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SECRETARY OF STATE
ADMINISTRATIVE RULES DIVISION

REBECCA MCDOWELL COOK
Secretary of State
Administrative Rules Division
RULE TRANSMITTAL

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

A. Rule Number 4 CSR 240-2.090
Diskette File Name 2.090 rule (Word 97 format)
Name of Person to call with questions about this rule:
Context Nancy Dippell Phone 573-751-4393 FAX 573-751-1847
Data Entry Judy Pope Phone 573-751-6526 FAX 573-751-1847
Interagency Mailing Address Truman Bldg., 301 W. High St., Room 530, Jefferson City, MO

Statutory Provision for Rulemaking
Authority § 386.410 Provide Most Current RSMo Year 1998
Date Filed With the Joint Committee on Administrative Rules Exempt per Sections 536.024 and 536.037, RSMo Supp. 1998, and Executive Order No. 97-97 (June 27, 1997)

B. CHECK, IF INCLUDED: FORMS, List by Mo-Form Number, # of Pages
 Cover Letter _____
 Affidavit _____
 Cost Statements _____
 Public Entity Fiscal Note OTHER _____
 Private Entity Fiscal Note _____

C. RULEMAKING ACTION TO BE TAKEN
 Emergency Rulemaking, Must Specify Effective Date
 Proposed Rulemaking
 Order of Rulemaking (MUST complete page 2 of this transmittal)
 Withdrawal (Rule, Amendment, Rescission or Emergency)
 Rule Action Notice
 In Addition

D. SPECIFIC INSTRUCTIONS: In this space indicate any special instructions (e.g., specify publication date preference, identify material incorporated by references, etc:)

E. ORDER OF RULEMAKING: Rule Number 4 CSR 240-2.090

1a. Effective Date for the Order
 Statutory 30 days or later 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 or rulemaking, indicating the specific section, subsection, subparagraph, part, etc., where each change is found.

In section (1), the words "one (1) or more of the following methods: depositions upon oral examination or written questions, written interrogatories, requests for production of documents or things and requests for admission upon" are deleted and replaced by the phrase "the same means".

In section (2), in the sentence which begins "Answers to data requests need not be under oath ...", the word "could" is deleted and replaced by the phrase "is able to". In the next sentence, which begins "Sanctions for failure ...", the phrase "shall be the same as" is deleted and replaced by the phrase "may include any of".

Section (5) is rewritten in its entirety as follows: "(5) Failure to appear at a prehearing conference without previously having secured a continuance shall constitute grounds for dismissal of the party or the party's complaint, application or other action unless good cause for the failure to appear is shown."

In section (7), the phrase "and settlement offers" is inserted after the phrase "prehearing conference".

Section (8) is rewritten in its entirety as follows:

(8) Except when authorized by an order of the commission, the commission will not entertain any discovery motions, until the following requirements have been satisfied:

(A) Counsel for the moving party has in good faith conferred or attempted to confer by telephone or in person with opposing counsel concerning the matter prior to the filing of the motion. Merely writing a demand letter is not sufficient. Counsel for the moving party shall certify compliance with this rule in any discovery motion; and

(B) If the issues remain unresolved after the attorneys have conferred in person or by telephone, counsel shall arrange with the commission for an immediate telephone conference with the presiding officer and opposing counsel. No written discovery motion shall be filed until this telephone conference has been held.

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.



Missouri Public Service Commission

Commissioners

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Chair

HAROLD CRUMPTON

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January 21, 2000

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WESS A. HENDERSON
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ROBERT SCHALLENBERG
Director, Utility Services

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Director, Administration

DALE HARDY ROBERTS
Secretary/Chief Regulatory Law Judge

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General Counsel

Honorable Rebecca McDowell Cook
Secretary of State
600 West Main Street
Jefferson City, Missouri 65101

ATTENTION: Administrative Rules Division

I do hereby certify that the attached are accurate and complete copies of the Orders of Rulemaking lawfully submitted by the Missouri Public Service Commission for filing this 21st day of January, 2000.

