



Robin Carnahan
Secretary of State

Administrative Rules Division
Rulemaking Transmittal Receipt

Rule ID: 4507
Date Printed: 5/25/2006
Rule Number: 4 CSR 240-2.135
Rulemaking Type: Proposed Rule
Date Submitted to Administrative Rules Division: 5/25/2006
Date Submitted to Joint Committee on Administrative Rules: 5/25/2006

Name of Person to Contact with questions concerning this rule:

Content: Morris Woodruff	Phone: 751-2849	Email: morris.woodruff@psc.mo.gov	Fax: 526-6010
RuleDataEntry: Lonnell Boyce	Phone: 751-3350	Email: lonnell.boyce@psc.mo.gov	Fax: 526-6010

Included with Rulemaking:

Cover Letter
Affidavit for public cost

5/25/2006
5/25/2006

Robin Carnahan
Secretary of State
Administrative Rules Division
RULE TRANSMITTAL

Administrative Rules Stamp

RECEIVED

MAY 25 2006

SECRETARY OF STATE
ADMINISTRATIVE RULES

A "SEPARATE" rule transmittal sheet **MUST** be used for EACH individual rulemaking.

A. Rule Number 4 CSR 240-2.135
Diskette File Name 2.135 (Word 2003 format)
Name of person to call with questions about this rule:
Content Morris L. Woodruff Phone 751-2849 FAX 526-6010
E-mail address morris.woodruff@psc.mo.gov
Data entry Lonnell Boyce Phone 751-3350 FAX 526-6010
E-mail address lonnell.boyce@psc.mo.gov
Interagency mailing address Governor Office Building, 200 Madison Street, Suite 900
Statutory Authority 386.040 and 386.410 Current RSMo date 2000
Date filed with the Joint Committee on Administrative Rules May 25, 2006

B. CHECKLIST guide for rule packets:

- | | |
|---|--|
| <input checked="" type="checkbox"/> This transmittal completed | <input type="checkbox"/> Forms, number of pages _____ |
| <input checked="" type="checkbox"/> Cover letter | <input type="checkbox"/> Authority section with history of the rule |
| <input checked="" type="checkbox"/> Affidavit | <input type="checkbox"/> Public cost statement |
| <input checked="" type="checkbox"/> Small business impact statement | <input type="checkbox"/> Private cost statement |
| <input type="checkbox"/> Fiscal notes | <input checked="" type="checkbox"/> Hearing date <u>August 7, 2006</u> |

C. RULEMAKING ACTION TO BE TAKEN

- ☐ Emergency rulemaking (choose one) ☐ rule, ☐ amendment, ☐ rescission, or ☐ termination
MUST include effective date _____
- ☒ Proposed Rulemaking (choose one) ☒ rule, ☐ amendment, or ☐ rescission
- ☐ Order of Rulemaking (choose one) ☐ rule, ☐ amendment, ☐ rescission, or ☐ termination
MUST complete page 2 of this transmittal
- ☐ Withdrawal (choose one) ☐ rule, ☐ amendment, ☐ rescission, or ☐ emergency
- ☐ Rule action notice ☐ In addition ☐ Rule under consideration

D. SPECIFIC INSTRUCTIONS: Any additional information you may wish to provide to our staff

Small Business Regulatory
Fairness Board (DED) Stamp

JCAR Stamp

JOINT COMMITTEE ON

MAY 25 2006

ADMINISTRATIVE RULES

RULE TRANSMITTAL (PAGE 2)

E. ORDER OF RULEMAKING: Rule Number _____

1a. Effective Date for the Order

☐ Statutory 30 days

Specific date _____

1b. Does the Order of Rulemaking contain changes to the rule text?

☐ YES ☐ NO

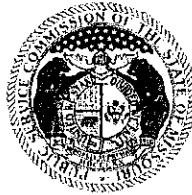
1c. If the answer is YES, please complete section F.

If the answer is NO, **STOP** here.

