



Commissioners

STEVE GAW
Chair

CONNIE MURRAY

KELVIN L. SIMMONS

BRYAN FORBIS

ROBERT M. CLAYTON III

Missouri Public Service Commission

POST OFFICE BOX 360
JEFFERSON CITY, MISSOURI 65102

573-751-3234
573-751-1847 (Fax Number)

<http://www.psc.mo.gov>
September 12, 2003

ROBERT J. QUINN, JR.
Executive Director

WESS A. HENDERSON
Director, Utility Operations

ROBERT SCHALLENBERG
Director, Utility Services

DONNA M. PRENGER
Director, Administration

DALE HARDY ROBERTS
Secretary/Chief Regulatory Law Judge

DANA K. JOYCE
General Counsel

Mr. Joseph L. Driskill, Director
Department of Economic Development
301 West High Street
Jefferson City, MO 65102

**Re: No Public Cost Affidavit for
Proposed Rules 4 CSR 240-36.010 to 36.080
Public Service Commission Arbitration Rules for *Telecommunications Act of 1996*
MoPSC Case No. TX-2003-0487**

Dear Mr. Driskill:

To address procedures used for review of interconnection agreements under the *Telecommunications Act of 1996*, the Public Service Commission proposes to publish Proposed Rules 4 CSR 240-36.010, **Definitions**; 4 CSR 240-36.020, **Filing Procedures**; 4 CSR 240-36.030, **Mediation**; 4 CSR 240-36.040, **Arbitration**; 4 CSR 240-36.050, **Commission Approval of Agreements Reached by Arbitration**; 4 CSR 240-36.060, **Commission Approval of Agreements Reached by Voluntary Mediation or Negotiation**; 4 CSR 240-36.070, **Commission Notice of Adoption of Previously Approved Agreement**; 4 CSR 240-36.080, **Commission Approval of Amendments to Agreements Approved or Adopted Under These Rules**.

Please find enclosed:

- (1) an affidavit regarding public entity costs for these proposed rules;
- (2) a "takings" analysis; and
- (3) a copy of each of the proposed rules.

The Commission has performed the small business analysis required by Executive Order 03-15 and plans to include the language following in the transmittal letter to the Secretary of State for the proposed rules:

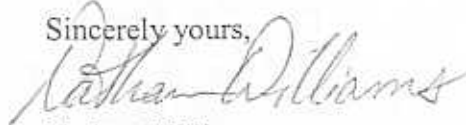
Executive Order 03-15 requires state agencies to "determine whether the proposed rules affect small businesses and, if so, the availability and practicability of less restrictive alternatives that could be implemented to achieve the same results of the proposed rule." A small business is defined to be "a for-profit enterprise consisting of fewer than fifty (50) full or part-time employees." A proposed rule "affects" a small business if it "imposes any requirement" that "will cause direct and significant economic

burden upon a small business, or is directly related to the formation, operation, or expansion of a small business.”

Proposed rules 4 CSR 240-36.010 through 4 CSR 240-36.080 state procedures for Public Service Commission review of interconnection agreements made under the *Telecommunications Act of 1996*, in particular, 47 U.S.C. § 252. Because these rules do not impose any requirement that “will cause direct and significant economic burden upon a small business, or [that] is directly related to the formation, operation, or expansion of a small business,” the Commission certifies that it has determined that the proposed rules will not have an economic impact on small businesses.

Please let me know if you have any questions concerning these proposed rules.

Sincerely yours,

A handwritten signature in cursive script, appearing to read "Nathan Williams".

Nathan Williams

Senior Counsel

(573) 751-8702

(573) 751-9285 (Fax)

nathanwilliams@psc.state.mo.us (E-Mail)

Enclosures.

MEMORANDUM

TO: Dale Hardy Roberts, Secretary

THROUGH: Dan Joyce

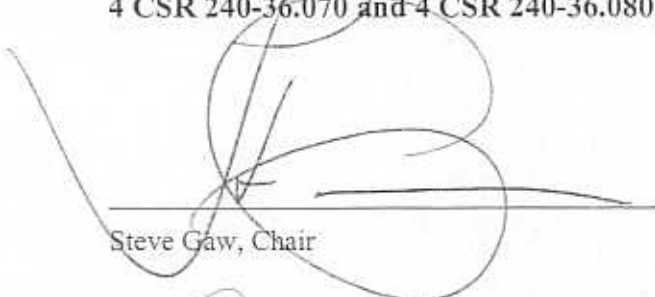
FROM: Nathan Williams

DATE: December 30, 2003


SUBJECT: Authorization to File Proposed Rulemakings with the Office of the Secretary of State.

