

**Public Utilities Commission
Department of Regulatory Agencies**

**Performance Audit
May 2012**



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The mission of the Office of the State Auditor is to improve the efficiency, effectiveness, and transparency of government for the people of Colorado by providing objective information, quality services, and solution-based recommendations.



May 9, 2012

Members of the Legislative Audit Committee:

This report contains the results of a performance audit of the Public Utilities Commission. The audit was conducted pursuant to Section 2-3-103, C.R.S., which authorizes the State Auditor to conduct audits of all departments, institutions, and agencies of state government. The report presents our findings, conclusions, and recommendations, and the responses of the Public Utilities Commission.

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We Set the Standard for Good Government

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PUBLIC UTILITIES COMMISSION

Performance Audit, May 2012 Report Highlights



Dianne E. Ray, CPA
State Auditor

Public Utilities Commission
Department of Regulatory Agencies

PURPOSE

Evaluate the adequacy of the Public Utilities Commission's (the Commission) policies and procedures for ensuring the transparency of *ex parte* communications between Commissioners and interested persons and that Commissioners' travel expenditures are reasonable, appropriate, and allowable.

BACKGROUND

- The Constitution and statute provide the Commission regulatory authority over fixed utilities, rail safety, gas pipeline safety, and motor carriers.
- The Commission is a Type 1 agency within the Department of Regulatory Agencies (the Department), made up of three members appointed by the Governor with approval of the Senate. Commissioners serve 4-year terms and are not subject to term limits.
- The Commissioners are full-time, salaried state officials, and the Commission is supported by 96 full-time-equivalent staff within the Public Utilities Commission Division.
- The Commission is entirely cash funded through fees paid by regulated companies.

OUR RECOMMENDATIONS

The Public Utilities Commission should:

- Establish and implement written policies or rules related to the disclosure of *ex parte* and permit-but-disclose communications between Commissioners and interested persons.
- Work with the Department Executive Director to develop and implement written travel policies to address travel authorizations when there is disagreement between the Commissioners and Department policy and work with the Department to ensure that all travel documentation is properly and consistently maintained.

The Commission agreed with these recommendations.

EVALUATION CONCERN

The Public Utilities Commission could strengthen its internal policies and controls to ensure that the Commissioners' communications with interested persons and travel practices comply with the letter and spirit of the Colorado Constitution, statutes, and state rules.

KEY FACTS AND FINDINGS

- The Commission functions in a uniquely independent capacity within state government, with limited administrative oversight. Given the limited administrative oversight, it is important that the Commission have sufficient controls and processes in place to ensure that the Commissioners comply with all state requirements and that their actions are transparent to the general public.
- We identified instances where the Commissioners have not fully complied with statutory requirements related to the disclosure of *ex parte* communications. For example, we found that the Commissioners do not currently disclose *ex parte* communications occurring through email even though statute does not distinguish between oral and written communications and requires that *all* private communications concerning matters under the Commission's jurisdiction be disclosed.
- Current statutory and rule requirements related to the disclosure of *ex parte* communications are limited. There are no time requirements for filing the disclosure memoranda, and the Commissioners do not have to note the affiliation of the individuals identified in the disclosures.
- Interested persons have not always filed permit-but-disclose memoranda within the 2-day filing requirement or included the location of the communications, as directed in Commission orders.
- The Commissioners did not consistently follow applicable State Fiscal Rules or Department policies related to travel. Of the 128 out-of-state trips taken by Commissioners during Calendar Years 2008 through 2011:
 - 8 lacked documentation to show they had been approved prior to travel, or at all, by the Executive Director.
 - 17 trips to Washington, D.C., and foreign countries lacked documentation to show Governor's Office approval.
 - 27 trips paid for in part, or fully, by third-party organizations lacked documentation to show they complied with Amendment 41 requirements.

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Public Utilities Commission

The Public Utilities Commission (the Commission) is responsible for ensuring the people of Colorado receive safe, reliable, and reasonably priced fixed utility and transportation services and that the providers of those services have the capital to provide safe and reliable services while remaining innovative, competitive, and profitable. The fixed utility companies that serve Colorado citizens operate without market-based competition, and thus the Commission's regulatory authority ensures the needs of both the consumers and suppliers are met. The Commission's responsibilities over public utilities include granting operating authority to businesses; maintaining just and reasonable rates for consumers; ensuring reliable and responsive utility service; minimizing utility dangers posed to consumers; and ensuring utilities have the opportunity to maintain their infrastructure, so as to benefit the State.

Throughout this report, we will use the term "the Commission" to refer specifically to the three members of the Public Utilities Commission. We will use the term "Division" to refer to the Public Utilities Commission Division within the Department of Regulatory Agencies, including the Commission and all assigned staff.

Regulatory Authority of the Commission

The Constitution and statute provide the Commission regulatory authority over fixed utilities, rail safety, gas pipeline safety, and motor carriers. Title 40 of the Colorado Revised Statutes provides direction to the Commission on conducting utility regulation in Colorado and defines public utilities. According to statute (Section 40-1-103, C.R.S.), the Commission has full economic and quality of service regulatory authority over the following public utilities in Colorado:

- Electric utilities, such as Xcel Energy and Black Hills Energy. The Commission does not regulate municipal utilities or cooperative electric associations.
- Natural gas and pipeline utilities, such as Xcel Energy and Atmos Energy Corporation.
- Water utilities, such as the Dallas Creek Water Company and the Prospect Mountain Water Company. The Commission does not regulate municipal water systems, water districts, or water and sanitation districts.

- Telephone utilities, such as CenturyLink.
- Common carriers, such as motor carrier utilities for hire, including taxi cabs, limousines, buses, and shuttles.

