DR SCAN → Thru Morris

John B. Coffman
Acting Public Counsel

State of Missouri

Bob Holden
Governor

Office of the Public Counsel
Governor Office Building
200 Madison, Suite 650
P.O. Box 7800
Jefferson City, Missouri 65102

Telephone: 573-751-4857
Facsimile: 573-751-5562
Web: http://www.mo-opc.org
Relay Missouri
1-800-735-2966 TDD
1-800-735-2466 Voice

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Public Service Commission

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Mr. Dale Hardy Roberts
Executive Secretary
Missouri Public Service Commission
Governor Office Building, 9th Floor
Jefferson City, MO.65102
daleroberts@psc.state.mo.us

RE: Comments of the Office of the Public Counsel Regarding the Proposed Rulemaking RE: Protective Orders by the Missouri Public Service Commission

Dear Mr. Roberts,

Thank you for allowing the Office of the Public Counsel the opportunity to submit the following comments to the Missouri Public Service Commission regarding its proposal to establish a rule for the handling of confidential information. We have reviewed the three drafts of proposed Rule 4 CSR 240.2-135 regarding the handling of confidential information in the course of proceedings before the Commission. Public Counsel believes that a properly designed rule would assist the Commission in standardizing the criteria for handling of sensitive information in a way that best allows the Commission full information on all relevant factors before it in a given case, while respecting legitimate business concerns of regulated companies, as well as the constraints imposed on other parties by such matters as budgetary restrictions. Public Counsel's comments follow.

The three alternatives to the proposed Rule 4 CSR 240.2-135 are as follows:

Option A: Confidential Information (Single Tier Option).
Option B: Confidential Information (HC Modification Option)
Option C: Highly Confidential and Proprietary Information (Revised)

I. Designation of sensitive information as confidential, highly confidential or proprietary.

Public Counsel believes that Option A's method of combining what the Commission now designates as "highly confidential" and "proprietary" information into a single category of protected information is a positive step which would serve to streamline the process. Public Counsel believes that this "single-tier" methodology provides adequate protection for regulated companies and eliminates confusion. By allowing parties to designate sensitive information as confidential, the process of discovery is more productive and the Commission is able to consider the complete information regarding all relevant factors in every case.

However, Public Counsel recognizes that there may be some instances when companies, especially in the telecommunications area, may have legitimate concerns about allowing the employees of actual or potential competitors to have access to some types of sensitive information. If the Commission believes that the two-tier system for handling sensitive information should remain, Public Counsel believes that the designation method in Option B (Confidential Information, HC modification option) provides the best method of handling especially sensitive material. Under this Option, a party may designate any information it deems sensitive as "proprietary," and if the party believes that this will not adequately protect its interests, it can ask the Commission to designate specific types of information as "highly confidential" and subject to even more restrictions on disclosure. Public Counsel also supports the requirement that the proponent of restricting access to material it deems "highly confidential" should exercise its burden of requesting that the Commission allow the designation.

Two final comments regarding the handling of confidential/proprietary information:

(a) in Option B, Sec. 4 and Option C, Sec. 3, there is a provision which allows a party to ask the Commission to allow inspection of "highly confidential" information on "its own premises." These paragraphs also provide that "The person reviewing highly confidential information may not make copies of such material but may take notes about the information. Any such notes just also be treated as highly confidential." These proposed restrictions on the viewing of "HC" information are unduly burdensome for parties, such as Public Counsel, who operate under significant personnel and budgetary restraints. Given the increasing incidence of companies with foreign ownership who may keep records in places like Texas, New Jersey or Germany, this provision would effectively prevent Public Counsel from doing its job anytime a company claimed information was highly confidential and located out of state. Public Counsel proposes that this section be re-worded to resolve this problem as follows (proposed additions in *italics* and proposed deletions in [brackets]):

(i) "The party that is disclosing highly confidential information may file a motion with the commission asking that the highly confidential information be made available *for initial inspection* only at its own premises *within Jefferson City, Missouri.*

(ii) "The person reviewing highly confidential information may [not] make copies of such material [but] *and* may take notes about the information. Any such notes *or copies* must also be treated as highly confidential."

Public Counsel believes that the above proposed changes to Options B and C would make the requested information available for meaningful review. Further, it is not uncommon in proceedings before the Commission, that confidential information from one party must be used as a supporting schedule to document a witness's pre-filed testimony. It is also fairly common that confidential information may be necessary to impeach an opposing witness in an evidentiary hearing. Neither of these vital functions of presenting a full and fair picture of all relevant factors can occur unless the party seeking to use the information has a complete and accurate copy of the information. "Notes" taken by a party opponent are not sufficient. Therefore, it is vital to the due process rights of all parties that copies of highly confidential information be allowed.