- Rules: 4 CSR 240-2.010 – Definitions
4 CSR 240-2.015 – Waiver of Rules
4 CSR 240-2.040 – Practice Before the Commission
4 CSR 240-2.050 – Computation of Time
4 CSR 240-2.060 – Applications
4 CSR 240-2.065 – Tariff Filings Which Create Cases
4 CSR 240-2.070 – Complaints
4 CSR 240-2.075 – Intervention
4 CSR 240-2.080 – Pleadings, Filing, and Service
4 CSR 240-2.085 – Protective Orders
4 CSR 240-2.090 – Discovery and Prehearings
4 CSR 240-2.100 – Subpoenas
4 CSR 240-2.110 – Hearings
4 CSR 240-2.115 – Nonunanimous Stipulations and Agreements
4 CSR 240-2.116 – Dismissal
4 CSR 240-2.120 – Presiding Officers
4 CSR 240-2.125 – Procedures for Alternative Dispute Resolution
4 CSR 240-2.130 – Evidence
4 CSR 240-2.140 – Briefs and Oral Argument
4 CSR 240-2.150 – Decisions of the Commission
4 CSR 240-2.160 – Rehearings or Reconsideration
4 CSR 240-2.180 – Rulemaking
4 CSR 240-2.200 – Small Company Rate Increase Procedure

Honorable Rebecca McDowell Cook
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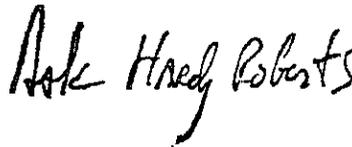
Statutory authority: Section 386.410, RSMo Supp. 1998

Effective date of the rules: thirty days after publication in the *Code of State Regulations*

Missouri Public Service Commission Case Nos.: AX-2000-108 through AX-2000-128, and
AX-2000-130 through AX-2000-131

If there are any questions, please contact: *(These rules are assigned to several regulatory law judges. Please refer to the transmittal form for the name, phone number and fax number of the regulatory law judge assigned to a particular rule.)*

BY THE COMMISSION



Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge

DHR:jp

Enclosures: Packets for 23 Orders of Rulemaking
Orders of Rulemaking in Word 97 format on 3-1/2" diskette

**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 Missouri Public Service Commission under section 386.410, RSMo Supp. 1998, the commission adopts a rule as follows:

4 CSR 240-2.090 Discovery and Prehearings is adopted.

A notice of proposed rulemaking containing the text of the proposed rule was published in the *Missouri Register* on Oct. 1, 1999 (24 MoReg 2329-2330). Those sections with changes are reprinted here. This proposed rule becomes effective thirty days after publication in the *Code of State Regulations*.

SUMMARY OF COMMENTS: Written comments were received regarding sections (1), (2), (5), (7) and (8).

COMMENT: One comment was received objecting to proposed section (2). The commentator stated that data requests should not be required to be signed by a person who could attest to the truthfulness and correctness of the answers. The commentator explains that parties to proceedings before the Commission have three basic methods of obtaining information through discovery. Two of these methods are identical to those used in circuit courts as provided by Rule 57, Interrogatories and Depositions, under the Rules of Civil Procedure. Both interrogatories and depositions are provided under oath. The third method, data requests, are provided for in the current and proposed rules of the Commission. This method has not been required to be submitted under oath. The commentator suggests that requiring the data requests to be signed as proposed, will not insure greater accuracy in the answers provided in the data requests, but will only slow down the process by requiring the party answering the request to track down a person who will be able to swear to the statement's truthfulness. The commentator also does not believe this is necessary because under section 386.560, Revised Statutes of Missouri, it is a criminal act to make a false statement required to be made to the Public Service Commission. The commentator also disagrees with the proposal in section (2) that requires the answering party to promptly notify the requesting party of any changes to the answers previously given to a data request. The commentator states that this requirement is too burdensome and is not required due to the process of prefiled written testimony used in most Commission proceedings.

