chapter it also includes an independent telephone company as defined in Minnesota Statutes, section 237.01, subdivision 3; a radio common carrier as defined in Minnesota Statutes, section 237.01, subdivision 4; a telecommunications carrier as defined in Minnesota Statutes, section 237.01, subdivision 6; a small telephone company as defined in Minnesota Statutes, section 237.773, subdivision 1.; and their agents, officers, and representatives.

It is both necessary and reasonable to amend the definition of a telephone company to include telecommunications carriers and small telephone companies. "Telephone company" is used in code of conduct provisions that were adopted to ensure and uphold the integrity of the Commission's decision-making processes by restricting certain actions between Commissioners and influential stakeholders, and this change is necessary to further these goals.

For example, the code of conduct, in part 7845.0700, prohibits a Commissioner or an employee from accepting gifts, loans, or other things having monetary value, from a telephone company. But, the current definition of a "telephone company" in Chapter 7845 uses the statutory definition found at Minn. Stat. § 237.01, subd. 7, which expressly excludes a "telecommunications carrier." And to the extent that the definition of "telephone company" could be read to also exclude a "small telephone company," the proposed rule amends the definition of "telephone company" to include both a telecommunications carrier and a small telephone company.

Telecommunications carriers and small telephone companies regularly have stake in the outcome of Commission proceedings, and therefore have potential influence on Commission decisions. Applying code of conduct restrictions to these important and influential stakeholders is necessary in preventing misconduct and ensuring clean hands in Commission processes and decisions.

Subp. 9. Rate-regulated entity.

“Rate-regulated entity” means an entity subject to rate regulation by the Commission and includes all of the following:

- A. a public utility as defined in Minnesota Statutes section 216B.02, subdivision 4;
- B. a cooperative electric association that has elected to become subject to regulation by the Commission under Minnesota Statutes, section 216B.026;
- C. a municipality that has elected to become subject to regulation by the commission under Minnesota Statutes, section 216B.025;
- D. a telephone company as defined in Minnesota Statutes, section 237.01, subdivision 7;
- E. an independent telephone company as defined in Minnesota Statutes, section 237.01, subdivision 3;
- F. a telecommunications carrier as defined in Minnesota Statutes, section 237.01, subdivision 6;
- G. a small telephone company as defined in Minnesota Statutes, section 237.773, subdivision 1.

Minn. Stat. § 216A.036 prohibits a Commissioner from accepting employment “with an entity, or an affiliated company of an entity, that is subject to rate regulation by the Commission” within one year of leaving the Commission. The current rules include this ban by applying it to a “public utility or telephone company subject to rate regulation by the Commission.” But because the definition of “telephone company” excludes a telecommunications carrier, and because the Commission finds that a telecommunications carrier is an entity subject to rate regulation by the Commission, the proposed rule uses the phrase “rate-regulated entity”, the definition of which includes a telecommunications carrier.

This term will be used in subsequent provisions that prohibit Commissioners from accepting employment with a “rate-regulated entity” within one year of leaving the Commission. To ensure clarity in understanding to whom the restriction applies, it is necessary to define the term,

and it is reasonable to include the entities listed. The definition lists all entities that are subject to varying degrees of rate regulation by the Commission. Because the Commission has the authority to change, implement, modify, or otherwise affect these entities' rates, it is reasonable to include each of them in the definition.

The rates of public utilities and telephone companies are subject to rate regulation by the Commission. Under Minn. Stat. § 216B.16, a public utility's rates must be filed with the Commission and are subject to Commission review and approval, and under Minn. Stat. § 237.075, a telephone company's rates must be filed with the Commission and are subject to Commission review and approval.

The Commission has rate authority over a cooperative electric association under Minn. Stat. § 216B.026 or a municipality under Minn. Stat. § 216B.025, if either elects to become subject to regulation, under either of these statutes.

And even though, under Minn. Stat. § 237.035, telecommunications carriers are not subject to *rate-of-return* regulation, Minnesota rules do give the Commission authority over telecommunications carriers' rates. Minn. Rules, Chapter 7811.2210, subp. 8, and Minn. Rules Chapter 7812.2210, subp. 8, govern the pricing of telecommunications carriers and contain five instances in which the Commission, on its own motion or upon complaint, has authority to review and order the change of prices, including prices that unreasonably restrict resale, that are discriminatory, that are deceptive, that impede competition, or that result in substantial customer harm.

Under Minn. Stat. § 237.081, the Commission may, upon complaint or on its own motion, review and change the rates of independent telephone companies, even though they are not required to follow the procedures for rate changes that are required of larger telephone companies under Minn. Stat. § 237.075.

