

# Robin Carnahan

Secretary of State  
Administrative Rules Division

## RULE TRANSMITTAL

Administrative Rules Stamp

Rule Number 4 CSR 240-2.070

Use a "SEPARATE" rule transmittal sheet for EACH individual rulemaking.

Name of person to call with questions about this rule:

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### TYPE OF RULEMAKING ACTION TO BE TAKEN

☐ Emergency rulemaking, include effective date

☐ Proposed Rulemaking

☐ Withdrawal ☐ Rule Action Notice ☐ In Addition ☐ Rule Under Consideration

☒ Order of Rulemaking

Effective Date for the Order

☒ Statutory 30 days OR Specific date

Does the Order of Rulemaking contain changes to the rule text? ☐ NO

☒ YES—LIST THE SECTIONS WITH CHANGES, including any deleted rule text:

4 CSR 240-2.070(13) and (14)(A) through (H) have been amended

Small Business Regulatory  
Fairness Board (DED) Stamp

JCAR Stamp

JOINT COMMITTEE ON

JUL 15 2010

ADMINISTRATIVE RULES



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***Missouri Public Service Commission***

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**KEVIN A. THOMPSON**  
Chief Staff Counsel

Honorable Robin Carnahan  
Secretary of State  
Administrative Rules Division  
600 West Main Street  
Jefferson City, Missouri 65101

Dear Secretary Carnahan:

**Re: Amendment of 4 CSR 240-2.070**

**CERTIFICATION OF ADMINISTRATIVE RULE**

I do hereby certify that the attached is an accurate and complete copy of the order of rulemaking lawfully submitted by the Missouri Public Service Commission for filing.

Statutory Authority: Sections 386.410. RSMo 2000.

If there are any questions, please contact: **Morris L. Woodruff, Chief Regulatory Law Judge**  
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[morris.woodruff@psc.mo.gov](mailto:morris.woodruff@psc.mo.gov)

A handwritten signature in cursive script that reads "Morris L. Woodruff".

**Morris L. Woodruff**  
Chief Regulatory Law Judge  
Missouri Public Service 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 Public Service Commission under section 386.410, RSMo 2000, the commission amends a rule as follows:

**4 CSR 240-2.070 is amended.**

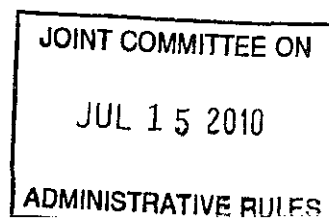
A notice of proposed rulemaking containing the text of the proposed amendment was published in the *Missouri Register* on May 3, 2010 (35 MoReg 682). The sections with changes are reprinted here. The proposed amendment becomes effective thirty (30) days after publication in the *Code of State Regulations*.

**SUMMARY OF COMMENTS:** The public comment period ended June 2, 2010, and on June 3, 2010, the commission held a public hearing on the proposed amendment. Timely written comments were received from the staff of the Missouri Public Service Commission, the Office of the Public Counsel, and in a joint comment filing submitted by the Missouri Telecommunications Industry Association (MTIA) and the Missouri Energy Development Association (MEDA). In addition, the commission's staff, Public Counsel, and MTIA/MEDA offered comments at the hearing. The comments generally supported the concept of a simplified process to handle small consumer complaints but proposed several modifications to that process.

**COMMENT 1 Change "Judgment" to "Order":** Section (13) requires the presiding regulatory law judge to notify the parties of their procedural rights after the commission has rendered a "judgment" disposing of the case. The commission's staff points out that the commission issues orders, not judgments, and suggests that the references to "judgment" should be changed to "order."

