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September 23, 2016

Mike Downing, Director
Department of Economic Development
301 W. High Street
P.O. Box 1157
Jefferson City, Missouri 65102



RE: 4 CSR 240-2.135 Confidential Information

Dear Mr. Downing:

The Public Service Commission proposes an amendment to rule 4 CSR 240-2.135, Confidential Information. This amendment will revise the procedures for handling confidential information in cases before the commission.

The proposed amendment does not implicate the takings clause of the U.S. Constitution, because the proposed amendment does not involve the taking of real property.

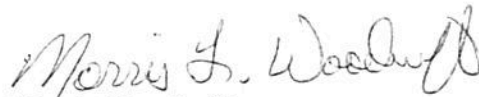
The Commission has performed the small business analysis required by Section 536.300, RSMo Supp. 2013, and includes the small business impact statement with this filing. Proposed Amendment 4 CSR 240-2.135 does not impose any requirement that "will cause direct and significant economic burden upon a small 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 amendment will not have an economic impact on small businesses.

Mr. Mike Downing
September 23, 2016
Page 2

Please find enclosed a copy of the Proposed Amendment, a Small Business Impact Statement, and, for your signature, a Public Entity Cost Affidavit. Please review and sign the Affidavit at your earliest convenience so that the Commission may proceed with publishing the proposed amendment.

Please let me know if you have any questions concerning this proposed amendment.

Sincerely,

A handwritten signature in cursive script that reads "Morris L. Woodruff".

Morris Woodruff
Chief Regulatory Law Judge
(573) 751-2849 (telephone)
(573) 526-6010 (facsimile)
Morris.woodruff@psc.mo.gov (e-mail)

Enclosure

mw/ck

Title 4—DEPARTMENT OF
ECONOMIC DEVELOPMENT
Division 240—Public Service Commission
Chapter 2—Practice and Procedure

4 CSR 240-2.135 Confidential Information. The Commission is amending sections (1), (2), (3), (4), (7), (9), (10), (11), (12), (15), (17), (18), (19), (20), (21), and (22), adding a new section (4), and deleting (5), (6), (8), (13), (14), and (16).

PURPOSE: This amendment revises the procedures for handling confidential information in cases before the commission.

(1) *[The commission recognizes two (2) levels of protection for information that should not be made public.] All items filed in case proceedings before the commission shall be open to the public unless protected pursuant to this rule or otherwise protected by law.*

(2) Confidential Designation.

(A) *[Proprietary information is information concerning trade secrets, as well as confidential or private technical, financial, and business information.] Any person may submit to the commission, without first obtaining a protective order, information designated as confidential if that information is:*

[(B) Highly confidential information is information concerning—]

1. *[Material or documents that contain information relating directly to specific c]Customer[s]-specific information;*

2. Employee-sensitive personnel information;

3. Marketing analysis or other market-specific information relating to services offered in competition with others;

4. Marketing analysis or other market-specific information relating to goods or services purchased or acquired for use by a company in providing services to customers;

5. Reports, work papers, or other documentation related to work produced by internal or external auditors, *[or] consultants, or attorneys, except that total amounts billed by each external auditors, consultants, or attorneys shall always be public;*

6. Strategies employed, to be employed, or under consideration in contract negotiations; *[and]*

7. *[Information r]Relating to the security of a company's facilities[.]; or*

8. Concerning trade secrets, as defined in section 417.453, RSMo.

(B) Any information designated as confidential shall be submitted with a cover sheet or pleading describing how such information qualifies as confidential under 2(A) of this rule, including the specific subsection relied upon and an explanation of its applicability. Only the specific information that qualifies as confidential shall be designated as such. In addition, each document that contains confidential information shall bear the designation "Confidential" and show the 2(A) subsection number through which that information is protected.