In fulfilling its regulatory responsibilities, the Commission functions in two different roles:

- **Quasi-judicial.** The Commission holds adjudicatory hearings that involve litigation in a formal administrative law process where there are frequently multiple parties involved and attorney representation is often necessary. These hearings occur when a utility regulated by the Commission or the customer of a utility requests that the Commission address an issue within its jurisdiction. These issues might include a formal complaint against a utility or a construction approval request that affects a utility under the purview of the Commission. During hearings, the Commission will listen to, consider, and make decisions based on exhibits and testimony presented by the regulated entity and other interested parties, including Division staff. The Commission has the authority to take any action on the issue deemed necessary. When acting in its quasi-judicial capacity, the Commission is subject to the Canons of the Colorado Code of Judicial Conduct, which establish standards for the ethical conduct of judges.
- **Quasi-legislative.** The Commission also holds non-adjudicatory hearings that may involve rulemaking by the Commission and do not require that stakeholders have an attorney to participate. These hearings often occur when the Commission takes up an issue on its own volition. For example, the Commission can open an informational docket and hold meetings to learn more about a developing energy distribution method that would fall under its purview, or it can hold a hearing to set new rules that were not necessarily prompted by a regulated business.

The Commission has an annual caseload of about 1,000 adjudicatory and non-adjudicatory cases. As of April 5, 2012, the Commission had 828 active dockets, or cases involving issues under the Commission's regulatory purview. The Commission meets weekly to discuss procedural and substantive items in these dockets and holds additional hearings roughly every few weeks to hear testimony on issues in these dockets. The Commission also schedules informational meetings, as needed, which are designed to obtain information about a particular issue and can be hosted by the Commission or outside parties. There must be a quorum (i.e., two Commissioners) of the Commission for the transaction of any Commission business. Furthermore, under the Colorado Open Meetings Law, all meetings of two or more Commissioners at which Commission business is discussed, including all hearings before the Commission, must be public, with appropriate notice given to allow interested individuals to observe and participate.

Structure and Oversight of the Public Utilities Commission

The Commission was first created by the General Assembly in 1913. The Commission received its current regulatory authority in 1954, when Article XXV was added to the Colorado Constitution. The article constitutionalized the General Assembly's authority to regulate utilities and then delegated that authority to the Commission unless the General Assembly designated otherwise. The Division operates as a Type 1 agency within the Department of Regulatory Agencies (the Department). Thus, the Commission exercises its "statutory powers, duties, and functions, including rule-making, regulation, licensing, and registration, the promulgation of rules, rates, regulations, and standards, and the rendering of findings, orders, and adjudications," independently from the Executive Director of the Department [Section 24-1-105(1), C.R.S.]. However, some of the Division's administrative functions, such as budgeting and purchasing, are performed under the direction of the Department.

The Commission comprises three Commissioners who serve in a full-time capacity and are compensated with a salary set by the Executive Director of the Department. The Commissioners are appointed to staggered 4-year terms by the Governor and confirmed by the Colorado Senate. The Commissioners are not subject to term limits. Each Commissioner must be a qualified elector of the State (i.e., citizen of the United States, resident of the State of Colorado, and 18 years of age or older) and no more than two Commissioners can be affiliated with the same political party. Of the three current Commissioners, two were appointed in January 2008 and one was appointed in April 2011. Of the two appointed in 2008, one Commissioner completed the remaining year of an outgoing Commissioner's term and was reappointed in December 2008 for a full term that expires January 2013. The other Commissioner's term expired in January 2012, but he has continued to serve on an interim basis until the Governor appoints a new Commissioner.

The Commission is supported by approximately 96 full-time-equivalent (FTE) Division staff, who are classified state employees that report to the Division Director. The Division Director reports to the Department Executive Director and is responsible for managing the Division's daily operations in order to carry out the Commission's statutory obligations by implementing policies, procedures, and decisions made by the Commission. Division staff are organized into one of the following three categories:

- **Trial staff** act as a party in Commission business and represent the interests of the public.

- **Advisory staff** provide advice and technical support and training to the Commissioners.
- **Administrative staff** are responsible for fund administration, budget preparation, purchasing, central records control, business system administration, personnel, and administrative support, including managing the timing, disposition, and weekly agenda of filings.

These staff are further divided into the Division's 11 working sections and units, including energy, telecommunications, transportation, rail/transit safety, gas pipeline safety, economics, administrative services, research and emerging issues, administrative hearings, external affairs, and policy advisory.

Revenue and Expenditures

The General Assembly annually appropriates the Division's budget, which is entirely cash funded through fees paid by the regulated companies. The Division retains 97 percent of the fees it collects and the remaining 3 percent goes into the State's General Fund. Two-thirds of the Division's funding comes from fees paid by gas, electric, telephone, and water utilities; these funds are deposited into the Division's Fixed Utility Fund. The other one-third comes from registration and permit fees charged to motor carriers; these funds are deposited into the Division's Motor Carrier Fund. From Fiscal Years 2009 through 2011, the Division received an annual appropriation of about \$21 million and had expenditures of about \$18.6 million. Any monies remaining in the Fixed Utility or Motor Carrier Funds at the end of each fiscal year are used for Division expenses in subsequent years and are taken into account when setting fees. Since Fiscal Year 2009, the Division has been appropriated about 101 FTE.

Audit Scope and Methodology

We conducted this performance audit in response to a legislative request and pursuant to Section 2-3-103, C.R.S., which authorizes the State Auditor to conduct audits of all departments, institutions, and agencies of state government. Audit work was performed from November 2011 through May 2012. We acknowledge the cooperation and assistance provided by the Commissioners and Division staff.

The objective of this audit was to review the processes and controls over the Commission's regulatory and decision-making activities and travel. Specifically, the audit evaluated whether:

- The Commission has established and executed adequate policies and procedures related to communications with interested persons, while maintaining transparency in decision-making activities, and complying with the Colorado Constitution, statutes, and Commission rules.
- There are adequate processes and controls in place to ensure that the Commissioners' travel expenditures are reasonable, appropriate, for allowable purposes, and in the best interest of the State.