**RESPONSE AND EXPLANATION OF CHANGE:** The commission will modify the amendment in the manner suggested by Staff.

**COMMENT 2 Three Thousand Dollar Threshold:** Staff, Public Counsel, and MTIA/MEDA are concerned that the \$3,000 threshold for application of the new process might create some ambiguities. Some pro se complaints may not allege a specific dollar amount at issue, but may raise important customer service issues. Furthermore, the amount in dispute may not be clear on the face of the complaint, leading to uncertainty about which procedure the commission will follow. Staff suggests the rule be expanded to allow application of the new



procedures whenever the applicant, the company, and the Commission agree that they should apply. Public Counsel asks that the rule not apply to any complaint it might bring, regardless of the amount in dispute. MTIA/MEDA suggests the rule should afford both the complainant and the utility a means to object to proceeding under the small complaint process.

**RESPONSE AND EXPLANATION OF CHANGE:** The comments raise valid concerns about the ambiguity of the threshold for application of this new procedure. The commission will modify the amendment to reduce that ambiguity by directing the regulatory law judge to notify the parties at the start of the hearing that the simplified procedures set forth in this section will be used. The commission will also change the amendment to clarify that the new procedures will apply only to complaints brought by utility customers. Additionally, the commission will establish a procedure by which any party may ask the commission to decide whether the small complaint process will be used.

**COMMENT 3 Inadvertent Elimination of the Informal Complaint Process:** Public Counsel and MTIA/MEDA expressed concern that section (14) may inadvertently eliminate the informal complaint process found in section (2) of the existing rule. They ask that the new rule specifically reaffirm the continued applicability of that informal process.

**RESPONSE AND EXPLANATION OF CHANGE:** The informal complaint process that exists under the current rule is a valuable means to quickly resolve many consumer complaints without the necessity for expensive and time-consuming formal procedures. The commission certainly does not want to eliminate that informal process. The commission will modify the amendment to make it clear that the informal complaint process is still available under the new small complaint process.

**COMMENT 4 Restrictions on Rate Complaints:** MTIA/MEDA is concerned that the existing rule's restrictions on the bringing of rate complaints also apply to the new small complaint process. The restriction in question is found in section (3) of the existing rule and states that no complaint about the reasonableness of a utility's rates is allowed unless it is brought by 25 or more consumers.

**RESPONSE:** Section (3)'s restriction on the rate complaints is not inconsistent with the new small complaint process and would still apply to those complaints. Furthermore, that restriction is also statutory, being found in section 386.390(1), RSMo. Therefore, it is not necessary to restate that restriction in the amended section of the rule.

**COMMENT 5 Participation by Telephone:** MTIA/MEDA and Public Counsel suggest the commission make the small formal complaint process more accessible by allowing any party to participate by telephone if they wish to do so.

**RESPONSE AND EXPLANATION OF CHANGE:** The commission agrees that in appropriate circumstances, participation in the hearing by telephone is appropriate. However, in some circumstances a party or witness may need to appear at the hearing in person if the due process rights of the parties are to be protected. Therefore, the commission will modify the amendment to allow the regulatory law judge discretion to allow any party, witness, or attorney to participate in the hearing or other proceeding by telephone.

**COMMENT 6 Concerns about Unlawful Delegation of Authority:** Staff, Public Counsel, and MTIA/MEDA all express concern that the proposed amendment would unlawfully delegate the commission's decision-making responsibility to the regulatory law judge. They suggest that instead, the rule authorize the regulatory law judge to issue a recommended report and order, allow the parties time to comment, and then require the commission to either approve or reject the recommended report and order.

**RESPONSE AND EXPLANATION OF CHANGE:** The proposed amendment would create a procedure that would allow the presiding regulatory law judge to issue a final report and order, subject to review by the commission if any party requests rehearing. The commission proposed to delegate that authority to the judge so that a final decision could be reached more quickly. However, the commission recognizes the concern that delegating its final decision-making authority to the judge might be unlawful. The commission will modify the procedure to authorize the judge to issue a recommended report and order that the commission will either approve or reject. That procedure should be as fast as the proposed delegation of authority without risking any legal infirmities. Subsection (14)(I) of the proposed amendment, which purports to make the regulatory law judge's report and order the final order of the commission for purposes of judicial review will be removed in its entirety.

