

MEMORANDUM

TO: Dale Hardy Roberts, Secretary
DATE: August 27, 2002
RE: Authorization to File Order of Rulemaking With the Office of Secretary of State
CASE NO: AX-2002-157

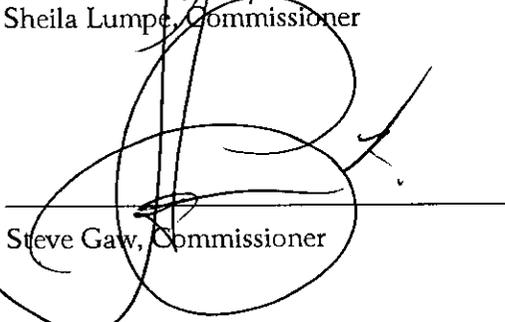
The undersigned Commissioners hereby authorize the Secretary of the Missouri Public Service Commission to file an Order of Rulemaking with the Office of Secretary of State, to wit:

4 CSR 240-2.075 Intervention


Kelvin L. Simmons, Chair


Connie Murray, Commissioner


Sheila Lumpe, Commissioner


Steve Gaw, Commissioner


Bryan Forbis, Commissioner



**AGENDA - 8/27/02
Thompson/Pope**

Draft circulated: 8/23/02, 11:40 a.m.

**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 sections 386.230 and 386.410, RSMo 2000, the commission amends a rule as follows:

4 CSR 240-2.075 Intervention is amended.

A notice of proposed rulemaking containing the text of the proposed amendment was published in the *Missouri Register* on May 1, 2002 (27 MoReg 691). Those sections with changes are reprinted here. This proposed amendment becomes effective thirty (30) days after publication in the *Code of State Regulations*.

SUMMARY OF COMMENTS: A public hearing on this proposed amendment was held on June 10, 2002, and the public comment period ended on May 31, 2002. Six (6) persons offered comments at the public hearing.

COMMENT: Carl Lumley, of Curtis, Oetting, Heinz, Garrett and Soule, P.C., commented, regarding section (7), that the wording needs to be changed because a tariff would not usually set forth facts which could be admitted or denied in a responsive pleading. If the intended reference was to a pleading regarding a tariff, substituting the word "pleading" for "tariff" would eliminate the confusion. In cases that do not involve any pleadings (i.e., perhaps a tariff suspended by the Commission without a motion), the intervention rules already require a statement of support or opposition, and a responsive pleading would not be appropriate. Regarding the estimate of private entity cost, he commented that the requirement of new pleadings will clearly involve aggregate costs in excess of \$500, whether in the form of attorney's fees or internal personnel costs.

RESPONSE AND EXPLANATION OF CHANGE: Based on this and other comments made, the Commission will withdraw proposed section (7). The Commission is persuaded that intervenors, in Commission practice, generally lack significant knowledge regarding the issues within thirty (30) days of intervention. Consequently, proposed section (7) will either require intervenors at significant cost to quickly develop sufficient knowledge of the case to file a responsive pleading or result in responsive pleadings that simply state that the intervenor lacks sufficient knowledge to take a position. In the former case, many potential intervenors will be deterred from intervening due to the expense involved. In the latter case, parties will bear the cost of an unnecessary and unhelpful pleading. Instead, the Commission will, as some

commentors suggested, rely upon existing section (2) and prefiled testimony, issues lists and position statements to develop the issues for hearing.

COMMENT: Paul Boudreau, of Brydon, Swearngen & England, P.C., on behalf of several utilities, commented that he generally supports a practice that requires a greater degree of specificity in the positions taken by intervening parties. However, section (7) regarding the requirement that an intervenor file a "responsive pleading" may be problematic in practice. Although it makes some sense in the context of a complaint, it is likely to cause confusion and difficulty in the context of a tariff filing which typically does not contain allegations of facts or law that are conducive to a response. Also, to the extent a responsive pleading is required, the rule should include language to the effect that a party may deny an allegation in those circumstances in which it does not have a basis from which to conclude that it is true or false. This would be consistent with practice before Missouri courts and would also conform to current Commission practice regarding answers to complaints.