We planned our audit work to assess the effectiveness of those internal controls that were significant to our audit objectives. Our conclusions on the effectiveness of those controls are described in the audit findings and recommendations.

To accomplish the audit objectives, we reviewed constitutional and statutory requirements, as well as rules that are applicable to the Commission, such as the State Fiscal Rules. We conducted interviews with the Commissioners, as well as staff from the Division, the Department, and the Governor's Office of Boards and Commissions. We also examined oversight structures for other independent entities in the State, including the General Assembly and the state judiciary, and the practices of public utilities regulating bodies in other states with regard to *ex parte* communications. Additionally, we analyzed electronic and paper documentation provided by the Division and the Department related to:

- **Communications.** We reviewed the 668 disclosure memoranda filed by the Commissioners and interested persons between January 1, 2008, and December 31, 2011, related to private communications that occurred between Commissioners and interested persons concerning matters under the Commission's jurisdiction. We examined each disclosure memorandum to determine the date of the meeting, date the memorandum was signed by the Commissioner or interested person, the location of the meeting, the identity of persons present at the meeting, and the topic of conversation.
- **Travel.** We reviewed documentation for the 128 out-of-state trips made by the Commissioners between January 1, 2008, and December 31, 2011. We examined each trip to determine what authorizations were obtained, whether the trip was paid for by the State or a third party, the cost of the trip, and the dates and number of days of travel. We also compared Commissioner travel dates with Commissioner meeting attendance for the 199 weekly meetings held between January 1, 2008, and December 31, 2011.

Between January 1, 2008, and December 31, 2011, there were four different Commissioners, including the three current Commissioners and one prior Commissioner.

We conducted this performance audit in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

Summary of Findings

The Commission functions in a uniquely independent capacity within the state government, with limited administrative oversight. As appointees of the Governor, the Commissioners are not classified state employees within the state personnel system, and while they are employees of the Department, they do not report to anyone within the Department. Thus, the Commissioners do not fall under the direct oversight of the Division Director or the Department Executive Director. Although the Governor appoints the Commissioners, the Governor does not have direct oversight over the Commissioners once the appointments are made. The Governor can only remove a Commissioner from the Commission due to a violation of the standards of conduct or for impropriety through a failure to “refrain from financial, business, and social dealings that adversely affect their impartiality or interfere with the proper performance of their official duties” (Section 40-6-123, C.R.S.). The Commissioners also act independently of each other, and the Chair of the Commission, who is appointed by the Governor, provides no oversight of the other two Commissioners. According to Division staff, the intent of this autonomy is to allow the Commissioners to perform their role as a regulatory authority over utilities, some of which operate without market competition, independently, without concern that controversial decisions will be swayed by the political motivations of elected officials. Given the limited administrative oversight, it is important that the Commission have sufficient controls and processes in place to ensure that the Commissioners comply with all state requirements and that their actions are transparent to the general public.

Like other policy makers, the Commissioners are under the scrutiny of the public eye and can face complaints through the Independent Ethics Commission or inquiries through the Colorado Open Records Act. However, we found there is more that the Commission could do on an ongoing basis to demonstrate transparency and openness. Overall, we found that the Commission could strengthen its internal policies and controls to ensure that the Commissioners’ communications with interested persons and travel comply with the letter and

spirit of the Colorado Constitution, statutes, and state rules. Specifically, we found:

- The Commission should strengthen the requirements related to the disclosure of *ex parte* and permit-but-disclose communications to ensure that the Commission and the individual Commissioners comply with the intent of disclosure statutes and the Colorado Open Meetings Law, which calls for state business to be conducted in public and in a manner that maintains public confidence. We found that current requirements related to the disclosure of *ex parte* communications are limited and that not all memoranda meet the filing requirements. In addition, we found that interested persons have not always complied with Commission orders related to the disclosure of permit-but-disclose communications.
- The Commission should work with the Department Executive Director to develop written policies to address Commissioner travel, and work with the Department and the Division to establish and maintain a central repository of Commission travel documentation and authorizations. We found that the Commission could not provide documentation to show that the Commissioners always obtained appropriate authorizations prior to travel and for reimbursements, or that Commissioner travel paid for by third parties complied with Amendment 41 requirements.

We discuss these issues and our recommendations in the remainder of this report.

Communications with Interested Persons

The statutes governing the Commission mandate that Commissioners “shall conduct themselves in such a manner as to ensure fairness in the discharge of the duties of the [C]ommission, to provide equitable treatment of the public, utilities, and other parties, to maintain public confidence in the integrity of the [C]ommission’s actions, and to prevent the appearance of impropriety or of conflict of interest” [Section 40-6-123(1), C.R.S.]. In addition, the Commission is subject to the Colorado Open Meetings Law, in which the General Assembly declares it to be “a matter of statewide concern and the policy of this state that the formation of public policy is public business and may not be conducted in secret” (Section 24-6-401, C.R.S.). To mitigate the risk that public policy decisions will be made in secret, the Colorado Open Meetings Law requires that all meetings of any state public body, including boards and commissions, at which two or more members are present, at which public business is discussed, or at which decisions are made, must be open to the public, with full and timely notice provided [Section 24-6-402(2)(c), C.R.S.].

Although the Commissioners must comply with Colorado's Open Meetings Law when two or more Commissioners meet and discuss public business, statute and Commission policies allow individual Commissioners to have private communications with interested persons concerning matters under the Commission's jurisdiction in two instances. First, statute (Section 40-6-122, C.R.S.) allows each individual Commissioner to have "*ex parte*," or private, communications with interested persons, as long as the Commissioner discloses certain information about the communications and makes the disclosures available to the public. An interested person is defined as a person or entity whose operations are under the Commission's jurisdiction or who has participated or anticipates participating in a proceeding before the Commission within a year prior to or after the communication. In 2008, statute was amended to specify that discussion of "adjudicatory" proceedings is prohibited during *ex parte* meetings, and clarify that rulemaking and pending legislative proposals are not considered "adjudicatory" matters.

