

MEMORANDUM

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AUG 27 2002

TO: Dale Hardy Roberts, Secretary

DATE: August 27, 2002

RE: Authorization to File Order of Rulemaking With the Office of Secretary of State

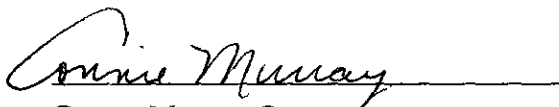
CASE NO: AX-2002-159

*Records
Public Service Commission*

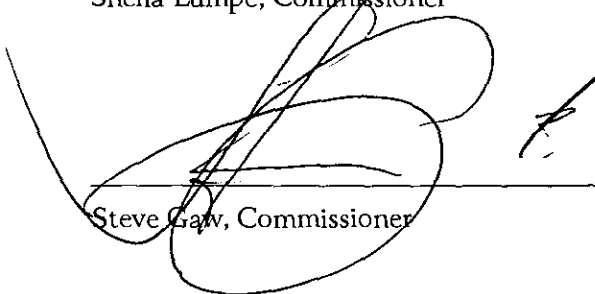
The undersigned Commissioners hereby authorize the Secretary of the Missouri Public Service Commission to file an Order of Rulemaking with the Office of Secretary of State, to wit:

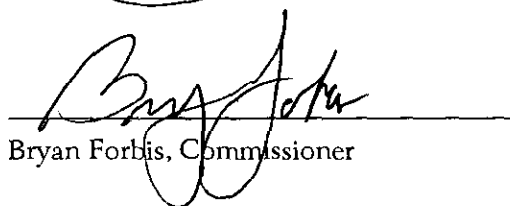
4 CSR 240-2.117 Summary Disposition


Kelyn 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 adopts a rule as follows:

4 CSR 240-2.117 Summary Disposition is adopted.

A notice of proposed rulemaking containing the text of the proposed rule was published in the *Missouri Register* on May 1, 2002 (27 MoReg 692). Those sections with changes are reprinted here. This proposed rule 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 subsection (1)(C), that the responding party should be allowed thirty (30) days to respond, just as in circuit court proceedings. The filing party has a substantial advantage, in that they can take as long as they want to prepare their filing and the evidence on which it is based. Ten (10) days is much too short a time for responding parties to go through the logistics of assembling opposing evidence and preparing what can be substantial responsive pleadings. The circuit court rules are well-established and time-tested. The Commission would not be well served by an abbreviated 10-day response time.

RESPONSE AND EXPLANATION OF CHANGE: The Commission is persuaded by this and other comments that the response interval should be increased to thirty (30) days.

COMMENT: Paul Boudreau and Gary Duffy, of Brydon, Swearngen & England, P.C., on behalf of several utilities, commented that, while they generally support the Commission's proposed rule with respect to summary determinations, a longer period should be allowed within which to respond to a motion than the ten (10) days permitted by subsection (1)(C) of the proposed rule. They suggest that perhaps a fifteen (15) – thirty (30) day time period would provide the non-moving party a more reasonable opportunity to locate or generate the necessary evidentiary support to respond to a dispositive motion. A somewhat longer period of time would be in line with Missouri Civil Rule 74.04(c)(2) that provides thirty (30) days to respond unless a longer period is needed for discovery. They also suggest that the phrase "contested case" not be used

as many Commission cases, in their view, are not "contested cases" within the meaning of Chapter 536, RSMo. Mr. Duffy also offered comments at the hearing. He commented that summary disposition should not be available in any case with an operation of law date. He also commented that a non-moving party would require at least thirty (30) days to respond to a motion for summary determination.

RESPONSE AND EXPLANATION OF CHANGE: The Commission is persuaded by this and other comments to extend the response interval to thirty (30) days. The Commission is also persuaded by this and other comments to remove references to "contested cases." Such references are not necessary and may be confusing. The Commission will also remove the reference to contested cases from the title of the rule. The Commission is also persuaded by this and other comments to provide that summary determination shall not be available in rate cases or in other cases with operation of law dates.

