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-2002-158

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 240-2.115 Stipulations and Agreements

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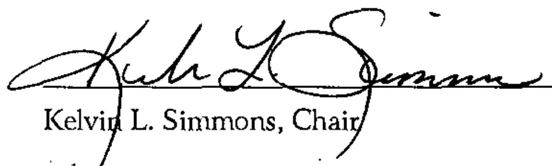
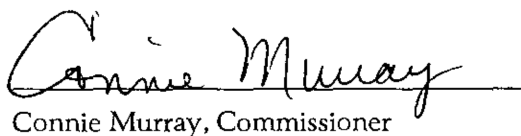
AUG 27 2002

Records
Public Service Commission

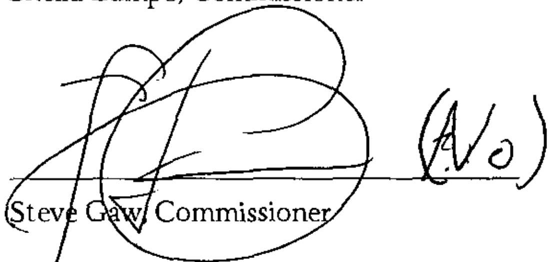


Kelvin L. Simmons, Chair



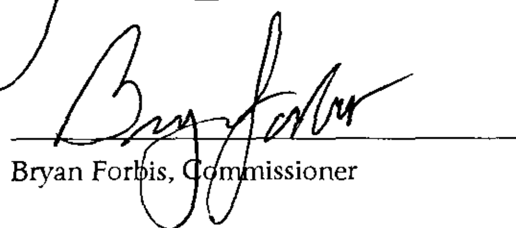
Connie Murray, Commissioner

Sheila Lumpe, Commissioner

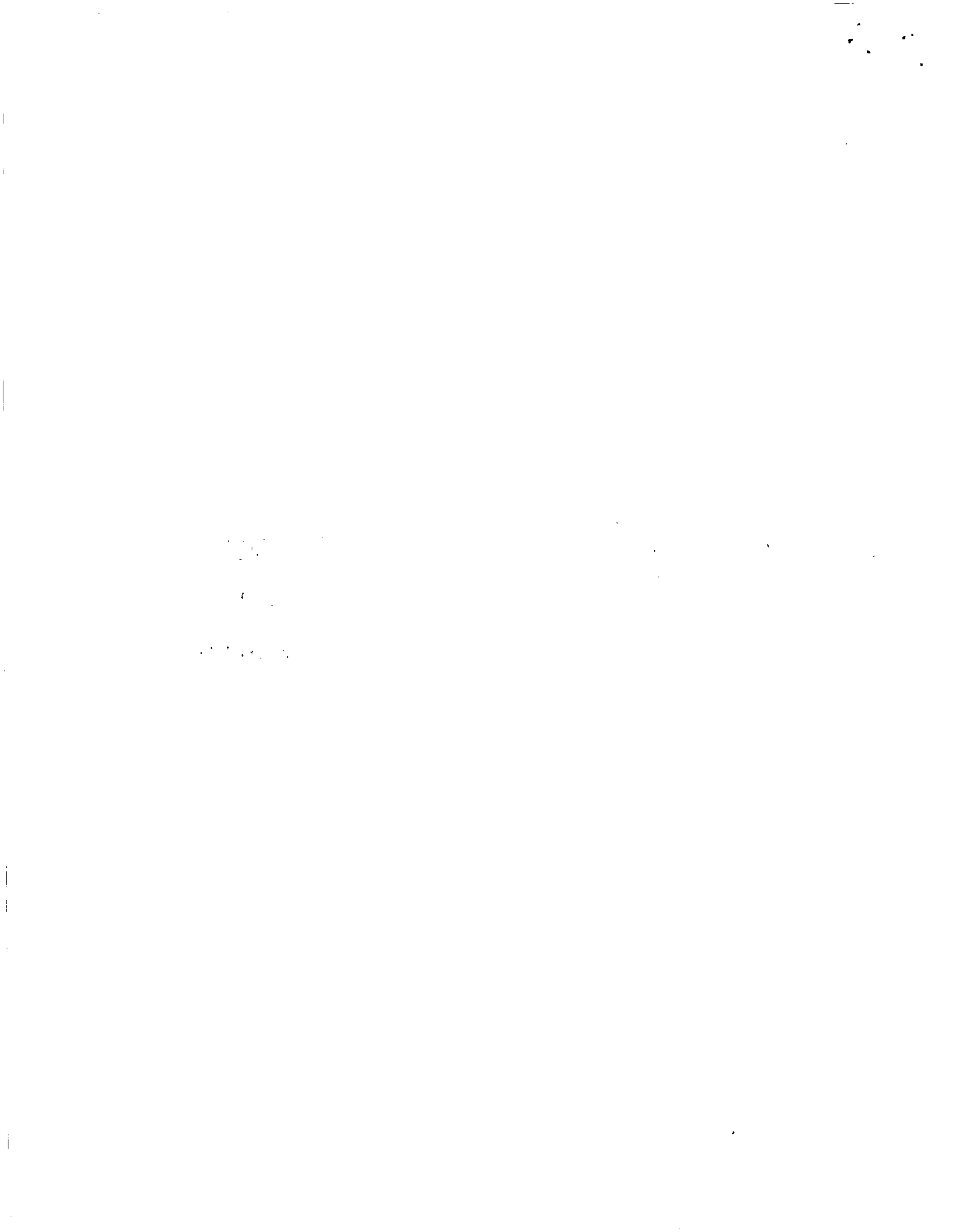


(No)

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 240-2.115 Stipulations and Agreements **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 691-692). 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 that, regarding subsection (2)(B), the seven-day time period is too short for a situation in which a default waiver of hearing rights can result. At least ten days should be allowed, given the potential consequences.
RESPONSE: Seven days is the time period permitted by existing Rule 45 CSR 240-2.115(3). Most commentors spoke favorably of the existing rule. Therefore, the Commission concludes that seven (7) days is a sufficient interval. No changes have been made to the proposed amendment as a result of this comment.

COMMENT: Paul Boudreau and Gary Duffy, of Brydon, Swearengen & England, P.C., on behalf of several utilities, commented that they are opposed to the second sentence of proposed subsection (1)(A) because the language proposed by the Commission will have the unintended effect of discouraging the settlement of cases, particularly of rate cases. They commented that the Commission need only require that the recommendation of the parties be supported by the record evidence. If the Commission's new rule is intended to require the parties to submit a stipulation of basic facts as to every cost and revenue element which results in a particular revenue requirement recommendation, then very few, if any, rate case settlements will be attainable in the future. This will have the adverse effect of unnecessarily forcing more cases to a full-blown evidentiary hearing than would otherwise be the case. They commented that there is no requirement *in a settled case* that the Commission make detailed findings of fact. They are also opposed to subsection (2)(B) which contains