Second, Commission practice provides for a process known as "permit-but-disclose." This is a process wherein the Commission opens an informational docket in which it solicits information from interested persons on non-adjudicatory matters. Once the Commission has opened an informational docket, outside organizations can make presentations to any of the Commissioners only regarding the topic described in the docket. For example, some recent permit-but-disclose dockets included discussions related to the Federal Communications Commission's National Broadband Plan and possible statutory changes to Colorado's laws related to telecommunications services. In these informational, non-adjudicatory dockets in which "permit-but-disclose" communications are authorized, the interested party is responsible for disclosing information about the meeting, including any materials or presentations provided to the Commissioners. The disclosure requirements for these two instances when Commissioners and interested persons are allowed to have private communications concerning matters under the Commission's jurisdiction help ensure that these private discussions are transparent to the public.

What audit work was performed and what was the purpose?

We conducted interviews with the Commissioners and Division staff, and reviewed all of the *ex parte* communications disclosure memoranda filed by the Commissioners and all of the permit-but-disclose memoranda filed by interested persons during Calendar Years 2008 through 2011. For that 4-year time frame, there were 569 *ex parte* communications disclosure memoranda and 99 permit-but-disclose memoranda filed with the Commission. We examined each disclosure memorandum to determine the date of the communication, date the memorandum was filed with the Division Director or with the Division, the

location of the meeting, the identity of persons present at the meeting, and the topic of conversation.

In addition, we examined the practices of other states' regulatory agencies, as well as the Federal Communications Commission and the Federal Energy Regulatory Commission regarding communications with interested persons, including *ex parte* and permit-but-disclose communications.

The purpose of our audit work was to determine whether individual Commissioners comply with statutory requirements related to *ex parte* communications and to determine if current requirements related to the disclosure of *ex parte* and permit-but-disclose communications are adequate and consistent with the intent of the Colorado Open Meetings Law that public business not be conducted in secret.

How were the results of the audit work measured?

We identified the following criteria by which to measure our audit work.

***Ex Parte* Communications**

According to statute [Section 40-6-122(1), C.R.S.], the Commissioners must file memoranda of "all private communications to or from interested persons concerning matters under the Commissioners'...jurisdiction." According to statute, "interested person" means any person or entity, or any agent or representative of a person or entity:

- Whose operations are within the jurisdiction of the Commission, or
- Who has participated in a proceeding before the Commission within 1 year prior to the communication, or
- Who anticipates participating in a proceeding before the Commission within 1 year after the communication.

Statute requires that each *ex parte* memorandum include:

- The time and place at which the communication was made.
- The persons who were present at that time and place.
- A statement of the subject matter of the communication.
- A statement that the subject matter of the communication did not relate to any pending adjudicatory proceeding before the Commission. According to statute, "adjudicatory proceeding" does not include a rulemaking proceeding or discussions on pending legislative proposals.

Further, statute requires that the memorandum be signed by the Commissioner, whose signature constitutes a certificate that the memorandum is complete and accurate. All memoranda must be filed with the Division Director, who shall keep them on file and available for public inspection for a minimum of 3 years after their submission.

We also reviewed the practices of regulatory agencies in other states. Although other states' public utility regulatory agencies vary widely in their structure and practices, we identified two western states, California and Utah, which are similar in structure to Colorado. Both of these states have specified a time frame in which *ex parte* communication disclosure memoranda must be submitted: in California, 3 days from the date of the communication, and in Utah, 2 days from the date of the communication.

Permit-But-Disclose Communications

The Commission has also adopted the practice of permit-but-disclose. In such cases, the Commission can open an informational, non-adjudicatory docket wherein it solicits input from subject-matter experts on a topic that the Commission will not take formal action on. The ensuing communications, known as permit-but-disclose, are held under similar standards as *ex parte* communications, but the only guidance for these communications is detailed in the procedural order specific to the docket. In the procedural order, the Commission typically states that any information provided by interested persons "should relate to matters being investigated in this docket and should not concern any matter pending before the Commission in any other docket." The order also typically states that within 2 business days following the presentation, the party requesting the meeting must file a memorandum with the Division disclosing:

- The time, date, and place of the meeting.
- The persons attending the meeting.
- A summary description of the presentation.

What did the audit work find?

We identified instances where the Commissioners have not fully complied with statutory requirements related to the disclosure of *ex parte* communications and interested persons have not complied with Commission orders related to the disclosure of permit-but-disclose communications. In addition, we found that the requirements related to the disclosure of *ex parte* and permit-but-disclose communications should be strengthened to ensure that they are consistent with the intent of the Colorado Open Meetings Law that public business not be conducted in secret.

- ***Ex Parte Communications.*** We did not find any disclosures for electronic *ex parte* communications (i.e., emails) between the Commissioners and interested persons or regulated entities. Statute states that *all* private communications concerning matters under the Commission's jurisdiction must be disclosed; statute does not distinguish between oral and written or between electronic and hard copy communications. We did find a number of disclosures for communications that had occurred over the telephone.

We also identified limited instances where the Commissioners did not comply with existing statutory requirements for disclosing *ex parte* communications. For example, 10 (2 percent) of the 569 *ex parte* memoranda filed during Calendar Years 2008 through 2011 did not include the date of the communication and seven (1 percent) of the memoranda did not include the location of the communication.

