

This section will contain the final text of the rules proposed by agencies. The order of rulemaking is required to contain a citation to the legal authority upon which the order or rulemaking is based; reference to the date and page or pages where the notice of proposed rulemaking was published in the *Missouri Register*; an explanation of any change between the text of the rule as contained in the notice of proposed rulemaking and the text of the rule as finally adopted, together with the reason for any such change; and the full text of any section or subsection of the rule as adopted which has been changed from that contained in the notice of proposed rulemaking. The effective date of the rule shall be not less than thirty days after the date of publication of the revision to the *Code of State Regulations*.

The agency is also required to make a brief summary of the general nature and extent of comments submitted in support of or opposition to the proposed rule and a concise summary of the testimony presented at the hearing, if any, held in connection with the rulemaking, together with a concise summary of the agency's findings with respect to the merits of any such testimony or comments which are opposed in whole or in part to the proposed rule. The ninety-day period during which an agency shall file its Order of Rulemaking for publication in the *Missouri Register* begins either: 1) after the hearing on the Proposed Rulemaking is held; or 2) at the end of the time for submission of comments to the agency. During this period, the agency shall file with the secretary of state the order of rulemaking, either putting the proposed rule into effect, with or without further changes, or withdrawing the proposed rule.

Title 2—DEPARTMENT OF AGRICULTURE Division 10—Market Development Chapter 5—Price Reporting

ORDER OF RULEMAKING

By the authority vested in the director of agriculture under sections 277.200 through 277.215, RSMo Supp. 1999, the director hereby adopts a rule as follows:

2 CSR 10-5.010 Price Reporting Requirements for Livestock Purchases by Packers is adopted.

A notice of proposed rulemaking containing the text of the proposed rule was published in the *Missouri Register* on November 15, 1999 (24 MoReg 2676-2679). No changes have been made in the text of the proposed rule, so it is not reprinted here. This proposed rule becomes effective thirty days after publication in the *Code of State Regulations*.

SUMMARY OF COMMENTS: A public hearing was held on December 16, 1999 from 10:00 a.m.-11:30 a.m. in the third floor conference room of the Missouri Department of Agriculture Building. No comments were received during the public hearing. No written comments were received during the comment period.

By the authority vested in the Missouri Public Service Commission under section 386.410, RSMo Supp. 1999, the commission rescinds a rule as follows:

4 CSR 240-2.010 Definitions is rescinded.

A notice of proposed rulemaking containing the proposed rescission was published in the *Missouri Register* on Oct. 1, 1999 (24 MoReg 2318). No changes were made in the proposed rescission, so it is not reprinted here. This proposed rescission becomes effective thirty days after publication in the *Code of State Regulations*.

SUMMARY OF COMMENTS: This rescission was proposed in conjunction with a replacement proposed rule. The comments received were directed to the proposed rule.

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

ORDER OF RULEMAKING

By the authority vested in the Missouri Public Service Commission under section 386.410, RSMo Supp. 1999, the commission adopts a rule as follows:

4 CSR 240-2.010 is adopted.

A notice of proposed rulemaking containing the text of the proposed rule was published in the *Missouri Register* on October 1, 1999 (24 MoReg 2318-2319). Those sections with changes are reprinted here. This proposed rule becomes effective thirty days after publication in the *Code of State Regulations*.

SUMMARY OF COMMENTS: The Commission received written comments from several sources. The Commission also made a minor grammatical change to the rule by inserting the word "the" before the words "Public Counsel" in section (16).

COMMENT: In section (2), the "certificate of service" refers to "the name of the party served." One comment suggested that this should be "attorney of record served or the name of the party served."

RESPONSE AND EXPLANATION OF CHANGE: The Commission finds that the suggested wording does clarify the intent. The Commission will amend the provisions to include "attorney of record served" as suggested.

COMMENT: The proposed rule adds a definition, section (2), for "certificate of service," meaning a "document showing the caption of the case, the name of the party served, the date and manner of service, and the signature of the serving party or attorney." One comment states that the Commission should clarify that as long as the certificate of service contains the information required by the new definition, the certificate could be incorporated into a pleading (e.g., at the end of the pleading as is customarily done today). **RESPONSE:** The Commission agrees that as long as the certificate of service contains the information required, the certificate could be incorporated into a pleading. The Commission will clarify this intent by adding the words "or page of a document" to the definition.

COMMENT: One comment recommends that section (9) be revised as discussed in the provision regarding section (17). There is a need to balance the public policy preference for open records and the need of the company to protect confidential information.

AX-2000-108

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

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Highly confidential (HC) information is information concerning (1) material or documents that contain information relating directly to specific customers; (2) employee-sensitive information; (3) marketing analyses or other market-specific information relating to services offered in competition with others; (4) reports, work papers or other documentation relating to work produced by internal or external auditors or consultants; (5) strategies employed, to be employed, or under consideration in contract negotiations where the party seeking protection from the disclosure of this information has made a showing that the detriment to the party outweighs the public interest in public disclosure.