RESPONSE: The purpose of the discovery process is to provide accurate information to the requesting party. The Commission utilizes the discovery methods of interrogatories and depositions as found in the Civil Rules of Procedure. In addition, the Commission's current rules and the proposed rule, provides for an additional method of discovery known as data requests. Data requests are meant to provide information to the requesting party in a more expedited fashion than interrogatories and depositions. However, data requests are not intended to provide less accurate information. After reviewing the comments and analyzing the rule as proposed, the Commission determines that a change to proposed section (1) is necessary to clarify the methods

of discovery. The Commission determines that a change to proposed section (2) is necessary to clarify that the person signing the data requests not only can, but will, attest to the truthfulness of the reply if necessary. The Commission also determines upon review of the rule that the language referring to sanctions for misconduct involving data requests should be clarified. Therefore, the Commission will amend section (1) and (2) of this rule.

COMMENT: One comment was received suggesting that proposed section (5) be amended to include a reference to being excused for good cause, identical to the language for hearings in proposed rule 2.110(2)(B).

RESPONSE: The Commission has reviewed the suggested amendment and finds that it is a reasonable to amend section (5) so that it is consistent with other rule proposed by the Commission.

COMMENT: One comment was received suggesting that proposed section (7) specify that settlement offers are also privileged.

RESPONSE: The Commission finds that settlement offers should be added to the items which are privileged during prehearing conferences. Therefore, the Commission will amend section (7).

COMMENT; One commentor suggested that proposed section (8) be amended by adding a sentence stating, "No party shall file a motion to compel or motion for sanctions without first making a good faith effort to resolve the dispute informally." A similar comment was received from another commentor suggesting that section (8) of the rule be clarified to make it clear that the Commission is requiring a moving party to make informal good faith attempts to resolve discovery disputes prior to seeking a Commission order. The commentor points out that this would be similar to the "golden rule" followed by many circuit courts.

RESPONSE: The Commission has considered the comments to section (8) and determines that it would be appropriate for parties to Commission cases to follow a "golden rule" regarding discovery motions, similar to that followed by parties to cases in the United States District Court, Western District of Missouri, Rule 37.1 Discovery Motions. Therefore, the Commission will revise section (8) to include a "golden rule" for discovery motions.

4 CSR 240-2.090 Discovery and Prehearings

(1) Discovery may be obtained by the same means and under the same conditions as in civil actions in the circuit court. Sanctions for abuse of the discovery process or failure to comply with commission orders regarding discovery shall be the same as those provided for in the rules of civil procedure.

(2) Parties may use data requests as a means for discovery. The party to whom data requests are presented shall answer the requests within twenty (20) days after receipt unless otherwise agreed by the parties to the data requests. If the recipient objects to data requests or is unable to answer within twenty (20) days, the recipient shall serve all of the objections or reasons for its inability to answer in writing upon the requesting party within ten (10) days after receipt of the data requests, unless otherwise ordered by the commission. If the recipient asserts an inability to answer the data requests within the twenty (20) day time limit, the recipient shall include the date it will be able to answer the data requests simultaneously with its reasons for its inability to

answer. Upon agreement by the parties or for good cause shown, the time limits may be modified. As used in this rule, the term data request shall mean an informal written request for documents or information which may be transmitted directly between agents or employees of the commission, public counsel or other parties. Answers to data requests need not be under oath or be in any particular format, but shall be signed by a person who is able to attest to the truthfulness and correctness of the answers. Sanctions for failure to answer data requests may include any of those provided for abuse of the discovery process in section (1) of this rule. The responding party shall promptly notify the requesting party of any changes to the answers previously given to a data request.

(5) Failure to appear at a prehearing conference without previously having secured a continuance shall constitute grounds for dismissal of the party or the party's complaint, application or other action unless good cause for the failure to appear is shown.

(7) Facts disclosed in the course of a prehearing conference and settlement offers are privileged and, except by agreement, shall not be used against participating parties unless fully substantiated by other evidence.

(8) Except when authorized by an order of the commission, the commission will not entertain any discovery motions, until the following requirements have been satisfied:

(A) Counsel for the moving party has in good faith conferred or attempted to confer by telephone or in person with opposing counsel concerning the matter prior to the filing of the motion. Merely writing a demand letter is not sufficient. Counsel for the moving party shall certify compliance with this rule in any discovery motion; and

(B) If the issues remain unresolved after the attorneys have conferred in person or by telephone, counsel shall arrange with the commission for an immediate telephone conference with the presiding officer and opposing counsel. No written discovery motion shall be filed until this telephone conference has been held.