

RESPONSE AND EXPLANATION OF CHANGE: The Commission agrees with the commenter. The proposed rule inadvertently required service on the parties rather than on the parties' attorneys. The Commission will amend section (2) as recommended.

COMMENT: One general comment in support of this rule was received. The commenter indicated that the Commission should move away from blanket protective orders and tailor each protective order to the specific information sought to be protected and justified in the motion for protective order.

RESPONSE: No changes to this rule are necessary as a result of this comment.

COMMENT: One general comment was received recommending that the Commission adopt the text of its standard protective order in the body of this rule. The commenter stated that "[i]t is a waste of natural resources for the Commission to issue a separate, multi-page protective order in each instance when the text of the protective order has not changed in many years." The commenter states that the Commission can save thousands of pieces of paper by issuing a single page order saying that the protective order as set out in the rule is in effect. The commenter states that the Commission would also be able to issue non-standard protective orders when necessary.

RESPONSE: The Commission has reviewed the "standard" protective order to which the commenter refers. Contrary to the statement of the commenter, the Commission's "standard" protective order has changed in recent years. The Commission has determined that additional revisions may be needed as well. The Commission finds that inclusion of the text of that "standard" order should only be done after careful consideration and with a chance for comments on the specific language included. Furthermore, inclusion of the protective order language would be cumbersome in this rule. The Commission's current practice of issuing a protective order on a case-by-case basis remains the appropriate method for establishing protective orders. Therefore, the Commission finds that no changes to this rule are needed as a result of this comment.

4 CSR 240-2.085 Protective Orders

(2) Pleadings, testimony, or briefs shall not contain highly confidential or proprietary information unless a protective order has been issued by the commission; except that if the pleading which initiates a case or testimony accompanying a pleading initiating a case contains highly confidential or proprietary information, then the party shall file one (1) original, and eight (8) copies of the public version, and one (1) original, and eight (8) copies of the complete version containing the information to be protected, together with a Motion for Protective Order. A highly confidential or proprietary copy of the pleadings shall be served on the attorneys of record, including general counsel and the public counsel.

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Title 4—DEPARTMENT OF ECONOMIC DEVELOPMENT
Division 240—Public Service Commission
Chapter 2—Practice and Procedure
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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 240-2.090 Discovery and Prehearings is rescinded.

A notice of proposed rulemaking containing the proposed rescission was published in the *Missouri Register* on October 1, 1999 (24 MoReg 2329). No changes were made in the proposed rescis-

sion, 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 240-2.090 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 2329-2330). 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: Written comments were received regarding sections (1), (2), (5), (7) and (8).

COMMENT: One comment was received objecting to proposed section (2). The commenter stated that data requests should not be required to be signed by a person who could attest to the truthfulness and correctness of the answers. The commenter explains that parties to proceedings before the Commission have three basic methods of obtaining information through discovery. Two of these methods are identical to those used in circuit courts as provided by Rule 57, Interrogatories and Depositions, under the Rules of Civil Procedure. Both interrogatories and depositions are provided under oath. The third method, data requests, are provided for in the current and proposed rules of the Commission. This method has not been required to be submitted under oath. The commenter suggests that requiring the data requests to be signed as proposed, will not insure greater accuracy in the answers provided in the data requests, but will only slow down the process by requiring the party answering the request to track down a person who will be able to swear to the statement's truthfulness. The commenter also does not believe this is necessary because under section 386.560, *Revised Statutes of Missouri*, it is a criminal act to make a false statement required to be made to the Public Service Commission. The commenter also disagrees with the proposal in section (2) that requires the answering party to promptly notify the requesting party of any changes to the answers previously given to a data request. The commenter states that this requirement is too burdensome and is not required due to the process of prefiled written testimony used in most Commission proceedings.

RESPONSE AND EXPLANATION OF CHANGE: The purpose of the discovery process is to provide accurate information to the requesting party. The Commission utilizes the discovery methods of interrogatories and depositions as found in the Civil Rules of Procedure. In addition, the Commission's current rules and the proposed rule, provides for an additional method of discovery known as data requests. Data requests are meant to provide information to the requesting party in a more expedited fashion than interrogatories and depositions. However, data requests are not intended to provide less accurate information. After reviewing the comments and analyzing the rule as proposed, the Commission determines that a change to proposed section (1) is necessary to clarify the methods of discovery. The Commission determines that a change to proposed section (2) is necessary to clarify that the

person signing the data requests not only can, but will, attest to the truthfulness of the reply if necessary. The Commission also determines upon review of the rule that the language referring to sanctions for misconduct involving data requests should be clarified. Therefore, the Commission will amend section (1) and (2) of this rule.