And the Commission has authority to review and change the rates of small telephone companies, as defined in Minn. Stat. § 237.773, that operate under an alternative form of regulation, as described in Minn. Stat. §§ 237.76 through 237.775. Under this plan, a small telephone company has its rates frozen for two years, after which the Commission has authority to review and change the rates upon complaint. And under Minn. Stat. § 237.081, the Commission may, on its own motion or upon complaint, review and revise rates for services other than switched access services. Under Minn. Stat. §§ 237.761 and .762, rates for switched access services may not be changed without prior Commission approval.

The Commission's authority to review, investigate, and order change of rates in the instances described above, establishes that each of the entities listed is subject to rate regulation by the Commission and that each is properly included among the entities subject to the one-year employment ban.

If left unchanged, the ban does not apply to telecommunications carriers. The current rules apply the employment ban to a telephone company *subject to rate regulation by the Commission*. But not every entity listed in the definition of "telephone company" is subject to rate regulation

by the Commission. For example, although the rules define a “radio common carrier” as a type of telephone company, its rates are not subject to Commission regulation. This means that certain code of conduct provisions apply to radio common carriers, but the employment ban does not.

To avoid confusion over which entities are subject to rate regulation by the Commission and to ensure clarity in understanding to whom the employment ban applies, the proposed rules use the term “rate-regulated entity,” the definition of which includes a complete list of all entities that are subject to rate regulation by the Commission. This approach is consistent with Minn. Stat. § 216A.036, which applies the ban to “an entity, or an affiliated company of an entity, that is subject to rate regulation by the Commission.”

7845.0800 FUTURE EMPLOYMENT.

The Commission proposes to amend subpart 1 as follows:

Subpart 1. **One-year restriction.** While employed with the commission or within one year after leaving it, a commissioner shall not accept employment with, receive compensation directly or indirectly from, or enter into a contractual relationship with a ~~public utility or telephone company subject to rate regulation by the commission~~ rate-regulated entity.

Without this change, the ban does not apply to telecommunications carriers. The current rule applies the restriction to a telephone company, the definition of which excludes a telecommunications carrier. But Minn. Stat. § 216A.036 (a) bans employment for Commissioners with an entity that is subject to rate regulation by the Commission, and because telecommunications carriers are subject to the Commission’s rate authority, it is necessary to include telecommunications carriers in the ban. And it is reasonable to do so by amending the rule to include the term “rate-regulated entity,” the definition of which includes a telecommunications carrier.

7845.0900 POST EMPLOYMENT REPRESENTATION.

The Commission proposes to amend subpart 1 as follows:

Subpart 1. **By commissioner.** A commissioner shall not represent a ~~public utility or telephone company subject to rate regulation by the commission,~~ rate-regulated entity, formally or informally, before the commission for one year after leaving the commission. At no time shall a commissioner represent a party on a proceeding that was pending before the commission during that commissioner's term in office.

Without this change, the ban does not apply to telecommunications carriers. The current rule applies the restriction to a telephone company, the definition of which excludes a telecommunications carrier. But Minn. Stat. § 216A.036 (a) bans employment with an entity

that is subject to rate regulation by the Commission, and because telecommunications carriers are subject to the Commission's rate authority, it is necessary to include telecommunications carriers in the ban. And it is reasonable to do so by amending the rule to include the term "rate-regulated entity," the definition of which includes a telecommunications carrier.

The Commission proposes to amend subpart 2 as follows:

Subp. 2. **By employee.** For one year after leaving the commission, an employee shall not represent a ~~public utility or telephone company subject to rate regulation by the commission,~~ rate-regulated entity before the commission on a proceeding that the employee participated in during that employment with the commission.

Without this change, this restriction does not apply to telecommunications carriers. The current rule applies the restriction to a telephone company, the definition of which excludes a telecommunications carrier. Because the rules that contain employment restrictions for Commissioners are being amended to apply the ban to telecommunications carriers, it is consistent with that change to extend this employment restriction for staff to telecommunications carriers. And even though the statutory ban on employment, found at Minn. Stat. § 216A.036, applies to Commissioners and does not cover future employment activities by staff, this proposed change ensures consistency within the rules by using the term "rate-regulated entity" in each of the provisions that contain employment restrictions.

7845.7000 DEFINITIONS.

The Commission proposes to amend subparts 4 and 7 as follows:

Subp. 4. **Ex parte communication.** "Ex parte communication" means an oral or written, off-the-record communication made to or by commissioners or commission decision-making personnel, without notice to parties or participants, that is directed to the merits or outcome of an on-the-record proceeding. This term does not include procedural, scheduling, and status inquiries or other inquiries or requests for information that have no bearing on the merits or the outcome of the proceeding.

This change is necessary to ensure compliance with Minn. Stat. § 216A.037 subd. 1, which prohibits certain *ex parte* communications between a Commissioner and a party or participant. Adding the term *participant* to this rule is the most reasonable and clear approach to implementing the statutory changes.

Subp. 7. **Participant.** "Participant" means a person who files comments or appears in a proceeding, other than public hearings held in contested cases and other

commission proceedings conducted to receive general public comments, to present views without becoming a party.