F. Please provide a complete list of the changes in the rule text for the order of rulemaking, indicating the specific section, subsection, paragraph, subparagraph, part, etc., where each change is found. It is especially important to identify the parts of the rule that are being deleted in this order of rulemaking. Give an explanation of each section, subsection, etc. which has been changed since the proposed rulemaking was published in the Register.

NOTE: ALL changes MUST be specified here in order for those changes to be made in the rule as published in the *Missouri Register* and the *Code of State Regulations*.

Add additional sheet(s), if more space is needed.



Commissioners

JEFF DAVIS
Chairman

CONNIE MURRAY

STEVE GAW

ROBERT M. CLAYTON III

LINWARD "LIN" APPLING

Missouri Public Service Commission

POST OFFICE BOX 360
JEFFERSON CITY MISSOURI 65102
573-751-3234
573-751-1847 (Fax Number)
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WESS A. HENDERSON
Executive Director

DANA K. JOYCE
Director, Administration and
Regulatory Policy

ROBERT SCHALLENBERG
Director, Utility Services

WARREN WOOD
Director, Utility Operations

COLLEEN M. DALE
Secretary/Chief Regulatory Law Judge

KEVIN A. THOMPSON
General Counsel

May 25, 2006

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

Dear Secretary Carnahan,

RE: 4 CSR 240-2.135 – Confidential Information

CERTIFICATION OF ADMINISTRATIVE RULE

I do hereby certify that the attached is an accurate and complete copy of the proposed rule lawfully submitted by the Missouri Public Service Commission on this 25th day of May 2006.

The Missouri Public Service Commission has determined and hereby certifies that this proposed rule will not have an economic impact on small businesses. The Missouri Public Service Commission also certifies that it has conducted an analysis of whether or not there has been a taking of real property pursuant to section 536.017, RSMo 2000 and that this proposed rule does not constitute a taking of real property under relevant state and federal law.

Statutory Authority: sections 386.040, RSMo (2000) and 386.410, RSMo (2000)

If there are any questions regarding the content of the rule, please contact:

Morris L. Woodruff, Deputy Chief Regulatory Law Judge

Missouri Public Service Commission

Governor Office Building

200 Madison Street, Suite 900

Post Office Box 360

Jefferson City, Missouri 65102

Phone: (573) 751-2849

E-mail: morris.woodruff@psc.mo.gov

BY THE COMMISSION

Colleen M. Dale

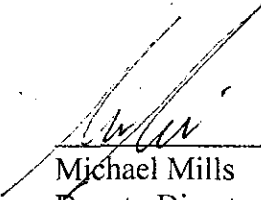
Secretary

Missouri Public Service Commission

AFFIDAVIT

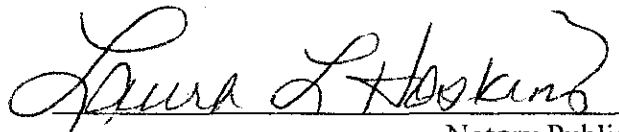
STATE OF MISSOURI
COUNTY OF COLE }

I, Michael Mills, Deputy Director of the Department of Economic Development, first being duly sworn, on my oath, state that it is my opinion that the cost of Proposed Rule **4 CSR 240-2.135 Confidential Information** is less than five hundred dollars in the aggregate to this agency, any other agency of state government or any political subdivision thereof.



Michael Mills
Deputy Director
Department of Economic Development

Subscribed and sworn to before me this 23rd day of May, 2006. I am commissioned as a notary public within the County of Cole, State of Missouri, and my commission expires on February 1, 2008.



Notary Public

Laura L. Hoskins
Notary Public Notary Seal
State of Missouri
County of Cole
My Commission Expires 02/01/08

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

PROPOSED RULE

RECEIVED
MAY 25 2006
SECRETARY OF STATE
ADMINISTRATIVE RULES

4 CSR 240-2.135 Confidential Information

PURPOSE: This rule prescribes the procedures for handling confidential information in cases before the commission.

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

(A) Proprietary information includes trade secrets and other confidential or private technical, financial, and business information.

