

LAW OFFICES  
**BRYDON, SWEARENGEN & ENGLAND**

PROFESSIONAL CORPORATION  
312 EAST CAPITOL AVENUE  
P.O. BOX 456  
JEFFERSON CITY, MISSOURI 65102-0456  
TELEPHONE (573) 635-7166  
FACSIMILE (573) 635-3847  
E-MAIL: DEANBSE@SOCKET.NET

DAVID V.G. BRYDON  
JAMES C. SWEARENGEN  
WILLIAM R. ENGLAND, III  
JOHNNY K. RICHARDSON  
GARY W. DUFFY  
PAUL A. BOUDREAU  
SONDRA B. MORGAN  
CHARLES E. SMARR

DEAN L. COOPER  
MARK G. ANDERSON  
TIMOTHY T. STEWART  
GREGORY C. MITCHELL  
RACHEL M. CRAIG  
BRIAN T. MCCARTNEY  
DALE T. SMITH

OF COUNSEL  
RICHARD T. CIOTTONE

October 29, 1999

Mr. Dale Hardy Roberts  
Executive Secretary  
Public Service Commission  
P. O. Box 360  
Jefferson City, MO 65102


**RE: Case No. AX-2000-116**

Dear Mr. Roberts:

Enclosed for filing in the above-referenced proceeding please find an original and fourteen copies of the initial comments of Brydon, Swearngen & England, P.C.

If you have any questions, please give me a call.

Sincerely yours,

  
Gary W. Duffy

Enclosures  
cc w/encl: Office of Public Counsel

**FILED<sup>3</sup>**  
OCT 29 1999  
Missouri Public  
Service Commission

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

In the matter of Proposed Rule        )  
4 CSR 240-2.080 Pleadings         )

Case No. AX-2000-116

**COMMENTS OF BRYDON, SWEARENGEN & ENGLAND, P.C.**

Comes now the law firm of Brydon, Swearngen & England P.C. and for its comments in this matter respectfully states as follows:

1.       These comments are in response to the numerous notices of proposed rulemaking published in the *Missouri Register* on October 1, 1999 (24 Mo.Reg. 2318 through 2340). The law firm of Brydon, Swearngen & England P.C. ("BSE") routinely represents numerous utilities who are regulated by the Commission. Therefore, the firm is required to utilize and abide by the rules of practice and procedure of the Commission, and thus members of the firm and their clients will be affected by changes in those rules. Several members of the firm have experience with the existing rules of practice and procedure of the Commission since their inception in 1975.

2.       Section (2) of 4 CSR 240-2.080 as proposed would require each pleading or brief filed with the Commission to state the signer's "electronic mail address." BSE questions the need for this information to be *required* since there is no current legal requirement that the Commission communicate in this fashion. The Commission has several statutes which specify the manner in which it is to communicate, and none of them specify electronic mail. There is no assurance that electronic mail is a secure means of communication. Legal journals have cautioned attorneys not to utilize electronic mail for certain types of communications. While the Commission may *request* an attorney to voluntarily provide an electronic mail address on a

pleading or brief, and the signer of a pleading or brief may voluntarily give an electronic mail address, there should be no requirement to provide one and the Commission should not utilize that means of communication for official reasons unless a statute authorizes it. We want to encourage the use of electronic communication in certain circumstances, such as to reduce the number of paper copies for filing, but this is not an appropriate application.

3. Section (6) should be modified with the addition of the following language at the beginning of the sentence: "By signing a pleading ... ." Without that phrase, the existing language is a sentence fragment.

4. We applaud the Commission's efforts to cut down on the amount of paper that has to be filed with the Commission through the proposed section (8) which would mandate an original and 8 copies of pleadings and briefs, instead of the current 14 copies. Efforts should be made to reduce the eight copies to just an original with electronic filing of as much as possible (considering that it may be difficult to make electronic filings of certain types of maps or other non-text documents.)

5. Section (16) as proposed requires the filing of a response to a pleading within seven (7) days. Unless modifications are made to this proposal, it should be rejected by the Commission. There are numerous and interrelated reasons for this.