(b) Public Counsel would propose that the last sentence of Section (3) in Option A [which is Section (5) in Option B and Section (4) in Option C] be modified to read as follows:

"Disclosure of confidential/proprietary information may not be limited to on-premises inspection, except [for voluminous documents, the handling of which is] *as* described in section (___)."

II. Copies of versions of testimony.

Public Counsel supports the provisions, contained in all three proposed options for this Rule, which clarify that a party need not file multiple versions of testimony which may contain sensitive material. For the options which retain the distinction between "highly confidential" and "proprietary" information, the proposal to submit "HC" and "P" versions of testimony in a single document promotes efficiency and is ecologically sound.

III. Provision of "voluminous" discovery items.

All three versions of the proposed Rule contain the following provision:

"If a response to a discovery request requires the duplication of material not easily copies because of its binding or size, the furnishing party may require that the material be reviewed on its own premises."[1]

Public Counsel believes that this provision is problematic for a number of reasons. First, the terms "easily copied" and "binding" are vague and may be more broadly construed than the Commission intends. The "binding" provision may also encourage companies to use permanent, hard to remove bindings for storing any information they do not wish to provide to other parties in regulatory matters. Additionally, more "voluminous" material is likely to be available electronically, and electronic transfer is a perfectly acceptable manner of providing discovery. Public Counsel understands that, in certain rare instances, complying with a discovery request by providing paper copies of documents may impose a burden on the company, and agrees that the rule could properly speak to such rare situations. However, the current language seems designed for the general discovery request rather than the rare exception. Public Counsel could support a section on this issue if revamped as follows (additions in *italics;* deletions in [brackets]:

"If a response to a discovery request requires the duplication of material [not easily copied because of its binding or size] *which is so voluminous, or of such a nature, that copying would be unduly burdensome, and if the information cannot be made available in electronic format,* the furnishing party may require that the material be reviewed on its own premises *within the State of Missouri.*"

These changes provide for the rare situation when information is truly not amenable to duplication or electronic transfer. The addition of "within the State of Missouri" should also be included in order to allow parties such as Public Counsel to zealously and effectively perform their function under budgetary constraints.

V. Obligations of Staff and Public Counsel and limiting use of information outside the current proceeding.

All three versions of the proposed rule contain a provision which provides that:

"All persons who have access to information under this rule must keep the information secure and may neither use nor disclose such information for any purpose other than preparation for and conduct of the proceeding for which the information was provided."[2]

[1] Option A, Sec. 10; Option B, Sec. 12; Option C, Sec. 11.
[2] Option A, Sec. 14, Option B, Sec. 16, Option C, Sec. 15.

While Public Counsel supports the policy behind the first portion of this section, the second portion of the section creates the potential that Staff and Public Counsel may be required to engage in duplicative discovery requests in proceedings which concern essentially the same matters. Staff and Public Counsel have continuing statutory duties to review and monitor regulated utility companies in order to make sure that companies are providing safe and adequate service at just and reasonable rates. For this reason, Public Counsel believes that this office and the Commission Staff should be exempt from the provisions of the second portion of this section. In order to effectuate this distinction, Public Counsel believes that, by slightly re-wording a subsequent section of the rule, the parties can honor the underlying policy designed to protect sensitive information from disclosure outside Commission proceedings, yet the Staff and Public Counsel will not be impeded from performing their required duties. Staff and Public Counsel's obligations under Sec. 386.480 RSMo protect parties from unlawful disclosure.

One of the arguments which has been raised in the past when Public Counsel has attempted to address the issue of avoiding duplication of discovery was the concern about the "gaps" in coverage of a protective order. However, because the Commission is considering a rulemaking as opposed to orders in each case, there should no longer be any concerns about "gaps" in the enforcement of the provisions of a protective order from one case to another 'sequel' case.

(17)[3] The provisions of sections 3, 4, 5, [and] 6 *and 14*[4] of this protective order do not apply to the staff of the commission or to the Office of the Public Counsel. The staff of the commission and the Office of the Public Counsel must provide are subject to the non-disclosure provisions of Section 386.430 RSMo. The staff of the commission and the Office of the Public Counsel must provide all other parties a list of the names of their employees who will have access to confidential information. *Neither the staff of the commission nor the Office of the Public Counsel shall use or disclose any information obtained in discovery for any purpose other than in the performance of their duties.*

On behalf of the Office of the Public Counsel, thank you for the opportunity to comment on these proposals for rulemaking.

Sincerely,

M. Ruth O'Neill
Assistant Public Counsel

cc: Missouri Public Service Commission
General Counsel for the Staff of the Public Service Commission
Dean Cooper

[3] Option A, Sec. 17; Option B, Sec 19; Option C, Sec. 18.
[4] Option A, Sec. 14; Option B, Sec. 16, Option C, Sec. 15