RESPONSE: The Commission has reviewed the comment and has determined that, although the comment contains some merit, it requires further review. In addition, the proposed changes would be of such a substantial nature that they would best be addressed in a new proposed rulemaking. The Commission will keep the comments in mind for possible future revisions. No changes were made to the proposed rule as a result of this comment.

COMMENT: One comment states that the terms "highly confidential information" and "proprietary information," found in sections (9) and (17), have been included in the Commission's "standard" protective order for many years. It is a waste of natural resources for the Commission to issue a separate, multipage protective order in each instance where the text of the protective order has not changed in many years. Therefore, the Commission should adopt a rule containing the text of the protective order. Then, when the Commission decides to issue an order making the protective order apply in a particular case, the Commission can simply issue a one-page order saying the protective order, as provided in the rule, is in effect. If the Commission wishes to issue a non-standard protective order, it can at least incorporate by reference the provisions in the rule that would still apply. This suggestion could save potentially thousands of pieces of paper.

RESPONSE: The Commission has reviewed the comment and has determined that, although the comment contains some merit, further review is necessary. In addition, the matter would best be addressed in a separate rulemaking provision and not in the definitions rule. No changes were made to this rule as a result of this comment.

COMMENT: One comment states that although section (12) purports to define "person," the term "person" is already statutorily defined and the Commission does not have the statutory authority to expand on a statutorily defined term. There are numerous court cases which say that any rule which expands on or conflicts with a statute is void. See, e.g., *Missourians for Honest Elections v. Missouri Elections Commission*, 536 S.W.2d 766, 772 (Mo. App. E.D. 1976). The rule should simply reference the statutory section.

RESPONSE: The Commission disagrees with the comment's interpretation and applicability of the cited case. The Commission notes that the proposed definition of "person" is very similar to the current rule's definition of "person." The proposed definition substitutes the term "natural person" for the previous term of "individual." The proposed definition also added the phrase "state or federal agency." These changes were made to clarify the rule. The Commission finds that these changes are appropriate procedural changes and do not change any substantive rights. No changes were made to the rule as a result of this comment.

COMMENT: One comment indicates that the "Pleading" definition in section (13) should specify that the "staff recommendation" is a pleading so that the response time rule applies. A Staff recommendation is always signed by an attorney for the General Counsel's Office and is treated in every significant way as if it were a pleading.

COMMENT: Another comment suggests that the Commission should add "staff recommendation" to the enumerated documents

considered to be a pleading in section (13), or at least clarify in its discussion of the final rule that it considers recommendations from the Staff of the Missouri Public Service Commission to be "pleadings."

RESPONSE AND EXPLANATION OF CHANGE: The Commission agrees to amend the definition of pleading to include Staff recommendation.

COMMENT: One comment indicates that section (13) should specify whether a Staff "recommendation" is a pleading or not, or the Commission should direct the Staff to cease filing "recommendations" which are not in the commonly recognized form of a pleading. The most problematic recommendations are those which are issued by the Staff in Actual Cost Adjustment proceedings. Sometimes these recommendations are complex and require more than ten days in which to formulate a response; they are also not in the form of a pleading with numbered paragraphs to which a response either admitting or denying the allegations can be made. If Staff recommendations are to continue in the current form, they should not be considered pleadings for purposes of the rule because the response time would be too short in most cases, and thus the Commission should issue orders specifying the response time in each instance.

RESPONSE AND EXPLANATION OF CHANGE: As previously noted, the Commission finds that the definition of pleading should be amended to include Staff recommendation. If a party believes that in a particular case the standard response time is inadequate, it may file a motion requesting additional time. As a result of this and other comments, the Commission will amend the definition of pleading to include Staff recommendations.

COMMENT: A comment states that section (17) should be revised. It appears that the standard protective order mixes the scope of protection for proprietary and highly confidential (HC) information. Suggested language is as follows: "Proprietary Information - information concerning trade secrets, as well as confidential or private technical, financial and business information where the party seeking protection from the disclosure of this information has made a showing that public disclosure of the information would be detrimental to the party's marketing and strategic planning of competitive products or services."

RESPONSE: The Commission has reviewed this comment and determines that the rule is appropriate as written. However, if the Commission later decides to promulgate a new rule addressing protective orders, as suggested by another comment, the Commission will then reevaluate the definitions of "highly confidential information" and "proprietary information." No changes were made to the rule as a result of this comment.

COMMENT: The Commission received a comment suggesting that although section (18) purports to define "public utility," the term "public utility" is already defined in Section 386.020(42), RSMo 1994. The comment contends that the Commission does not have the statutory authority to expand on a statutorily defined term. There are numerous court cases which say that any rule which expands on or conflicts with a statute is void. See, e.g., *Missourians for Honest Elections v. Missouri Elections Commission*, 536 S.W.2d 766, 772 (Mo. App. E.D. 1976). The rule should simply reference the statutory section.