[(2)](3) Protective Order. [In addition to discovery and testimony which may be designated as highly confidential or proprietary without a protective order from the commission as set out in this rule, any person may seek an order protecting information from disclosure by the commission. A request for a protective order shall be made as follows:]

(A) In addition to information that may be designated as confidential as set out in this rule, any person may seek a protective order from the commission designating specific information confidential. If a protective order is granted, the protected information shall be considered confidential information. A request for a protective order shall be made as follows:

1. By filing a separate pleading denominated "Motion for Protective Order," **which may initiate a new case if a related case is not already pending;**

*[(B)]*2. The pleading shall state with particularity why the moving party seeks protection and what harm may occur if the information is made public;

*[(C)]*3. The pleading shall also state whether any of the information for which a claim of confidentiality is made can be found in any other *[open]* public document;

[(D)](B) The information *[provided to the commission]* **for which a claim of confidentiality is made** may be designated as *[highly]* confidential *[or proprietary]* while the motion is pending~~;~~**if only the specific information at issue is designated as such.**

(4) The commission may order greater protection than that provided by a confidential designation upon a motion explaining what information must be protected, the harm to the disclosing entity or the public that might result from disclosure of the information, and an explanation of how the information shall be disclosed to the parties that require the information while protecting the interests of the disclosing entity and the public.

(A) While such a motion is pending, the information about which such a claim is made may be disclosed only to the attorneys of record or to outside experts that have been retained for the purpose of the case.

(B) Any document that contains such information shall bear the designation "Highly Confidential," rather than "Confidential," but shall otherwise follow the formatting delineated in section (10) of this rule.

[(E) Any information designated as highly confidential or proprietary shall be provided in a redacted public version and a complete confidential version the same as for testimony as set out in section (11) of this rule; and

[(F) If the motion is granted, the information shall be protected from disclosure as set out in sections (3)–(22) of this rule.]

[(3)](5) When a party seeks discovery of information that the party from whom discovery is sought believes to be confidential, the party from whom discovery is sought may designate the information *[as proprietary or highly]* confidential.

(A) No order from the commission is necessary before a party in any case pending before the commission may designate *[material as proprietary or highly]***discovery responses** confidential, and such information shall be protected as provided in this rule.

(B) The party that designates **discovery** information *[as proprietary or highly]* confidential *[must]***shall** inform, in writing, the party seeking discovery **how each piece of that information qualifies as confidential under subsection 2(A) of this rule** *[of the reason for the designation]* at the same time it responds to the discovery request. If the party seeking discovery disagrees with the designation placed on the information, *[it must utilize]***that party shall follow** the informal discovery dispute resolution procedures set forth at 4 CSR 240-2.090(8). If the party seeking discovery **exhausts these dispute resolution procedures**, *[continues to disagree with the designation placed on the information, it]***that party** may file a motion challenging the designation.

[(C) This rule does not require the disclosure of any information that would be protected from disclosure by any privilege, rule of the commission, or the Missouri Rules of Civil Procedure.]

[(4)](6) **[Proprietary]Confidential** information may be disclosed only to the attorneys of record for a party and to employees of a party who are working as subject-matter experts for those attorneys or who intend to file testimony in that case, or to persons designated by a party as an outside expert in that case.

(A) The party disclosing information designated as *[proprietary]***confidential** shall serve the information on the attorney for the requesting party.

(B) If a party wants any employee or outside expert to review *[proprietary]***confidential** information, the party *[must]***shall** identify that person to the disclosing party by name, title, and job classification before disclosure. *[Furthermore, t]*The person to whom the information is to be disclosed *[must]***shall** comply with the certification requirements of section (7) of this rule.

(C) A customer of a utility may view his or her own customer-specific information, even if that information is otherwise designated as *[proprietary]***confidential**.

[(5) Highly confidential information may be disclosed only to the attorneys of record, or to outside experts that have been retained for the purpose of the case.

(A) Employees, officers, or directors of any of the parties in a proceeding, or any affiliate of any party, may not be outside experts for purposes of this rule.

