

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

In the Matter of a Proposed Rule Regarding)
Staff Assisted Small Utility Rate Cases.) File No. AX-2018-0050

OFFICE OF PUBLIC COUNSEL’S COMMENTS

COMES NOW the Office of the Public Counsel, through the undersigned counsel, and for the Office of the Public Counsel’s Comments, hereby states the following:

On July 20, 2017, stakeholders discussed a draft proposal to change the small utility rate case rule at a workshop. See AX-2018-0050, Item No. 3, Small Regulator Fairness Board Small Business Impact Statement (August 22, 2017).

OPC provided comments verbally at the workshop and filed written comments in the workshop docket.

On August 8, 2017, the Missouri Public Service Commission (the “Commission”) opened AX-2018-0050.

On October 5, 2017, a filing on behalf of the Commission indicates that the Commission is rescinding 4 CSR 240-3.050 (Existing Rule) and proposing new rule 4 CSR 240-10.075 (Proposed Rule). Many of the comments made by OPC in the workshop did not lead to changes in the Proposed Rule.

On October 6, 2017, the Commission gave notice of a hearing for December 21, 2017 at 10 a.m. in room 310, but the notice did not include a deadline to submit written comments. Counsel for OPC was not aware that there would be written comments in this case until directed by a co-worker that the Commission’s website sometimes contains deadlines for written comments that can be found separately here:

<https://psc.mo.gov/CMSInternetData/RuleMakingAndWorkshops/Proposed%20Rules.pdf>.

COMMENTS AND ARGUMENT

1. 4 CSR 240-10.05(11)(E) and (11)(E)1 is Unlawful

The Proposed Rule, at 4 CSR 240-10.075 (11)(E) and (11)(E)1, indicates that either the “utility or staff” may present “evidence in support of the disposition agreement” at an evidentiary hearing. Furthermore, the utility can be excused from the hearing - although the utility’s representatives may still be called as witnesses by other parties.

The procedure described arguably violates section 393.150.2, RSMo, which states that at “any hearing involving a rate sought to be increased, the burden of proof to show that the increased rate or proposed increased rate is just and reasonable shall be upon the gas corporation, electrical corporation, water corporation or sewer corporation...”

Furthermore, if the utility or Staff are merely required to present evidence in support of the disposition agreement rather than present factual evidence to support contested issues, then the procedure also arguably violates due process, section 386.420, RSMo, and *State ex rel Fisher v. Public Service Commission*, 645 S.W.2d 39 (Mo. App. W.D. 1982) (citing to 386.420 and citing to due process concerns, the Court indicates the Commission’s duty to make a report that includes findings of fact and that due process is not meaningfully honored when the “only issue it would consider was whether or not to approve the stipulation and agreement”).

Additionally, elsewhere in the rule at 4 CSR 240-10.075(4), there is an unnecessary rule that indicates that the Staff shall assist a small utility to the extent doing so is consistent with staff’s function and responsibility to the commission. The Proposed Rule does not define staff’s function and responsibility to the commission, but arguably, Staff is without authority to provide counsel to a utility and represent their interests jointly in a contested proceeding. Indeed, “staff counsel *represents the commission* staff in investigations, contested cases, and other proceedings

before the commission.” 4 CSR 240-2.040 (emphasis added). Prior to a disposition agreement, Staff’s interests and the utility’s interests are not yet aligned. To assist the utility in developing its case could be a conflict of interest.

In contested cases, which Public Service Commission proceedings are,¹ assisting the utility in the development of its case and permitting a public utility to not participate in a hearing removes the adversarial nature associated with contested case hearings. Finally, “[t]he commission may authorize any person employed by it to do or perform any act, matter or thing *which the commission is authorized by this chapter to do or perform....*” Section 386.240, RSMo. There is nothing within Chapter 386 which permits the Commission to act as a proxy to a private utility.

2. *The Proposed Rule increases regulatory costs, and specifically, the increased burden on OPC could effectively eliminate OPC’s ability to participate in small utility proceedings.*

The Proposed Rule could be read to direct OPC to perform additional work, by stating that if “public counsel [is]... conducting its own investigation...” then OPC would be required to file a preliminary investigation report. §(8)(F). It is unclear what is meant by “its own investigation.” If this provision is meant for the Commission to direct OPC to furnish work product that it might not otherwise need to create as necessary condition to participating in small utility rate case or as a necessary condition to conducting an investigation, there is questionable legal authority for the Commission to do so. It is also not stated if these documents would be filed publicly for the general benefit of the public or would be merely exchanged between the parties and possibly

¹ See *State ex rel. Division of Transp. v. Sure-Way Transp.*, 948 S.W.2d 651, 656 (Mo. App. W.D. 1997).

never making it into the public spotlight but for a sunshine request. Section (8)(F) should be reworded so as to remove these burdens from OPC.

Furthermore, the Proposed Rule also requires OPC to produce, as a necessary condition of conducting its own investigation, a settlement proposal addressing: the utility's annual operating revenues, the utility's customer rates, the utility's service charges and fees, the utility's plant depreciation rates, updated work papers, and other documents supporting the settlement proposal. *Id.* at (9)(A)3-4.

Unlike the Staff of the Missouri Public Service Commission, OPC receives its enabling authority through sections 386.700 and 386.710, and OPC's statutory powers are arguably being infringed upon when OPC cannot conduct "its own investigation" without also producing Commission-required documents, like a "report of its preliminary investigation, audit, analysis and workpapers including: 1. an evaluation of the utility's record-keeping practices, and 2. A list of the cost of service items that are still under consideration with an explanation for why those items are not yet resolved." *See* Proposed Rule, 4 CSR 240-10.075(8)(F)1-2. While the Commission has the statutory authority to direct Staff to perform certain functions, it does not have the authority to make such directions to OPC.