language addressing a so-called "conditional assent". This language is troubling to the extent that it suggests that a nonsignatory will be deemed by the Commission to have assented to or joined in the specific terms of a particular settlement agreement. This difficulty is aggravated by the following subsection (2)(C) that provides that the Commission may treat a nonunanimous stipulation and agreement as a unanimous stipulation and agreement if no objection is filed. The underlying problem is that a nonsignatory party should not be deemed to take a particular position on the merits of a proposed settlement. To the contrary, it should be allowed to simply step aside so as not to impede a settlement without being deemed to have joined in the terms of a document to which it is not a signatory. Consequently, they suggest the last sentence in subsection (2)(B) be stricken from the proposed amendment. Should the Commission choose to retain subsection (2)(B), then subsection (2)(C) should be deleted and rewritten as follows: "If no party timely objects to a non-unanimous stipulation and agreement, the commission may rule summarily on the merits of the non-unanimous stipulation and agreement without the necessity of holding a hearing." Mr. Duffy also offered comments at the hearing. He commented that the Commission ought to accept the settlements reached by the parties at face value and not try to look behind them.
RESPONSE AND EXPLANATION OF CHANGE: Based on this and other comments, the Commission is persuaded to withdraw the second sentence of proposed subsection (1)(A), particularly because the Commission need not make findings of fact in an order approving a stipulation and agreement. As the commentors suggested, the Commission will use the device of an on-the-record presentation when it is necessary to acquire additional information regarding a proposed stipulation and agreement. Based on this and other comments, the Commission is persuaded to withdraw the third sentence of proposed subsection (2)(B), relating to "conditional assents" because the proposed language is confusing and unnecessary. Proposed subsection 2(C) reflects the second sentence of section (1) of the existing rule, except that the word "objection" is used in place of "request for hearing." Most commentors spoke favorably of the existing rule; therefore, the Commission will make no change to proposed subsection (2)(C) of the amendment. However, as suggested by several commentors, the Commission will add language to proposed subsection (2)(E) stating that a party may choose to not oppose all or any part of a nonunanimous stipulation and agreement because this option reflects long-standing practice before the Commission. This permits a party to make unmistakably clear that it has not joined in a nonunanimous stipulation and agreement.