(B) The party disclosing highly confidential information may, at its option, make such information available only on the furnishing party's premises, unless the discovering party can show good cause for the disclosure of the information off-premises.

(C) The person reviewing highly confidential information may not make copies of the documents containing the information and may make only limited notes about the information. Any such notes must also be treated as highly confidential.

(D) If a party wants an outside expert to review highly confidential information, the party must identify that person to the disclosing party before disclosure. Furthermore, the outside expert to whom the information is to be disclosed must comply with the certification requirements of section (7) of this rule.

(E) Subject to subsection (5)(B), the party disclosing information designated as highly confidential shall serve the information on the attorney for the requesting party.

(F) A customer of a utility may view his or her own customer-specific information, even if that information is otherwise designated as highly confidential.]

[(6) If any party believes that information must be protected from disclosure more rigorously than would be provided by a highly confidential designation, it may file a motion explaining what information must be protected, the harm to the disclosing entity or the public that might result from disclosure of the information, and an explanation of how the information may be disclosed to the parties that require the information while protecting the interests of the disclosing entity and the public.]

(7) Any employee of a party **or outside expert retained by a party** that wishes to review *[proprietary]***confidential** information[, or any outside expert retained by a party that wishes to review highly confidential or proprietary information *must*]**shall** first certify in writing that *[he or she]***such expert or party** will comply with the requirements of this rule.

(A) The certification *[must]***shall** include the signatory's full name, permanent address, title or position, date signed, the case number of the case for which the signatory will view the information, and the identity of the party for whom the signatory is acting.

(B) The signed certificate shall be filed in the case.

(C) The party seeking disclosure of the *[highly]* confidential *[or proprietary]* information *[must]***shall** provide a copy of the certificate to the disclosing party before disclosure is made.

[(8) Attorneys possessing proprietary or highly confidential information or testimony may make such information or testimony available only to those persons authorized to review such information or testimony under the restrictions established in sections (4) and (5).]

*[(9)]***(8)** If information to be disclosed in response to a discovery request is information concerning another entity—whether or not a party to the case—*[which]***that** the other entity has indicated is confidential, the disclosing party *[must]***shall** notify the other entity of its intent to disclose the information. If the other entity informs the disclosing party that it wishes to protect the *[material or]* information, the disclosing party *[must]***shall** designate the *[material or]* information as *[proprietary or highly]* confidential under the provisions of this rule.

*[(10)]***(9)** Any party may use *[proprietary or highly]* confidential information in prefiled testimony, in a pleading, *[or]* at hearing, **or in a brief** if the same level of confidentiality assigned by the disclosing party, or the commission, is maintained. Before including nonpublic information that it has obtained outside this proceeding in its pleading or testimony, a party *[must]***shall** ascertain from the source of the information whether that information is claimed to be *[proprietary or highly]* confidential.

*[(11)]***(10)** *[A party may designate portions of prefiled or live testimony as proprietary or highly confidential. Prefiled testimony]***Any prefiled testimony** that contains information designated as *[proprietary or highly]* confidential *[must]***shall** be filed **with both a public and a nonpublic version** as follows:

(A) *[A public version of the prefiled testimony must be filed along with the proprietary or highly confidential version of the testimony.]* For the public version, the *[proprietary or highly]* confidential portions *[must]shall* be *[obliterated or]* removed. *[The proprietary pages must be marked "P" and the removal of proprietary information shall be indicated by one (1) asterisk before and after the information, e.g., *proprietary information removed*. The highly confidential pages must be marked "HC" with t]*The removal of *[highly]* confidential information **shall be** indicated by underlining and two (2) asterisks before and after the *[highly]* confidential information, e.g., ****[highly] confidential information removed****. The designated information *[must]shall* be removed *[with blank spaces remaining so]***in such a way** that the lineation and pagination of the public version remains the same as the *[highly]* confidential *[and proprietary]* version[s];

