

John R. Ashcroft

Secretary of State
Administrative Rules Division

RULE TRANSMITTAL

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SECRETARY OF STATE
ADMINISTRATIVE RULES

Rule Number 4 CSR 240-10.095

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

Name of person to call with questions about this rule:

Content Morris Woodruff Phone 573-751-2849 FAX 573-526-6010

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TYPE OF RULEMAKING ACTION TO BE TAKEN

☐ Emergency Rulemaking ☐ Rule ☐ Amendment ☐ Rescission ☐ Termination

Effective Date for the Emergency _____

☐ Proposed Rulemaking ☐ Rule ☐ Amendment ☐ Rescission

☐ Rule Action Notice ☐ In Addition ☐ Rule Under Consideration

☐ Request for Non-Substantive Change

☐ Statement of Actual Cost

☒ Order of Rulemaking ☐ Withdrawal ☒ Adopt ☐ Amendment ☐ Rescission

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:

Sections (2), (4), (6), (7), and (8)

Small Business Regulatory
Fairness Board (DED) Stamp

JCAR Stamp

JOINT COMMITTEE ON

CCT 03 2018

ADMINISTRATIVE RULES

STATE CAPITOL
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Michael L. Parson

GOVERNOR
STATE OF MISSOURI

October 1, 2018

Mr. Daniel Hall
Public Service Commission
200 Madison Street
PO Box 360
Jefferson City, MO 65102

RE: *Final Orders of Rulemaking*

Dear Daniel:

This office has received your Order of Rulemaking for 4 CSR 240-10.095 Environmental Improvement Contingency Fund.

Executive Order 17-03 requires this office's approval before state agencies release proposed regulations for notice and comment, amend existing regulations, rescind regulations, or adopt new regulations. After our review of this rulemaking, we approve the rule's submission to the Joint Committee on Administrative Rules and the Secretary of State.

Sincerely,

A handwritten signature in black ink, appearing to read "Jessie Eiler", is written over a horizontal line.

Jessie Eiler
Deputy Counsel



Commissioners

RYAN A. SILVEY
Chairman

WILLIAM P. KENNEY

DANIEL Y. HALL

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John Ashcroft
Secretary of State
Administrative Rules Division
600 West Main Street
Jefferson City, Missouri 65101

Re: 4 CSR 240-10.095 Environmental Improvement Contingency Fund

Dear Secretary Ashcroft,

CERTIFICATION OF ADMINISTRATIVE RULE

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

Statutory Authority: section 386.040, 396.250, 393.140, and 393.270, RSMo 2016.

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

Morris Woodruff, Chief Regulatory Law Judge
Missouri Public Service Commission
200 Madison Street
P.O. Box 360
Jefferson City, MO 65102
(573) 751-2849
Morris.woodruff@psc.mo.gov

Morris L. Woodruff
Chief Regulatory Law Judge

Enclosures

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**Title 4 – DEPARTMENT OF ECONOMIC DEVELOPMENT
Division 240 – Public Service Commission
Chapter 10 – Utilities**

SECRETARY OF STATE
ADMINISTRATIVE RULES

ORDER OF RULEMAKING

JOINT COMMITTEE ON

OCT 03 2018

By the authority vested in the Public Service Commission under sections 386.040, 386.250, 393.140, and 393.270 RSMo 2016, the commission adopts a rule as follows:

4 CSR 240-10.095 Environmental Improvement Contingency Fund is adopted.

A notice of proposed rulemaking containing the proposed rule was published in the *Missouri Register* on July 2, 2018 (43 MoReg 1425-1426). Changes to the proposed rule are reprinted here. This proposed rule becomes effective thirty (30) days after publication in the *Code of State Regulations*.

SUMMARY OF COMMENTS: The public comment period ended August 1, 2018, and the commission held a public hearing on the proposed rule on August 7, 2018. The commission received timely written comments from Missouri-American Water Company, the Office of the Public Counsel and the staff of the commission. Jacob Westen, representing the commission's staff, Ryan Smith and Caleb Hall representing the Office of the Public Counsel, and Jim Jenkins on behalf of Missouri-American, appeared at the hearing and offered comments.

COMMENT #1: Staff explained that the purpose of the proposed rule is to provide small water and sewer companies with a means to obtain funds needed to comply with environmental rules and orders. It would allow for prefunding of needed capital investments by utility customers under limited circumstances.

RESPONSE: The commission thanks staff for its comment. No change will be made in response to this comment.