This is a new rule and is necessary to ensure compliance with Minn. Stat. 216A.037, subd. 1, which prohibits certain *ex parte* communications between a Commissioner and a party or participant.

It is reasonable to define the term *participant*. Because the definition of an *ex parte* communication is being amended to include prohibited communications between a Commissioner and a party or *participant*, it is consistent with that change to also define *participant* where only the term *party* had been defined.

The rule uses the definition of *participant* found at Minnesota Rules Chapter 7829.0100, the Commission's rules on practice and procedure, as required under Minn. Stat. § 237.037 subd. 1.

7845.7200 PROHIBITED EX PARTE COMMUNICATIONS.

The Commission proposes to amend subpart 1 and item D as follows:

Subpart 1. **Communications with commissioners.** An *ex parte* communication, either direct or indirect, must not be made or attempted to be made between a commissioner and a party or a participant concerning:

Subpart 1 must be changed to add *participant*. This change is necessary to comply with Minn. Stat. § 216A.037, subd. 1, which prohibits certain *ex parte* communications between a Commissioner and a party or participant. The current rule prohibits communications between a Commissioner and a party and should be amended to include that same prohibition between a Commissioner and a *participant*.

Leaving out this term would cause the rule to be nonconforming with the statute and run the risk of causing confusion about the extent to which the *ex parte* rules apply to *participants*.

The Commission proposes to amend Subpart 1, item D as follows:

Subpart 1. **Communications with commissioners.** An *ex parte* communication, either direct or indirect, must not be made or attempted to be made between a commissioner and a party or a participant concerning:

A. a material issue during a pending contested case proceeding, from the date the matter is referred to the Office of Administrative Hearings until the commission issues its final order and the time to petition for reconsideration expires, or until the commission issues a final order responding to the petition for reconsideration, whichever is later;

B. a material issue in a rulemaking proceeding after the beginning of commission deliberations, from the date the commission posts notice of its deliberations for adoption of rules on the open meeting calendar until the order adopting the rules is issued;

C. a material issue in a disputed formal petition; or

D. other communications prohibited by law, such as:

~~(1) offers of employment to commissioners, as described in Minnesota Statutes, section 216A.036, and~~

~~(2) discussions with commissioners concerning past or future benefits or compensation, as described in Minnesota Statutes, section 216A.037, subdivision 2, and in parts 7845.0700 and 7845.0800; or (3) offers to commissioners of compensation, gifts, gratuities, favors, entertainment, meals, beverages, loans, or other things of monetary value, as described in part 7845.0700.~~

Parts 7845.0100 through 7845.1000 address code of conduct violations and parts 7845.7000 through 7845.7900 address *ex parte* communications. It is important to maintain this distinction, and the proposed rule is set forth for to do so.

Item D inadvertently restricts code of conduct actions that are also restricted in the rules' code of conduct provisions. These prohibited actions are fully addressed in the code of conduct rule provisions for which certain sanctions, including monetary sanctions, apply. And with the addition of three proposed rules that include an investigatory process for complaints alleging *ex parte* violations, it is necessary to eliminate most of item D so that regulated and affected persons understand that the new complaint process applies only to *ex parte* violations and does not apply to code of conduct violations.

It is reasonable to distinguish between code of conduct violations and *ex parte* violations. The code of conduct provisions prohibit the offering by parties or regulated companies, or the acceptance by Commissioners or staff, of things such as future employment opportunities, benefits, gratuities or other things having monetary value. These are distinct and separate from the treatment of *ex parte* violations, which primarily restrict communications with Commissioners regarding a material issue in a pending proceeding.

If left in the *ex parte* rule provision, the language in item D could be misinterpreted to mean that code of conduct violations are also a type of prohibited *ex parte* communication. That interpretation would require applying the proposed rules' *ex parte* communications investigatory process and sanctions to code of conduct violations. This is not the intent of the rule, and therefore it is reasonable to remove the code of conduct language from this rule.

7845.7300 HANDLING PROHIBITED EX PARTE COMMUNICATIONS.

The commission proposes to amend subparts 2 and 3 as follows:

Subp. 2. **Oral communication.** If a party or participant makes or attempts to make a prohibited oral *ex parte* communication to a commissioner, the commissioner shall advise the party or participant who makes or attempts to make the communication that the communication is prohibited and shall immediately terminate the communication. If a prohibited oral *ex parte* communication takes place, the commissioner who receives the communication shall forward to the commission's executive secretary, within 48 hours, a signed and dated statement that includes the following information:

- A. the name and docket number of the proceeding;
- B. to the extent known, the name and address of the person making the communication and the relationship, if any, to the parties to or the participants in the proceeding;
- C. the date and time of the communication, its duration, and the means by and circumstances under which it was made;
- D. a summary of the matters discussed; and
- E. whether the party or participant making the prohibited communication persisted after being advised that the communication was prohibited.