COMMENT: Michael F. Dandino, of the Office of the Public Counsel, commented that Public Counsel opposes this proposed amendment and urges the Commission to continue the existing rule without amendment. Public Counsel comments that the amendment does not guarantee a hearing upon request by a nonsignatory party, thereby violating the constitutional and statutory rights of such parties. Public Counsel opposes the provision regarding conditional assents as it transforms such conditional assents into unconditional assents. Public Counsel also opposes the provisions of subsection (1) (A) of the proposed amendment that requires a stipulated set of facts sufficient to support the resolution proposed by the parties. Public Counsel sees this proposed amendment as discouraging settlement. Public Counsel also opposes subsection (2)(E) because it deprives a party of the right to develop evidence on

cross-examination or at hearing. There is no rule or requirement for a party to prefile prepared testimony as a condition for the participation in the hearing or for the ability to brief or otherwise take a position in the case. There is no PSC procedural rule that a party must file a "position statement" or similar pleading in which it must take a firm position on each and every issue before all the evidence is adduced at hearing. A party has a right to file a brief on any or all of the issues contested in the case. Subsection (2)(D) also deprives the parties of the right to set the terms of their agreement. Under this subsection, the nonunanimous stipulation seems to be converted into a binding agreement and a *de facto* statement of position even if it is objected to and perhaps even if the issue or case goes to hearing. In summary, Public Counsel comments that the existing rule complies with the *Fischer* case and has served the public, the parties, and the Commission well has since its adoption. The proposed amendment is unreasonable and unnecessary and should be rejected. John Coffman, Acting Public Counsel, offered additional comments on the proposed amendment at the hearing. Coffman commented that several aspects of the proposed amendment appeared to violate the *Fischer* decision. Additionally, Coffman commented that the proposed amendment would act to make settlements less likely.
RESPONSE AND EXPLANATION OF CHANGE: See the response to the second comment, above. The Commission is persuaded by this and other comments to clarify the compliance of the proposed amendment to the decision of the Missouri Court of Appeals, *State ex rel Fischer v. PSC,* 645 SW.2d 39 (Mo. App. 1982). Therefore, the Commission has added language to proposed subsection (2)(D) to indicate that the merits of a case remain for determination after hearing upon the filing of a timely objection to a nonunanimous stipulation and agreement. Additionally, the Commission is persuaded by this and other comments to withdraw the proposed subsection (2)(E).

COMMENT: Anthony K. Conroy offered comments on behalf of Southwestern Bell Telephone Company. Southwestern Bell supports the Commission's proposed amendments to subsections (A) and (B) of section (1) of rule 2.115, which apply generally to "Stipulations and Agreements." Southwestern Bell also supports many of the Commission's proposed amendments to section 2 of rule 2.115, entitled "Nonunanimous Stipulations and Agreements." Southwestern Bell supports the Commission's proposed amendments to subsections (A), (C) and (D) of section (2) of the rule. Southwestern Bell also supports the Commission's proposed amendments to subsection (B) of section (2) of the rule, with the exception of the final sentence of that subsection, as proposed by the Commission, which provides "[A] conditional assent to a nonunanimous stipulation and agreement shall be regarded as a non-conditional assent and not as an objection." Southwestern Bell does not believe it is appropriate for the Commission, by rule, to permit a party to file a "conditional assent" and then relabel this pleading an "unconditional assent." In addition to being confusing, the Commission's proposed amendment will likely lead to parties stating all of their positions with respect to a stipulation and agreement in the form of objections, resulting in the need for more hearings, not less. Southwestern Bell also opposes the Commission's proposed subsection (E) of section (2) of rule 2.115. Southwestern Bell is concerned that this proposed amendment has the potential to deprive parties to a particular case of their right to due process and a fair hearing. Stipulations and agreements may be filed before

parties file testimony or finalize their position in a case. A party to a case should not be foreclosed from objecting to a stipulation and agreement simply because the stipulation and agreement "resolves only issues as to which a party has stated no position and filed no testimony." If a party has sought and been granted intervention as a party in a particular case, the Commission's rules should not provide that an objection to a stipulation and agreement filed by other parties "shall have no effect." The amendment of section (2) of rule 2.115, to include subsection (E) as proposed by the Commission should be withdrawn.
RESPONSE AND EXPLANATION OF CHANGE: Based on this and other comments, the Commission is persuaded to withdraw the third sentence of proposed subsection (2)(B), relating to "conditional assents" because the proposed language is confusing and unnecessary. Additionally, the Commission is persuaded by this and other comments to withdraw the proposed subsection (2)(E).