COMMENT #2 Public Counsel generally supports the goals of the proposed rule, but questions the Commission's legal authority to promulgate this rule. Public Counsel urges the Commission to instead use better established legal authority to accomplish its goals through the use of interim rates, or through establishment of an environmental cost adjustment mechanism (ECAM) as authorized by section 386.266, RSMo.

RESPONSE: The commission has considered the use of interim rates or an ECAM to address the problem, but has found that neither alternative can be effective. As Public Counsel indicates, in a 1976 decision regarding a request

from Laclede Gas Company for interim rates, the Missouri Court of Appeals held that “the Commission has power in a proper case to grant interim rate increases within the broad discretion implied from the Missouri file and suspend statutes and from the practical requirements of utility regulation.”¹ However, the commission’s authority to grant interim rates exists only as a part of its authority to set the utility’s permanent rates through the eleven-month ratemaking process.² Interim rates might be appropriate to help a struggling utility meet operating requirements while a permanent rate increase is being considered, but it would not help that utility to begin making a large, immediate capital investment needed to comply with environmental requirements.

The ECAM alternative proposed by Public Counsel is based on section 386.266 RSMo, which authorizes the commission to approve a mechanism to make periodic rate adjustments outside a general rate proceeding to reflect increases and decreases in prudently incurred capital or other expenses incurred to comply with environmental requirements. The ECAM alternative is not helpful for small water and sewer systems because it includes a statutory cap limiting it to two and a half percent of the utility’s gross income. For a small utility with a total gross revenue of \$50,000 per year, the cap would amount to only \$1,250, clearly not enough to support a major capital expense. Further, the ECAM would address past, not future, spending.

Of course, that there are problems with the alternatives offered by Public Counsel does not mean the rule can stand in the absence of statutory authority for it. Fortunately, there is statutory authority for the rule as proposed. Section 393.270.4, RSMo (2016) gives the commission explicit authority in setting a utility’s rates to give due regard to “the necessity of making reservations out of income for surplus and contingencies.” The Environmental Improvement Contingency Fund (EICF) addressed by this proposed rule is exactly the sort of contingency fund contemplated and authorized by the statute.

COMMENT #3 Public Counsel recommends language be added to the rule to require the applicant utility to meet some sort of objective standard before an EICF would be authorized.

RESPONSE AND EXPLANATION OF CHANGE: The commission agrees the rule should include a standard for when an EICF should be established. The commission will add a sentence to section (2) establishing a “public interest” standard.

COMMENT #4 Public Counsel recommends language be added to the rule to permit a refund of unused EICF funds to the utility’s ratepayers.

RESPONSE AND EXPLANATION OF CHANGE: The Commission agrees. A refund provision will be added to section 10.095(7) as a new subsection (B).

¹ *State ex rel. Laclede Gas Co. v. Public Serv. Com’n*, 535 S.W.2d 561, 567 (Mo. App. 1976).

² “In its very nature, an interim rate request is merely ancillary to a permanent rate request, ...” *Laclede* at 565.

COMMENT #5 The written comments filed by Missouri-American Water Company asked that the rule be modified to make the use of an EICF available to large water and sewer companies, such as itself. At the hearing, Missouri-American indicated that after further review of the rule, it has concluded that the rule should not be made applicable to large water or sewer companies. Missouri-American now supports the proposed rule.

RESPONSE: The commission will make no changes in response to this comment.

COMMENT #6 Section 10.095(2) as currently written allows the utility or the commission's staff to request establishment of an EICF. Public Counsel asks that it also be authorized to make such a request. Further, Public Counsel suggests that various public officials or a group of rate payers, as described in section 393.146.12, RSMo also be authorized to make that request.

RESPONSE AND EXPLANATION OF CHANGE: The commission will modify section 10.095(2) to allow Public Counsel to request establishment of the EICF. The same change to recognize Public Counsel's authority to request the establishment of an EICF will also be made in section 10.095(4). The commission does not, however, believe it is appropriate or necessary to allow other persons or entities to request the establishment of such a fund.

COMMENT #7 Subparagraph 10.095(4)(A).1.A. indicates the list of necessary improvements to be funded through an EICF are to include improvements directly related to orders issued by specified federal, state, and local authorities. Staff suggested at the hearing that court orders be added to that list.

RESPONSE AND EXPLANATION OF CHANGE: The commission agrees and will add court orders to the list.

COMMENT #8: Also regarding subparagraph 10.095(4)(A).1.A., it was suggested at the hearing that the reference to improvements related to "environmental" rules, regulations, or orders be expanded to include "health and safety" related rules, regulations, or orders.

RESPONSE AND EXPLANATION OF CHANGE: The commission agrees with the comment and will modify the subparagraph accordingly.