COMMENT: Michael Dandino offered comments on behalf of the Office of the Public Counsel. Public Counsel opposes this proposed rule in its present form. The ten (10) day period of time is unreasonable given the nature of the cases and complexity of the issues. By timing the filing of the motion, the utility can use the rule as a tactical weapon to overwhelm the opposition and limit the ability of the other parties to be heard. It shifts the burden of proof from the company to Public Counsel, Staff, and other parties to come forward with evidence on a very short time frame to demonstrate factual disputes. The proposed rule does not give a non-moving party a right to discovery, but rather requires a non-moving party to show good cause to delay the response to the motion for summary judgment and conduct discovery. The PSC must allow reasonable time for discovery for non-moving parties. Public Counsel suggests that if the Commission adopts a summary judgment rule that it exclude rate making and tariff filings or any changes in rates from the scope of the rule. This summary motion practice for most of the cases before this Commission works an unreasonable hardship on the ratepayers and is a fundamentally unfair and oppressive procedure. Public Counsel is concerned that this proposed rule will lead to an attempt to deprive ratepayers of its rights to full and fair hearings. Public Counsel also suggests that summary judgment be limited to a few purposes where a preliminary legal issue should be resolved prior to further action. It could be used to determine the legal scope of a proceeding or even if a proceeding is proper as a matter of law. Acting Public Counsel John Coffman offered additional comments at the hearing. Coffman commented that the Commission should avoid adopting a summary determination rule that would tilt the balance against parties with fewer resources. In particular, Coffman commented that the time limit for responses is too short.

RESPONSE AND EXPLANATION OF CHANGE: The Commission is persuaded by this and other comments to extend the response interval to thirty (30) days. The Commission is also persuaded by this and other comments to provide that summary determination shall not be available in rate cases or in other cases with operation of law dates. The Commission will make a similar change to proposed subsection (2). The Commission is persuaded by this and other comments that this procedure might be subverted and used as a litigation tactic is meritorious. Therefore, in order to prevent the use of this procedure as a tactic to deprive parties such as the Public Counsel from an

opportunity to contest utility initiatives through litigation, the Commission will modify proposed subsection (1)(E) to provide that the Commission "may grant the motion for summary determination if . . . the commission determines that it is in the public interest." This will permit non-moving parties to argue to the Commission that summary determination is, for some reason, not appropriate in the case at bar. This option will also reduce the burden on non-moving parties to discover evidence by which to show the existence of a genuine dispute of material fact. The Commission acknowledges that many Commission cases are driven by public policy disputes rather than by factual disputes. The proposed rule, as modified, will permit non-moving parties to avoid summary determination in proper cases by showing the existence of such public policy disputes. The Commission will make a similar change to subsection (2).

COMMENT: Southwestern Bell supports the adoption of a new Commission rule which would provide for the summary disposition of contested cases upon the motion of a party, where the "pleadings, testimony, discovery, affidavits, and memoranda on file show that there is no genuine issue as to any material fact," and where the moving party is "entitled to relief as a matter of law as to all or any part of the contested case." However, Southwestern Bell opposes the adoption of the second sentence of subsection (1)(E), which permits the Commission to order summary determination against the moving party. Bell believes that, if the Commission determines that a party filing a motion for summary determination fails to establish that such relief is appropriate, the Commission should simply deny the motion. Neither the Federal Rules of Civil Procedure nor the Missouri Rules of Civil Procedure, upon which the Commission's proposed summary determination rule appears to be directly based, include such a provision. Southwestern Bell also responded to the comments offered by the Public Counsel, commenting that it does not believe it would be appropriate to drastically limit the applicability of any summary disposition rule. If the Commission adopts a summary disposition rule for contested Commission cases, a motion for summary determination should be available to resolve all or any part of any case in which the motion, along with the supporting materials, establishes that "there is no genuine issue as to any material fact and that the moving party is therefore entitled to relief as a matter of law as to all or any part of the contested case." Public Counsel's concerns regarding sufficient time to conduct discovery prior to responding to a motion for summary determination in more complex cases are already addressed in subsection (1)(D) of the Commission's proposed rule. In an appropriate case, the Commission can permit a party additional time to respond to a motion for summary determination if further discovery is necessary and has not yet been completed. James Fischer, of Fischer & Dority, P.C., offered comments on behalf of Southwestern Bell at the hearing. Fischer commented that Bell was opposed to the provision that authorizes summary determination against the moving party.

RESPONSE AND EXPLANATION OF CHANGE: The Commission is persuaded by this and other comments to delete the second sentence of proposed subsection (1)(E), which authorized summary determination against the moving party. The Missouri civil rules have been modified to exclude summary judgment against the moving party and this modification will permit the Commission's rule to more closely track the civil rules.

As explained above, the Commission has decided to exclude ratemaking cases and cases with operation of law dates from the scope of this rule.