Changes to subpart 2 are necessary to ensure compliance with Minn. Stat. § 216A.037 subd. 1, which prohibits certain *ex parte* communications between a Commissioner and a party or participant.

This subpart explains all of the following: how a Commissioner should handle *ex parte* communications made by a party; what information the Commissioner must provide to the executive secretary and requires the Commissioner to describe the relationship, if known, between the person making the communication and that person's relationship to other parties to the proceeding; it requires information in the notice about whether the party persisted in engaging a Commissioner in a prohibited *ex parte* communication; and it requires that the notice include a description of the relationship, if known, between the person making the communication and other parties to the proceeding. It is necessary for each of these requirements to incorporate the statutory change that includes *participants*, and the proposed rule changes include this term.

This change is reasonable because it is consistent with the rest of the changes in the *ex parte* rules where the term *participant* is being added in order to include this class of persons as a regulated group under the rules.

Leaving out this term would cause the rule to be nonconforming with the statute and run the risk of causing confusion about the extent to which the *ex parte* rules apply to *participants*.

Any additional duties the Commission faces in handling *ex parte* communications made by *participants* will not be overly burdensome compared with the current duties the Commission faces in these situations. The Commission is already required to follow these steps if the *ex parte* communication occurred between a Commissioner and a party, and it is unlikely that extending this reporting requirement to communications with participants will create undue burdens for Commissioners or staff.

Subp. 3. **Notice to parties and participants.** The commission's executive secretary shall place the statement in the commission's public file within 48 hours, but shall not make the statement part of the record of the pending proceeding. The executive secretary shall serve a copy of the statement on the parties and participants on the commission's official service list. If the statement is voluminous, the executive secretary may serve notice to the parties and participants on the official service list that the statement is available for public inspection at the commission's offices during regular business hours.

This change is necessary to ensure compliance with Minn. Stat. § 216A.037, subd. 1, which prohibits certain *ex parte* communications between a Commissioner, and a party or participant. It explains how notice of an *ex parte* communication is to be provided. Because the rule requires notice to be given to parties, it is necessary to also give notice to *participants*.

This change is reasonable because it is consistent with the rest of the changes in the *ex parte* rules where the term *participant* is being added. Leaving out this term would cause the rule to be nonconforming with the statute and run the risk of causing confusion about the extent to which the *ex parte* rules apply to *participants*.

7845.7400 HANDLING PERMISSIBLE EX PARTE COMMUNICATIONS.

The commission proposes to amend subpart 4 as follows:

Subp. 4. **Interim rate proceedings; compliance filings.** Commissioners and decision-making personnel may receive or generate written or oral *ex parte* communications with a party or participant in the setting of interim rates or the review of compliance filings following the issuance of a final order or order after reconsideration. Commissioners and decision-making personnel who receive or generate written or oral *ex parte* communications in these situations shall place a signed note in the commission's public file containing the name of the party or participant, date, docket number of proceeding, and topic as soon as practicable, but no later than the issuance of the interim rate order or the compliance filing order.

This change is necessary to ensure compliance with Minn. Stat. § 216A.037 subd. 1, which prohibits certain *ex parte* communications between a Commissioner and a party or participant. This subpart addresses how permissible *ex parte* communications with a party should be handled by Commissioners or staff. It is necessary to amend this rule to include *participants*.

This change creates no costs to *participants* because it puts a duty on Commission staff. Any cost to the Commission in documenting these communications is outweighed by the benefit of applying this rule to communications with participants. And the Commission does not anticipate a significant increase in documenting that will result in increased costs.

7845.7500. SANCTIONS.

This part will be amended to make reference to a new rule part that will list these same sanctions.

7845.7500 SANCTIONS.

Subject to notice and hearing, a party who makes a prohibited *ex parte* communication to a commissioner or who encourages or solicits others to make a prohibited *ex parte* communication to a commissioner is subject to the following sanctions: listed in part 7845.7800.

~~A. dismissal of the proceeding if the prohibited *ex parte* communication has so prejudiced the proceeding that the commission cannot consider it impartially;~~

~~B. an adverse ruling on a pending issue that is the subject of the prohibited *ex parte* communication, when other parties are prejudiced by the prohibited *ex parte* communication;~~

~~C. the striking of evidence or pleadings when the evidence or pleadings are tainted by the prohibited *ex parte* communication; or~~

~~D. a public statement of censure by the commission, when the prohibited *ex parte* communication is determined to be part of a continuing pattern of improper *ex parte* communication or when a single prohibited communication takes place and mitigating circumstances exist that:~~

~~(1) negate the need for a more severe sanction;~~

~~(2) do not prejudice the proceeding to the extent that the commission is unable to consider it impartially;~~

~~(3) do not prejudice other parties to the proceeding; and~~

~~(4) do not taint the evidence or pleadings.~~

It is reasonable for the Commission to remove this list of sanctions because they will be listed in a new rule that includes an investigatory process for complaints seeking sanctions for alleged *ex parte* violations. And this rule references the new rule where the sanctions are listed. If the Commission finds that the process described in the new rule provisions does not apply, then it is reasonable for the Commission to use the process described in this rule. And it is sound policy to apply these sanctions to either process, but it is unnecessary to list them twice in two different rule parts.