(B) For the nonpublic version of the prefiled testimony, the *[proprietary pages must be marked "P" and the proprietary information indicated by one (1) asterisk before and after the information, e.g., *Proprietary*. The highly confidential pages shall be stamped "HC" with the highly]* confidential information **shall be** indicated by underlining and by two (2) asterisks before and after the *[highly]* confidential information, e.g., ****[Highly C]confidential information****; and

(C) At the hearing, the party offering the prefiled testimony *[must]shall* present a public version of the testimony in which the *[proprietary or highly]* confidential portions are *[obliterated or]* removed. The public version of the testimony will be marked as Exhibit _____. The offering party *[must]shall* also present a separate copy of the prefiled testimony containing *[proprietary or highly]* confidential information, sealed in an envelope. The version of the testimony containing *[proprietary or highly]* confidential information will be marked as Exhibit _____*[P or H]C*, as appropriate].

*[(12)](11) [Not later than ten (10) days]***At any time after the filing of discovery or** testimony *[is filed]* that contains information designated as *[proprietary or highly]* confidential, *[any party that wishes to]* **the commission may** challenge the designation of the **discovery or** testimony. *[may file]* **A party may also challenge such a designation at any time by filing** an appropriate motion with the commission.

[(A) If the designation of the testimony is challenged, the party asserting that the information is proprietary or highly confidential must, not later than ten (10) days, unless a shorter time is ordered, file a pleading establishing the specific nature of the information that it seeks to protect and establishing the harm that may occur if that information is disclosed to the public.

[(B) If the asserting party fails to file the pleading required by this section, the commission may order that the designated information be treated as public information.

(13) *If a response to a discovery request requires the duplication of material that is so voluminous, or of such a nature that copying would be unduly burdensome, the furnishing party may require that the material be reviewed on its own premises, or at some other location, within the state of Missouri.*

(14) *If prefiled testimony includes information that has previously been designated as highly confidential or proprietary in another witness's prefiled testimony, that information must again be designated as highly confidential or proprietary.]*

[(15)](12) All live testimony, including cross-examination and oral argument, which reveals information that is designated as *[proprietary or highly]* confidential may be offered only after the hearing room is cleared of all persons except those persons to whom the *[highly]* confidential *[or proprietary]* information is available under this rule. The transcript of such live testimony or oral argument *[will]***shall** be kept under seal and copies *[will]***shall** be provided only to the commission and *[the]* attorneys of record. The contents of such transcripts *[may]***shall** not be disclosed to anyone other than those permitted access to the designated information under this rule.

[(16) Proprietary or highly confidential information may not be quoted in briefs or other pleadings unless those portions of the briefs or other pleading are also treated as proprietary or highly confidential.]

[(17)](13) All persons who have access to information under this rule *[must]***shall** keep the information secure and may neither use nor disclose such information for any purpose other than preparation for and conduct of the proceeding for which the information was provided. This rule shall not prevent the commission's staff or the Office of the Public Counsel from using *[highly]* confidential *[or proprietary]* information obtained under this rule as the basis for additional investigations or complaints against any **public** utility *[company]*.

[(18)](14) After receiving *[an appropriate writ of review]***a notice of appeal**, the commission will deliver *[proprietary and highly]* confidential testimony constituting part of the record before the commission to the reviewing court under seal, unless otherwise directed by the court.

[(19)](15) Within ninety (90) days after the completion of *[the]***a** proceeding, including judicial review, all copies of all *[proprietary and highly]* confidential information, testimony, exhibits, transcripts, or briefs in the possession of any party *[must]***shall** be returned to the party claiming a confidential interest in such information if that party requests that the information be returned. Otherwise, the information *[must]***shall** be destroyed by the party possessing such information. Any notes pertaining to such information *[must]***shall** be destroyed.