COMMENT: Lisa Creighton Hendricks offered comments on behalf of Sprint Communications Company, L.P. and Sprint Missouri, Inc. While Sprint agrees that this Commission should have a rule that allows summary dispositions of cases, Sprint cautions the Commission to not set the time period in which a party replies to motions for summary determinations so short that it puts the party defending the motion for summary determination in a position that they are unable to completely respond. Therefore, Sprint suggests to this Commission that it extend the ten (10) day period to a twenty-day period and allow an additional three days if a party selects to serve by mail.

RESPONSE AND EXPLANATION OF CHANGE: As explained above, the Commission is persuaded by this and other comments to extend the response interval to thirty (30) days.

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 they oppose this proposed rule in its present form as it places an undue burden on the parties, requiring them to file a response in opposition to a motion for summary determination within ten days. The proposed rule could arguably shift the burden of the case to the respondent, requiring it to disprove the case, rather than requiring the moving party to prove its case. Adoption of this proposed rule could deprive a party of its right of a full and fair hearing on the issues as required by *State ex rel Fischer v. PSC*, 645 SW.2d 39 (Mo. App. 1982). While a motion for summary determination may be appropriate in civil litigation, it is not appropriate in administrative proceedings. The use of stipulations better serves this purpose. Robert C. Johnson also offered comments at the hearing. He commented that, while summary disposition might be useful and appropriate in nuisance complaints brought against utilities, the device would not be appropriate in most Commission cases.

RESPONSE AND EXPLANATION OF CHANGE: As explained above, the Commission is persuaded by this and other comments to extend the response interval to thirty (30) days. The Commission has concluded that an appropriately-drafted rule providing for summary disposition of cases has a useful role to play in Commission practice.

COMMENT: James Fischer, of Fischer & Dority, P.C., on behalf of Kansas City Power & Light Company, commented that proposed rule 4 CSR 240-2.117(1) appears to be somewhat patterned after motions for summary judgment in civil courts. He suggests that, if this rule is adopted, it should provide that the Commission's scheduling order in contested cases set a specific date by which motions for disposition be filed, which shall not be less than sixty (60) days prior to the evidentiary hearing, with responding parties being allowed twenty (20) days to respond. Allowing parties to file motions for disposition up to (20) days before the hearing, as the proposed rule provides, places an undue burden on the responding parties, as they must continue to prepare for hearing and at the same time respond to the motion. Further, all parties would be required to

prepare for hearing without knowing what issues would be allowed at hearing until very shortly before, or even at, the hearing. Fischer suggests that proposed rule 4 CSR 240-2.117(2) not be adopted in light of proposed rule 4 CSR 240-2.117(1), which provides for a process by which parties may by motion seek disposition of all or part of a contested case after a responsive pleading is filed or after the close of the intervention period. 4 CSR 240-2.117(2) is at best duplicative, and at worst injects ambiguity regarding the interplay of that paragraph with 4 CSR 240-2.117(1). Mr. Fischer also offered comments at the hearing. Mr. Fischer commented that the proposed rule should also require that any motion for summary disposition be filed no later than sixty (60) days before the hearing.

RESPONSE AND EXPLANATION OF CHANGE: As explained above, the Commission is persuaded by this and other comments to extend the response interval to thirty (30) days. The Commission is also persuaded by this comment to require that motions for summary disposition be filed not later than sixty (60) days before the hearing. The Commission believes that proposed section (2) does have a useful role to play in Commission proceedings. In particular, it relieves the moving party in appropriate cases from the greater effort of preparing a motion for summary determination, which must be supported by an offer of proof and by a memorandum of law. This, in turn, will spare parties the burden of additional legal fees. Therefore, the Commission will adopt proposed section (2).

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 the proposed rule should not be promulgated because it is susceptible to manipulation by utilities. Conrad commented that, in utility practice, the utility has possession of all of the relevant facts and other parties must acquire those facts from the utility. In such an environment, a procedure for summary disposition is inappropriate. He suggested that Alternative Dispute Resolution be used to dispose of cases in which no actual dispute exists. He suggested that the Commission convene a roundtable with members of the utility bar to address procedural changes.

