BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of a Proposed Rule to Establish a Procedure for Handling Confidential Information in Commission Proceedings	)))	**Case No. AX-2003-0404**

FINAL ORDER OF RULEMAKING

Issue Date: September 21, 2006

On April 7, 2003, the Commission opened a new case to consider a proposed rule designated as Commission Rule 4 CSR 240-2.135. A proposed rule was published by the Missouri Secretary of State's Office on July 3, 2006.

On September 21, 2006, the Commission adopted the Final Order of Rulemaking, which is fully set forth as Attachment A.

IT IS ORDERED THAT:

1. Commission Rule 4 CSR 240-2.135 is adopted.

2. This order shall become effective on October 1, 2006.

BY THE COMMISSION

(S E A L)

Colleen M. Dale
Secretary

Morris L. Woodruff, Deputy Chief Regulatory Law Judge, by delegation of authority pursuant to Section 386.240, RSMo 2000.

Dated at Jefferson City, Missouri,
on this 21st day of September, 2006.

MEMORANDUM

TO: Colleen M. Dale, Secretary

DATE: September 21, 2006

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

CASE NO.: AX-2003-0404

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

4 CSR 240-4.135 – Confidential Information

Jeff Davis, Chairman

Connie Murray, Commissioner

Steve Gaw, Commissioner (NO)

Robert M. Clayton III, Commissioner (NO)

Linward "Lin" Appling, Commissioner

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 2000, the commission adopts a rule as follows:

4 CSR 240-2.135 Confidential Information **is adopted.**

A notice of proposed rulemaking containing the text of the proposed rule was published in the *Missouri Register* on July 3, 2006 (31 MoReg 982-984). 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 submitted and a public hearing was held on August 7, 2006.

COMMENT: AT&T Missouri suggests that the commission revise the definitions of the two types of information defined as confidential in subsections (1)(A) and (1)(B) of the proposed rule to more closely mirror the definitions used in the standard protective order that the Commission currently issues on a case-by-case basis.
RESPONSE: No other commentator opposed the proposed change and the changes, while minor, bring the rule more closely in line with aspects of the current order that are known and respected by the parties that appear before the commission. The suggested changes will be made.

COMMENT: AT&T Missouri suggests that subsection (2)(B) be revised. That subsection establishes the procedure to be followed when a party seeks discovery of information that the party possessing that information believes to be proprietary or highly confidential. The proposed rule requires the party seeking to designate information as proprietary or highly confidential to inform the discovering party, in writing, of the reason for making that designation. AT&T Missouri points out that such a written notification is not required by sections (10) and (11) when a party designates prefiled testimony as proprietary or highly confidential, and suggests that the procedure for discovery should be changed to match the procedure for filing testimony. The commission's staff expressed opposition to this suggestion.

AT&T Missouri also suggests that any motion challenging the designation of discovery information as highly confidential be served by electronic mail and that the party designating the information as proprietary or highly confidential be allowed ten days to file a response.
RESPONSE: The commission has considered the comment but believes that a different procedure for designation of proprietary or highly confidential information is appropriate in discovery settings. The filing of testimony as proprietary or highly confidential takes place later in the hearing process, at a time when all the parties are more familiar with the information and can better judge whether the information should be protected from disclosure. In contrast, a

discovery response claiming that information should be protected from disclosure will frequently concern information that is unfamiliar to the discovering party. As a result, the discovering party may not be able to determine whether that information should be protected unless the party asserting that it should be treated as proprietary or highly confidential gives a reason for that designation. The suggested change will not be adopted.

The second part of the comment, which would require electronic service of a motion and require a response within ten days, will also be rejected. The commission's existing procedural rules already establish the permitted methods for service of pleadings and establish times for responding to those pleadings. There is no need to establish a separate procedure for those actions in this rule.

COMMENT: Laclede Gas Company suggested a revision to section (4). Laclede pointed out that under subsection (4)(B), a party disclosing highly confidential information may choose to make such information available only at its own premises. Subsection (4)(E), however, requires the disclosing party to serve the highly confidential information on the attorney for the requesting party. Laclede is concerned that these two provisions may conflict and suggests that subsection (4)(E) be modified to make it clear that it is subject to the terms of subsection (4)(B). No commentator opposed Laclede's suggestion.
RESPONSE: Laclede's suggested revision may avoid a conflict in the interpretation of the rule. The suggested change will be made.