7845.7700 EX PARTE COMMUNICATIONS; COMPLAINTS SEEKING SANCTIONS

Part 7845.7700 is a new rule and explains the process for filing a complaint alleging *ex parte* violations.

This rule complies with Minn. Stat. § 216A.037, subd. 4, which lists the requirements for complaint contents, filing and responses.

The rule lists what is required in the complaint, including how the complaint will be served and on whom, and the timeframe to file an answer. Because these steps precede the investigation, it is reasonable to include them in one rule, using four subparts: Complaint, Contents, Service and Answer.

An alternative would be to leave out this rule since the statute includes this information. However, the proposed rules require the Commission to make a decision on sanctions, a requirement not found in the statute, but one that arises out of the statutory requirement that the Administrative Law Judge's decision on violations is binding on the Commission. Because the ALJ's decision is binding on the Commission, it is reasonable for the rules to include the full complaint process, including a final provision that describes the Commission's process for making a decision on sanctions.

Subpart 1. **Complaint.** Any person seeking sanctions for alleged *ex parte* violations may file a complaint with the commission.

This subpart is necessary to explain what type of complaint may be filed with the Commission. The complaint process addresses sanctions for alleged *ex parte* violations, as the statute states. *Id.* at subd. 4 (a) and (b). This rule implements the statute's requirement that the complaint be filed

with the Commission. It is reasonable to include the statute's complaint requirements in the rules to ensure clarity and consistency in enforcement.

Subpart 2. **Contents.** The contents of the complaint must include all of the following information:

- A. name and address of the complainant;
- B. name and address of the complainant's counsel, if any;
- C. name and address of each person alleged to have violated the ex parte prohibition (respondents);
- D. name and address of each respondent's counsel, if any;
- E. the facts which constitute the allegation; and
- F. sanctions sought.

It is necessary to list the information required in the complaint. This subpart includes the list described in statute. *Id.* at subd. 4 (b).

It is reasonable to require the complaint to include identifying information about the complainant and the respondent. It is reasonable to require that the complaint include both a description of the facts giving rise to the allegation as well as the sanctions sought, as the rule is intended to be used to investigate complaints seeking sanctions. This procedural requirement will be used to capture relevant information for the purpose of enabling the Office of Administrative Hearings to begin investigation of the complaint.

Subpart 3. **Service.** Complaints filed under this part must be filed with the commission and mailed to or served on the following:

- A. each respondent;
- B. the department;
- C. the Residential Utilities Division of the Office of the Attorney General; and
- D. all persons on the commission's official service list for the proceeding.

This subpart is necessary to describe how and on whom the complaint should be served. It includes the list described in statute. *Id.* at subd. 4 (c).

It is reasonable to require the complaint to be served on the persons and agencies listed. They are listed because they are most reasonably likely to be involved in responding to the complaint and participating in the investigation.

It is reasonable to notify persons on the Commission's official service list for the affected proceeding because their right to a fair hearing is the central protection the rule aims to provide.

The statute requires the complaint to be served by mailing it. The Commission finds that it is reasonable to allow service to be completed by mail or "service on" those listed to receive it.

Because the statute allows the *answer* to be “served on” not “mailed to” those required to be served, it is consistent with the statute’s intent to allow complainants to “serve” the complaint.

Subpart 4. **Answer.** Within seven days of service of the complaint, each respondent must file an answer with the commission and serve it on all of the following:

- A. each complainant;
- B. the department;
- C. the Residential Utilities Division of the Office of the Attorney General; and
- D. all persons on the commission’s official service list for the proceeding.

This subpart is necessary to explain when and on whom the answer should be served. It is consistent with the requirements described in statute. *Id.* at subd. 4 (d). It is appropriately placed in the rule detailing similar procedural steps that precede the investigation.

It is reasonable to require the answer to be served on the persons and agencies listed. They are listed because they are most reasonably likely to be involved in responding to the complaint and participating in the investigation.

It is reasonable to notify persons on the Commission’s official service list for the affected proceeding because their right to a fair hearing is the central protection the rule aims to provide.

7845.7800 COMPLAINT PROCEEDING

This is a new rule and it incorporates the statute’s complaint process. Minn. Stat. § 216A.037 subd 4 (e), (f), (g), and (h).