COMMENT #9: Public Counsel is concerned about the Commission's legal authority to authorize a five-year surcharge as contemplated in subparagraph 10.095(4)(A).1.B.

RESPONSE: The EICF is a contingency fund, not a surcharge and it is authorized by statute. The commission will make no change in response to this comment.

COMMENT #10: Public Counsel asks the commission to add language to subsection 10.095(4)(B) to state that the required estimated amount of funds necessary to carry out the proposed improvements must be reasonable and supported by competent and substantial evidence.

RESPONSE: The commission agrees that such estimates must be reasonable and supported by competent and substantial evidence. But that determination will be made in the rate case through which the EICF is authorized and the requirement does not need to be stated in the text of the rule. The commission will make no change in response to this comment.

COMMENT #11: Subsection 10.095(4)(C) requires the utility to submit a schedule for completion of the list of improvements to be funded through the EICF. It also allows the commission's staff to assist the utility in the preparation of that schedule if requested by the utility or directed by the commission. Public Counsel suggests the Department of Natural Resources, the Environmental Protection Agency, or some other appropriate agency should craft the compliance schedule. Staff replied that it does not believe other agencies need to be involved in preparing the completion schedule for purposes of this contingency fund.

RESPONSE: The commission agrees with its staff that while other agencies may certainly be consulted, their possible participation in preparing a compliance schedule does not need to be addressed in this section of the rule. Further, the commission has no authority to make a rule that would require other agencies to participate in preparing a compliance schedule. The commission will make no change in response to this comment.

COMMENT #12: Section 10.095(5) requires the utility to collect an authorized EICF as part of the customer charge on customer's bills. Public Counsel argues that any authorized "surcharge" should be clearly identified as such on a customer's bill.

RESPONSE: The EICF is not a "surcharge," rather, it is a contingency fund gathered through base rates just as any other element of a utility's rates would be gathered for "surplus and contingencies." It is not necessary to determine in this rule whether or how that funding mechanism should be described on a customer's bill. Instead, that determination should be made on a case-by-case basis in the rate case in which the fund is established. The commission will make no changes in response to this comment.

COMMENT #13: Subsection 10.095(5)(B) states that funds held in an EICF account may "only be disbursed to pay for projects approved during the rate case." Public Counsel states it is unclear about who would receive payments from the EICF, asking whether payments could be made only to vendors of a project, or whether the utility could be reimbursed from the EICF for repayment of the cost of equity or debt.

RESPONSE: The commission believes that the rule adequately indicates that payments from the EICF are to be made to vendors who work on the approved projects. The commission will make no changes in response to this comment.

COMMENT #14: Section 10.095(6) requires the utility to submit quarterly reports to staff and Public Counsel after its EICF has been approved. Public Counsel suggests the requirement be clarified to specify that those reports are to be filed at the end of each quarter. Staff agreed with that recommendation.

RESPONSE AND EXPLANATION OF CHANGE: The commission will clarify the requirement of the section by making the required reports due thirty days following the end of each quarter.

COMMENT #15: Public Counsel suggests what it believes to be simplified alternative language for subsection 10.095(7)(A). Staff replied that it believes the proposed language is appropriate.

RESPONSE: The proposed language is appropriate. The commission will make no changes in response to this comment.

COMMENT #16: Missouri-American suggests section 10.095(8) be modified to make it clear that in response to a complaint, the commission's authority would be to authorize its general counsel to seek civil penalties in circuit court as the commission does not have authority to authorize civil penalties on its own. Staff agreed with that comment.

RESPONSE AND EXPLANATION OF CHANGE: The commission agrees with the comment and will modify the section to make it clear that the commission cannot itself impose civil penalties.

COMMENT #17: Public Counsel suggests the authority section also cite sections 386.266 and 393.150, RSMo as authority for the rule.

RESPONSE: Section 386.266 RSMo is the statute that authorizes an interim energy charge or periodic rate adjustments to reflect increases and decreases in fuel and purchased power costs. Section 393.150 RSMo gives the commission general authority to fix the rates charged by a utility after a hearing. The commission does not believe either rule need be cited as authority for this rulemaking. The commission will make no changes in response to this comment.

**Rules of
Department of Economic Development
Division 240 - Public Service Commission
Chapter 10 - Utilities**

4 CSR 240-10.095 Environmental Improvement Contingency Fund

(1) For the purposes of this rule only, a water or sewer utility serving eight thousand (8,000) or fewer customers shall be considered a small utility.

