

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

In the Matter of a Proposed Rulemaking to     )     Case No. AX-2010-0249  
Create a Small Formal Complaint Procedure )

**COMMENTS OF THE STAFF**

COMES NOW the Staff of the Missouri Public Service Commission (Staff), and states that it generally supports the Missouri Public Service Commission's (Commission) proposed small formal complaint case procedure rule as filed with the Missouri Secretary of State on March 24, 2010. Staff offers the following comments to attempt to clarify the rule and allow it to withstand judicial scrutiny.

**COMMENTS**

**4 CSR 240-2.070 (13)**

Under Public Service Commission Law,<sup>1</sup> the Commission is authorized to issue orders or decisions. Therefore, the term "judgment" as found twice in subsection 2.070(13) of the proposed rule should be changed to the term "order" and/or "decision".

**4 CSR 240-2.070 (14)**

The proposed rule specifies that a case is considered a Small Formal Complaint Case only when it is "regarding any dispute involving less than [\$3000]..." This language may unintentionally block disputes that cannot be quantified in dollar amounts from being resolved in the context of this Small Formal Complaint Case procedure, such as provision of utility service or quality of service issues. Therefore, the Commission may want to include language that expands the disputes that qualify under this rule. One way to do this is to add language that specifies this provision also applies 'where parties agree to use the Small Formal Complaint Case procedure with the consent of the Commission, or where the complainant is a person acting pro se, or in any other case in which the Commission directs that the case shall be processed as a Small Formal Complaint.'

One other concern in this section is the phrase "the provisions of sections (1)–(13) of this rule shall apply unless they are in direct conflict with the provisions of this section..." When a rule is written with language this ambiguous, such ambiguity can potentially be used against pro se complainants. Therefore, the Commission should review this language to determine if less ambiguous language could be inserted in its place.

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<sup>1</sup> See also Chapter 536 and specifically §536.010 defining "decision" to include decisions and orders.

- **Subsection (14) (B)**

Subsection 2.070(14)(B) states that “[t]he commission may, by order, reserve the right to hear and decide such small formal complaints as it deems fit. Should the commission issue such an order, the complaint shall no longer qualify for treatment under this section.” As this section specifies that the Commission can take away a complainant’s ability to proceed under this Small Formal Complaint Case procedure, the Commission should include the standard by which the Commission would decide to hear this case, presumably the public interest standard.

Please see the discussion below on Subsections 2.070(14)(G), (H) and (I) as to removing the term “decide” from this subsection.

- **Subsection (14) (D)**

Subsection 2.070(14)(D) establishes that Staff “shall serve as an advisor to the judge and shall not act as an advocate...”, and shall “investigate the complaint and file a report detailing staff’s findings and recommendations...” within 45 days. Staff suggests that this subsection specifically allow the regulatory law judge to grant more time to Staff to investigate and report if good cause is shown.

Staff also points out that as Staff’s report, findings and recommendations may be relied on by the Commission<sup>2</sup> as evidence within this case, then such evidence can be questioned by other parties to the action. However, if Staff is designated an advisor and not a party, then it is questionable whether Staff and its findings can be defended if other parties object, cross-examine and rebut such information. Therefore, for simplicity’s sake, Staff suggests this rule not designate Staff as an advisor if it designates that Staff will file information that will be considered evidence.

- **Subsection (14) (F)**

Subsection 2.070(14)(F) sets out that “[s]mall formal complaint case hearings shall be conducted in an informal summary manner whenever possible and without affecting the rights of the parties...” In an abundance of caution, Staff notes that § 536.070 RSMo specifies evidentiary and procedural requirements that apply to every contested case which are statutory “rights of the parties”, and therefore, cannot be waived by rule. *See also* the definition of contested case under § 536.010(4) RSMo (Cum Supp 2009). One other relevant statute to consider is the Commission’s complaint statute, in § 386.390 RSMo, which establishes that the Commission shall hold a hearing, unless the parties do not request a hearing as discussed in State ex rel. Rex Deffenderfer Enterprises, Inc. v. Public Service Commission, 776 S.W.2d 494, 496 (Mo. App. 1989) (The requirement for a hearing is met when the opportunity for hearing has been provided and no proper party has requested the opportunity to present evidence.).

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<sup>2</sup> Please see the discussion on Subsections 2.070(14)(G), (H) and (I), below, as to Commission ultimately determining these cases.

Therefore, Staff recommends referencing § 536.070 RSMo to make clear what formalities are being dispensed with under this subsection.

- Subsection (14) (F) (1):

Staff recommends this subsection reflect § 386.410 RSMo and state “...not bound by the technical rules of evidence...,” instead of “...formal rules of evidence and procedure shall not apply....”

- **Subsections (14) (G), (H) and (I)**

Subsection 2.070(14) (G) establishes that the regulatory law judge (RLJ) shall issue the report and order for Small Formal Complaint cases. Subsection 2.070(14) (H) specifies that the RLJ’s report and order may be affirmed, modified, reversed or set aside by the Commission if an application for rehearing is appropriately filed, presumably pursuant to §386.500 RSMo (Cum Supp 2009), but without citation. Then, subsection 2.070(14) (I) deems the RLJ report and order as the final decision of the Commission once an application for rehearing is denied. However, pursuant to § 386.240 RSMo, “...no order... of any person employed by the commission shall be binding on any public utility or any person unless expressly authorized or approved by the commission.” Therefore, a report and order issued by an RLJ without the express authorization of the Commission is not legally binding. See State ex rel. Associated Natural Gas Co. v. Public Service Com’n of State of Mo., 37 S.W.3d 287, 294 -295 (Mo. App. W.D., 2000).

Staff recommends that the language authorizing and referencing an RLJ report and order be changed to establish an RLJ recommended order which will be voted on by the Commission; and delete any reference to a “regulatory law judge report and order”, and insert just the phrase “report and order” in its place.

- Subsection (14) (G):

This subsection allows the time designated to issue a report and order to be extended “...unless... due process requires additional time.” As the term “due process” can encompass many complex and specific meanings, a simpler standard of “good cause” should be inserted in its place.

Respectfully submitted,

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***Certificate of Service***

I hereby certify that copies of the foregoing have been mailed, hand-delivered, transmitted by facsimile or electronically mailed to all counsel of record this 2<sup>nd</sup> day of June 2010.

**/s/ Shelley Syler Brueggemann**