It is reasonable to capture the investigation process in four sufficiently congruent subparts: Office of Administrative Hearings; Investigation; Decision; Sanctions. The first subpart identifies the agency that will handle the investigation. The second subpart explains that an Administrative Law Judge (ALJ) will conduct a hearing and issue a report within a specified timeframe. The third subpart explains that the ALJ’s findings are binding and that the ALJ must make recommendations on sanctions. The fourth subpart explains which sanctions the ALJ may recommend. Because these four subparts all go to the process of investigation, they are included together in this rule.

An alternative would be to leave out this rule since the statute includes this information. However, the proposed rules require the Commission to make a decision on sanctions, a requirement not found in the statute, but one that arises out of the statutory requirement that the Administrative Law Judge’s decision on violations is binding on the Commission. Because the ALJ’s decision is binding on the Commission, it is reasonable for the rules to include the full

complaint process, including a final provision that describes the Commission's process for making a decision on sanctions.

Subpart 1. Office of Administrative Hearings. The commission shall refer the complaint and answer to the Office of Administrative Hearings.

This subpart is consistent with the statute, which requires the Office of Administrative Hearings to handle the investigation. *Id.* at subd. 4 (e). It is reasonable to include this subpart in the rule that describes the complaint proceeding.

Subpart 2. Investigation. The administrative law judge assigned to the ex parte complaint proceeding by the Office of Administrative Hearings shall conduct a hearing investigation and shall issue a report within 30 days after the matter is referred. If the administrative law judge determines that the report cannot be properly completed within that time period, the judge shall report that fact to the commission within the 30-day period and shall file a final report within a reasonable time thereafter, no later than 60 days after the referral to the Office of Administrative Hearings.

This subpart is consistent with the statutory language requiring the Office of Administrative Hearings to handle the investigation. *Id.* at subd. 4 (f). This subpart requires the ALJ to issue a report after a hearing and sets a time limit for issuing the report to the Commission. It is reasonable to include this subpart in the rule that addresses the complaint proceeding.

Subpart 3. Decision. The report of the administrative law judge shall describe the relevant facts of the case and shall set forth the judge's findings as to whether ex parte violations occurred. The findings and decisions of the judge as to whether ex parte violations occurred are binding on the commission.

This subpart is consistent with statutory language that makes binding on the Commission the ALJ's findings as to whether *ex parte* violations occurred. *Id.* at subd. 4 (g). It is necessary and reasonable to include this part in the rule that details the complaint proceeding.

Subpart 4. Sanctions. In the report, the administrative law judge shall discuss and make recommendations regarding sanctions, including the recusal of any commissioner or the removal of decision-making personnel from an affected case. The administrative law judge may only recommend that the commission impose one of the following sanctions if the judge finds that the condition specified for the sanction is met:

A. dismiss the proceeding if the prohibited ex parte communication has so prejudiced the proceeding that the commission cannot consider it impartially;

B. issue an adverse ruling on a pending issue that is the subject of the prohibited ex parte communication, when other parties or participants are prejudiced by the prohibited ex parte communication;

C. strike evidence or pleadings when the evidence or pleadings are tainted by the prohibited ex parte communication;

D. issue a public statement of censure by the commission, when the prohibited ex parte communication is determined to be part of a continuing pattern of improper ex parte communication;

E. issue a public statement of censure by the commission when a single prohibited communication takes place and mitigating circumstances exist that:

(1) negate the need for a more severe sanction;

(2) do not prejudice the proceeding to the extent that the commission is unable to consider it impartially;

(3) do not prejudice other parties to or participants in the proceeding; and

(4) do not taint the evidence or pleadings; or

F. if the administrative law judge finds the complainant's allegation of an ex parte violation was interposed for any improper purpose, such as to harass or cause unnecessary delay or needless increase in the cost of the proceeding, the judge may recommend that the commission issue an appropriate sanction against the complainant.

This subpart is consistent with statutory language requiring the ALJ to make recommendations on sanctions. *Id.* at subd. 4 (g). The statute lists the sanctions the ALJ may recommend, and those sanctions are incorporated into this rule. *Id.* at subd. 4 (h)

It is necessary to state that the ALJ must make recommendations on sanctions and to list the possible sanctions. It is reasonable to include the list of sanctions at the end of the rule because making recommendations on sanctions is the ALJ's final step in the investigation proceeding.

Item B and subitem D (3) add *participants*, which is consistent with the addition of this term in the other proposed amended rules. It is reasonable to include *participants* in this rule since Minn. Stat. § 216A.037, subd. 1 prohibits certain *ex parte* communications between a Commissioner and a party or participant.

7845.7900 COMMENT PERIOD; COMMISSION DECISION

This is a new rule designed to provide interested persons the opportunity to comment on the ALJ's recommendations regarding sanctions. This rule completes the complaint process by including the final step, which is the determination of sanctions by the Commission.

It is reasonable for the rule to include three subparts that will go to the Commission's decision on sanctions: Notice; Comment Period and Decision.