**COMMENT 7 The Proper Role for the Commission's Staff:** Subsection (14)(D) of the proposed amendment directs the commission's staff to investigate a submitted complaint and report its findings within 45 days after the complaint is filed. The proposed amendment also indicates that Staff is to serve as an advisor to the judge rather than as an advocate. Staff, Public Counsel, and MTIA/MEDA are concerned that Staff not be placed in both an investigative and judicial role.

**RESPONSE AND EXPLANATION OF CHANGE:** The Staff member who completes an investigation and files a report about that investigation must be available as a witness to any party who wishes to test the reasonableness of Staff's investigation and recommendation through cross-examination. If that staff member also serves as an advisor to the judge, it would be inappropriate for the staff member to take the stand as a witness. The commission wants to have the benefit of Staff's investigations, but does not need advice from Staff, except as Staff's recommendation is offered through the hearing process. Therefore, the

commission will revise the amendment to direct Staff to investigate the small complaint. Staff will not be a party to the complaint, but the Staff member or members who investigate the complaint shall be available as a witness if the regulatory law judge or any party wishes to call them to testify. The amendment will not designate the Staff member or members as advisors to the judge.

**COMMENT 8 The Amount of Time Allowed Commission's Staff to Complete its Investigation:** The commission's staff is concerned about the provision in subsection (14)(D) that requires Staff to complete its investigation and file its report within 45 days of the filing of the complaint. Staff asks that it be allowed to request additional time to file its report if it cannot complete its investigation within the allotted 45 days.

**RESPONSE AND EXPLANATION OF CHANGE:** The commission agrees with Staff's concern and will modify that subsection to allow Staff to receive additional time upon a showing of good cause.

**COMMENT 9 Informal Hearing Procedures:** Subsection (14)(F) provides that the regulatory law judge is to conduct the small formal complaint proceedings in an informal manner to the extent possible without affecting the procedural rights of the parties. Staff is concerned that the commission not sanction the waiver of the basic procedural rights set out in section 536.070, RSMo, and suggests that the commission add a reference to that section to the language of the amendment. Staff also suggests a change to paragraph (14)(F)1 to make the language of that section track the provision of section 386.410, RSMo, which indicates the commission is not bound by "the technical rules of evidence."

**RESPONSE AND EXPLANATION OF CHANGE:** The commission does not intend to sanction the waiver of any basic procedural rights, including those set out in section 536.070, RSMo. However, as Staff points out, the commission cannot do away with the basic procedural rights established by statute no matter what it puts in its regulation. There is, therefore, no reason to specifically reference section 386.410, RSMo in the regulation. The commission does agree with Staff's suggestion about paragraph (14)(F)1 and will make the suggested change.

**COMMENT 10 Extension of Time to Issue Recommended Report and Order:** Subsection (14)(G) requires the regulatory law judge to issue a recommended report and order within 100 days of the filing of the complaint unless the judge finds that due process requires additional time. Staff suggests that the due process language be changed to a reference to a good cause shown standard.

**RESPONSE AND EXPLANATION OF CHANGE:** The commission agrees with Staff's suggestion and will make the suggested change.

#### 4 CSR 240-2.070 Complaints

(13) When an order is rendered disposing of a case, the regulatory law judge shall cause the parties to be notified that the order will be final unless an application for rehearing is filed within the allotted number of days and provide information regarding the rehearing and appeal process.

(14) Small Formal Complaint Case. If, after complying with the informal complaint process established by section (2) of this rule, a customer of a utility files a formal complaint regarding any dispute involving less than three thousand dollars (\$3,000), the process set forth in this section shall be followed for such complaints. The provisions of sections (1)-(13) of this rule shall also apply to such complaints unless they directly conflict with the provisions of this section, in which case the provisions of this section shall apply.