Case No. TX-2003-0487


The undersigned Commissioners hereby authorize the General Counsel's Office of the Missouri Public Service Commission to file the following Proposed Rulemakings with the Office of the Secretary of State, to wit: 4 CSR 240-36.010, 4 CSR 240-36.020, 4 CSR 240-36.030, 4 CSR 240-36.040, 4 CSR 240-36.050, 4 CSR 240-36.060, 4 CSR 240-36.070 and 4 CSR 240-36.080.



Steve Gaw, Chair



Connie Murray, Commissioner



Robert M. Clayton, Commissioner

MATT BLUNT
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 240-36.040
Diskette File Name Proposed Rule 4 CSR 240-36.040
Name of Person to call with questions about this rule:
Content Nathan Williams Phone 573-751-8702 FAX 573-751-9285
Data Entry Nathan Williams Phone 573-751-8702 FAX 573-751-9285
Email Address nathan.williams@psc.mo.gov
Interagency Mailing Address Governor Office Building, 200 Madison St., 8th Floor, Jefferson City, MO
Statutory Authority 386.410 Current RSMo date 2000
Date Filed With the Joint Committee on Administrative Rules Exempt per Sections 536.024 and 536.037, RSMo 2000, and Executive Order No. 97-97 (June 27, 1997)

B. CHECK, IF INCLUDED:

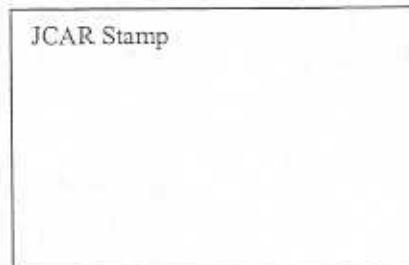
- | | |
|--|--|
| <input checked="" type="checkbox"/> This transmittal completed | <input type="checkbox"/> Incorporation by reference materials, if any |
| <input checked="" type="checkbox"/> Cover letter | <input checked="" type="checkbox"/> Authority with history of the rule |
| <input type="checkbox"/> Affidavit | <input checked="" type="checkbox"/> Public cost |
| <input type="checkbox"/> Forms, number of pages _____ | <input checked="" type="checkbox"/> Private cost |
| <input type="checkbox"/> Fiscal notes | <input checked="" type="checkbox"/> Hearing and comment period |

C. RULEMAKING ACTION TO BE TAKEN

- ☐ Emergency Rulemaking, (check one) ☐ rule ☐ amendment ☐ rescission ☐ termination
MUST include effective date _____
- ☒ Proposed Rulemaking (check one) ☒ rule ☐ amendment ☐ rescission
☐ Order of Rulemaking (check one) ☐ rule ☐ amendment ☐ rescission ☐ termination
MUST complete page 2 of this transmittal
- ☐ Withdrawal (check one) ☐ rule ☐ amendment ☐ rescission ☐ emergency
☐ Rule action notice
☐ In addition
☐ Rule under consideration

D. SPECIFIC INSTRUCTIONS: Please indicate any special instructions (e.g., publication date preference, identify material to be incorporated by reference, or forms included herein).

JCAR Stamp



E. ORDER OF RULEMAKING: Rule Number _____

1a. Effective Date for the Order

☐ Statutory 30 days

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 of rulemaking, indicating the specific section, subsection, paragraph, subparagraph, part, etc., where each change is found. It is especially important to identify the parts of the rule that are being deleted in this order of rulemaking. This is not a reprinting of your order, but an explanation of what sections, subsections, etc. have been changed since the original proposed rule was filed.

(Start text here. If text continues to a third page, insert a continuous section break and, in section 3, delete the footer text. DO NOT delete the header, however.)

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.



Commissioners

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Chair

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Secretary/Chief Regulatory Law Judge

DANA K. JOYCE
General Counsel

December 30, 2003

Mr. Matt Blunt
Secretary of State
Administrative Rules Division
600 West Main Street
Jefferson City, MO 65101

Dear Secretary Blunt,

RE: 4 CSR 240-36.040 Arbitration

CERTIFICATION OF ADMINISTRATIVE RULE

I do hereby certify that the attached is an accurate and complete copy of the proposed rule lawfully submitted by the Missouri Public Service Commission on this thirtieth day of December 2003.