RESPONSE AND EXPLANATION OF CHANGE: As explained above, the Commission is persuaded by this and other comments to modify the proposed rule in order to prevent the use of this procedure as a tactic to deprive parties of an opportunity to contest utility initiatives through litigation. Therefore, the Commission will modify proposed subsection (1)(E) to provide that the Commission "may grant the motion for summary determination if . . . the commission determines that it is in the public interest." This will permit non-moving parties to argue to the Commission that summary determination is, for some reason, not appropriate in the case at bar. This option will also reduce the burden on non-moving parties to discover evidence by which to show the existence of a genuine dispute of material fact. The Commission acknowledges that many Commission cases are driven by public policy disputes rather than by factual disputes. The proposed rule, as modified, will permit non-moving parties to avoid summary determination in proper cases by showing the existence of such public policy disputes. The Commission will make a similar change to subsection (2). The Commission already employs Alternative Dispute Resolution methods where

appropriate and will continue to do so. Nonetheless, the proposed rule will play a useful role in Commission practice that is not addressed by Alternative Dispute Resolution methods. The Commission has held a public hearing and solicited written comments in this case. Consequently, the Commission concludes that there is no need for a roundtable with members of the utility bar.

COMMENT: Diana Vuylsteke of Bryan Cave LLP offered comments in opposition to the proposed rule at the hearing on behalf of the Missouri Industrial Energy Consumers. She joined in the comments by the Public Counsel, that the proposed rule could serve as a dangerous weapon for the utilities.

RESPONSE AND EXPLANATION OF CHANGE: As explained above, the Commission is persuaded by this and other comments to modify the proposed rule in order to prevent the use of this procedure as a tactic to deprive parties of an opportunity to contest utility initiatives through litigation. Therefore, the Commission will modify proposed subsection (1)(E) to provide that the Commission "may grant the motion for summary determination if . . . the commission determines that it is in the public interest." This will permit non-moving parties to argue to the Commission that summary determination is, for some reason, not appropriate in the case at bar. This option will also reduce the burden on non-moving parties to discover evidence by which to show the existence of a genuine dispute of material fact. The Commission acknowledges that many Commission cases are driven by public policy disputes rather than by factual disputes. The proposed rule, as modified, will permit non-moving parties to avoid summary determination in proper cases by showing the existence of such public policy disputes. The Commission will make a similar change to subsection (2).

No other comments were received.

4 CSR 240-2.117 Summary Disposition

(1) Summary Determination.

(A) Except in a case seeking a rate increase or which is subject to an operation of law date, any party may by motion, with or without supporting affidavits, seek disposition of all or any part of a case by summary determination at any time after the filing of a responsive pleading, if there is a respondent, or at any time after the close of the intervention period. However, a motion for summary determination shall not be filed less than sixty (60) days prior to the hearing except by leave of the commission.

(B) Motions for summary determination shall state with particularity in separately numbered paragraphs each material fact as to which the movant claims there is no genuine issue, with specific references to the pleadings, testimony, discovery, or affidavits that demonstrate the lack of a genuine issue as to such facts. Each motion for summary determination shall have attached thereto a separate legal memorandum explaining why summary determination should be granted and testimony, discovery or affidavits not previously filed that are relied on in the motion. The movant shall serve the motion for summary determination upon all other parties not later than the date upon which the motion is filed with the commission.

(C) Not more than thirty (30) days after a motion for summary determination is served, any party may file and serve on all parties a response in opposition to the motion for summary determination. Attached thereto shall be any testimony, discovery or affidavits not previously filed that are relied on in the response. The response shall admit or deny each of movant's factual statements in numbered paragraphs corresponding to the numbered paragraphs in the motion for summary determination, shall state the reason for each denial, shall set out each additional material fact that remains in dispute, and shall support each factual assertion with specific references to the pleadings, testimony, discovery, or affidavits. The response may also have attached thereto a legal memorandum explaining why summary determination should not be granted.

(D) For good cause shown, the commission may continue the motion for summary determination for a reasonable time to allow an opposing party to conduct such discovery as is necessary to permit a response to the motion for summary determination.

(E) The commission may grant the motion for summary determination if the pleadings, testimony, discovery, affidavits, and memoranda on file show that there is no genuine issue as to any material fact, that any party is entitled to relief as a matter of law as to all or any part of the case, and the commission determines that it is in the public interest. An order granting summary determination shall include findings of fact and conclusions of law.

(F) If the commission grants a motion for summary determination, but does not dispose thereby of the entire case, it shall hold an evidentiary hearing to resolve the remaining issues. Those facts found in the order granting partial summary determination shall be established for purposes of the hearing.

(G) The commission may hear oral argument on a motion for summary determination.

(2) Determination on the Pleadings-- Except in a case seeking a rate increase or which is subject to an operation of law date, the commission may, on its own motion or on the motion of any party, dispose of all or any part of a case on the pleadings whenever such disposition is not otherwise contrary to law or contrary to the public interest.

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" (and there appears
no genuine issue as to
any material fact") 436