A. **Time Computation.** The current rule provides 10 days for a response to a pleading. Further, the use of seven days, under the proposed rule for computation of time, could mean that a response is due in much less than seven days. The current rule, 4 CSR 240-2.050(2), specifies that when a prescribed time period is less than seven days, Saturdays, Sundays and legal holidays are not counted, so that a party is really afforded seven working days. The *proposed* rule on time computations eliminates that provision, however, so that if a response is

due in seven days, Saturdays, Sundays and legal holidays are included. Therefore, in a three-day weekend with a Monday holiday, the response is due *four* working days after filing. Attorneys working on Commission cases are not sitting around with nothing to do and just waiting for someone to file a motion so they can get right to work creating a response. Once they receive a motion, they have to consult with their client on an appropriate response and perhaps do legal research to properly present the response. The proposal to shorten the response time is not reasonable and the Commission has not presented any reasons in the PURPOSE section as to why it needs to be shortened.

B. **Postal Service Delays.** To compound the problem discussed immediately above, the state of postal service in this state is less than rapid. It is not unusual for first class mail from some parts of the state to take five to seven days to reach another part of the state. This means that while a party might obtain a filing with the Commission using an overnight parcel delivery service, it may send the service copies in the mail. Proposed subsection (18)(C) says that "Service by mail is complete upon mailing." The Supreme Court of Missouri recognizes this delay inherent in the postal service and its rule (Civil Rule 44.01(e)) automatically adds *three days* to any time requirement if service is by mail. While we can sympathize with an apparent desire of the Commission to "speed the process up" by reducing the time allowed from ten days to seven days, the Commission needs to understand that some things take time. While the pace of business may have apparently speeded up during this decade, that does not mean that all things get accomplished any faster, or that they should. Indeed, there may be fewer people handling a greater workload, which means they have less time to spend on each item.

C. If the Commission nevertheless believes that the time period should be

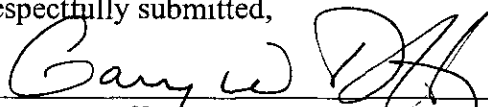
shortened, and the time period is tied to when something is filed with the Commission, the Commission needs to provide that the person serving the pleading serve the other parties at the *same time* that it is filed with the Commission. This can be accomplished by requiring that filings be served by facsimile or overnight delivery service. In this fashion, persons attempting to respond to the filing have the full amount of time available, instead of several days being wasted in the delivery process.

D. This proposal is really not necessary since, in appropriate situations, parties filing motions can request to have the response time shortened and in appropriate situations, the Commission can provide for that. It has done so in the past.

6. Proposed subsection (17)(C) is a new requirement apparently designed to let the Commission determine whether a motion for expedited treatment was filed at the earliest possible moment. The proposal requires "An attestation by the moving party that the pleading was filed as soon as it could have been or an explanation why it was not." First of all, "as soon as it could have been" is a subjective rather than an objective test and will likely lead to controversy and argument over irrelevant facts. For example, does "as soon as it could have been" mean that someone is required to charter an airplane and fly across the state to deliver an original signature or a document or does it instead allow the use of the mail to transmit something? Does it mean that an attorney who is working on something for another client with an impending deadline must neglect that other work in order to deal with something that must be filed "as soon as it could have been?" Second, whether a pleading is filed "as soon as it could have been" does not tend to prove or disprove whether something should be expedited by the Commission. The Commission should make a determination of whether something should be expedited based on the merits of the motion, not whether it was filed a day later than it

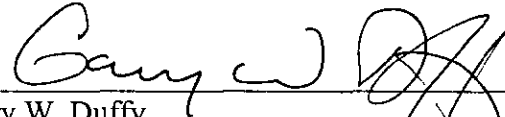
theoretically "could have been." This proposal should be abandoned.

Respectfully submitted,

  
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Gary W. Duffy MBE 24905  
Brydon, Swearingen & England, P.C.  
P.O. Box 456  
Jefferson City, Missouri 65102-0456  
Telephone 573 635-7166  
Facsimile 573 635-3847

Certificate of Service

The undersigned certifies that a true and correct copy of the foregoing was served by hand delivery on the Office of the Public Counsel and the Office of the General Counsel of the Commission this 29<sup>th</sup> day of October, 1999.

  
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Gary W. Duffy