COMMENT: Laclede Gas Company also suggested a further revision to section (4). That section places limits on the disclosure of information that has been designated as highly confidential. In particular, it provides that highly confidential information may be disclosed only to the attorney for a party and to outside experts that have been retained for purposes of the case. Highly confidential information may not be disclosed to employees, officers, or directors of parties. A problem may arise when a party to a case before the commission is appearing pro se. If the party has no attorney and has not hired an expert, there is no one acting on his or her behalf to which highly confidential information can be disclosed. In particular, Laclede is concerned about consumer complaints to the commission in which ratepayers frequently appear pro se. Customer specific information, such as names, addresses, social security numbers, and payment records, are generally designated as highly confidential so that they are not released to the general public. Laclede suggests that sections (3) and (4) be revised to make it clear that a customer's own specific information can be disclosed to the customer.

In response to Laclede's suggestion, the commission's staff went further and suggested that pro se litigants be allowed to see any proprietary or highly confidential information that would be available to any other party. AT&T Missouri and AmerenUE opposed staff's suggestion, arguing that disclosing proprietary of highly confidential information to a pro se litigant would increase the risk that the information would be improperly disclosed to competitors or the general public. AT&T Missouri and AmerenUE, however, supported Laclede's more limited suggestion.
RESPONSE: Laclede's suggested revision is helpful. Certainly, a pro se litigant should be able to see their own information. The disclosure of such information is the current practice at the commission but the rule should be changed to reflect that practice. The commission will not, however, make the change suggested by Staff. A rule providing that pro se litigants are always entitled to view proprietary and highly confidential information would increase the risk that such

information would be improperly disclosed, to the detriment of the utilities and their ratepayers. If a situation arises in a particular case that requires that a pro se litigant be allowed to view a utility's proprietary or highly confidential information, that situation can best be addressed in that particular case, rather than through a general rule.

COMMENT: Public Counsel suggests that a provision be added to section (9) to emphasize that consultant and other reports that contain both publicly available information and confidential analysis of that information should not be designated as confidential in their entirety but rather confidential designation should be limited to those portions that are truly confidential. AT&T Missouri and AmerenUE opposed that rule as being unnecessary and contrary to recent decisions by the commission.
RESPONSE: The commission has recently decided in a specific case that confidential consultant reports may be designated as confidential in their entirety. But that was a specific ruling in a specific case. The commission intends to retain the flexibility to decide that issue in the particular circumstances of future cases where it may arise. There is no need to place any such restriction in this rule.

COMMENT: AmerenUE suggests that section (10) be modified to incorporate recent changes to the standard protective order that allow for the use of redaction software in preparing highly confidential and proprietary testimony.
RESPONSE: The proposed rule already incorporates the changes needed to accommodate the use of redaction software. No further modifications are required.

COMMENT: Public Counsel suggests that a provision be added to section (12) regarding the duplication of voluminous materials. The proposed rule provides that if a party attempts to discover material that would be unduly burdensome to copy, the furnishing party may require that the voluminous material be reviewed at its premises, or elsewhere in Missouri, rather than be copied and delivered to the requesting party. Public Counsel suggests that the rule specifically state that material that is available in electronic form can never be considered as voluminous material. The commission's staff supported Public Counsel's proposal. AT&T Missouri and AmerenUE contend that no such provision is needed, but do not oppose Public Counsel's proposal so long as it would not be construed to require non-electronic material to be converted into an electronic form.
RESPONSE: The commission agrees with Public Counsel's contention that it should never be unduly burdensome to copy and produce materials that are available in an electronic form. However, Public Counsel's contention seems so self-evident that there is no need to add a provision to the rule to state that fact. Section (12) will not be modified.

COMMENT: Public Counsel suggests that the commission add a new section, which it proposes be known as (16a). This new section would allow the commission's staff and Public Counsel to use highly confidential and proprietary information in a proceeding for any purpose in other proceedings relating to the same utility company if the level of confidentiality is maintained. This proposal is a change from current practice and would be contrary to the requirements of the standard protective order that the commission has issued in particular cases. The commission's staff opposes Public Counsel's suggestion, and AT&T Missouri and AmerenUE strongly oppose that suggestion. They argue that if Public Counsel or the commission's staff want to use highly

confidential or proprietary information in a different case they can easily submit a separate discovery request in the other case. The utilities want to be sure that highly confidential or proprietary information disclosed in one case does not unexpectedly turn up out of context in another case.

At the hearing, Public Counsel explained that its concern was that the language of the rule was overly broad and could be interpreted to limit Public Counsel's and staff's ability to use highly confidential or proprietary information obtained in one case as the basis for a new investigation or complaint against the utility company.

RESPONSE: The commission does not intend to interpret its rule in such a way as to limit the ability of its staff or the Public Counsel to investigate and bring complaints against the utilities that it regulates. The language of section (16), while it is essentially unchanged from the existing standard protective order, could be construed to put such limits on the commission's staff and Public Counsel. The rule should not, however, give staff and Public Counsel a free hand to cart highly confidential and proprietary information from case to case in any way they see fit. The commission will add some clarifying language to section (16).