In addition, we found that current statutory and rule requirements related to the disclosure of *ex parte* communications are limited. For example, there is:

- **No statutory or rule time requirement for filing memoranda.** Our review of the 569 *ex parte* disclosure memoranda submitted by the Commissioners during Calendar Years 2008 through 2011 showed that the length of time between communications and the filing of the memoranda ranged from 0 days (filed the day of the communication) to 189 days. Of the 569 disclosure memoranda filed:
 - 408 (72 percent) were filed within 30 days of the communications.
 - 84 (15 percent) were filed between 31 and 60 days after the communications.
 - 65 (11 percent) were filed more than 60 days after the communications.
 - 12 (2 percent) did not include the date of the communication or the date the memoranda were signed to determine the timeliness of the filings.
- **No statutory or rule requirement to note the affiliation of individuals identified in disclosures.** Our review of the 569 *ex parte* disclosure memoranda submitted by the Commissioners during Calendar Years 2008 through 2011 showed that 279 (49 percent) of the memoranda did not identify the affiliation of persons present during the communications.

- **Permit-But-Disclose Communications.** We found that interested persons do not always comply with Commission orders regarding the disclosure of permit-but-disclose communications. Specifically, we found:
 - **Disclosures are not always filed within the 2-day filing requirement.** Of the 99 permit-but-disclose memoranda filed by interested persons during Calendar Years 2008 through 2011, we found 35 (35 percent) were filed more than 2 days after the communications occurred. On average, the memoranda were filed 3 days after the communications occurred. Division staff report that they currently follow up with the interested person if a memorandum is not filed.
 - **Location of the communication was not always identified.** For 26 (26 percent) of the 99 memoranda filed, the location where the communications took place was not included on the disclosures. Division staff report that most of these communications take place at the Commission's offices.

What caused the finding to occur?

The issues identified occurred because of the following:

- ***Ex Parte* Communications.** The statutory requirements related to *ex parte* communications and disclosures are limited and do not require sufficient detail to provide the greatest transparency and information the public needs to help ensure that the Commissioners' actions are consistent with the intent of the Colorado Open Meetings Law that policy decisions are made publicly and to avoid secrecy. In addition, although statute [Section 40-6-122(4), C.R.S.] grants the Commission the authority to adopt rules to govern *ex parte* communications, the Commission has only adopted rules clarifying which types of communications are allowed and which are prohibited, and establishing remedies should Commissioners engage in prohibited communications. The Commission has not adopted rules to expand upon or further define statutory requirements related to the types of communications that should be disclosed, how soon after the communications are held that they should be disclosed, or what type of information should be disclosed. For example:
 - The Commission has not promulgated rules to define the types of communications (e.g., emails and telephone calls) that should be disclosed. Although statute requires that *all* private communications between the Commissioners and interested persons involving matters under the Commission's jurisdiction be disclosed, the Commissioners

have not considered emails a type of communication that must be disclosed. In addition, although we found that all of the current Commissioners and the one former Commissioner from our testing period disclosed private communications held through telephone calls, it is not clear that all of the Commissioners have consistently followed this approach. We recognize that the Commissioners must use their judgment when determining which communications should be disclosed according to statute. However, establishing rules to define the types of communications that should be disclosed will help ensure that all Commissioners are consistent in their disclosures.

- There is no requirement in statute or Commission rules that *ex parte* memoranda be filed within a certain number of days after the communications occur. Implementing such a requirement would help ensure that the public and other interested persons receive timely information on the communications.
- There is no requirement in statute or Commission rules that the Commissioner disclose the affiliation of individuals present during *ex parte* communications.

Further, there is no formalized review process of the disclosure memoranda to ensure that they are complete. Therefore, the Commission should implement written policies related to the disclosure of *ex parte* communications and a review process to ensure that the disclosures are complete.

- **Permit-But-Disclose Communications.** The Commission first implemented the permit-but-disclose process on a trial basis in 2008 to provide opportunities for interested persons to share information within informational, non-adjudicatory dockets, while maintaining transparency of that information sharing. Because the Commission began the process on a trial basis without certainty that it would continue, the Commission has not implemented formal rules to address the requirements surrounding permit-but-disclose communications. Instead, the Commission provides requirements for such meetings and disclosures in procedural orders specific to the dockets. Although the Commission's orders for all of the permit-but-disclose dockets opened during Calendar Years 2008 through 2011 contained the same language for disclosing the communications, there is no requirement that it do so. In addition, there are no formalized review and follow-up processes to ensure that interested persons appropriately and timely disclose all relevant information. Further, the Commission has not established a process for the Commissioners to complete and submit disclosures if the interested persons fail to do so. The

lack of formal rules to direct the process increases the risk of inconsistencies in the type of information disclosed. The Commission reports that it is considering whether to continue with the permit-but-disclose process. If the process continues, the Commission should implement rules to address the requirements surrounding these communications.

Why does this finding matter?

The Commission has broad authority to regulate utilities and set rates for basic services on which the people of the State of Colorado rely. In addition, as mentioned previously, the Commissioners function independently with little external oversight. Therefore, it is important that the Commission establish rigorous controls over the *ex parte* and permit-but-disclose communication disclosure processes to ensure that the individual Commissioners and interested persons appropriately disclose private communications so that the public is aware of the issues being discussed and to provide the public with sufficient information to assess the appropriateness of the discussions. In addition, these controls should help ensure that *ex parte* and permit-but-disclose communications are consistent with the intent of the Colorado Open Meetings Law that public policy decisions not be made in secret. For example:

- **Timeliness Requirements.** If either *ex parte* or permit-but-disclose communications are not disclosed timely, it can result in questions being raised regarding the appropriateness of the communications. For example, Commission rules define “prohibited communications” to include discussion of a current docketed proceeding or one that may commence within 30 days, as well as a communication that does not allow other persons the opportunity to respond. When disclosures are filed months after a communication occurs, it becomes more difficult to assess whether the communication related to proceedings pending before the Commission at that time, and thus was prohibited. Delays by Commissioners in filing disclosures also prevent other interested persons from having the opportunity to submit a timely response to the Commission. If prohibited communications occur, Commission rules provide for penalties, which include dismissal of the proceeding, striking of evidence or pleading, or public censure.
- **Affiliations of Individuals Present.** If the affiliations of individuals present during *ex parte* or permit-but-disclose communications are not clearly identified, other interested persons who review the disclosures may not be able to determine the nature of the conversation, and thus, whether a party with a pending proceeding before the Commission was involved in

the meeting. The topic of the conversation, as disclosed, can be cast in a different light depending on the affiliation of the person in the meeting.

