



**Testimony of  
Charlie Higley, Executive Director  
Citizens Utility Board**

Before the Assembly Committee on Energy & Utilities

Tuesday, May 28, 2013

**AB 214 Will Undermine Sound and Lawful Decisions by  
the Public Service Commission**

Good morning Chairman Honadel and members of the committee, and thank you for the opportunity to provide testimony on AB 214.

The Citizens Utility Board is a member-supported, nonprofit organization that advocates for reliable and affordable utility service. CUB represents the interests of residential, farm, and small business customers of electric, natural gas, and water utilities before the Legislature, regulatory agencies, and the courts.

**AB 214**

CUB is opposed to AB 214, because it would undermine the ability of the Public Service Commission to make sound and lawful decisions in contested case proceedings, such as utility requests to change electric rates, or to get permission to build new power plants or transmission lines.

An administrative law judge for the PSC, in an order made just last week, identified “the fundamentals of the contested case process. Namely that:

1. The factual basis of a Commission decision shall be solely the evidence and matters officially noticed. Wis. Stat. § 227.44(9).
2. All evidence presented to the Commission shall be duly offered and made a part of the record in the case. Wis. Stat. § 227.45(2).
3. Every party shall be afforded adequate opportunity to rebut or offer countervailing evidence.” Wis. Stat. § 227.45(2).
4. A party may conduct cross-examinations reasonably required for a full and true disclosure of the facts. Wis. Stat. § 227.45(6).
5. A Commission decision, dependent on facts found without the support of substantial record evidence, shall be set aside or remanded on judicial review. Wis. Stat. § 227.57(6).”<sup>1</sup>

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<sup>1</sup> Docket No. 3270-WI-102, *Order on Motion to Strike*, p. 3 (May 21, 2013) (PSC REF #: 185137)



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A contested case proceeding, which is used for utility cases typically involving hundreds of millions of dollars of ratepayer money, has formal rules so that a record of the case is created in a transparent manner. Any party to the case can review and challenge any of the testimony and evidence presented by other parties. The commissioners and other staff involved in the decision-making process are required by law to make decisions based on the record.

AB 214 would change the rules regarding the conduct of parties in contested case proceedings. The bill would allow parties to have unilateral conversations (“ex parte communications”) with PSC officials, including executive assistants to the commissioners, who may be involved in the decision-making process.

The motive behind these unilateral conversations may be to influence the decision in the case. These unilateral conversations won’t become part of the record, and other parties will not know what has been discussed, and will have no formal opportunity to inspect or challenge any of the issues raised.

If anyone involved in the case, including commissioners, has questions about any of the testimony or evidence, he or she can request additional information. Under contested case procedures, all parties will see the request and the response. These requests and responses can be made quickly, even by email.

As the PSC administrative law judge noted, “The contested case process exists to provide due process and create an adequate record upon which the Commission may make sound and lawful decisions.” Allowing parties to have unilateral conversations with PSC staff involved in the decision-making process, as provided by AB 214, would undermine the contested case process, and would undermine sound and lawful decisions by the Public Service Commission.

Please oppose AB 214, and thank you for the opportunity to testify on this important issue.

May 28, 2013

To: Sen. Paul Farrow, Chair, Senate Committee on Government Operations, Public Works, and Telecommunications  
Rep. Mark Honadel, Chair, Assembly Committee on Energy & Utilities

From: Charlie Higley, Citizens Utility Board

Subject: Suggestion for amending the ex parte bill SB 194 and AB 214

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Below is a suggestion for amending the ex parte bill SB 194 and AB 214.

If an ex parte communication is made by or to an executive assistant of a commissioner in a contested case proceeding, or any other official or employee of the commission who is involved in the decision-making process, each communication must be logged, noting the contested case that was discussed, the date of each communication (if there are multiple communications in a day, each communication must be specified) the name of the commission official, employee, or executive assistant, the name of the party, and the name of the party representative making or receiving the communication.

The log must be made available within two days of the communication by being posted on the commission's electronic regulatory filing system in the docket number for the contested case that was being discussed.

Thank you for your consideration.