OPC interprets the Proposed Rule as trying to help ease the burden for small companies, but OPC also asks this Commission to consider the impact to small communities. If OPC is without resources to "conduct its own investigation" as the Proposed Rule might be interpreted, these small communities might not have a consumer advocate. OPC hopes that is not the intent of this rule, but OPC notices that 4 CSR 240-10.075(9)(B)-(C) provides additional evidence that excluding OPC may be an implied intent of this Proposed Rule. For example, 4 CSR 240-10.075 (9)(B) fails to mention OPC. Four CSR 240-10.075 (9)(C) similarly only contemplates a

situation in which staff has offered a settlement proposal, which implies an expectation that OPC will not be conducting their own investigation. Consequently, the Proposed Rule only requires the utility to be responsive to a staff settlement rather than to respond to a Staff settlement and an OPC settlement. To compound these problems, 4 CSR 240-10.075(9)(C) also creates an increased burden on the utility to produce workpapers, rate design work papers, or other documents in its possession that support its suggestions. Small utilities, at times, fail to provide their own workpapers including rate design work papers. This expectation may be unrealistic, and it might lead to routine violations.

Finally, if OPC decides that it wishes to “conduct its own investigation” at any point after day 120, OPC is unclear if it will have waived the opportunity to do so under this Proposed Rule. The Proposed Rule should expressly clarify and mitigate OPC’s concerns to create more certainty about how OPC can participate in these cases.

3. OPC reincorporates its comments that were filed in the workshop, WW-2017-0283, because they equally apply to the Proposed Rule.

OPC resubmits its comments and concerns in the workshop, and OPC would ask judicial notice be taken of these comments through this filing and/or at the hearing. OPC continues to take issue with the following

- OPC opposes reducing the amount of time for continuances to thirty days. See §(5)(A). Often, small utility rate cases need extensions longer than thirty days, but the length of extensions still remains short. See workshop exhibit 3 (attached).
- OPC opposes reducing the amount of time to conduct the case. See §(13).

- OPC proposes eliminating 4 CSR 240-10.075(4) because it is unnecessary and Staff already provides sufficient assistance to small utilities.
- OPC proposes adding additional notice. OPC suggests added notice at the start of a proceeding and at the conclusion of the proceeding.
- OPC proposes eliminating words that imply the ability to use estimates (see §(8)(E)) because it places too much emphasis on credibility determinations that can be made in the hearing room and interjects confusion about whether this change constitutes burden shifting that conflicts with section 393.150.2, RSMo.
- OPC proposes moving the local public hearing to a later date (see §(6)):
 - If the initial notice does not go out until ten days before the local public hearing, many people will not have adequate time to file comments making it more difficult to judge the demand for a local public hearing.
 - Additionally, having a local public hearing at an early stage in the proceeding creates a situation where parties are unable to educate the public on the actual positions of the parties limiting the meaningfulness of the hearing.

4. Although Staff may or may not want “internal procedures” to attempt to uniformly handle cases that often are unique and fact-specific, OPC does not specifically object to the language of the Proposed rule requiring Staff to have “internal procedures” provided that those “internal procedures” are publicly available to parties like OPC.

5. OPC recommends not regulating the number of days to make a comment in the invitation to submit comments identified in (7)(C).

6. OPC recommends removing (7)(E) and merging this into the description of the notice in Paragraph (7) because, technically speaking, the written notice probably does not need to comment on whether Staff will be filing a copy in the case file. OPC suggests that the Proposed Rule direct Staff to file the written notice in the file as a condition to Paragraph (7)'s introduction.

7. OPC does not believe a waiver of provisions is necessary because it appears to be redundant with other Commission rules on file that allow a waiver of provisions.

8. *4 CSR 240-10.075(3)(B)&(C)*

The Proposed Rule offers several ways by which a small utility rate case proceedings may begin. OPC supports being able to commence a rate case by a complaint; however, OPC recommends language that would require additional procedure as an intervening step between the filing of a complaint and the commencement of a small utility rate case. For example, the rule could require a Commission order to initiate a rate case. OPC reasons that a Commission order, or similar intervening procedure, could mitigate risk of abuse of parties bringing vexatious complaints that could initiate frivolous rate case proceeding.

Similar in rationale to OPC's recommendation at 4 CSR 240-10.075(3)B), OPC reasons that an intervening procedural step would help preserve parties' rights to notice and an opportunity to be heard. OPC suggests that a new tariff that is filed by a small utility that is filed with the intention of initiating small utility rate case proceedings should accompany other filings, such as the letter required in 4 CSR 240-10.075(3)(A). Furthermore, a Commission order may help direct non-moving parties as to their rights and obligations related to the filing.

WHEREFORE, OPC submits these comments for the Commission's consideration and asks that the Commission modify the Proposed Rule to mitigate OPC's concerns raised herein.

Respectfully submitted,

OFFICE OF THE PUBLIC COUNSEL

By: /s/ Ryan D. Smith

Ryan D. Smith, Mo. Bar No. 66244

Curtis Schube, Mo. Bar. No. 63227

PO Box 2230

Jefferson City, MO 65102

P: (573) 751-4857

F: (573) 751-5562

E-mail: Ryan.Smith@ded.mo.gov

E-mail: Curtis.Schube@ded.mo.gov

CERTIFICATE OF SERVICE

On this 15th day of December, 2017, I hereby certify that a true and correct copy of the foregoing motion was submitted to all relevant parties by depositing this motion into the Commission's Electronic Filing Information System ("EFIS").

/s/ Ryan D. Smith