Executive Order 03-15 requires state agencies to "determine whether the proposed rules affect small businesses and, if so, the availability and practicability of less restrictive alternatives that could be implemented to achieve the same results of the proposed rule." A small business is defined to be "a for-profit enterprise consisting of fewer than fifty (50) full or part-time employees." A proposed rule "affects" a small business if it "imposes any requirement" that "will cause direct and significant economic burden upon a small business, or is directly related to the formation, operation, or expansion of a small business."

Proposed rule 4 CSR 240-36.040 is part of a group of rules—4 CSR 240-36.010 through 4 CSR 240-36.080—that state procedures for Public Service Commission review of interconnection agreements made under the *Telecommunications Act of 1996*, in particular, 47 U.S.C. § 252. Because proposed rule 4 CSR 240-36.040 will not impose any requirement that "will cause direct and significant economic burden upon a small business, or [that] is directly related to the formation, operation, or expansion of a small business," the Commission certifies that it has determined that the proposed rule will not have an economic impact on small businesses.

The Missouri Public Service Commission also certifies that it has conducted an analysis of whether or not there has been a taking of real property pursuant to section 536.017, RSMo 2000 and that this final rule does not constitute a taking of real property under relevant state and federal law.

Statutory Authority: Sections 386.410 RSMo 2000.

If there are any questions regarding the content of the rule, please contact:

December 30, 2003

Page 2

Nathan Williams
200 Madison Street, Suite 800
P. O. Box 360
Jefferson City, MO 65101
(573) 751-8702
nathan.williams@psc.mo.gov

Sincerely yours,



Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge
Public Service Commission
State of Missouri

DHR:NW:

Enclosures: Transmittal Form, Cover Letter, Public Entity no cost affidavit, Proposed Rule & 3.5" Diskette

cc: Missouri Small Business Regulatory Fairness Board

AFFIDAVIT

STATE OF MISSOURI)
)
COUNTY OF COLE)

I, Joseph L. Driskill, Director of the Department of Economic Development, first being duly sworn on my oath state that it is my opinion that the cost of proposed rule 4 CSR 240-36.040—**Arbitration** is less than five hundred dollars in the aggregate to this agency, any other agency of state government or any political subdivision thereof.



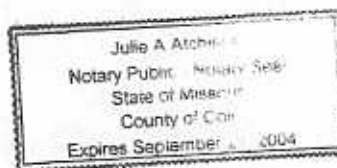
Joseph L. Driskill
DIRECTOR

Department of Economic Development

Subscribed and sworn to before me this 15th day of December, 2003.
I am commissioned as a notary public within the County of Cole, State of Missouri, and my commission expires on September 21, 2004.



NOTARY PUBLIC



Title 4--DEPARTMENT OF
ECONOMIC DEVELOPMENT
Division 240--Public Service Commission
Chapter 36 - Alternative Dispute Resolution Procedural Rules Governing Filings
Made Pursuant to the Telecommunications Act of 1996

PROPOSED RULE

4 CSR 240-36.040 Arbitration

PURPOSE: This rule provides the procedure for requesting and conducting arbitrations.

(1) Who May Petition for Arbitration—A party to a negotiation entered into pursuant to section 251 of the Act may file a petition for arbitration.

(2) Time to File—A petition for arbitration may be filed not earlier than the one hundred and thirty-fifth (135th) day nor later than the one hundred and sixtieth (160th) day following the date on which an incumbent local exchange carrier receives the request for negotiation. The arbitration shall be deemed to begin on the date that the petition for arbitration is filed with the commission. Regardless of proceedings in the arbitration, the parties may continue to negotiate unresolved issues. The party petitioning for arbitration shall provide a copy of the petition to the other party or parties not later than the day the commission receives the petition. If the incumbent local exchange carrier is a "rural carrier" subject to the rural exemption contained in 47 U.S.C. section 251(f), then a commission order terminating the rural exemption must precede any petition for arbitration.