- **Disclosure of Email Communications.** By not including email communications in the types of *ex parte* communications that must be disclosed, the Commission is not including one of the most common forms of communication in the current age. Entire discussions of relevant topics can be had via email as easily and conveniently as they can face-to-face. As a result, there is potentially a gap in the information disclosed by Commissioners.

Recommendation No. 1:

The Public Utilities Commission (the Commission) should strengthen its processes for ensuring that *ex parte* and permit-but-disclose communications are transparent to outside parties and comply with statutory and regulatory requirements. Specifically, the Commission should:

- a. Implement written policies or rules related to the disclosure of all *ex parte* communications, including the required disclosure of appropriate electronic and telephone communications, a short deadline for filing the disclosures, and identification of the affiliation of the persons participating in the communications. Once these requirements are put in place, the Commission should implement a review process to ensure that the disclosure memoranda comply with each requirement.
- b. If the decision is made to continue the permit-but-disclose communication process, implement written rules to address the requirements surrounding the disclosure of these communications. These rules should be consistent with the rules adopted in part a of this recommendation and should include rules related to the required disclosure of electronic communications, the timeliness of filing the disclosures, and the identification of the affiliation of all persons present during the communications. The Commission should also implement a review process to ensure that the disclosure memoranda comply with each requirement.

Public Utilities Commission Response:

- a. Agree. Implementation date: December 31, 2012.

The Commission has recently implemented internal processes to modify the form used by Commissioners to ensure that Commissioner

ex parte communications disclosures contain the date, time, and location of the communications and the affiliation of all persons present. The Commission also recently created a new policy requiring the following: (1) Commissioners will submit all *ex parte* communications disclosures to the Division Director within 5 business days of the communication, (2) the Division Director will verify that the disclosures contain all the required information, and (3) the Division Director will ensure that all such disclosure are posted to the Commission's website within 3 business days of receipt. Additionally, the Commission recently issued a Notice of Proposed Rulemaking to revise its Rules of Practice and Procedure, 4 Code of Colorado Regulations 723-1. These revisions include changes to the rules on Commissioner *ex parte* disclosures, which will require that: (1) the Director post the disclosures to the Commission's website within 3 business days of their receipt, (2) the affiliations of the persons present be disclosed, and (3) the Director ensures the disclosures contain all required information. The revisions will also contain guidance for the conditions under which email and telephonic communications are to be disclosed. These rules are expected to be completed in the second quarter of the upcoming fiscal year.

- b. Agree. Implementation date: December 31, 2012.

The Commission is currently investigating whether to continue the permit-but-disclose communications process in its rulemaking proceeding. If it determines that the process is a benefit to interested persons and to the Commission and that it is administratively efficient, the Commission will amend its Rules of Practice and Procedure to codify this process. This will be determined by rule during the second quarter of the upcoming fiscal year.

Commissioner Travel

Travel is not expressly defined in law as a responsibility of a Public Utilities Commissioner; however, it is a common practice and, according to the Commissioners, a necessity of the position. In order to engage in local, regional, and national dialogue that affects the interests of the State of Colorado, the Commissioners are often invited to attend conferences or meetings organized and funded by federal government agencies, such as the Federal Energy Regulatory Commission. Additionally, the Commissioners belong to professional associations, such as the National Association of Regulatory Utility Commissioners, which hold various meetings and conferences throughout the

year for commissioners across the United States to learn about regulation policies, address regional and national issues, and share best practices.

Furthermore, due to their position and expertise as state utility regulators, and to support the interests of Colorado on regional and national levels, the Commissioners are frequently invited by nonprofit organizations, educational institutions, and for-profit entities to attend and speak at conferences or seminars, or to go on fact-finding missions outside of Colorado. Often airfare, lodging, and other travel expenses are partially, and sometimes fully, covered by the third-party organization that extended the invitation to the Commissioner. In other instances, Commissioner travel is paid for by the State.

What audit work was performed and what was the purpose?

We conducted interviews with the three current Commissioners and Department and Division staff, and we analyzed electronic and paper documentation provided by the Department and the Division for all of the 128 out-of-state trips identified by the Division that the Commissioners took between January 1, 2008, and December 31, 2011. During this time period, there were four different Commissioners, including the three current Commissioners and one former Commissioner. The total cost of 102 (80 percent) of the 128 trips for which we could calculate the actual cost was about \$104,000, of which about \$52,000 was paid for by the State and \$52,000 was paid for by third parties. There was insufficient documentation to determine the actual cost of the remaining 26 trips, which were paid for entirely by third parties.

The purpose of our audit work was to determine whether the Commissioners comply with constitutional and statutory requirements, State Fiscal Rules, and Department policies related to travel by state officials.

How were the results of the audit work measured?

We identified the following criteria by which to measure the results of our audit work:

- **State Fiscal Rules.** According to statute [Section 24-30-202(13)(a), C.R.S.], the State Fiscal Rules promulgated by the State Controller “shall be binding upon the several departments, institutions...and other agencies of the state and upon their several officers and employees.” In addition, the State Fiscal Rules state that they are applicable to all state agencies and institutions of higher education, to all employees of the State, and to all funds of the Executive Branch. The rules define a state agency as “a department, division, section, unit, commission, board...in Colorado state government, created by law, executive order, or any other authority.” As

such, the Division and the Commissioners are subject to the State Fiscal Rules.