COMMENT: One comment was received suggesting that proposed section (5) be amended to include a reference to being excused for good cause, identical to the language for hearings in proposed rule 2.110(2)(B).

RESPONSE AND EXPLANATION OF CHANGE: The Commission has reviewed the suggested amendment and finds that it is reasonable to amend section (5) so that it is consistent with other rule proposed by the Commission.

COMMENT: One comment was received suggesting that proposed section (7) specify that settlement offers are also privileged.

RESPONSE AND EXPLANATION OF CHANGE: The Commission finds that settlement offers should be added to the items which are privileged during prehearing conferences. Therefore, the Commission will amend section (7).

COMMENT: One commenter suggested that proposed section (8) be amended by adding a sentence stating, "No party shall file a motion to compel or motion for sanctions without first making a good faith effort to resolve the dispute informally." A similar comment was received from another commenter suggesting that section (8) of the rule be clarified to make it clear that the Commission is requiring a moving party to make informal good faith attempts to resolve discovery disputes prior to seeking a Commission order. The commenter points out that this would be similar to the "golden rule" followed by many circuit courts.

RESPONSE AND EXPLANATION OF CHANGE: The Commission has considered the comments to section (8) and determines that it would be appropriate for parties to Commission cases to follow a "golden rule" regarding discovery motions, similar to that followed by parties to cases in the United States District Court, Western District of Missouri, Rule 37.1 Discovery Motions. Therefore, the Commission will revise section (8) to include a "golden rule" for discovery motions.

4 CSR 240-2.090 Discovery and Prehearings

(1) Discovery may be obtained by the same means and under the same conditions as in civil actions in the circuit court. Sanctions for abuse of the discovery process or failure to comply with commission orders regarding discovery shall be the same as those provided for in the rules of civil procedure.

(2) Parties may use data requests as a means for discovery. The party to whom data requests are presented shall answer the requests within twenty (20) days after receipt unless otherwise agreed by the parties to the data requests. If the recipient objects to data requests or is unable to answer within twenty (20) days, the recipient shall serve all of the objections or reasons for its inability to answer in writing upon the requesting party within ten (10) days after receipt of the data requests, unless otherwise ordered by the commission. If the recipient asserts an inability to answer the data requests within the twenty (20)-day time limit, the recipient shall include the date it will be able to answer the data requests simultaneously with its reasons for its inability to answer. Upon agreement by the parties or for good cause shown, the time limits may be modified. As used in this rule, the term data request shall mean an informal written request for documents or information which may be transmitted directly between agents or employees of the commission, public counsel or other parties. Answers to data requests need not be under oath or be in any particular format, but shall be signed by a person who is able to attest to the truthfulness and correctness of the answers. Sanctions for failure to answer data

requests may include any of those provided for abuse of the discovery process in section (1) of this rule. The responding party shall promptly notify the requesting party of any changes to the answers previously given to a data request.

(5) Failure to appear at a prehearing conference without previously having secured a continuance shall constitute grounds for dismissal of the party or the party's complaint, application or other action unless good cause for the failure to appear is shown.

(7) Facts disclosed in the course of a prehearing conference and settlement offers are privileged and, except by agreement, shall not be used against participating parties unless fully substantiated by other evidence.

(8) Except when authorized by an order of the commission, the commission will not entertain any discovery motions, until the following requirements have been satisfied:

(A) Counsel for the moving party has in good faith conferred or attempted to confer by telephone or in person with opposing counsel concerning the matter prior to the filing of the motion. Merely writing a demand letter is not sufficient. Counsel for the moving party shall certify compliance with this rule in any discovery motion; and

(B) If the issues remain unresolved after the attorneys have conferred in person or by telephone, counsel shall arrange with the commission for an immediate telephone conference with the presiding officer and opposing counsel. No written discovery motion shall be filed until this telephone conference has been held.

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 240-2.100 Subpoenas is rescinded.

A notice of proposed rulemaking containing the proposed rescission was published in the *Missouri Register* on October 1, 1999 (24 MoReg 2330). 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 240-2.100 is adopted.