(3) Content—A petition for arbitration must contain:

- (A) A statement of each unresolved issue.
- (B) A description of each party's position on each unresolved issue.
- (C) A statement of all resolved issues and the terms of resolution.
- (D) A proposed agreement addressing all issues, including those upon which the parties have reached an agreement and those that are unresolved. In preparing the proposed agreement, the petitioner should rely on the fundamental organization of clauses and subjects contained in an agreement previously arbitrated and approved by this Commission.
- (E) Direct testimony that supports the petitioner's position on each unresolved issue.
- (F) Documentation that the petition complies with the time requirements of 4 CSR 240-36.040(2) and the certificate requirement of 4 CSR 240-36.020(2).

(4) Appointment of Arbitrator—Upon receipt of a petition for arbitration, the commission, or its designee, shall appoint an arbitrator to facilitate resolution of the disputed issues raised by the petition and shall immediately notify the parties of the identity of the arbitrator. The commission, or its designee, may appoint an arbitrator from outside the commission's employ only with the consent of all parties. The costs of an outside arbitrator shall be borne equally by the parties. The arbitrator shall attend all meetings, conferences and hearings as described in 4 CSR 240-36.040(9) and (10). The

arbitrator shall not have participated as a mediator in a negotiation of any of the issues contained in the petition for arbitration.

(5) **Style of Arbitration**—An arbitrator, acting pursuant to the commission's authority under section 252(e)(5) of the Act, shall use final offer arbitration, except as otherwise provided in this section:

(A) At the discretion of the arbitrator, final offer arbitration may take the form of either entire package final offer arbitration or issue-by-issue final offer arbitration. The arbitrator in the initial arbitration meeting shall set time limits for submission of final offers and time limits for subsequent final offers, which shall precede the date of a limited evidentiary hearing.

(B) Negotiations among the parties may continue, with or without the assistance of the arbitrator, after final arbitration offers are submitted. Parties may submit to the commission any settlements reached following such negotiations.

(C) To provide an opportunity for final post-offer negotiations, the arbitrator will not issue a decision for a set time after submission to the arbitrator of the final offers by the parties.

(D) Final offers submitted by the parties to the arbitrator shall be consistent with section 251 of the Act, including the rules prescribed by the commission pursuant to that section.

(E) Each final offer shall:

1. Meet the requirements of section 251 of the Act, including the rules prescribed by the commission pursuant to that section;

2. Establish rates for interconnection, services, or access to unbundled network elements according to section 252(d) of the Act, including the rules prescribed by the commission pursuant to that section; and

3. Provide a schedule for the parties to the agreement to implement the terms and conditions.

If a final offer submitted by one or more parties fails to comply with the requirements of this section or if the arbitrator determines in unique circumstances that another result would better implement the Act, the arbitrator has discretion to take steps designed to result in an arbitrated agreement that satisfies the requirements of section 252(c) of the Act, including requiring parties to submit new final offers within a time frame specified by the arbitrator, or adopting a result not submitted by any party that is consistent with the requirements of section 252(c) of the Act, and the rules prescribed by the commission pursuant to that section.

(6) **Discovery**—Discovery may begin after the filing of a petition for arbitration and may continue up until hearings begin, unless the arbitrator sets a later date. The parties may enter into nondisclosure agreements or request the commission issue a protective order. Unless otherwise provided, the commission's rules for discovery, 4 CSR 240-2.090, apply to discovery in the arbitration and the arbitrator may permit further discovery procedures at the initial arbitration meeting, section 4 CSR 240-36.040(9). For good cause, the arbitrator may compel responses to data requests; in such cases, the response normally will be required in five (5) working days or less. Advisory staff, as provided in subsection (12) of this rule, may assist the arbitrator in resolving discovery disputes.

(7) Opportunity to Respond—Pursuant to subsection 252(b)(3) of the Act, any party to a negotiation, which did not file a petition for arbitration (“respondent”), shall file with the commission, within twenty-five (25) days of the date the petition for arbitration is filed with the commission, a response to the petition for arbitration. For each issue listed in the petition, the respondent shall restate the issue followed by the respondent’s position on that issue. The respondent shall also identify and present any additional issues for which the respondent seeks resolution and provide such additional information and evidence necessary for the commission’s review. The respondent shall include, in the response, a document containing the language upon which the parties agree and, show where the parties disagree, and provide both the petitioner’s proposed language (bolded) and the respondent’s proposed language (underscored). Finally, the response must contain direct testimony that supports the respondent’s position on each issue identified in the response that remains unresolved. On the same day that the respondent files a response with the Commission, the respondent must serve a copy of the response, and all supporting documentation, on each other party to the negotiation.