(B) Highly Confidential information includes:

1. information relating directly to specific customers;
2. employee-specific 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 in contract negotiations; and
7. information relating to the security of a company's facilities.

(2) When a party seeks discovery of information that the party from whom discovery is sought believes to be confidential, the party from whom discovery is sought may designate the information as proprietary or highly confidential.

(A) No order from the commission is necessary before a party in any case pending before the commission may designate material as proprietary or highly confidential and such information shall be protected as provided in this rule.

(B) The party that designates information as proprietary or highly confidential must inform, in writing, the party seeking discovery of the reason for the designation at the same time it responds to the discovery request. If the party seeking discovery disagrees with the designation placed on the information, it must utilize the informal discovery dispute resolution procedures set forth at 4 CSR 240-2.090(8). If the party seeking discovery continues to disagree with the designation placed on the information, it may file a motion challenging the designation.

(C) This rule does not require the disclosure of any information that would be protected from disclosure by any privilege, rule of the commission, or the Missouri Rules of Civil Procedure.

JOINT COMMITTEE ON
MAY 25 2006
ADMINISTRATIVE RULES

(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.

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

(5) If any party believes that information must be protected from disclosure more rigorously than would be provided by a highly confidential designation, it may file a motion explaining what information must be protected, the harm to the disclosing entity or the public that might result from disclosure of the information, and an explanation of how the information may be disclosed to the parties that require the information while protecting the interests of the disclosing entity and the public.

(6) Any employee of a party that wishes to review proprietary information, or any outside expert retained by a party that wishes to review highly confidential or proprietary information must first certify in writing that he or she will comply with the requirements of this rule.

(A) The certification must include the signatory's full name, permanent address, title or position, date signed, the case number of the case for which the signatory will view the information, and the identity of the party for whom the signatory is acting.

(B) The signed certificate shall be filed in the case.

(C) The party seeking disclosure of the highly confidential or proprietary information must provide a copy of the certificate to the disclosing party before disclosure is made.

(7) Attorneys possessing proprietary or highly confidential information or testimony may make such information or testimony available only to those persons authorized to review such information or testimony under the restrictions established in sections (3) and (4).

(8) If information to be disclosed in response to a discovery request is information concerning another entity – whether or not a party to the case – which the other entity has indicated is confidential, the disclosing party must notify the other entity of its intent to disclose the information. If the other entity informs the disclosing party that it wishes to protect the material or information, the disclosing party must designate the material or information as proprietary or highly confidential under the provisions of this rule.

(9) Any party may use proprietary or highly confidential information in prefiled testimony, in a pleading, or at hearing, if the same level of confidentiality assigned by the disclosing party, or the commission, is maintained. Before including non-public information that it has obtained outside this proceeding in its pleading or testimony, a party must ascertain from the source of the information whether that information is claimed to be proprietary or highly confidential.

(10) A party may designate portions of prefiled or live testimony as proprietary or highly confidential. Prefiled testimony that contains information designated as proprietary or highly confidential must be filed as follows:

(A) A public version of the prefiled testimony must be filed along with the proprietary or highly confidential version of the testimony. For the public version, the proprietary or highly confidential portions must be obliterated or removed. The proprietary pages must be marked "P" and the removal of proprietary information shall be indicated by one asterisk before and after the information, e.g. *proprietary information removed*. The highly confidential pages must be marked "HC" with the removal of highly confidential information indicated by two asterisks and underlining before and after the highly confidential information, e.g. **highly confidential information removed**. The designated information must be removed with blank spaces remaining so that the lineation and pagination of the public version remains the same as the highly confidential and proprietary versions.

(B) For the non-public version of the prefiled testimony, the proprietary pages must be marked "P" and the proprietary information indicated by one asterisk before and after the information, e.g. *Proprietary*. The highly confidential pages shall be stamped "HC" with the highly confidential information indicated by underlining and by two asterisks before and after the highly confidential information, e.g. **Highly Confidential**.

(C) At the hearing, the party offering the prefiled testimony must present a public version of the testimony in which the proprietary or highly confidential portions are obliterated or removed. The public version of the testimony will be marked as Exhibit _____. The offering party must also present a separate copy of the prefiled testimony containing proprietary or highly confidential information, sealed in an envelope. The version of the testimony containing proprietary or highly confidential information will be marked as Exhibit _____P or HC, as appropriate.

(11) Not later than ten (10) days after testimony is filed that contains information designated as proprietary or highly confidential, any party that wishes to challenge the designation of the testimony may file an appropriate motion with the commission.

(A) If the designation of the testimony is challenged, the party asserting that the information is proprietary or highly confidential must, not later than ten (10) days, unless a shorter time is ordered, file a pleading establishing the specific nature of the information that it seeks to protect and establishing the harm that may occur if that information is disclosed to the public.

(B) If the asserting party fails to file the pleading required by this section, the commission may order that the designated information be treated as public information.

(12) If a response to a discovery request requires the duplication of material that is so voluminous, or of such a nature that copying would be unduly burdensome, the furnishing party may require that the material be reviewed on its own premises, or at some other location, within the state of Missouri.

(13) If prefiled testimony includes information that has previously been designated as highly confidential or proprietary in another witness' prefiled testimony, that information must again be designated as highly confidential or proprietary.

(14) (A) All live testimony, including cross-examination and oral argument, that reveals information that is designated as proprietary or highly confidential, may be offered only after the hearing room is cleared of all persons except those persons to whom the highly confidential or proprietary information is available under this rule.

(B) The transcript of such live testimony or oral argument will be kept under seal and copies will be provided only to the commission and the attorneys of record. The contents of such transcripts may not be disclosed to anyone other than those permitted access to the designated information under this rule.

(15) Proprietary or highly confidential information may not be quoted in briefs or other pleadings unless those portions of the briefs or other pleading are also treated as proprietary or 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.

(17) After receiving an appropriate writ of review, the commission will deliver proprietary and highly confidential testimony constituting part of the record before the commission to the reviewing court under seal, unless otherwise directed by the court.

(18) Within 90 days after the completion of the proceeding, including judicial review, all copies of all proprietary and highly confidential information, testimony, exhibits, transcripts or briefs in the possession of any party must be returned to the party claiming a confidential interest in such information, if that party requests that the information be returned.

Otherwise, the information must be destroyed by the party possessing such information. Any notes pertaining to such information must be destroyed.

(19) The provisions of sections (3), (4), (6), (7), and (18) of this rule do not apply to officers or employees of the commission or to the public counsel or employees of the office of the public counsel. The officers or employees of the commission and the public counsel and employees of the office of the public counsel are subject to the nondisclosure provisions of Section 386.480, RSMo. Neither the officers or employees of the commission, nor the public counsel and the employees of the office of the public counsel shall use or disclose any information obtained in discovery for any purpose other than in the performance of their duties.

(20) Outside experts of the staff of the commission or the office of the public counsel who have been contracted to be witnesses in the proceeding have access to designated information and testimony on the same basis as the staff of the commission and the office of the public counsel except that the outside expert must comply with the provisions of sections (6) and (18). Outside experts of the staff of the commission and the office of the public counsel who have not been contracted to be witnesses in the proceeding are subject to all provisions of this rule.

(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. The commission may impose appropriate sanctions against any party or person that violates any provision of this rule, pursuant to Rule 61.01 of the Missouri Rules of Civil Procedure. In addition, the commission may seek to recover penalties by bringing an action in circuit court as permitted by statute.

(22) The commission may waive or grant a variance from any provision of this rule for good cause shown.

AUTHORITY: section 386.040, RSMo (2000) and section 386.410, RSMo (2000).

PUBLIC ENTITY COST: This proposed rule will not cost state agencies or political subdivisions more than \$500 in the aggregate.

PRIVATE ENTITY COST: This proposed rule will not cost private entities more than \$500 in the aggregate.