- (A) When a complaint is filed that qualifies for handling as a small formal complaint, the assigned regulatory law judge shall direct the secretary of the commission to serve, by certified mail, postage prepaid, a copy of the complaint upon the person, corporation, or public utility against whom the complaint has been filed. At the same time, the regulatory law judge shall notify all parties that the complaint will proceed under the small formal complaint process. The person, corporation, or public utility against whom the complaint has been filed is allowed thirty (30) days after the date of notice to satisfy the complaint or file an answer. If the person, corporation, or public utility does not satisfy the complaint or file an answer within thirty (30) days, the regulatory law judge may issue an order granting default and deeming the allegations of the complaint to have been admitted by the respondent. A party in default has seven (7) days from the issue date of the order granting default to file a motion to set aside the order of default. The regulatory law judge may grant the motion to set aside the order of default and allow the respondent additional time to answer upon a showing of good cause.
- (B) If any party believes that a complaint should or should not be handled as a small formal complaint, that party may file a motion with the commission requesting that the status of the complaint be changed. In response to such motion, or acting on its own motion, the commission shall, at its discretion, decide how the complaint shall be handled.
- (C) Upon the filing of a complaint that qualifies under this section, the chief regulatory law judge shall assign the case to a regulatory law judge. To process small complaint cases in the timeliest manner and in the most convenient location for the customers, the

commission hereby delegates the commission's authority to hear the case, make rulings, and issue a recommended report and order or other appropriate order disposing of the case to such regulatory law judge.

- (D) The commission's staff shall, within forty-five (45) days after the complaint is filed, investigate the complaint and file a report detailing Staff's findings and recommendations. The regulatory law judge may allow Staff additional time to complete its investigation for good cause shown. The member or members of the commission's staff who investigate the complaint shall be available as a witness at the hearing if the regulatory law judge or any party wishes to call them to testify. Staff shall not advocate a position beyond reporting the results of its investigation. If Staff believes it should advocate a position, it may file a motion to change the status of the complaint under subsection (B) of this section.
- (E) Any hearing, unless otherwise agreed to by the parties, shall be held in the county, or a city not within a county, where the subject utility service was rendered or within thirty (30) miles of where the service was rendered. The regulatory law judge may allow any party, witness, or attorney to participate in the hearing by telephone.
- (F) Small formal complaint case hearings shall be conducted in an informal summary manner whenever possible, without affecting the rights of the parties:
  - (1) The technical rules of evidence shall not apply;
  - (2) The regulatory law judge shall have the authority to dispense with pre-filed written testimony; and
  - (3) The regulatory law judge shall assume an affirmative duty to determine the merits of the claims and defenses of the parties and may question parties and witnesses.
- (G) The regulatory law judge, after affording the parties reasonable opportunity for discovery and a fair hearing, shall issue a recommended report and order within one hundred (100) days following the filing of the complaint, unless the regulatory law judge finds good cause to extend that time or the extension is otherwise agreed to by the parties.
- (H) Any party subject to a recommended order disposing of the case or a recommended report and order issued by a regulatory law judge under this section may file with the commission, within ten (10) days of the issuance of the recommended order, comments supporting or opposing the recommended order. Any comments



opposing the recommended order shall contain specific detailed grounds upon which it claims the order is unlawful, unjust, or unreasonable. The commission may approve or reject the recommended order based on the existing record without further hearing. If the commission rejects the recommended order, the commission shall issue its own order based on the evidence previously submitted, or upon such additional evidence, as the commission shall choose to receive.

## MEMORANDUM

**TO:** Steven C. Reed, Secretary

**DATE:** July 15, 2010

**RE:** Authorization to File Order of Rulemaking with the Office of Secretary of State

**FILE NO:** AX-2010-0249

The undersigned Commissioners hereby authorize the Secretary of the Missouri Public Service Commission to file the following Order of Rulemaking with the Office of the Secretary of State, to wit:

**Proposed Rule 4 CSR 240-2.070 – Practice and Procedure**

*Robert Clayton III by SCA*

Robert M. Clayton III, Chairman

*Jeff Davis*

Jeff Davis, Commissioner

*Terry M. Jarrett*

Terry M. Jarrett, Commissioner

*Kevin D. Gunn by CDV*

Kevin D. Gunn, Commissioner

*Robert C. Kenney by JH*

Robert C. Kenney