

**STATE OF MISSOURI
PUBLIC SERVICE COMMISSION
JEFFERSON CITY
November 14, 2001**

CASE NO: AX-2002-157

Office of the Public Counsel
P.O. Box 7800
Jefferson City, MO 65102

General Counsel
Missouri Public Service Commission
P.O. Box 360
Jefferson City, MO 65102

Enclosed find certified copy of an NOTICE in the above-numbered case(s).

Sincerely,



Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge

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

In the Matter of Proposed Amendments to 4 CSR) **Case No. AX-2002-157**
240-2.075, Intervention.)

NOTICE OF RESPONSE TO PUBLIC RECORD REQUEST

On November 6, 2001, the Office of the Public Counsel filed a Sunshine Law Request, requesting "that the Commission make publicly available all documents circulated to the members of the Public Service Commission regarding the above docketed case, including any drafts of a proposed rule or proposed amendments to a rule."

Drafts of proposed rules, and proposed amendments to rules, are informal workpapers and are used merely as an aid to discussion in the course of the rulemaking process. Drafts are circulated to the members of the Commission prior to Agenda meetings and are used during discussion at the meetings. The drafts are not retained, but are discarded after the Agenda meetings. The text of the proposed rule or amendment is retained in electronic form between meetings; once it has been published in the Missouri Register, the electronic draft is discarded.

Are such informal workpapers public records subject to disclosure under the Missouri Sunshine Law in Chapter 610, RSMo 2000? Section 610.010(6), RSMo 2000, defines a "public record":

"Public record", any record, whether written or electronically stored, retained by or of any public governmental body including any report, survey, memorandum, or other document or study prepared and presented to the public governmental body by a consultant or other professional service paid for in whole or in part by public funds;

provided, however, that personally identifiable student records maintained by public educational institutions shall be open for inspection by the parents, guardian or other custodian of students under the age of eighteen years and by the parents, guardian or other custodian and the student if the student is over the age of eighteen years. The term "public record" shall not include any internal memorandum or letter received or prepared by or on behalf of a member of a public governmental body consisting of advice, opinions and recommendations in connection with the deliberative decision-making process of said body, unless such records are retained by the public governmental body or presented at a public meeting[.]

The workpapers in question are "internal memorand[a] . . . prepared . . . on behalf of a member of a public governmental body consisting of advice, opinions and recommendations in connection with the deliberative decision-making process of said body[.]" Thus, they are not subject to Sunshine Law disclosure unless they are either "retained" by the Commission or "presented at a public meeting." As far as retention goes, it appears that any item that actually exists at the moment the Sunshine Law request is made is "retained" for the purposes of the law.¹ Therefore, to the extent that the workpapers still exist, they are subject to disclosure.

Section 610.023.3, RSMo 2000, provides:


Each request for access to a public record shall be acted upon as soon as possible, but in no event later than the end of the third business day following the date the request is received by the custodian of records of a public governmental body. If access to the public record is not granted immediately, the custodian shall give a detailed explanation of the cause for further delay and the place and earliest time and date that the record will be available for inspection. This period for document production may exceed three days for reasonable cause.

¹ See *Hemeyer v. KRCG-TV*, 6 S.W.3d 880, 882 (Mo. banc 1999). In *Hemeyer*, the Court concluded that a videotape routinely re-used within four-and-one-half-days was "retained" within the meaning of Section 610.010, RSMo 2000.

In compliance with Section 610.023.3, RSMo 2000, it is noted that the delay in responding was occasioned by the need to search for surviving copies of the draft workpapers sought by Public Counsel.

Attached hereto is a copy of the text of the proposed amended rule as retained electronically. This is the only document available within the scope of Public Counsel's request.

BY THE COMMISSION



Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge

(S E A L)

Dated at Jefferson City, Missouri,
on this 14TH day of November, 2001.

Thompson, Deputy Chief Regulatory Law Judge

Title 4—DEPARTMENT OF ECONOMIC
DEVELOPMENT
Division 240—Public Service Commission
Chapter 2—Practice and Procedure

PROPOSED AMENDMENT

4 CSR 240-2.075 Intervention

PURPOSE: The purpose of this amendment is to clarify the proceedings applicable to amici curiae and to impose on intervenors an obligation to file a responsive pleading.

(6) Any person not a party to a case may petition the commission for leave to file a brief as an *amicus curiae*. **The petition for leave must state the petitioner's interest in the matter and explain why an *amicus* brief is desirable and how the matters asserted are relevant to the determination of the case. The brief may be submitted simultaneously with the petition for leave. Except by leave of the commission, the brief must be filed no later than seven (7) days after the parties have filed their initial briefs. If leave to file a brief as an *amicus curiae* is granted, the brief shall be deemed filed on the date submitted. An *amicus curiae* may not file a reply brief.**

(7) Any party whose application to intervene is granted shall, within thirty (30) days thereafter or such other period as the commission may order, file a responsive pleading to the application, complaint or tariff that is the subject of the contested case, specifically admitting or denying each fact asserted therein.

AUTHORITY: section 386.410, RSMo [Supp. 1998] 2000. Original rule filed March 10, 1995, effective Nov. 30, 1995. Rescinded and readopted: Filed August 24, 1999, effective April 30, 2000. Amended: Filed Nov. ~~2000~~, 2001.*

** Original authority: 386.410, RSMo 1939, amended 1947, 1977, 1996.*

PUBLIC ENTITY COST: This proposed rule will not cost state agencies or political subdivisions more than \$500 in the aggregate.

PRIVATE ENTITY COST: This proposed rule will not cost private entities more than \$500 in the aggregate.

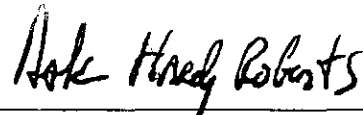
NOTICE TO SUBMIT COMMENTS: Anyone may file a statement in support of or in opposition to this proposed rule with the Missouri Public Service Commission, Dale Hardy Roberts, Secretary, P.O. Box 360, Jefferson City, MO 65102. To be considered, comments shall be filed on or before [DATE]. Comments should refer to Case No. AX-2002-157 and be filed with an original and fourteen (14) copies. No public hearing is scheduled.

STATE OF MISSOURI

OFFICE OF THE PUBLIC SERVICE COMMISSION

I have compared the preceding copy with the original on file in this office and
I do hereby certify the same to be a true copy therefrom and the whole thereof.

WITNESS my hand and seal of the Public Service Commission, at Jefferson City,
Missouri, this 14th day of Nov. 2001.



Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge