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COMMENT: Michael F. Dandino, of the Office of the Public Counsel, commented that the proposed amendment is unnecessary and should not be adopted. Dandino commented that a responsive pleading is not practical in many cases and is unnecessary in others. He commented that it adds additional procedure and costs for no real benefit. Acting Public Counsel John Coffman offered additional comments at the hearing. He commented that the Commission should continue its tradition of granting broad intervention. He also commented that the proposed amendment will discourage intervention. Additionally, a responsive pleading is just not workable in many Commission cases.

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unnecessary and unhelpful pleading. Instead, the Commission will, as some commentors suggested, rely upon existing section (2) and prefiled testimony, issues lists and position statements to develop the issues for hearing.

COMMENT: Gary Duffy, of Brydon, Swearngen & England, P.C., on behalf of Missouri Gas Energy, Laclede Gas Company and The Empire District Electric Company, commented that the proposed section (7) appears to be much more complex and legalistic than is necessary. It appears to have a practical application only in the context of a formal complaint. With respect to applications or tariff filings, if the matter goes to hearing, the Commission will presumably learn of the position of the parties in prepared testimony. The intervenor should at least be allowed to deny allegations based on a lack of information, as is allowed by Civil Rule 55.07. In any event, that burden should apply equally to all parties to the case, not just those granted intervention. Additionally, the reference to "contested case" should be removed because it is inapplicable, confusing, and unnecessary. On the whole, he finds the proposed amendment in section (7) to be troublesome and lacking when it comes to furthering the interests of the efficient administration of justice. He also offered comments at the hearing. He suggested that the proposed amendment might deter intervention by such parties as homeowners. He also suggested that the proposed amendment might serve as a practice trap for counsel unfamiliar with practice before the PSC.

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COMMENT: Robert C. Johnson and Lisa Langeneckert, of Blackwell Sanders Peper Martin, commented on behalf of the Missouri Energy Group, including Barnes-Jewish Hospital, Continental Cement Company, Emerson Electric Company, Lone Star Industries Inc., River Cement Company, and SSM HealthCare, that the Commission should reject the proposed amendment because section (7) makes the intervention process more difficult and requires useless paperwork and unnecessary expense for the parties involved in cases. The information in the pleading required by proposed section (7) is duplicative of the information already required under section (2) of this rule. In most cases, it is impossible to take a position on the issues in a case until testimony is filed and discovery is completed. Section (7) would also serve to deter interested parties from intervening in cases. The public interest would be better served by deleting the proposed section (7) and relying upon the current section (2). Robert C. Johnson also

offered comments at the hearing. He commented that the proposed amendment would impose an undue burden on intervenors without significant financial resources.

RESPONSE AND EXPLANATION OF CHANGE: Based on this and other comments made, the Commission will withdraw proposed section (7). The Commission is persuaded that intervenors, in Commission practice, generally lack significant knowledge regarding the issues within thirty (30) days of intervention. Consequently, proposed section (7) will either require intervenors at significant cost to quickly develop sufficient knowledge of the case to file a responsive pleading or result in responsive pleadings that simply state that the intervenor lacks sufficient knowledge to take a position. In the former case, many potential intervenors will be deterred from intervening due to the expense involved. In the latter case, parties will bear the cost of an unnecessary and unhelpful pleading. Instead, the Commission will, as some commentors suggested, rely upon existing section (2) and prefiled testimony, issues lists and position statements to develop the issues for hearing.

COMMENT: James Fischer, of Fischer & Dority, P.C., on behalf of Kansas City Power & Light Company, commented that he opposes the proposed addition of section (7) to 4 CSR 240-2.075. He suggests that it is not possible for an intervenor to have sufficient information regarding the subject matter of applications, complaints or tariffs so that it could in good faith either admit or deny "each fact" asserted. In circuit court litigation, parties are able to plead that they have insufficient information to enable them to admit or deny other parties' allegations. It is Fischer's experience, as counsel for an intervenor, that little information is available to intervenors at the beginning of a contested case, and that issues and positions develop as discovery progresses and testimony is filed. Fischer suggests that the addition of section (7) will not aid the Commission and the parties in identifying issues and positions earlier than is done in the current practice. Fischer also offered comments at the hearing. He commented that requiring a responsive pleading from an intervenor is not helpful because the intervenor likely knows nothing about the factual situation. Furthermore, the drafting will result in additional and unnecessary attorney fees to the intervenor.

