

## MEMORANDUM

**TO:** Morris L. Woodruff, Secretary

**DATE:** May 14, 2014

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

**CASE NO:** AX-2014-0193

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

### **Proposed Rule 4 CSR 240-2.090 – Discovery and Prehearings**



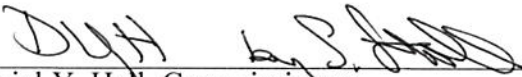
Robert S. Kenney, Chairman



Stephen M. Stoll, Commissioner



William P. Kenney, Commissioner



Daniel Y. Han, Commissioner



Scott T. Rupp, Commissioner

# Jason Kander

Secretary of State  
Administrative Rules Division

## RULE TRANSMITTAL

Administrative Rules Stamp

Rule Number 4 CSR 240-2.090

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

Name of person to call with questions about this rule:

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Interagency mailing address Public Service Commission, 9th Fl., Gov. Ofc. Bldg., JC, MO

### TYPE OF RULEMAKING ACTION TO BE TAKEN

- ☐ Emergency rulemaking, include effective date  
☐ Proposed Rulemaking  
☐ Withdrawal ☐ Rule Action Notice ☐ In Addition ☐ Rule Under Consideration  
☐ Request for Non-Substantive Change  
☐ Statement of Actual Cost  
☒ 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:

(2)(c) and (2)(4)

Small Business Regulatory  
Fairness Board (DED) Stamp

JCAR Stamp

JOINT COMMITTEE ON  
MAY 14 2014  
ADMINISTRATIVE RULES



Commissioners

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Chairman

STEPHEN M. STOLL

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Chief Staff Counsel

Jason Kander  
Secretary of State  
Administrative Rules Division  
600 West Main Street  
Jefferson City, Missouri 65101

Re: 4 CSR 240-2.090 Discovery and Prehearings.

Dear Secretary Kander,

CERTIFICATION OF ADMINISTRATIVE RULE

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

Statutory Authority: sections 386.410 RSMo 2000

If there are any questions regarding the content of this order of rulemaking, please contact:

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Morris L. Woodruff  
Chief Regulatory Law Judge

**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 240-2.090 is amended.**

A notice of proposed rulemaking containing the text of the proposed amendment was published in the *Missouri Register* on March 3, 2014 (39 MoReg 630). Those sections with changes are reprinted here. This proposed amendment becomes effective thirty (30) days after publication in the *Code of State Regulations*.

**SUMMARY OF COMMENTS:** The public comment period ended April 2, 2014, and the commission held a public hearing on the proposed amendment on April 7, 2014. The commission received timely written comments from Kansas City Power & Light Company (KCP&L) and KCP&L Greater Missouri Operations Company (GMO). Additional written comments were received from Midwest Gas Users' Association (MGUA) and Midwest Energy Users' Association (MEUA). In addition, the following people offered comments at the hearing: James Fischer, representing KCP&L and GMO; Stuart W. Conrad, representing MGUA and MEUA; Sarah Giboney, representing Union Electric Company, d/b/a Ameren Missouri; Kevin Thompson, representing the Staff of the Missouri Public Service Commission; and Kim Happy and John Hanauer on behalf of the Staff of the Missouri Public Service Commission.

**COMMENT #1:** The written comment of MGUA and MEUA, which was reiterated by its attorney, Stuart Conrad, at the hearing, advises the commission to revise subsection (C) of the rule to allow the commission the flexibility to order the modification of response times to data requests as necessary in particular cases by adding the phrase "or as otherwise ordered by the commission" to the end of the subsection.

**RESPONSE AND EXPLANATION OF CHANGE:** The commission agrees with the comment and will modify the subsection in the manner suggested.

**COMMENT #2:** The written comment of MGUA and MEUA, which was reiterated by its attorney, Stuart Conrad, at the hearing, expresses concern about subsection (H) of the rule. That subsection, which is a new provision in the rule, requires that data requests sent to or from the staff of the commission be

submitted and responded to in the commission's electronic filing and information system (EFIS). MGUA, MEUA, and Mr. Conrad complain that requiring such data requests to be submitted and responded to in EFIS would place an unfair burden on non-utility intervening parties in cases before the commission and could provide an advantage to Staff. In particular they assert that the use of EFIS is time consuming because the system works more slowly for users outside the commission's firewall than it does for users at the commission. They also express concern about the security of sending confidential documents via the internet. Finally, they claim that the delays associated with having to use EFIS would increase litigation costs for intervening parties. In particular, they are concerned that expert witnesses engaged by counsel might not be able to access EFIS to view confidential data request responses until those responses are filtered by legal counsel. To avoid these problems, MGUA, MEUA and Mr. Conrad urge the commission to modify this subsection to make the use of EFIS optional for submitting and responding to data requests to and from staff.