COMMENT: Jason L. Ross, of Greensfelder, Hemker & Gale, P.C., provided comments on behalf of Fidelity Communication Services I, Inc., Fidelity Communication Services II, Inc., Fidelity Communication Services III, Inc., and Fidelity Cablevision, Inc. Ross commented that, in particular, the Fidelity CLECs oppose subsections 2(B), (C) and (E) of the proposed amendment on the grounds that these provisions may violate the due process rights of a party that is not a signatory to a "nonunanimous" stipulation and agreement; may discourage interested parties from intervening in cases that may affect their interests; and appear to effectively eliminate a party's ability to agree "not to oppose" a stipulation and agreement, and seemingly force the party to either join as a signatory in support of the stipulation or file an objection to said stipulation. While the Fidelity CLECs do not necessarily take issue with the notion that a failure to timely object constitutes a waiver -- although seven (7) days is a very short period -- they are concerned that a failure to timely object may be viewed, procedurally, as consent to the resolution of the stipulated issues or to the validity of the statement of the stipulated facts. While the Fidelity CLECs make every effort to comply with the Commission's filing requirements, and appreciate the Commission's need and desire to expeditiously move cases forward on the docket, they maintain that eliminating the mechanism by which a party can participate only with respect to those issues that are of importance to it, and agree not to oppose the resolution of the remainder, constitutes a denial of due process, by forcing a procedural presumption -- namely that the stipulation is unanimous -- that may adversely affect the party in future cases. The Fidelity CLECs request that the Commission preserve some procedural mechanism, i.e., the ability to agree not to oppose certain stipulated facts or resolved issues, where a party, although bound by the decision in the case, is not forced or deemed to take a position either way on every issue. To hold otherwise may discourage parties from intervening and participating in cases. The wording of subsection 2(E) also seems to ignore the fact that stipulations and agreements are often the product of informal negotiations between the parties, reached prior to any formal statement of position or filing of testimony in the record. Accordingly, the Fidelity CLECs request that, should the Commission reject the suggestions stated above, that subsection 2(E) be clarified to apply only where position statements or testimony could have been filed in the case under the procedural schedule. Otherwise, a party may be "steamrolled" early in a case before it has had the

opportunity to conduct discovery or otherwise thoroughly investigate the issues. Finally, the Fidelity CLECs also have concerns about the meaning of the terms "conditional assent" (used in subsection 2(C)) and "stipulation and agreement," as such terms are apparently not defined in the proposed amendment or otherwise in the *Code of State Regulations*. For example, must a stipulation and agreement be captioned as such when filed with the Commission to be considered a "stipulation and agreement?" Also, would a provision in a stipulation and agreement that conditions the agreement on the acceptance by the Commission of all terms contained therein be considered "conditional assent?"
RESPONSE AND EXPLANATION OF CHANGE: See the responses to the comments above. Based on this and other comments, the Commission is persuaded to withdraw the third sentence of proposed subsection (2)(B), relating to "conditional assents" because the proposed language is confusing and unnecessary. Additionally, the Commission is persuaded by this and other comments to withdraw the original proposed language of subsection (2)(E) and to substitute language that permits a party to neither join nor object to a nonunanimous stipulation and agreement, but to simply not oppose it.