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COMMENT: Stuart W. Conrad, of Finnegan, Conrad & Peterson, made comments at the hearing on behalf of Midwest Gas Users Association, Praxair, and a group of Sedalia industrial utility customers. He commented that requiring a responsive pleading

from intervenors was not likely to be helpful in practice. He suggested that the Commission convene a roundtable with members of the utility bar to address procedural changes.

RESPONSE AND EXPLANATION OF CHANGE: Based on this and other comments made, the Commission will withdraw proposed section (7). The Commission is persuaded that intervenors, in Commission practice, generally lack significant knowledge regarding the issues within thirty (30) days of intervention. Consequently, proposed section (7) will either require intervenors at significant cost to quickly develop sufficient knowledge of the case to file a responsive pleading or result in responsive pleadings that simply state that the intervenor lacks sufficient knowledge to take a position. In the former case, many potential intervenors will be deterred from intervening due to the expense involved. In the latter case, parties will bear the cost of an unnecessary and unhelpful pleading. Instead, the Commission will, as some commentors suggested, rely upon existing section (2) and prefiled testimony, issues lists and position statements to develop the issues for hearing. As to the suggestion that the Commission convene a roundtable, the Commission notes that it solicited written comments and held a public hearing as part of this rulemaking. Consequently, the Commission concludes that a roundtable is not necessary at this time.

COMMENT: James Fischer, of Fischer & Dority, P.C., commented at the hearing on behalf of Southwestern Bell Telephone Company. He commented that Southwestern Bell was concerned, with respect to the amicus brief issue, that the amicus brief ought not be filed after the initial briefs, especially if there is only ten days to respond. The amicus brief ought to be filed at the same time as the initial briefs.

RESPONSE AND EXPLANATION OF CHANGE: The Commission finds this comment to be helpful and, therefore, will modify proposed section (6) to provide that, absent express leave of the Commission, any amicus brief must be filed no later than the initial briefs of the parties.

COMMENT: Diana Vuylsteke of Bryan Cave LLP offered comments in opposition to the proposed amendment at the hearing on behalf of the Missouri Industrial Energy Consumers. She commented that the proposed amendment would impose a heavy burden on intervenors to discover information sufficient to permit filing the required responsive pleading. If, on the other hand, the intervenor can simply indicate that it lacks sufficient information, then the responsive pleading is useless. Intervenors generally enter a case to protect their interests, not because they have strong positions at the outset regarding the utility's filings.

RESPONSE AND EXPLANATION OF CHANGE: Based on this and other comments made, the Commission will withdraw proposed section (7). The Commission is persuaded that intervenors, in Commission practice, generally lack significant knowledge regarding the issues within thirty (30) days of intervention. Consequently, proposed section (7) will either require intervenors at significant cost to quickly develop sufficient knowledge of the case to file a responsive pleading or result in responsive pleadings that simply state that the intervenor lacks sufficient knowledge to take a position. In the former case, many potential intervenors will be deterred from intervening due to the expense involved. In the latter case, parties will bear the cost of an

unnecessary and unhelpful pleading. Instead, the Commission will, as some commentors suggested, rely upon existing section (2) and prefiled testimony, issues lists and position statements to develop the issues for hearing.

No other comments were received.

4 CSR 240-2.075 Intervention

(6) Any person not a party to a case may petition the commission for leave to file a brief as an *amicus curiae*. The petition for leave must state the petitioner's interest in the matter and explain why an *amicus* brief is desirable and how the matters asserted are relevant to the determination of the case. The brief may be submitted simultaneously with the petition. Unless otherwise ordered by the commission, the brief must be filed no later than the initial briefs of the parties. If leave to file a brief as an *amicus curiae* is granted, the brief shall be deemed filed on the date submitted. An *amicus curiae* may not file a reply brief.