**RESPONSE:** The commission thanks MGUA, MEUA, and Mr. Conrad for their comments. The commission is proposing to amend this subsection to centralize and standardize data request procedures for those data requests sent by or responded to by the commission's staff. The commission believes that goal can best be accomplished by routing such data requests through EFIS. Allowing some data requests to be routed in some other manner at the discretion of a party would defeat the purpose of the rule.

The concerns raised by MGUA, MEUA, and Mr. Conrad do not persuade the commission to modify the rule. The requirement that data requests sent to and by staff be submitted through EFIS does not provide any strategic advantage to staff. While EFIS does operate somewhat slower for users outside the system's firewall, such delays are minimal and can be measured in milliseconds. Submissions to EFIS are encrypted for transmission and, therefore, are more secure than an ordinary e-mail. Finally, the requirement that data requests to and from staff be routed through EFIS will not have a measurable fiscal impact on anyone. The commission will not make the change proposed by MGUA, MEUA and Mr. Conrad.

**COMMENT #3:** KCP&L and GMO filed written comments that also recommend that the use of EFIS be made optional. However, their concern is narrower than that raised by MGUA, MEUA, and Mr. Conrad. At the hearing, counsel for KCP&L and GMO, James Fischer, explained that sometimes the amount of data exchanged in response to a data request is so voluminous that it is impractical to submit it electronically through EFIS. In those circumstances, the other parties may agree with Staff to submit the data on a disk. For that reason, they propose the following clause be added to the end of subsection (H): "unless otherwise agreed by the parties to the data requests or otherwise ordered by the commission." KCP&L and GMO believe that such language will provide needed flexibility when dealing with voluminous materials. Sarah Giboney, counsel for Ameren Missouri, supported the alternative language proposed by Mr. Fischer.

Kim Happy, manager of the commission's data center, agreed that size limitations can be a problem and said that the data center is willing to work with parties to help get such documents into EFIS. She suggested that Mr. Fischer's alternative language be limited to apply only when EFIS limitations would prevent such a filing.

**RESPONSE AND EXPLANATION OF CHANGE:** The commission agrees that some additional flexibility is needed to permit a reasonable response when the limitations of EFIS would make it difficult or impossible to submit voluminous documents. However, that exception should not be so broad as to defeat the purpose of the rulemaking. The commission will adopt the language proposed by Mr. Fischer, but will add a limitation as suggested by Ms. Happy.

**COMMENT #4:** Sarah Giboney, counsel for Ameren Missouri, commented at the hearing that Ameren Missouri does not object to the proposed amendment. Further, as described in the previous comment, Ameren Missouri supports the revision proposed by Mr. Fischer.

**RESPONSE:** The commission thanks Ms. Giboney and Ameren Missouri for those comments.

**COMMENT #5:** Kim Happy, manager of the commission's data center, commented at the hearing to explain the purpose of the amendment and to explain how the data center handles data requests and responses.

**RESPONSE:** The commission thanks Ms. Happy for her comments.

**COMMENT #6:** John Hanauer, director of the commission's IT department, commented at the hearing to explain the technical aspects of EFIS and how the technical limitations of EFIS do and do not affect the users of that system.

**RESPONSE:** The commission thanks Mr. Hanauer for his comments.

**COMMENT #7:** Kevin Thompson, Chief Staff Counsel for the commission, commented at the hearing to explain why Staff wants to use EFIS as its primary data request interface. He also explained that the use of EFIS as that interface does not offer Staff any strategic advantage and would provide other parties easier access to Staff data requests and responses.

**RESPONSE:** The commission thanks Mr. Thompson for his comments.

#### **4 CSR 240-2.090 Discovery and Prehearings.**

(2) Parties may use data requests as a means for discovery.

(C) The party to whom data requests are presented shall answer the requests within twenty days after receipt unless otherwise agreed to by the parties to the data requests, or otherwise ordered by the commission.

(H) Any data request issued to or by the staff of the commission shall be submitted and responded to in the commission's Electronic Filing and Information System (EFIS). However, if the technical limitations of EFIS make such submission or response difficult, the parties to the data requests may agree upon an alternative method of submission and response, or an alternative method of submission and response may be ordered by the commission.