*NOTICE OF PUBLIC HEARING AND NOTICE TO SUBMIT COMMENTS: Anyone may file a statement in support of or in opposition to this proposed rule with the Missouri Public Service Commission, Colleen M. Dale, Secretary, P.O. Box 360, Jefferson City, MO 65102. To be considered, comments must be received within 30 days after publication of this notice in the **Missouri Register**. Comments should refer to Case No. AX-2003-0404. A public*

hearing is scheduled for 9:00 a.m., August 7, 2006 in Room 310 of the Governor Office Building, 200 Madison Street, Jefferson City, Missouri.



Commissioners

JEFF DAVIS
Chairman

CONNIE MURRAY

STEVE GAW

ROBERT M. CLAYTON III

LINWARD "LIN" APPLING

Missouri Public Service Commission

POST OFFICE BOX 360
JEFFERSON CITY MISSOURI 65102
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573-751-1847 (Fax Number)
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Executive Director

DANA K. JOYCE
Director, Administration and
Regulatory Policy

ROBERT SCHALLENBERG
Director, Utility Services

WARREN WOOD
Director, Utility Operations

COLLEEN M. DALE
Secretary/Chief Regulatory Law Judge

KEVIN A. THOMPSON
General Counsel

April 27, 2006

Ms. Colleen M. Dale
Secretary
Missouri Public Service Commission
Post Office Box 360
Jefferson City, Missouri 65102

RE: Proposed Rule 4 CSR 240-2.135 Confidential Information

Dear Ms. Dale:

Executive Order 93-13 requires state agencies to undertake a "takings analysis" of each proposed rule or regulation in light of the United States Supreme Court decision in *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886(1992). Pursuant to that order, I have undertaken a "takings analysis" of the above-referenced proposed rulemaking. In *Lucas*, the Court held that state regulation depriving an owner of real property of all economically beneficial use of that property constitutes a "taking" under the Fifth and Fourteenth Amendments of the U.S. Constitution, for which the property owner must be compensated. The Court also held that when state regulations compel a property owner to suffer a permanent physical invasion of his/her property, such an invasion is compensable.

The proposed rule will establish the procedures for disclosing and handling confidential information in matters pending before the Commission.

The proposed rule 4 CSR 240-2.135 does not implicate the takings clause of the U.S. Constitution, because the rule does not involve the taking of real property.

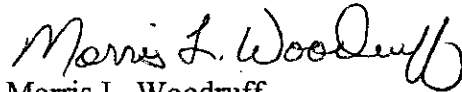
Ms. Colleen M. Dale

Page two

April 27, 2006

Please let me know if you have any questions on this issue.

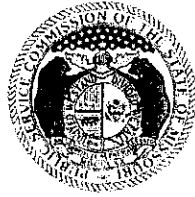
Very truly yours,

A handwritten signature in cursive script, reading "Morris L. Woodruff". The signature is written in dark ink and is positioned above the printed name and title.

Morris L. Woodruff

Deputy Chief Regulatory Law Judge

MLW:lb



Commissioners

JEFF DAVIS
Chairman

CONNIE MURRAY

STEVE GAW

ROBERT M. CLAYTON III

LINWARD "LIN" APPLING

Missouri Public Service Commission

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Executive Director

DANA K. JOYCE
Director, Administration and
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ROBERT SCHALLENBERG
Director, Utility Services

WARREN WOOD
Director, Utility Operations

COLLEEN M. DALE
Secretary/Chief Regulatory Law Judge

KEVIN A. THOMPSON
General Counsel

April 27, 2006

Ms. Colleen M. Dale
Secretary
Missouri Public Service Commission
Post Office Box 360
Jefferson City, Missouri 65102

RE: Proposed Rule 4 CSR 240-2.135 Confidential Information

Dear Ms. Dale:

Executive Order 96-18 requires state agencies to determine whether a proposed rulemaking will have direct economic impact on small businesses of five hundred dollars or more in the aggregate. A small business is defined in the Executive Order as an independently owned and operated business entity that employs fifty or fewer full-time employees.