State Fiscal Rule 5-1, which applies to all state employees and officials, provides that all travel be for the purpose of conducting state business and benefit the State. In addition, the rule requires the following:

- **Travel Authorization.** All out-of-state travel, regardless of whether it is paid for by the State or a non-state organization, must have prior written or electronic authorization by the Chief Executive of the agency, and all foreign travel must also receive prior written or electronic approval from the Governor's Office. Executive Order D 005 03 also requires each principal department to submit travel plans to the Governor's Office for approval prior to trips to Washington, D.C.
- **State Travel Reimbursement.** Travel at the expense of the State must be for official state business or for the benefit of the State. Reimbursements for expenses incurred for airfare, lodging, meals, transportation, personal vehicle mileage, and certain incidental expenses can only be issued if the travel is approved by the approving authority and expenses are reasonable and include required documentation, such as receipts. Though nothing defines for the Commissioners who the approving authority is, according to Division practice, it is the Division Director.
- **Department Travel Policy.** According to the Department's travel policy (2011-DORA-ACCT-005), all out-of-state travel, regardless of funding source, requires prior authorization by the approving authority and the Department Executive Director. Travel to Washington, D.C., and foreign countries also requires prior authorization by the Governor's Office. According to the Department's policy, "Approving authorities shall
 - i. Authorize travel only when it is in the best interests of the State and necessary to accomplish the Department's mission.
 - ii. Manage travel expense budgets to maximize the benefit and assure cost effectiveness and practicality.
 - iii. Review the travel expense claimed by the traveler and authorize reimbursement for only those expenses incurred for the benefit of the State."
- **Colorado Constitution.** Article XXIX (commonly known as Amendment 41) of the Colorado Constitution establishes the gift ban, which forbids public officers from receiving anything valued greater than \$50 (adjusted

for inflation to \$53 as of 2011) in any calendar year. However, it does allow public officers to accept paid travel if the expenses are reasonable and being paid for by a state government, local government, or nonprofit organization that receives less than 5 percent of its funding from for-profit sources. The Amendment 41 requirements went into effect beginning December 31, 2006.

From February 19, 2009, through November 23, 2011, the Department required employees and Commissioners to complete the Travel Expense Reimbursement by Non-State Organization Certification form to show that any third-party reimbursements complied with Amendment 41 requirements. The Division was required to keep a copy of the approved form on file. Beginning in February 2011, employees were also required to submit the form to the Department's ethics officer for approval prior to all travel paid for by third parties. On November 23, 2011, the Department discontinued use of this form due to questions about its reliability and placed a moratorium on all travel paid for by third parties until new guidelines were implemented.

What did the audit work find?

Overall, we found that the Commissioners did not consistently follow State Fiscal Rules or Department policies related to state travel. Of the 128 trips taken by the Commissioners during Calendar Years 2008 through 2011, we found that 21 (16 percent) trips did not comply with one or more of the State Fiscal Rules for travel and/or with the Executive Order for approval of travel to Washington, D.C. These 21 trips had a total cost of at least \$17,500. For 15 of the 21 trips, more than \$9,300 was paid for by the State and nearly \$8,200 was paid for by third parties. There was not sufficient documentation to determine how much third parties paid for the remaining six trips. In addition, the Commission could not provide documentation to show that 27 trips that were paid for, at least in part, by third parties complied with Amendment 41 requirements. Specifically, we identified the following:

- **Travel Authorization.** Neither the Commission nor the Department could provide documentation to show that the Commissioners obtained prior travel authorization from the Department's Executive Director for all travel outside of Colorado and from the Governor's Office for all foreign and Washington, D.C., travel. Of the 128 out-of-state trips (which includes 30 trips to Washington, D.C., and seven trips to foreign countries) we identified that the Commissioners took during Calendar Years 2008 through 2011, we found:

- Eight (6 percent) of the 128 trips lacked documentation to show that they had been approved prior to travel, or at all, by the Department's Executive Director. The expenses for seven of these trips totaled \$6,513 and were entirely paid for by third parties. The one remaining trip was also paid for entirely by a third party, but there was not sufficient documentation to determine the total cost of the trip.
- Seventeen (46 percent) of the 37 trips taken by the Commissioners to Washington, D.C., and foreign countries (this includes 30 trips to Washington, D.C., and seven trips to foreign countries) lacked documentation to show that the Governor's Office had approved these trips. The expenses for 12 of the trips totaled \$14,756, of which the State paid \$8,204 and third parties paid \$6,552. The remaining five trips were paid for entirely by third parties, but there was not sufficient documentation to determine the total cost of the trips.
- **State Travel Reimbursement.** The Commission could not provide documentation to show that two of the Commissioners' travel reimbursements for out-of-state trips, totaling \$2,489, were reviewed and approved by the Division Director, who acts in practice as the approving authority.
- **Third-Party Travel Reimbursements.** Of the 128 out-of-state trips taken by the Commissioners during Calendar Years 2008 through 2011, we identified 91 that were paid for in part, or fully, by third-party organizations. Of the 91 trips paid for in part or fully by third parties, the Commission could not provide documentation for 27 (30 percent) of the trips to show that the third-party reimbursements complied with Amendment 41 requirements; 13 (48 percent) of these 27 trips were taken before the Department implemented its policy requiring the Travel Expense Reimbursement by Non-State Organization Certification form. The expenses paid for by third parties for 23 of these trips totaled \$15,731. There was not sufficient documentation to determine the total cost of the four remaining trips.

What caused the finding to occur?

The issues identified occurred because of the following:

- **The Commission has not established its own written travel policies to direct the approval process for Commissioner travel when it conflicts with Department policy.** According to the Commission, it follows State Fiscal Rules and the Department's travel policies, including the requirement that travel paid for by a third party be approved by the

Department Executive Director and the approving authority. In addition, the Commission acknowledges the authority of the Department Executive Director to ensure that the Commission's travel costs remain within the amount budgeted by the Department for Commission travel.