RESPONSE: The Commission disagrees with the comment's interpretation and applicability of the cited case. The Commission notes that proposed definition of "public utility" is very similar to the current rule's definition of this term. The changes are appropriate procedural changes intended to clarify the rule and are not intended to change any substantive rights. No changes were made to the rule as a result of this comment.

4 CSR 240-2.010 Definitions

(2) Certificate of service means a document or page of a document showing the caption of the case, attorney of record served or the name of the party served, the date and manner of service, and the signature of the serving party or attorney.

(13) Pleading means any application, complaint, petition, answer, motion, staff recommendation, or other similar written document, which is not a tariff or correspondence, and which is filed in a case. A brief is not a pleading under this definition.

(16) Public counsel means the Office of the Public Counsel as created by the Omnibus State Reorganization Act of 1974, and includes the assistants who represent the public before the commission.

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

ORDER OF RULEMAKING

By the authority vested in the Missouri Public Service Commission under section 386.410, RSMo Supp. 1999, the commission adopts a rule as follows:

4 CSR 240-2.015 Waiver of Rules is adopted.

A notice of proposed rulemaking containing the text of the proposed rule was published in the *Missouri Register* on October 1, 1999 (24 MoReg 2319). No changes were made in the text of the proposed rule, so it is not reprinted here. This proposed rule becomes effective thirty days after publication in the *Code of State Regulations*.

SUMMARY OF COMMENTS: The Commission received one comment regarding the proposed rule.

COMMENT: One comment indicated opposition to this revision, stating that the rule is too broad and does not provide adequate due process safeguards, including notice and opportunity to be heard on the proposed waiver. At a minimum, the rule should provide that the Commission may waive or modify a rule upon application of a party, with proper notice and an opportunity to intervene, and with adequate and reasonable opportunity to be heard, for good cause shown. It is error for the Commission not to follow its own rules. The broad, open-ended waiver provision leaves the rules and their application solely at the Commission's discretion and whim and does not provide the predictability and protection that the rules of procedure are designed to provide.

RESPONSE: The Commission has reviewed the comment and finds that it is in the public interest to include a waiver provision in the rules. No changes were made to the rule as a result of this comment.

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

ORDER OF RULEMAKING

By the authority vested in the Missouri Public Service Commission under section 386.410, RSMo Supp. 1999, the commission rescinds a rule as follows:

4 CSR 240-2.040 Practice Before the Commission is rescinded.

A notice of proposed rulemaking containing the proposed rescission was published in the *Missouri Register* on October 1, 1999 (24 MoReg 2320). No changes were made in the proposed rescission, so it is not reprinted here. This proposed rescission becomes effective thirty days after publication in the *Code of State Regulations*.

SUMMARY OF COMMENTS: This rescission was proposed in conjunction with a replacement proposed rule. The comments received were directed to the proposed rule.

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

ORDER OF RULEMAKING

By the authority vested in the Missouri Public Service Commission under section 386.410, RSMo Supp. 1999, the commission adopts a rule as follows:

4 CSR 240-2.040 Practice Before the Commission is adopted.

A notice of proposed rulemaking containing the text of the proposed rule was published in the *Missouri Register* on October 1, 1999 (24 MoReg 2320). No changes were made in the text of the proposed rule, so it is not reprinted here. This proposed rule becomes effective thirty days after publication in the *Code of State Regulations*.

SUMMARY OF COMMENTS: The Commission received two comments, one in support and one in opposition to the proposed rule.

COMMENT: One comment simply notes support of the proposed rule.

RESPONSE: The Commission appreciates the comment in support of the rule. The comment does not propose any changes and none were made as a result of this comment.

COMMENT: The new Section (6) allows an attorney to withdraw from a case at the Commission only with leave of the Commission. Attorneys in this state are governed as to their conduct by rules adopted by the Missouri Supreme Court. The Public Service Commission is not a court, and has no inherent authority over the ethical conduct of attorneys. While rule 4-1.16 of the Supreme Court Rules indicates that a "tribunal" can order an attorney to continue representing a client notwithstanding good cause for terminating the representation, there do not appear to be any provisions similar to proposed Section (6). Further, the comments to rule 4-1.16 indicate that there are situations where a client has a right to terminate a lawyer, and there are situations where a lawyer must withdraw from representation (mandatory withdrawal). There appears to be a conflict between Supreme Court Rule 4-1.16, e.g., a client's right to dismiss a lawyer at any time, and the Commission's unauthorized attempt to inject itself into that relationship. There is little, if any, authority for the Commission to promulgate rules regarding attorney conduct in this situation. Additionally, the Commission has provided no explanation in the Purpose section as to why this new provision is necessary. For these reasons, the Commission should not adopt this provision.

RESPONSE: The Commission has reviewed the comment and the rule and has determined that the requirement is within the Commission's authority. No changes were made to the rule as a result of this comment.