The proposed rule 4 CSR 240-2.135 will establish the procedures for disclosing and handling confidential information in matters pending before the Commission. The proposed rule is not estimated to have a direct economic impact on small businesses of five hundred dollars or more in the aggregate.

Please let me know if you have any questions on this issue.

Very truly yours,

A handwritten signature in black ink, reading "Morris L. Woodruff".

Morris L. Woodruff
Deputy Chief Regulatory Law Judge

MLW:lb

MEMORANDUM

TO: Colleen M. Dale, Secretary

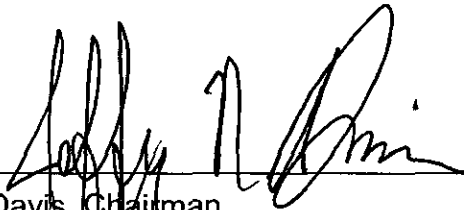
DATE: May 25, 2006

RE: Authorization to File Proposed Rule 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 Proposed Rule with the Office of Secretary of State, to wit:

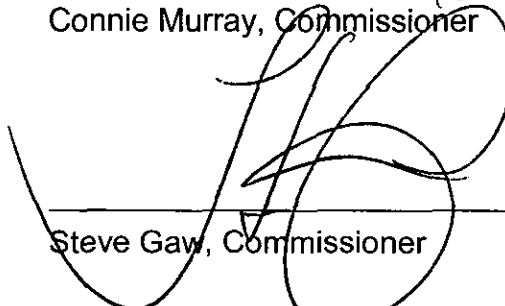
4 CSR 240-4.135 – Confidential Information



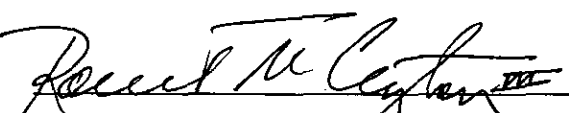
Jeff Davis, Chairman



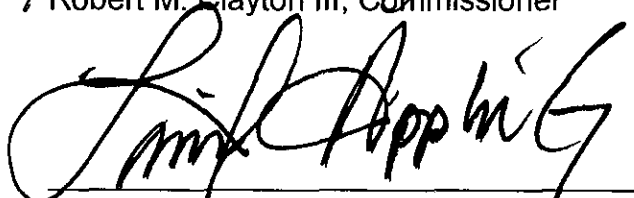
Connie Murray, Commissioner

 (No)

Steve Gaw, Commissioner

 (No)

Robert M. Clayton III, Commissioner



Linward "Ln" Appling, Commissioner



Commissioners
JEFF DAVIS
Chairman
CONNIE MURRAY
STEVE GAW
ROBERT M. CLAYTON III
LINWARD "LIN" APPLING

Missouri Public Service Commission

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Director, Utility Operations
COLLEEN M. DALE
Secretary/Chief Regulatory Law Judge
KEVIN A. THOMPSON
General Counsel

April 27, 2006

Mr. Gregory A. Steinhoff, Director
Department of Economic Development
Harry S Truman State Office Building
301 West High Street
Jefferson City, Missouri 65109

RE: Affidavit for Proposed Rule 4 CSR 240-2.135 Confidential Information

Dear Mr. Steinhoff:

As required by statute, enclosed for your signature is an affidavit for a Proposed Rule to add a new section, 4 CSR 240-2.135, to the Public Service Commission rules. A copy of the Proposed Rule is also enclosed, as well as copies of the takings and small business impact analyses.

If you have any questions, please feel free to contact me at (573) 751-4255.

Very truly yours,

A handwritten signature in black ink, appearing to read "Colleen M. Dale".

Colleen M. Dale
Secretary

CMD:lb

Enclosures: Affidavit for 4 CSR 240-2.135 Confidential Information
Proposed Rule – 4 CSR 240-2.135 Confidential Information
Takings Analysis
Small Business Impact Analysis