

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

CHARLES HARTER,)	
COMPLAINANT)	
In the Matter of a Proposed Amendment to)	AX-2023-0281
Commission Rule 20 CSR 4240-13.050(5))	AX-2023-0287
Regarding Discontinuance of Service)	

MEMORANDUM OF LAW IN SUPPORT OF THE
PETITION & AMENDED PETITION TO AMEND RULE

COMES NOW Petitioner by 20 CSR 4240-2.180(2)(D) to provide citations of legal authority which authorize, support, or require the rulemaking action requested by the petition and in support of the petition to amend rule 20 CSR 4240-13.050(5) which now reads "Service of notice by mail is complete upon mailing" be amended by adding the words "postmarked by the United States Postal Service" states as follows:

Petitioner is currently the complainant in several complaints before this commission in which he received a notice of discontinuance of service on Saturday more than halfway through the ten day period even though he believes mail in St. Louis has overnight local delivery ability, and even though the letter prepared by

the utility stating the notice contained inside of the utility's un-post-marked envelope carried a claimed date of the Monday before the Saturday received.

The utilities in each of these letters and notices claims the date entered by the utility on the letter was the date of mailing but the utilities did not avail themselves of a postmark from the United States Postal Service. It is anticipated at hearing the utilities may introduce some evidence, testimony or an affidavit of an employee, that the notice letter date is accurate as to the mailing date. But in an analogous situation, the courts of Missouri have consistently ruled that such affidavit or testimony cannot take the place of a US Postmark. Petitioner hereinafter cites these cases in support of his request to amend the PSC rule to require a postmark to prove a date of mailing.

For appeals in worker comp proceedings, the law provides that "Any notice of appeal, application or other paper required under this law to be filed with the Division or the Commission shall, when mailed to and received by the Division or the Commission, be deemed to be filed as of the date endorsed by the United States Post Office on the envelope or the container in which such paper is received." (§ 287.480 RSMo.1974).

This statute was interpreted in *Patterson v. St. Louis University Hospital*, 780 S.W.2d 106, 108 (Mo.App.1989), partially overruled on other grounds *Abrams v.*

Ohio Pacific Express, 819 S.W.2d 338, (Mo. banc 1991), where the mailer attorney urged the court to “equating the undated shipper's receipt of Federal Express with the endorsement of a filing date by the United States Post Office” at page 107, but because there was no postmark, the appeal was dismissed as untimely. Patterson finds at page 108,

In Penn Valley Management v. Robertson, 724 S.W.2d 661 (Mo.App.1987), the Notice of Appeal was mailed in an envelope showing postage affixed by a postage meter in the attorney's office on the last day for filing under the statute. No postmark was endorsed on the envelope by the United States Post Office because of its policy not to cancel metered mail unless the date imprinted by the meter is different from the date the mail is received by the Post Office. Our brethren in the Western District affirmed dismissal of the appeal holding that only an endorsement by the United States Post Office is sufficient to meet the statutory requirement.

Similarly, in Headrick v. Jackes-Evans Mfg. Co. 108 S.W. 3d. 114 (Mo. App. 2003) the court ruled “that the affidavit of the paralegal does not conclusively establish the exact date the envelope was postmarked.” In short, courts have ruled that postmarks are reliable independent dating facts that are preferable to all sorts of claims from those who mail things as to when they believe they mailed them.

In a situation such as that presented by the proposed amendment to rule, where people are subject to disconnection of electricity, water, gas, heat, refrigeration, medical equipment, life sustaining things, shouldn't there be something more substantial to believe in a date to provide the full ten days of notice, such as a

postmark, where the courts often believe an affidavit of mailing from the mailer is insufficient? And as far as is known, postmarks are free to utilities to obtain.

It is further noted that in PSC rule 20 CSR 4240-2.090(1) "Discovery and Prehearings PURPOSE: This rule prescribes the procedures for depositions, written interrogatories, data requests, and prehearing conferences. (1) Discovery may be obtained by the same means and under the same conditions as in civil actions in the circuit court."

In circuit court concerning important mailing procedures for dating purposes, Missouri Supreme Court rules which govern practice in the circuit courts include Rule 24.035(b) that "A legible postmark affixed by the United States Postal Service shall be prima facie evidence of the date of the filing of the motion." Petitioner suggests that following the lead of practice before the PSC of 2-090(1) this circuit court rule of practice would be appropriate if enacted by the amendment of the rule 13.050(5) as proposed.

Also of interest in a procedural light is Supreme Court Rule 44.01(e), which when a court was faced with the language of the current un-amended 13.050(5) rule stated "Service by mail is complete upon mailing. However, this does not end the matter. Rule 44.01(e) reads as follows:

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"Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon him by mail, three days shall be added to the prescribed period." The court in *RB Industries v. Goldberg* 601 S.W. 2d 5 (Mo 1980) found "We note that Rule 44.01(e) and Rule 6(e) of the Federal Rules of Civil Procedure are identical, and that Rule 6(e) has been held not to apply in cases involving review of administrative decisions."

But for our discussion of rule 44.01(e), would it make sense to adopt this circuit court rule of practice and procedure to, not for an appeal with jurisdictional requirements which is barred by the RB Industries decision, but to a notice of discontinuances of service, through 20 CSR 4240 -2.180(2) to add three days to the notice of 13.050(5), regardless of whether or not that rule is amended?

It is interesting that in the complaints before the commission, if the petitioner's claim of date of receiving the notice and the utility's claim of date of mailing the notice as set on the letter inside are both correct, then that produces a six day mail en route time that is double the three days which the Supreme Court has estimated and established by rule 44.01(e) as normal and acceptable for mail such as can be excused by rule.

To make matters worse, this six day mail time comes in the face of the post office's hub system, where every night each St. Louis area zip office trucks to the downtown St. Louis post office, local zip marked outgoing mail and on return, brings to their zip office that bag of its area zip sorted mail for delivery in its zip. They claim this produces an overnight delivery system for local mail. Something is very wrong if, in our situation of disconnection of utility service notices, this not only fails to be overnight, but takes twice as long as our courts have established normal mail should take. Simply postmarking this mail would solve it all.

WHEREFORE complainant prays that this Honorable Commission hear this cause pursuant to 20 CSR 4240-2.180(8) and thereafter to grant the amendment to 20 CSR 4240 13.050(5) as prayed pursuant to 20 CSR 4240-2.180(9)(A), and for such other and further orders as are proper in the premises.

Respectfully submitted



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