The rule makes clear that the Commission, prior to making a decision, is interested in hearing from those interested in or affected by the Commission's decision. This will benefit both the complainant and respondent because it will provide each with an opportunity to respond to the ALJ's recommendations prior to a Commission hearing on the matter. This will benefit the Commission because it will offer the Commission an opportunity to evaluate comments prior to a hearing. And this rule gives anyone interested in or affected by the outcome of the investigation the opportunity to comment before the Commission makes a decision.

An alternative would be to add additional subparts with a more detailed decision-making process or to lengthen the timeframe for the comment period. However, this brief section is comprehensive in addressing the issue of a decision on sanctions while effectively setting parameters on how the decision is to be made. It strikes an even balance between providing opportunity to be heard and efficiency in making a final decision.

Subpart 1. Notice. After receiving the administrative law judge's report, the commission shall provide notice of the report to all persons on the commission's official service list for the affected proceeding.

The Commission will send out notice of the decision to those on its official service list so that people are aware the ALJ has made a decision. It is reasonable to require that notice be sent to the persons on the service list for the affected proceeding. The list includes those persons who can reasonably be ascertained as being interested in or affected by the outcome of an investigation and whose due process rights may have been adversely affected.

Subpart 2. Comment Period. Any person wishing to comment on the judge's report regarding the recommendation of sanctions must do so within ten days of the commission's notice of the report. The commission may vary the notice period as it deems appropriate.

This rule is necessary to give interested persons the opportunity to comment on the ALJ's recommendations on sanctions. The Commission believes it is necessary and reasonable to give interested and affected persons the opportunity to comment before a decision on sanctions is made.

This rule provides flexibility in setting a hearing on sanctions and allows the Commission to extend the notice period as needed.. A ten day notice period for comment will foster efficient and timely resolution of the complaint so that there is not undue delay in determining the outcome of a pending case affected by alleged *ex parte* violations.

Subpart 3. **Decision.** Following the comment period, and with notice, the commission shall hold a hearing and render its decision regarding the imposition of sanctions. Notice of the hearing must be sent to those on the commission's official service list for the affected proceeding.

This subpart is necessary because the statute requires a recommendation to the Commission on sanctions, ultimately making it necessary for the Commission to make a decision on sanctions.

Because the Commission's decision on sanctions arises out of the ALJ's investigatory process, it is reasonable for this decision to be the final step in the process.

It is reasonable to hold a hearing after the comment period has passed by issuing a notice of the hearing to those most reasonably likely to be interested in or affected by the outcome of the Commission's decision. This opportunity to be heard ensures that the Commission's decision will be a thorough decision based on the examination of all available information.

VII. REGULATORY ANALYSIS

The Administrative Procedure Act requires the statement of need and reasonableness to address the regulatory issues set forth and addressed below.

A. A description of the class of persons who will probably be affected by the proposed rule, including classes that will bear the costs of the proposed rule and classes that will benefit from the proposed rule. Minn. Stat. § 14.131 (1).

The following persons will probably be affected by the proposed rules:

- Any public utility or telephone provider who appears before the Commission as a party or participant in a pending case or proceeding.
- A municipality or electric cooperative if appearing before the Commission as a party or participant in a pending case or proceeding.
- The Commission in hearing an affected case or proceeding.
- Any member of the public who becomes involved in a pending case or proceeding through which a person becomes a party or a participant.
- Any member of any organization or any other person who, for any reason, becomes a party or participant in a pending case or proceeding.

- The Office of Administrative Hearings in handling the investigation and issuing findings and recommendations on sanctions.
- The Commission in making the final determination on sanctions.
- Agencies or other persons affected by a pending case or proceeding that is subject to the outcome of a complaint.

The following persons will probably bear the costs of the proposed rules:

- Any public utility or telephone provider who appears before the Commission as a party or a participant in a pending case or proceeding out of which a complaint arises.
- Any member of the public who becomes involved in a pending case or proceeding through which a person becomes a party or a participant, and a complaint is filed.
- Any member of any organization or any other person, for any reason who becomes a party or a participant in a pending case or proceeding, and a complaint is filed.
- The Commission in making the final determination on sanctions.
- Agencies or other persons affected by a pending case or proceeding that is subject to the outcome of a complaint.

B. The probable costs to the agency and to any other agency of the implementation and enforcement of the proposed rule and any anticipated effect on state revenues . Minn. Stat. § 14.131 (2).

The proposed rules will claim resources from the Office of Administrative Hearings and the Commission by requiring an investigation of alleged *ex parte* violations and a determination of possible sanctions if a complaint is filed. Other agencies could be affected if they become parties to or participants in a case or proceeding that is affected by the outcome of a complaint, including possible dismissal of a case or an adverse ruling. There does not appear to be a measurable impact on state revenues from this rulemaking.