# MARK R. HONADEL

STATE REPRESENTATIVE • 21<sup>ST</sup> ASSEMBLY DISTRICT

TESTIMONY ON ASSEMBLY BILL 214  
*ASSEMBLY COMMITTEE ON ENERGY & UTILITIES*  
MAY 28, 2013

Thank you, fellow committee members for attending today's hearing on Assembly Bill 214. This bill clarifies state law to improve the flow of information which will aid in the decision-making process at the Public Service Commission (PSC).

An ex parte communication is one that is made without the knowledge of all of the parties. Current law prohibits certain ex parte communications in contested cases. In those cases, the hearing examiner or any other official or employee of the agency who is involved in the decision-making process is prohibited from an ex parte communication with a state agency engaged in the matter, a party to the proceeding, or any person with a substantial interest in the case. Current law specifies several exceptions to the prohibition, which includes advisory staff at PSC who do not participate in the hearing.

The law is unclear as to whether Executive Assistants (EAs) fall under that exception. Before 2004, Executive Assistants at PSC could participate in this type of communication. At that time, with the possibility of facing a lawsuit on the matter, the Commission chairman chose to sign a Memorandum of Understanding to prohibit EAs from ex parte communications.

The result has been a process where EAs must ask other staff at the agency what was meant by a position of a party to the case. That staff would then have to ask the party and then relay that information back to the EA or Commissioner.

This bill seeks to resolve the uncertainty in statutory language by clearly defining that the ban on ex parte communications does not apply to EAs. The prohibition would remain in force for the hearing examiner and the PSC commissioners. This makes sense because EAs are not decision makers.

In closing, I hope you will join me in supporting this clarification. I believe AB 214 will improve efficiency and effectiveness at the PSC.

Thank you for taking the time to hear my testimony and I would be happy to answer any questions at this time.

*Working For You!*





# Public Service Commission of Wisconsin

Phil Montgomery, Chairperson  
Eric Callisto, Commissioner  
Ellen Nowak, Commissioner

610 North Whitney Way  
P.O. Box 7854  
Madison, WI 53707-7854

**Testimony of Ellen Nowak**  
**Assembly Committee on Energy & Utilities**  
**Tuesday May 28, 2013**  
**Assembly Bill 214**

Chairman Honadel, and members of the Assembly Committee on Energy & Utilities, good morning and thank you for allowing me to testify in support of AB 214, legislation to improve communication and decision making at the Wisconsin Public Service Commission. I am Ellen Nowak, one of the three commissioners at the agency. I've had the opportunity to meet with many of you to discuss this legislation prior to today and I want to again thank you for your time and consideration.

By way of background, the PSC has 3 commissioners and each commissioner has an Executive Assistant, or EA, as I'll refer to that position today. The chairperson of the commission has always been afforded an EA, and in the late 1990s, the other commissioners were provided authority to have EAs as well. EAs function as advisors to commissioners, and serve as a liaison to other agencies, regulated parties and other interested persons. EAs also assist commissioners in reading through the records in all cases and may conduct additional research or seek clarifying questions about issues in the proceeding.

Commissioners, like decision makers or hearing examiners at other administrative agencies, are prohibited from engaging in ex parte communications. This means that we cannot engage in communications regarding the merits of a contested case with any party or person that has a substantial interest in a case. This bill would not change that. When the EA positions were formed for commissioners, they were not subject to the ex parte prohibitions and commissioners used their EAs to pose questions to parties and gain a better understanding of a party's position in contested cases. Due to the technical nature of the decision making process for the commissioners, having the EAs available to interact with interested parties was considered a key function of the position. Commissioners relied on them to communicate to parties, for example, to seek clarification on a party's exhibit or other document that was in the record. In short, EAs were largely used by commissioners to better understand the various party arguments and positions in contested cases.