COMMENT: AT&T Missouri suggests that Section (19) be revised to require the commission's staff and the Office of the Public Counsel to provide a list of the names of their employees who will have access to information designated as proprietary or highly confidential. AT&T Missouri points out that such a list of employees is required by paragraph Y of the standard protective order that the commission has routinely issued in particular cases. The commission's staff and Public Counsel oppose this suggestion, arguing that although the standard protective order requires the production of such a list of employees, in practice such a list is not required. Furthermore, staff and Public Counsel point out that all of their employees are able to see highly confidential and proprietary information so that the list required would simply be a list of all commission or Public Counsel employees. AT&T Missouri acknowledges that the list of employees has not been required under current practices, but believes that the requirement should be put in the rule so that it can request such a list if the need arises in a future case.

RESPONSE: In drafting this rule, the commission has attempted to incorporate its standard protective order and current practices into the rule without substantial changes. Although the standard protective order requires staff and Public Counsel to list their employees who will have access to highly confidential and proprietary information, that is not the current practice. Indeed, the commission can see no reason why such a listing of employees would be needed. The commission will not include any unnecessary requirements in its rule. The section will not be modified.

COMMENT: AT&T Missouri suggests that the commission delete the portion of section (21) that would allow the commission to impose sanctions allowed by Rule 61.01 of the Missouri Rules of Civil Procedure and that would allow the commission to seek monetary penalties for the violation of this rule. AT&T Missouri contends that there is no record of parties having violated the commission's rule, such as would justify the need for a specific sanctions provision. AT&T Missouri also points out that the commission already has a rule, 4 CSR 240-2.090(1), that allows the commission to impose appropriate sanctions for abuse of the discovery process.

RESPONSE: The commission will accept the suggestion. The provisions found elsewhere in the commission's regulations and in the controlling statutes regarding sanctions for abuse of the

discovery process and disobedience of a commission order are sufficient and there is no need to include such a provision in this rule. Section (21) will be modified accordingly.

No other comments were received.

Revised sections:

(1) The commission recognizes two levels of protection for information that should not be made public.

(A) Proprietary information is information concerning trade secrets, as well as confidential or private technical, financial, and business information.

(B) Highly Confidential information is information concerning:

1. material or documents that contain information relating directly to specific customers;

2. employee-sensitive personnel information;

3. marketing analysis or other market-specific information relating to services offered in competition with others;

4. marketing analysis or other market-specific information relating to goods or services purchased or acquired for use by a company in providing services to customers;

5. reports, work papers, or other documentation related to work produced by internal or external auditors or consultants;

6. strategies employed, to be employed, or under consideration in contract negotiations; and

7. information relating to the security of a company's facilities.

(3) Proprietary information may be disclosed only to the attorneys of record for a party and to employees of a party who are working as subject-matter experts for those attorneys or who intend to file testimony in that case, or to persons designated by a party as an outside expert in that case.

(A) The party disclosing information designated as proprietary shall serve the information on the attorney for the requesting party.

(B) If a party wants any employee or outside expert to review proprietary information, the party must identify that person to the disclosing party by name, title, and job classification, before disclosure. Furthermore, the person to whom the information is to be disclosed must comply with the certification requirements of section (6) of this rule.

(C) A customer of a utility may view his or her own customer-specific information, even if that information is otherwise designated as proprietary.

(4) Highly confidential information may be disclosed only to the attorneys of record, or to outside experts that have been retained for the purpose of the case.

(A) Employees, officers, or directors of any of the parties in a proceeding, or any affiliate of any party, may not be outside experts for purposes of this rule.

(B) The party disclosing highly confidential information, may, at its option, make such information available only on the furnishing party's premises, unless the discovering party can show good cause for the disclosure of the information off-premises.

(C) The person reviewing highly confidential information may not make copies of the documents containing the information and may make only limited notes about the information. Any such notes must also be treated as highly confidential.

(D) If a party wants an outside expert to review highly confidential information, the party must identify that person to the disclosing party before disclosure. Furthermore, the outside expert to whom the information is to be disclosed must comply with the certification requirements of section (6) of this rule.

(E) Subject to subsection (4)(B), the party disclosing information designated as highly confidential shall serve the information on the attorney for the requesting party.

(F) A customer of a utility may view his or her own customer-specific information, even if that information is otherwise designated as highly confidential.

(16) All persons who have access to information under this rule must keep the information secure and may neither use nor disclose such information for any purpose other than preparation for and conduct of the proceeding for which the information was provided. This rule shall not prevent the commission's staff or the Office of the Public Counsel from using highly confidential or proprietary information obtained under this rule as the basis for additional investigations or complaints against any utility company.

(21) A claim that information is proprietary or highly confidential is a representation to the commission that the claiming party has a reasonable and good faith belief that the subject document or information is, in fact, proprietary or highly confidential.