

**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI**

In the Matter of a Request for a Waiver from)
Commission Rule 20 CSR 4240-125.040(1)(C)) **File No. MX-2020-0357**

**MOTION FOR A FINDING OF NECESSITY AND AN
ORDER DIRECTING THAT AN EMERGENCY RULE AND A
PROPOSED AMENDMENT BE PROMULGATED**

COMES NOW the Manager of the Manufactured Housing and Modular Units Program of the Missouri Public Service Commission (“Manager”), through counsel, and states:

1. Commission Rule 20 CSR 4240-125.040(1)(C) requires manufactured home installers to “attend certification classes every three (3) years or as otherwise required by the manager.”
2. During this COVID-19 emergency, installers attending and Staff providing these educational classes could potentially be exposed to COVID-19, even when social distancing requirements are observed.
3. To prevent exposing attendees and Staff to COVID-19 during certification classes, the Manager requests, pursuant to section 536.025, RSMo, that the Commission find necessity and issue an order directing that an emergency rule and a proposed amendment be promulgated for publication granting the Commission authority to (1) extend the certification class requirement beyond three years as applicable under extenuating circumstances, such as COVID-19, and (2) authorize certification classes to be held with virtual attendance (e.g., through a web portal capable of video and multimedia presentation and two-way communication).

4. On May 12, 2020 Staff filed a request for a waiver from the requirements of this education requirement. The Commission has authority to grant waivers to its rules under 20 CSR 4240-2.205 upon a finding of good cause. However, there is a concern that issuing a waiver to this rule may be considered rulemaking, thereby overstepping the Commission's authority and opening the Commission to litigation and liability.

5. The Missouri Supreme Court looks to the definition of "Rule" in section 536.010(6), RSMo to determine whether an agency decision should be promulgated as a rule. "**Rule**' means each agency statement of *general applicability* that implements, interprets, or prescribes law or policy, or that describes the organization, procedure, or practice requirements of any agency."¹ The Supreme Court stated in *Department of Social Services, Div. of Medical Services, v. Little Hills Healthcare, L.L.C.* ("*Little Hills*"):

Implicit in the concept of the word "rule" is that the agency declaration has a potential, however slight, of impacting the substantive or procedural rights of some member of the public. Rulemaking, by its nature, involves an agency statement that affects the rights of individuals in the abstract.²

6. It could be argued that Staff's proposal is an agency statement of general applicability because it applies to all installers. Further, *Little Hills* established that the definition of rule is broad, and in the instant situation a party could argue that the substantive or procedural rights of all certified installers would be affected by Staff's proposal.

¹ 536.010(6), RSMo (emphasis and italics in original).

² *Department of Social Services, Div. of Medical Services v. Little Hills Healthcare, L.L.C.*, 236 S.W.3d 637, 642 (Mo. banc 2007) (quoting *Baugus v. Director of Revenue*, 878 S.W.2d 39, 42 (Mo. banc 1994)).

7. Staff also considered requesting that the Commission institute a rulemaking procedure, pursuant to section 536.021, RSMo. However, because at least six months is typically required to finalize an amendment under section 536.021, RSMo, installers may lose their certification waiting for the new rule to take effect.

8. For these reasons, Staff requests that the Commission issue a finding of necessity and issue an order directing that an emergency rule and a proposed amendment be promulgated for publication granting the Commission authority to (1) extend the certification class requirement beyond three years as applicable under extenuating circumstances, such as COVID-19, and (2) allow installers to fulfill their education requirement via virtual attendance. Because some installers will need to take the certification class during this COVID-19 emergency and would otherwise lose their licenses without taking this class, Staff requests that this rule be filed as an emergency rule, pursuant to section 536.025, RSMo, and that an identical rule be adopted under normal rulemaking procedures pursuant to section 536.025.8, RSMo.

9. Section 536.025.1, RSMo, provides that a rule may be made, amended, or rescinded without following the provisions of section 536.021, RSMo if the Commission:

- (1) Finds that an immediate danger to the public health, safety or welfare requires emergency action or the rule is necessary to preserve a compelling governmental interest that requires an early effective date as permitted pursuant to this section;
- (2) Follows procedures best calculated to assure fairness to all interested persons and parties under the circumstances;
- (3) Follows procedures which comply with the protections extended by the Missouri and United States Constitutions; and
- (4) Limits the scope of such rule to the circumstances creating an emergency and requiring emergency action.

10. Requiring installers to attend a live, in-person course in an enclosed setting is an immediate danger to the public health, safety, and welfare. The other three

requirements of section 536.025.1, RSMo can be accomplished through carefully drafting an emergency rule.

11. Under section 536.025.7, RSMo, the emergency rule must clearly state the interval during which it will be in effect, and it may not be in effect for a period exceeding 180 calendar days or 30 legislative days, whichever period is longer. Under section 536.025.8, RSMo, the Commission may not renew or adopt consecutive emergency rules with substantially the same effect, but it may adopt an identical rule under normal rulemaking procedures.

WHEREFORE, due to the risks of COVID-19 in an in-person class setting, the Manager requests that the Commission issue a finding of necessity and issue an order directing that an emergency rule be promulgated and a proposed amendment be promulgated for publication, amending 20 CSR 4240-125.040(1)(C) to grant the Commission authority to (1) extend the installer certification class requirement beyond three years under extenuating circumstances, such as COVID-19, and (2) allow installers to fulfill their educational requirement via virtual attendance.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served via e-mail on counsel for the parties of record to this case on this 2nd day of September, 2020.

/s/ Karen Bretz