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 continue the existing rule 2.115, and each of its sections, without modification. They commented that this proposed amendment appears to remove a party's right to be heard if it objects to the proposed stipulation. *State ex rel Fischer v. PSC,* 645 SW.2d 39 (Mo. App. 1982) sets out the rights of parties to a case when a nonunanimous stipulation is filed, including the right to a full and fair hearing on the issues. While subsection (2)(B) of this proposed amendment allows a party to object to a proposed stipulation, the portion of the statute requiring a requested hearing is removed. The proposed amendment is silent relating to the granting of a hearing to a party objecting to a proposed stipulation and does not explain the meaning or effect of an objection. Removing a party's right to a hearing would also deny a party's right to cross-examination guaranteed under section 536.070, RSMo. Subsection (2)(E) requires a party to have stated a position and filed testimony on a particular issue in order to object to that issue in a nonunanimous stipulation. This deprives a party of the right to develop evidence on cross examination. Section 384 .420.1, RSMo, allows parties to introduce evidence without the requirement of prefiled testimony as a condition of participation. In addition, if a stipulation is entered into before testimony is filed, this would disallow any party not agreeing to the stipulation the right to object. Under section 536.080.1, RSMo, all parties have the right to present oral argument or file a brief and this rule would contradict that right by not allowing a party to object to a stipulation on an issue in which it had not previously filed a position or testimony. Subsection (2)(D) of this proposed amendment appears to convert a nonunanimous stipulation into a binding agreement if a nonsignatory objects to the stipulation. In many cases, a signatory's acquiescence to a stipulation is predicated on the understanding that all of the provisions of the stipulation will be accepted as a whole. A party to a

stipulation may be willing to agree to certain provisions of a stipulation that would otherwise be unacceptable in order to have the whole agreement. If the stipulation is not accepted as a whole, the parties' positions may differ greatly from that which was filed in the stipulation. Parties should have the right to negotiate and agree as to what effect an objection or hearing has on their continued agreement with the stipulation. A party should continue to have the right to change its position on the separate issues if a hearing is held. Robert C. Johnson also offered comments at the hearing. He commented that the use of nonunanimous stipulations and agreements amounts to a denial of due process of law.
RESPONSE AND EXPLANATION OF CHANGE: See the responses to the comments above. With modifications based on the comments received, the Commission concludes that the proposed amendment is superior to the existing rule. Therefore, the Commission will adopt it. Based on this and other comments, the Commission has added language to proposed subsection (2)(D) that permits a signatory party to repudiate a nonunanimous stipulation and agreement to which another party has objected.

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 stipulation to contain stipulated facts sufficient to support the stipulated outcome was not likely to be workable in practice. He suggested that the Commission use on-the-record presentations when it desires to inquire into a stipulation and agreement. He further commented that the rule should preserve the right of any party to request a hearing. He further commented that the response period allowed of seven (7) days was insufficient. Conrad also commented that the rule should preserve the right to conditionally assent to a stipulation and agreement. He further commented that he did not believe the proposed amendment complies with the *Fischer* decision. He suggested that the Commission convene a roundtable with members of the utility bar to address procedural changes.
RESPONSE: See the responses to the comments above. For the most part, the Commission has made changes to accomplish these suggestions and to make clear the adherence of the amended rule to the *Fischer* decision. As explained above, the Commission does not believe that a roundtable is necessary at this time. Likewise, as explained above, the Commission concludes that the seven (7) day interval is acceptable.

COMMENT: James Fischer of Fischer & Dority, P.C., offered comments at the hearing. He commented that the proposed amendment should include a statement that a hearing will be held upon request.
RESPONSE AND EXPLANATION OPF CHANGE: See the response to the comments above. The Commission has added language to proposed subsection (2)(D) intended to accomplish this.

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 an on-the-record presentation is the appropriate

vehicle by which the Commission may determine whether a settlement is in the public interest.
RESPONSE: See the responses to the comments above. The Commission has adopted the suggestion about the use of on-the-record presentations, although this is not reflected in the text of the proposed amendment.

No other comments were received.

4 CSR 240-2.115 Stipulations and Agreements

(1) Stipulations and Agreements.
(A) The parties may at any time file a stipulation and agreement as a proposed resolution of all or any part of a contested case. A stipulation and agreement shall be filed as a pleading.
(B) The commission may resolve all or any part of a contested case on the basis of a stipulation and agreement.

(2) Nonunanimous Stipulations and Agreements.
(A) A nonunanimous stipulation and agreement is any stipulation and agreement which is entered into by fewer than all of the parties.
(B) Each party shall have seven (7) days from the filing of a nonunanimous stipulation and agreement to file an objection to the nonunanimous stipulation and agreement. Failure to file a timely objection shall constitute a full waiver of that party's right to a hearing.
(C) If no party timely objects to a nonunanimous stipulation and agreement, the commission may treat the nonunanimous stipulation and agreement as a unanimous stipulation and agreement.
(D) A nonunanimous stipulation and agreement to which a timely objection has been filed shall be considered to be merely a position of the signatory parties to the stipulated position, except that no party shall be bound by it. All issues shall remain for determination after hearing.
(E) A party may indicate that it does not oppose all or part of a nonunanimous stipulation and agreement.