

**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. MO-2020-0357**

REQUEST FOR RELIEF FROM 20 CSR 4240-125.040(1)(C)

COMES NOW the Manager of the Manufactured Housing and Modular Units Program of the Missouri Public Service Commission (“Manager”), by and through counsel, and for its Request for Relief (“Request”), in this matter hereby states:

1. Commission Rule 20 CSR 4240-125.040 establishes the licensing requirements, fees, and responsibilities of manufactured homes installers.¹ Essential to the licensing requirements is the continuing educational requirement. Commission Rule 20 CSR 4240-125.040(1)(C) requires “A manufactured home installer must attend certification classes every three (3) years *or as otherwise required by the [M]anager* [emphasis added].”

2. In January 2020, the first confirmed case of coronavirus disease 2019 (COVID-19) was recorded in the United States, and the first case in Missouri was identified on March 7, 2020.² As of August 14, 2020, the Center for Disease Control and Prevention reported more than 5 million cases and over 166k deaths related to the disease.³

3. On May 12, 2020, the Manager filed with the Commission a Request for Waiver of 20 CSR 4240-125.040(1)(C) (“Request”). In the Request, the Manager

¹ See 20 CSR 4240-125.040.

² https://en.wikipedia.org/wiki/COVID-19_pandemic_in_the_United_States; Executive order 20-02 (<https://www.sos.mog.ov/library/reference/orders/2020/eo2>) (last visited Aug. 14, 2020).

³ Cases in the U.S., available at www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-inus.html (last visited Aug. 14, 2020).

indicated that requiring installers to attend to fulfill the educational requirements would not meet social distancing requirements and, in addition, the timing of the continuing educational requirement is at the discretion of the Manager.

RECOMMENDATION

4. In order to prevent potentially exposing attendees to COVID-19 by conducting in person certification classes, the Commission should issue an emergency rule under the Revised Statute of Missouri Section 536.025 rather than waive the requirements of 20 CSR 4240-125.040(1)(C) through the Commission's authority under 20 CSR 4240-2.205.

ANALYSIS

Waiver Through 20 CSR 4240-2.205

5. The Commission has the authority to grant waivers to Commission Rules under 20 CSR 4240-2.205. The only requirement to grant a waiver is "... finding of good cause."⁴ The benefits of issuing a waiver are that it is fast and requires fewer administrative steps to accomplish than a rulemaking. The biggest concern with issuing waiver is that it may be considered rulemaking, thereby overstepping the Commission's authority and opening the Commission to litigation and potential liability.

6. The most significant Missouri Supreme Court case on this issue is the *Department of Social Services, Division of Medical Services v. Little Hills Healthcare, L.L.C. (Little Hills)*⁵ case. The Court in *Little Hills* determined that under Section 536.010(6), RSMo Supp.2006, the definition of "Rule" does not include, among others, "...an interpretation issued by an agency with respect to a specific set of facts and

⁴ 20 CSR 4240-2.205

⁵ 236 S.W.3d 637

intended to apply only to that specific set of facts.”⁶ The Court states that “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.”⁷ Even though this situation appears to be specific to educational requirements of installers due to the COVID-19 pandemic and only to those entities, *Little Hills* established that the definition of rulemaking is quite broad, and a party might argue a rulemaking is required because the substantive or procedural rights of all license holders are being affected, and not just with respect to a specific set of facts unique to a subset of those license holders.⁸

Emergency Rulemaking Under Section 536.025 RSMo

7. On the other hand, the Commission could avail itself to the emergency rule powers of Section 536.025 RSMo. Rather than going through the full rulemaking procedures of Section 536.021, Section 536.025 may be implemented on a faster schedule. One of the benefits a rulemaking has over issuing a waiver is its certainty and it is unlikely to be challenged in court.

8. It typically takes longer than six months to finalize a rule under Section 536.021. Waiting six months to implement the new rule would make the Commission in violation of 20 CSR 4240-125.040(1)(C)

⁶ 236 S.W.3d 641-642

⁷ Id 642

⁸ While the Missouri Supreme Court has said that the procedures for challenging a Commission rulemaking are under 386.510, and not 536.050, the Court did not go so far as to say that the Commission would not be liable for costs and fees under Sections 536.021.9 in the event a court found that the Commission’s action should have been adopted as a rule. *See, State ex rel. Atmos Energy Corp. v. Pub. Serv. Comm’n*, 103 S.W.3d 753, 758 (Mo. banc 2003). In the absence of an express ruling, and in an abundance of caution, rulemaking is a safer alternative. The possibility of a nonstate party bringing a case to circuit court that actions by the Commission should be considered a rule but did not follow the procedures required in Sections 536.010 to 536.050 can be consequential. Section 536.021.9 states that “If a state agency in a contested case grants the relief sought by the nonstate party prior to a finding by an administrative or judicial fact finder that the agency’s action was based on a statement of general applicability which should have been adopted as a rule, but was not, then the affected party may bring action in the circuit court of Cole County for the nonstate party’s reasonable attorney’s fees incurred prior to the relief being granted, not to exceed the amount in controversy in the original action.

9. In order to comply with the emergency rule powers of Section 536.025.1, 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.⁹

These criteria should not be difficult to meet. Requiring installers to attend a live, in-person course in an enclosed setting could be considered an immediate danger to the public health.¹⁰ The other three requirements of Section 536.025.1 can be accomplished through careful drafting of an emergency rule temporarily granting the Commission authority to temporarily extend the certification requirement beyond every three years for any installer affected by the inability to attend an in-person certification class, and to grant the Commission authority to authorize certification classes via virtual attendance (e.g., through a web portal capable of video and multimedia presentation and two-way communication) based on the recommendation of the Manager.

10. Another aspect of an emergency rule is the certainty of time the rule will be in effect. The Commission may use emergency rulemaking procedures to amend a

⁹ Section 536.025.1 RSMo

¹⁰ The Centers for Disease Control states that, “Travel increases your chance of getting and spreading COVID-19. **Staying home is the best way to protect yourself and others from COVID-19.**” <https://www.cdc.gov/coronavir/2019-ncov/travelers/travel-during-covid19.html> (emphasis original (last visited Aug. 14, 2020)).

portion of a rule for any period of time not to exceed 180 calendar days or 30 legislative days, whichever period is longer.¹¹

CONCLUSION

11. Even though the Commission would be justified in issuing a waiver under 20 CSR 4240-2.205 to waive the educational requirements of 20 CSR 4240-125.040(1)(C), the prudent course of action would be to issue an emergency ruling under Section 536.025 RSMo finding that the Covid-19 pandemic presents an immediate danger to the public health, safety or welfare and requires emergency action to amend the in-person education requirements 20 CSR 4240-125.040(1)(C), and only that portion of Commission Rule 125.040.

WHEREFORE, the Manager recommends that the Commission issue an emergency rulemaking amending Commission Rule 20 CSR 4240-125.040(1)(C) due to the risks COVID19 and the lack of social distancing present to installers attending in-person continuing education classes, and grant such other and further relief as the Commission considers just in the circumstances. Staff will file a motion to establish the recommended rulemaking forthwith.

Respectfully submitted,

/s/ Ron Irving

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¹¹ Sections 536.025.7 and 536.025.9 RSMo. Legislative days are every Monday, Tuesday, Wednesday, and Thursday, beginning the first Wednesday after the first Monday in January and ending the first Friday after the second Monday in May. Section 386.025.7, RSMo. For 2021, 30 legislative days would elapse on February 25, 2021.

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing has been transmitted by facsimile or electronically mailed to all parties and/or counsel of record this 25th day of August, 2020.

/s/ Ron Irving