(2) A small utility, Public Counsel, or commission staff may request establishment of an Environmental Improvement Contingency Fund (EICF) during the course of a rate case, whether filed pursuant to 4 CSR 240-10.075 or section 393.150, RSMo. The commission may establish an EICF if it finds that doing so is in the public interest.

(3) Following the request for an EICF, the staff will—

(A) Investigate the small utility's financial resources and its ability to finance capital improvements;

(B) Conduct a managerial audit to determine the quality of the small utility's management; and

(C) Conduct a comprehensive review of the necessary improvements at the small utility.

(4) An EICF may only go into effect if, at the conclusion of the rate case where the small utility, Public Counsel, or commission staff requests an EICF, the commission approves the following items:

(A) A list of necessary improvements.

1. The list of necessary improvements may only include those improvements that—

A. Are directly related to environmental, health, or safety rules, regulations, or orders of the commission, the Missouri Department of Natural Resources (DNR), the United States Environmental Protection Agency (EPA), state or federal courts, or other regulatory authority including, but not limited to, federal, state, or local authorities, city ordinances, and the state attorney general; and

B. Are reasonably anticipated to be completed within five (5) years of the effective date of new rates, although, for good cause shown, the commission may consider projects that require longer to complete; and

2. During the rate case, upon request by the small utility or by direction of the commission, staff will assist the utility in identifying a list of necessary improvements;

(B) An estimated amount of funds necessary for the improvements in the list described in subsection (4)(A).

1. Staff and the small utility will submit the estimated amount of funds necessary for the improvements, which may include costs for preliminary engineering reports related to those improvements.

2. The percentage of the estimated amount collectable through an EICF will be based on an analysis of the needs of the small utility and its ability to secure financing through normal debt or equity sources. The commission may give special consideration to requests that do not require full funding of the estimated amount collectible.

3. If a requested EICF includes funds for a preliminary engineering report, the report must be completed and submitted to the commission prior to the first disbursement from the EICF account; and

(C) A schedule for completion of the list of improvements required by subsection (4)(A). Upon request by the small utility or by direction of the commission, staff will assist the small utility in preparing such a schedule.

(5) The EICF must be collected as a part of the customer charge on customers' bills.

(A) Revenues collected must be recorded by the small utility and placed into a commission-approved account specifically segregated from all other utility accounts, for the explicit purpose of regulatory review and tracking.

(B) Funds held in the EICF account shall only be disbursed to pay for projects approved during the rate case as noted in section (4) above.

(C) Disbursements from the EICF account shall only be made after notice to staff and public counsel.

1. The notice must be sent to staff and public counsel at least thirty (30) days prior to a disbursement.

2. If any party objects to the proposed disbursement, detailed objections must be filed in the official case file in which the EICF was approved no later than ten (10) days after receiving the disbursement notice. The commission may then determine whether or not to approve the requested disbursement of the funds.

3. If no timely objection is raised or staff and public counsel notify the small utility they agree to the disbursement, the small utility may make the

disbursement described in its notice no later than the date specified in that notice.

4. The commission will resolve any dispute regarding the proposed disbursements prior to the specified disbursement date.

(6) Not later than thirty (30) days following the end of every quarter after receiving commission approval of an EICF, the small utility shall submit documentation to staff and public counsel reporting—

- (A) Monthly EICF funds received from customers;
- (B) Monthly EICF deposits to the escrow account;
- (C) Monthly EICF expenditures; and
- (D) End-of-month balance of the EICF account.

(7) After an EICF is established, the small utility shall file a subsequent rate request no later than five (5) years after the effective date of the EICF, during which—

(A) Any monies expended from the fund shall be treated as contributions-in-aid-of-construction for purposes of setting rates for the small utility. The EICF will be trued-up and will be reviewed to determine if it should—

- 1. Remain in effect at the current rate; or
- 2. Remain in effect at a different rate; or
- 3. Be terminated.

(B) Any unallocated monies remaining in the fund when it is terminated shall be refunded to the utility's ratepayers.

(8) If, upon review of documentation described in section (6) above, staff, public counsel, or another regulatory authority has indication that the small utility has used EICF funds for any purpose other than as approved by the commission, Staff or the public counsel may, at their discretion, bring a complaint before the commission against the small utility seeking an order from the commission directing the small utility to promptly stop all collection of an EICF, as well as direction from the commission for its general counsel to seek civil penalties against the small utility in circuit court. Nothing in this rule shall prohibit civil or criminal action by any state or federal authority against the small utility for misuse of customer funds.

(9) Provisions of this rule may be waived by the commission for good cause shown.

AUTHORITY: sections 386.040, 386.250, 393.140, and 393.270, RSMo 2016. Original rule filed May 30, 2018.