However, according to the Commission, it does not believe that the Executive Director has the authority to question the appropriateness of a trip as it relates to the Commissioners' duties or to tell a Commissioner that he or she cannot go on a trip that the Commissioner deems necessary for the performance of his or her duties since the Commission does not report to the Executive Director. As discussed previously, the Commission, as a Type 1 agency, does not report to the Department Executive Director or the Division Director. Division staff reported one instance of the Department Executive Director denying a request by a former Commissioner to go on a third-party-paid trip, but the Commissioner went on the trip anyway. The Commission has not established a written process for determining how these types of situations should be handled when the Executive Director and a Commissioner disagree as to the appropriateness of a trip. As a result, there is a gap in the travel approval process for the Commissioners. Therefore, the Commission should work with the Executive Director to establish a written policy that addresses travel authorizations when there is disagreement between the individual Commissioners and the Executive Director or Department policy. Options might include sending the travel request to the Governor's Office or having the Chair of the Commission approve the travel.

- **There is no central repository of documentation related to Commission travel.** We had to obtain documentation related to Commission travel from multiple sources, including Division and Department financial staff, the Commissioners' administrative assistant, and the Division Director. However, as discussed in the previous section, neither Commission nor Division or Department staff could provide complete documentation to show that *all* Commissioner travel between Calendar Years 2008 and 2011 received the required approvals. For those trips where no approval was documented, we were unable to determine if the travel had been approved but the documentation was missing, or whether the travel had never been approved. For example, from February 19, 2009, through November 23, 2011, the Department required that a form be completed to demonstrate Amendment 41 compliance. However, neither the Commission nor the Division or the Department could provide a copy of that form for 14 (18 percent) of the 77 third-party-paid trips taken by Commissioners during that time period. According to Department policy, the Division is responsible for maintaining this

documentation. Maintaining all travel documentation in one place is important for greater transparency and accountability. Therefore, the Commission should work with the Department and the Division to determine where all Commission travel documentation and authorizations should be located and implement a system for maintaining this information.

Why does this finding matter?

Constitutional provisions, statutes, executive orders, State Fiscal Rules, and Department policy are designed to ensure that (1) state money is spent for the benefit of the State and for conducting state business, and (2) state employees and officials conduct themselves in a manner that demonstrates propriety and preserves public confidence. Given that the Commission is uniquely positioned in state government and the individual Commissioners function independently and do not directly report to anyone, it is important that the Commission develop and implement adequate policies to ensure that the Commissioners comply with state travel requirements and that information related to Commissioner travel is fully disclosed and transparent to the general public. This includes information on how often Commissioners are traveling and who is paying for the trips.

When state money is spent on travel without following established controls, including documentation of requests, approvals, and reimbursements, there is a risk that state funds will be used to pay for trips that are not necessary or beneficial to the State, which serves to erode public confidence in the Commission. Furthermore, should a Commissioner take a trip paid for by a third party without approval or knowledge by an approving authority, there is no mechanism to help ensure compliance with Amendment 41. Only when a particular trip is challenged with the Independent Ethics Commission is a true determination of compliance with Amendment 41 determined. Although two different Commissioners have faced challenges before the Independent Ethics Commission, one Commissioner was cleared of any violation and the other was determined to have not personally benefitted from the trip. While the current Commissioners voiced their concern about keeping costs reasonable and complying with state requirements related to travel, interviews suggested that past Commissioners have not always held that same perspective, and it is possible that future Commissioners will also not share this same concern. Of the 128 out-of-state trips taken by the Commissioners during Calendar Years 2008 through 2011, 91 were paid for, at least in part, by third parties. Without better controls, there is no assurance that these 91 trips, 65 of which cost in total more than \$51,000 and 26 of which did not have sufficient documentation to determine the cost of the trips, were for the benefit of the State and compliant with Amendment 41.

Additionally, given the scope of the Commission's responsibilities and the number of active cases reviewed each year, not following established controls can lead to an excessive amount of travel that may affect a Commissioner's ability to fulfill the necessary duties of the position. Interviews with the Commissioners and Division staff indicated that excessive travel can have a negative impact on a Commissioner's ability to fulfill his responsibilities. For example, staff stated that a former Commissioner's travel schedule made it difficult for Division staff to meet with him and ensure his preparedness for meetings and hearings. As discussed previously, the Commission holds weekly meetings to fulfill its duties. During Calendar Years 2008 through 2011, the Commission held a total of 199 weekly meetings. Our review of the minutes for these meetings showed that one of the three Commissioners was absent from 59 (30 percent) of the 199 meetings. We compared those absences with the dates of state business-related travel by the Commissioners and found that 32 (54 percent) of the 59 absences were due to state business-related travel; the reason for the other 27 absences is unknown.

Recommendation No. 2:

The Public Utilities Commission (the Commission) should ensure that the Commissioners are held accountable for complying with state requirements regarding travel and that complete information related to Commissioner travel is available to the public by:

- a. Working with the Executive Director of the Department of Regulatory Agencies (the Department) to develop and implement a written policy that addresses travel authorizations when there is disagreement between the individual Commissioners and the Executive Director or Department policy.
- b. Working with the Department and the Public Utilities Commission Division to determine where all Commission travel documentation and authorizations should be located and implement a system for maintaining this information.

Public Utilities Commission Response:

- a. Agree. Implementation date: June 29, 2012.

The Division Director will work with the Commissioners to develop a formal, internal Commission policy on Commissioner travel. The Division Director will consult with the Executive Director in the development of the formal, internal Commission policy. However, the

Commissioners are considered equal to one another in authority, so the policy will not address the auditor's suggestion that the Commission Chairman approve travel in the event of disagreement between the Commissioners and the Executive Director of the Department as suggested in the body of this audit report. This policy will be completed no later than June 29, 2012.

- b. Agree. Implementation date: June 29, 2012.

The Director of the Commission has already contacted the Department to ensure that copies of approvals for travel to Washington, D.C., and foreign countries will be provided to the Commission. Additionally, the Commission will incorporate into its travel policy methods to ensure that copies of all required approvals are maintained at the Division. This policy will be completed no later than June 29, 2012.

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