(8) Revised Statement of Unresolved Issues—Within seven (7) days after a response is filed, the petitioner and respondent(s) shall jointly file a revised statement of unresolved issues. This statement shall reflect deletions from the list presented by the petitioner in the initial petition and add only issues that appear to be unresolved based on the response(s) to the initial petition.

(9) Initial Arbitration Meeting—The arbitrator may call a mandatory initial meeting for purposes such as setting a procedural schedule, establishing a time limit for submission of final offers, allow the filing of rebuttal testimony and setting a time by which rebuttal testimony may be filed, simplifying issues, or resolving the scope and timing of discovery.

(10) Arbitration Conferences and Hearings—The arbitration shall consist of mark-up conferences and limited evidentiary hearings. At the mark-up conferences, the arbitrator shall hear the concerns of the parties, determine whether the parties can further resolve their differences, and identify factual issues that may require limited evidentiary hearings. The arbitrator shall also announce rulings at the conferences as the issues are resolved. The conduct of the conferences and hearings shall be noticed on the commission’s hearings calendar and notice shall be provided to all parties on the service list. Parties are expected to respond to questions from the arbitrator, and the arbitrator’s advisory staff. The parties shall be given the opportunity to present witnesses at an on-the-record evidentiary hearing, and to cross-examine the witnesses of the other party(ies) to the arbitration. These conferences and hearings shall commence no later than ten (10) days after all responses to the petition for arbitration are filed with the commission.

(11) Limitation of Issues—Pursuant to subsection 252(b)(4)(A) of the Act, the arbitrator shall limit the arbitration to the resolution of the unresolved issues raised in the petition, the response and the revised statement of unresolved issues (where applicable). However, in resolving these issues, the Arbitrator shall ensure that such resolution meets the requirements of the Act.

(12) Arbitrator's Reliance on Experts—The arbitrator may appoint and rely upon advisory staff in the decision-making process. Advisory staff may be selected from commission staff or be retained outside experts. The arbitrator shall inform the parties of the names of the advisory staff members. The advisory staff's role is limited to providing legal advice and other analysis to the arbitrator. Persons that advised a mediator regarding the same negotiation are ineligible to serve as advisors to the arbitrator. Upon the arbitrator's request, and after notice to the parties to the arbitration, the arbitrator may pose technical questions to commission staff members or outside individuals who are not advisory staff. Anyone who answers a technical question is not to advocate a position, but merely to provide neutral input to assist the arbitrator. Technical questions shall be answered either in written form or at an arbitration session attended by both parties. The parties may submit written responses to answers to technical questions in a timely manner as determined by the Arbitrator. Advisory Staff shall not have *ex-parte* contacts with any of the parties individually regarding the issues in the negotiation.

(13) Close of Arbitration—The conference and hearing process shall conclude within ten (10) days of the commencement of the first hearing, unless the arbitrator determines otherwise.

(14) Expedited Stenographic Record—An expedited stenographic record of each evidentiary hearing shall be made. The parties shall equally bear the costs of preparing the expedited transcript.

(15) Authority of the Arbitrator—In addition to authority granted elsewhere in this rule, the arbitrator shall have the same authority in conducting the arbitration as a presiding officer, as defined in 4 CSR 240-2.120, has in conducting hearings under the commission's rules of practice and procedure. Because of the short time frame mandated by the Act, the arbitrator shall have flexibility to set out procedures that may vary from those set out here; however, the arbitrator's procedures must substantially comply with the procedures listed herein. The arbitrator may vary from the schedule in this rule as long as the arbitrator complies with the deadlines contained in the Act.

(16) Participation in the Arbitration Conferences and Hearings—Participation in the arbitration conferences and hearings is strictly limited to the parties in a negotiation pursuant to sections 251 and 252 of the Act, the arbitrator, and the arbitrator's advisory staff. Only those parties involved in the negotiation shall be parties in the arbitration. Others that formally request to be kept apprised of the arbitration proceeding will be placed on the "Information Only" portion of the service list.

(17) Arbitration Open to the Public—Though participation in arbitration conferences and hearings is strictly limited to the parties listed in the preceding subsection, arbitration hearings shall be held in a public forum, unless circumstances dictate that a hearing, or portion thereof, be conducted in closed session due to presentation or discussion of a party's confidential or proprietary information. Any party to an arbitration that seeks to close any part of an arbitration hearing from the public must make a written request to the arbitrator describing the circumstances that support that party's request for a closed

session. The arbitrator shall consult with the commission and rule on such requests.