C. A determination of whether there are less costly methods or less intrusive methods for achieving the purpose of the proposed rule. Minn. Stat. § 141.131 (3).

The proposed rules were developed to comply with statutory changes, precluding exploring less costly or intrusive methods.

D. A description of any alternative methods for achieving the purpose of the proposed rule that were seriously considered by the agency and the reasons why they were rejected in favor of the proposed rule. Minn. Stat. § 141.131 (4)

The Commission concluded that statutory changes required amending the rules to comply with those changes, leaving no possibility for exploring less costly or intrusive approaches.

E. The probable costs of complying with the proposed rules. Minn. Stat. § 14.131. (5)

Complying with the rules do not impose costs on anyone. Non-compliance could result in a complaint being filed, at which point there will be costs to those involved in the complaint investigation. However, setting out clear and effective rules is more efficient and cost effective than devising a case-by-case process to be used each time a complaint is filed. Providing clearly understood rules up front is more likely to prevent violations, and thereby costs, by ensuring that people involved in Commission decisions know what type of communications are prohibited and what the possible sanctions will be for non-compliance. Codifying the statute's prescribed complaint investigation process into the rules is more efficient than attempting to create an entirely new process or to use a case-by-case approach to investigate alleged violations.

F. The probable costs or consequences of not adopting the proposed rule, including those costs or consequences borne by identifiable categories of affected parties, such as separate classes of government units, businesses, or individuals; Minn. Stat. § 14.131. (6)

In the absence of a rule change, the rules would not comply with the changes made to Minn. Stat. § 216A.037, which governs *ex parte* communications. Furthermore, such inconsistencies could cause confusion for utility companies, parties and participants, about what type of process the Commission will use when investigating complaints alleging *ex parte* communications or code of conduct violations. And without the proposed rule changes, telecommunications carriers, an important class of stakeholders, would not be held to the same standards of conduct that other rate-regulated companies must adhere to, which potentially compromises the integrity of the Commission's decision-making process.

G. An assessment of any differences between the proposed rule and existing federal regulations and a specific analysis of the need for and reasonableness of each difference. Minn. Stat. § 14.131 (7)

The Commission is not aware of any differences between the proposed rules and any federal regulations.

**VIII.
CONSIDERATION OF PERFORMANCE BASED REGULATORY SYSTEMS**

Minn. Stat. § 14.002 requires agencies to develop rules and regulatory programs that emphasize superior achievement in meeting regulatory goals while retaining maximum flexibility for agencies and regulated parties in meeting those goals. Minn. Stat. § 14.131 requires agencies to explain in their statements of need and reasonableness how they have taken this legislative policy into account.

The Commission was guided by performance-based regulatory principles as it developed these rules. Since the rules are largely procedural, however, they are necessarily more prescriptive than rules with more heavily substantive content. Yet the proposed rules extend duties and burdens no further than does the statute, and they are written for the purpose of carrying out already-imposed statutory requirements.

IX. COST OF RULE COMPLIANCE

The Commission has consulted with the Commissioner of Finance, as required by Minnesota Statutes § 14.131, regarding the cost of complying with the proposed rule changes.

While Minnesota Statutes § 14.127 directs agencies to evaluate the cost its rules will impose on small businesses or cities, the proposed rules are exempt from this requirement. See Minnesota Statutes § 14.127, subdivision 4(d).

X. LIST OF WITNESSES

The Commission does not plan to rely on any non-agency witnesses at any rule hearing.

XI. ADDITIONAL NOTICE PLAN

To ensure the public has sufficient notice to participate in a proposed rulemaking, the Administrative Procedure Act requires agencies to take certain prescribed steps to publicize their rulemakings. In addition, Minnesota Statutes § 14.14, subdivision 1a requires agencies to make unspecified additional efforts to notify persons who might be affected by proposed rules, and § 14.131 requires agencies to describe these efforts in their Statements of Need and Reasonableness.

The Commission plans to publicize its proposed rule changes in the following manner:

1. Publishing its Notice of Intent to Adopt Rules, and text of the proposed rule changes, in the *State Register*.
2. Mailing a copy of its Notice of Intent to Adopt Rules to everyone who has requested to receive it pursuant to Minnesota Statutes § 14.14, subdivision 1a.
3. Giving notice to the Legislature as required by Minnesota Statutes § 14.116.
4. Publishing the Notice of Intent to Adopt Rules and this Statement of Need and Reasonableness, including the text of the proposed rules, on the Commission's website at <http://www.puc.state.mn.us>.

5. Mailing notice to Minnesota energy utilities and telephone providers of the Commission's intent to adopt the proposed rules.
6. Issuing a press release to all newspapers of general circulation throughout the state.

XII. CONCLUSION

For all the reasons set forth above, the Commission respectfully submits that the proposed rules are both needed and reasonable.

Burl W. Haar
Executive Secretary