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**

DISSENTING OPINION OF COMMISSIONER ROBERT M. CLAYTON III

This Commissioner dissents from the Order of Rulemaking in the above case. The original rulemaking was designed to codify standard practice with regard to protective orders issued in cases that involve highly confidential and proprietary information. Due to concerns raised by the parties and the apparent shift from the presumption of keeping information public to deeming the information to be confidential, this Commissioner disagrees with the final Order of Rulemaking and urges the Commission to reevaluate its shift in policy.

The Commission has been advised that the rule only puts its current practice into codified form. In each case where a protective order is requested, the regulatory law judge opens the case and issues an order setting out the rights and responsibilities of the parties relating to the treatment of information filed in the case. It is only then that the utility is permitted to file certain documents designated as either highly confidential or as proprietary. A number of concerns have been raised by the parties involved in this case that warrant this Commission to take a second look at why this rule is needed.

The initial concern associated with this rule relates to Section 4 CSR 240-2.135(4), in

which the release of highly confidential and proprietary information is restricted. The material may only be released to the attorneys and experts for parties that have been joined in the case. In the circumstance of a party appearing pro se, or without counsel, the original draft contained no provision for allowing that litigant to see any of the restricted information, including his or her own customer information from the utility. The Commission staff argued that a pro se litigant should have the same level of access to this protected information as other parties or pro se litigants will be unable to effectively participate in a case.

However, in response, the majority found such open access for aggrieved parties to be inappropriate. The majority found that "[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." *Final Order of Rulemaking, Attachment A, pages 2-3.* Although the majority made this finding, there is no evidence in the record to support that pro se litigants are necessarily inclined to illegally distribute the company's confidential information.

While the Order of Rulemaking suggested a potential solution in evaluating such a release of information on a case by case basis, most pro se litigants are without the background and training to look for such information and will have the burden placed on them in performing their own discovery. The pro se litigant would have to find the highly confidential material first, and then have the burden to plead for its limited release causing additional time and expense to the process.

In Section (3) (C) of the Order of Rulemaking, the majority adopted language establishing that a pro se litigant is permitted to have access to its own proprietary information. This

information is absolutely critical to the resolution of disputes and should have been available regardless of this rule. The mere notion that an individual should be denied access to his or her own proprietary information is illogical.

The Office of Public Counsel's (OPC) comments raise another issue regarding the use of highly confidential material received in another case in a different matter. The OPC is statutorily authorized to have access to such information in section 386.480 RSMo 2000, and may keep files addressing certain issues of concern. The OPC suggested the option of using highly confidential and proprietary information from older matters in other proceedings relating to the same utility company if the level of confidentiality is maintained. Several utilities and the Commission staff objected to the use of the information based on surprise in the hearing room.

This Commissioner believes that it creates yet another step in an otherwise paper intensive process for the OPC to ask for information it already has in its possession. The Commission staff and the opposing utilities always have the ability through discovery and pre-filed testimony to learn of critical issues in a case and potentially damaging impeachment information. Most of the information used in a rate case or in a complaint case originates from the utility, to which the utility and its attorneys have immediate access. This proposal would simply permit the OPC to later use relevant material learned in another case. The comments submitted by the utilities suggest that surprise should be avoided and that there is great potential for information to be taken out of context.

There is very little surprise left in cases before the Public Service Commission as almost all material is disclosed prior to the hearing in testimony and in very generous discovery methods such as data requests. Parties are limited in the type of material they can use at hearing, once

discovery answers have been tendered. In other words, a party is bound to its discovery responses unless a subsequent event has occurred changing the answer. It is up to the regulatory law judge to strictly adhere to such discovery and evidentiary matters. Utilities have the ability to know what information they have distributed in other cases and such data resubmitted on a particular issue should not be a surprise. Discovery methods are currently in place to avoid surprise.

The utilities also believe that previously obtained material can be taken out of context. This is a highly specialized administrative tribunal that hears cases on the same or similar matters quite often. The Commission must carefully examine evidence in each of its cases and weigh the probative value of any information including impeachment testimony. Parties would have the ability of refreshing their witnesses' recollection and rehabilitating their testimony. The Commission is equipped to address the utility's concerns and is knowledgeable enough to work through the voluminous material in each case.

Lastly on this issue, the OPC would still be bound by the same levels of confidentiality currently in place. *In camera* sessions would be required for the release of the information during the hearing and the same confidentiality standards for external parties would apply. Nothing in this section should diminish the legitimacy of keeping certain information confidential.

Finally, section (21) of the Final Order of Rulemaking refers to Missouri Supreme Court Rule 66.01 and the ability of the Commission to impose sanctions and monetary penalties for violations of the rule. A commenting party suggested that the provision was unnecessary and that there is no evidence to support or justify the need for any sanctions provision.

This Commissioner has regularly expressed concerns with the nature of administrative procedure and the lack of tools available to the Commission as it enforces its rulings and processes the cases that come before it. Because Circuit Court action is usually necessary for the Commission to enforce sanctions, make a finding of contempt or otherwise penalize an offending party, the Commission should always strive to conduct its business with the use of such stronger provisions. Even if the provisions mirror other sections, a strong message should be sent to parties that appear before the Commission that compliance with Commission rules is critically important.

This Final Order of Rulemaking represents a shift in policy at the Missouri PSC. The presumption of disclosure of information should be in favor of keeping information open and available to the public and provisions should be amended to make this clear. For the foregoing reasons, this Commissioner respectfully dissents.

Respectfully submitted,

Robert M. Clayton III
Commissioner

Dated at Jefferson City, Missouri,
on this 18th day of October, 2006.