[(20)](16) The provisions of sections *[(4), (5)](6)*, (7), *[(8)]*, and *[(19)](15)* of this rule do not apply to officers or employees of the commission or to the public counsel or employees of the Office of the Public Counsel. The officers or employees of the commission and the public counsel and employees of the Office of the Public Counsel are subject to the nondisclosure provisions of section 386.480, RSMo. Neither the officers or employees of the commission, nor the public counsel and the employees of the Office of the Public Counsel shall use or disclose any information obtained in discovery for any purpose other than in the performance of their duties.

[(21)](17) Outside experts of the staff of the commission or the Office of the Public Counsel who have been contracted to be witnesses in the proceeding **shall** have access to designated information and testimony on the same basis as the staff of the commission and the Office of the Public Counsel except that the outside expert *[must]***shall** comply with the provisions of sections (7) and *[(19)](15)*. Outside experts of the staff of the commission and the Office of the Public Counsel who have not been contracted to be witnesses in the proceeding *[are]***shall be** subject to all provisions of this rule.

[(22)](18) A claim that information is [*proprietary or highly*] confidential [*is*]**constitutes** a representation to the commission that the claiming party has a reasonable and good faith belief that the subject document or information is[, *in fact, proprietary or highly*] confidential **pursuant to the section of this rule cited as justification for the designation.**

[(23)](19) The commission may waive or grant a variance from any provision of this rule for good cause shown.

AUTHORITY: sections 386.040 and 386.410, RSMo 2000. Original rule filed May 25, 2006, effective Jan. 30, 2007. Amended: Filed March 2, 2011, effective Oct. 30, 2011.*

*Original authority: 386.080, RSMo 1939 and 386.410, RSMo 1939, amended 1947, 1977, 1996.

Small Business Regulator Fairness Board

Small Business Impact Statement

Date: September 22, 2016

Rule Number: 4 CSR 240-2.135

Name of Agency Preparing Statement: Missouri Public Service Commission

Name of Person Preparing Statement: Morris Woodruff

Phone Number: 573-751-2849

Email: morris.woodruff@psc.mo.gov

Name of Person Approving Statement: Morris Woodruff

Please describe the methods your agency considered or used to reduce the impact on small businesses (*examples: consolidation, simplification, differing compliance, differing reporting requirements, less stringent deadlines, performance rather than design standards, exemption, or any other mitigating technique*).

The amendments revises procedures related to filing and providing confidential information to the commission and parties involved in cases before the commission. There are no significant differences in the proposed amendments that would impact small businesses.

Please explain how your agency has involved small businesses in the development of the proposed rule.

This rule change will not have an impact on small businesses so their involvement has not been sought.

Please list the probable monetary costs and benefits to your agency and any other agencies affected. Please include the estimated total amount your agency expects to collect from additionally imposed fees and how the moneys will be used.

The proposed rule will have no monetary impact on the MPSC or any other state agency.

Please describe small businesses that will be required to comply with the proposed rule and how they may be adversely affected.

Small utilities that submit confidential information to the Commission and other parties to the cases in which they are a party to, will be required to comply with the proposed rule.

Please list direct and indirect costs (in dollars amounts) associated with compliance.

There should be no direct or indirect costs associated with compliance.

Please list types of business that will be directly affected by, bear the cost of, or directly benefit from the proposed rule.

Regulated electric, natural gas, steam, telephone, sewer and water utilities, as well as manufactured home manufactures and dealers.

Does the proposed rule include provisions that are more stringent than those mandated by comparable or related federal, state, or county standards?

Yes___ No_X__

If yes, please explain the reason for imposing a more stringent standard.

For further guidance in the completion of this statement, please see §536.300, RSMo.

PUBLIC COST

COUNTY OF COLE)

I, Mike Downing, 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 amendment to rule, 4 CSR 240-2.135, is less than five hundred dollars in the aggregate to this agency, any other agency of state government or any political subdivision thereof.

Department of Economic Development

Subscribed and sworn to before me this _____ day of _____, 2016, I am
commissioned as a notary public within the County of _____, State of
Missouri, and my commission expires on _____.

Notary Public