(18) Filing of Post-Hearing Briefs—Each party to the arbitration may file a post-hearing brief within seven (7) days of the end of the mark-up conferences and hearings. Post-hearing briefs shall present, for each disputed issue, the party's argument in support of adopting its recommended position, with all supporting evidence and legal authorities cited therein. The arbitrator may limit the length of post-hearing briefs. The arbitrator shall also establish a time for the filing of reply briefs. The arbitrator may also permit or require the parties to file proposed arbitrator's reports or decisions.

(19) Filing of Arbitrator's Draft Report—Within fifteen (15) days following the hearings, the arbitrator shall file a draft report with the commission. The draft report shall include (a) a concise summary of each issue resolved by the arbitrator and (b) a reasoned articulation of the basis for the decision on each issue, including how the decision meets the standards set in sections 251 and 252 of the Act. The arbitrator shall issue a decision on the merits of the parties' positions on each issue raised by the petition for arbitration and response(s). Unless the result would be clearly unreasonable or contrary to the public interest, for each issue, the arbitrator shall select the position of one of the parties as the arbitrator's decision on that issue.

(20) Filing of Comments on the Arbitrator's Draft Report—Each party and any member of the public may file comments on the arbitrator's draft report within ten (10) days after it is filed with the commission. Such comments shall not exceed twenty (20) pages, unless otherwise authorized by the arbitrator, and shall be directed to perceived factual, legal or technical errors made in the draft report. Commenters shall make specific references to the record to support each claim of error. Comments that merely reargue positions taken in briefs will be accorded no weight. Reply Comments, if permitted by the arbitrator, shall be limited to identifying misrepresentations of law, fact or condition of the record contained in comments.

(21) Filing of the Final Arbitrator's Report—The arbitrator shall file a final report with the commission no later than fifteen (15) days after the filing date for comments and not later than two hundred and twenty (220) days after the request for negotiation. The final report shall include a statement of findings and conclusions and the reasons or basis therefore, on all the material issues of fact, law or discretion presented on the record. Upon filing, the Secretary of the Commission shall serve the final report on all parties to the arbitration.

(22) *Ex Parte* Rules Applicable to Arbitration Proceedings—the restrictions on *ex Parte* communications contained in 4 CSR 240-4.020 apply to arbitration proceedings held under this rule.

(23) Submission Date —Arbitration proceedings shall be deemed to be submitted for decision with the filing of post-hearing briefs.

(24) Final Arbitrator's Report—The commission may conduct oral argument concerning comments on the arbitrator's final report and may conduct evidentiary hearings at its

discretion. The commission shall approve, reject or modify the arbitrator's final report no later than the two hundred and seventieth (270th) day following the request for negotiation.

AUTHORITY: section 386.410 RSMo 2000

PUBLIC COST: This proposed rule will not cost state agencies or political subdivisions more than five hundred dollars (\$500) in the aggregate.

PRIVATE COST: This proposed rule will not cost private entities more than five hundred dollars (\$500) in the aggregate.

NOTICE OF PUBLIC HEARING AND NOTICE TO SUBMIT COMMENTS: Anyone may file comments in support of or in opposition to this proposed rule with the Missouri Public Service Commission, Dale Hardy Roberts, Secretary of the Commission, PO Box 360, Jefferson City, MO 65102. To be considered, comments must be received at the commission's offices on or before March 5, 2004, and should include a reference to commission Case No. TX-2003-0487. If comments are submitted via a paper filing, an original and eight (8) copies of the comments are required. Comments may also be submitted via a filing using the commission's electronic filing and information system at <<http://www.psc.state.mo.us/efis.asp>>. A public hearing regarding this proposed rule is scheduled for March 12, 2004, at 10:00 a.m. in Room 310 of the Governor Office Building, 200 Madison Street, Jefferson City, Missouri. Interested persons may appear at this hearing to submit additional comments and/or testimony in support of or in opposition to this proposed rule, and may be asked to respond to commission questions. Any persons with special needs as addressed by the Americans with Disabilities Act should contact the Missouri Public Service Commission at least ten (10) days prior to the hearing at one (1) of the following numbers: Consumer Services Hotline 1-800-392-4211 or TDD Hotline 1-800-829-7541.