That changed in 2004, a concern was raised when a draft of an order for a finance transaction for a utility was circulated, as was common practice, among Commission staff, the utility, interested parties and EAs. After one of the parties raised the concern, the Chairperson of the Commission at the time, Dan Ebert, brought the matter to the attention of then-Attorney General Lautenschlager. Attorney General Lautenschlager determined that the inclusion of EAs in the circulation of the draft order raised two potential concerns: a potential violation of Wisconsin's Open Meetings Law and a potential violation of the prohibition on ex parte communications. Rather than litigate the matter, Chairperson Ebert entered into a Memorandum of Understanding (MOU) with the Department of Justice. The MOU stated that EAs should, for

all intents and purposes of the statute regarding the prohibition on ex parte communications, be treated like Commissioners and our hearing examiner – meaning that they, too, are subject to the prohibition and that for this purpose, EAs are going to be treated the same as decision makers in a contested case. While the law does not explicitly say this, the parties agreed to interpret the law as described rather than pursue litigation.

Since the 9 years that the prohibition has been in place it has, unfortunately, frustrated the flow of information that aids in decision making and has resulted in an unbalanced playing field.

First, regarding the flow of information, as a result of the MOU, a core function of EA's – assisting commissioners with finding answers that he or she may have regarding testimony or an exhibit in the record, has been stripped away. As a result, if an EA has a question about an exhibit or information submitted by a party, the EA can no longer directly ask that party to clarify the information. Instead, the EA has to ask other PSC staff working on the case, to ask the party - whether it is Citizens Utility Board, the utility, or Clean Wisconsin - the question that the EA has. Then, the other staff person must relay the information back to the EA. Not only is this inefficient, it hinders the ability for concise and effective information to be communicated clearly, while at the same time creating an unlevelled playing field for the proper sharing of information. I will explain by giving you a simplified example of how the commission addresses issues in rate cases, which are almost always contested.

Commission staff prepares a list of the issues in a utility's rate case that need decisions by commissioners. For example, in rate cases for the large investor owned utilities, there could be anywhere from 50 to 70 or more issues that require a decision by the commission. To assist in the decision making process, staff will summarize the issues into what we call a decision matrix. This is a chart that presents the issues in one column and in another column summarizes the different positions of the parties and alternatives that commissioners can choose from. The current system creates several excessive layers of back and forth communication that is truly ineffective.

If an EA has a pointed question on a single issue in the midst of the 50 or more that may be ongoing on a case they must seek out staff, relay their concerns, ask their questions and await an answer. The staff, who has just been inquired to by the EA, must then do the exact same thing to the utility. During these exchanges subtle nuances may be lost and vital information may not be transmitted. Thus creating a potentially never-ending vicious cycle of the childhood game telephone where the clear answers are never really relayed.

This is fundamentally problematic and frustrates the process of good government and sound decision making and efficiency.

The second flaw I mentioned is that the MOU has created an unlevelled playing field. Under the current practice, staff conveys alternative options on many of the issues in contested cases. Unlike the utility and intervenors, staff has access to the Commissioners and EAs throughout the proceeding. They are free to offer additional explanation, free to answer

additional questions and free to offer additional advice – all up until the decision making time. All the while these other interested parties have no access to the EAs. It is time, and fair, to restore the balance of information flow to the Commissioners so that sound, effective and efficient decision making be made paramount.

We could have just repealed or amended the existing MOU between the Attorney General and the Chairperson of the PSC. In fact, we researched doing so. But, as we explored the issue, we concluded repealing or amending the MOU still leaves the statute regarding ex parte communications ambiguous as it pertains to the PSC. Under current law, the ex parte prohibition applies to staff involved in the decision-making process but does not apply to advisory staff. Without question, everyone agrees that the prohibition under current law applies to our hearing examiner and to commissioners. However, the line between staff involved in the decision-making process and advisory staff isn't clear at the Commission. Under the existing MOU, the law is interpreted to mean that the ex parte prohibition applies to EAs but to no other staff at the Commission.

Our concern is that if we repeal or amend the existing MOU, it leaves us open to challenge regarding whether the law applies to EAs or other staff, such as our chief legal counsel and division administrators. Thus, we requested this legislation to ensure that EAs to PSC commissioners are not considered "decision makers" as that term is used in Sec. 227.50, but grouped with other advisory staff that are currently exempt under the MOU from ex parte prohibitions. Amending the statute also ensures other key staff at our agency, such as our legal counsel or Gas & Energy Division Administrator, won't be classified by, for example, a court as one "who is involved in the decision making process" and therefore subject to the prohibition on ex parte communications.

With that, I'd be happy to answer any questions.