

STATE OF MISSOURI
PUBLIC SERVICE COMMISSION
JEFFERSON CITY
November 14, 2001

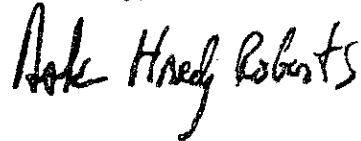
CASE NO: AX-2002-159

Office of the Public Counsel
P.O. Box 7800
Jefferson City, MO 65102

General Counsel
Missouri Public Service Commission
P.O. Box 360
Jefferson City, MO 65102

Enclosed find certified copy of an NOTICE in the above-numbered case(s).

Sincerely,



Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge

**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI**

In the Matter of Proposed Rulemaking, 4 CSR)
240-2.117, Summary Determination.) **Case No. AX-2002-159**

NOTICE OF RESPONSE TO PUBLIC RECORD REQUEST

On November 6, 2001, the Office of the Public Counsel filed a Sunshine Law Request, requesting "that the Commission make publicly available all documents circulated to the members of the Public Service Commission regarding the above docketed case, including any drafts of a proposed rule or proposed amendments to a rule."

Drafts of proposed rules, and proposed amendments to rules, are informal workpapers and are used merely as an aid to discussion in the course of the rulemaking process. Drafts are circulated to the members of the Commission prior to Agenda meetings and are used during discussion at the meetings. The drafts are not retained, but are discarded after the Agenda meetings. The text of the proposed rule or amendment is retained in electronic form between meetings; once it has been published in the Missouri Register, the electronic draft is discarded.

Are such informal workpapers public records subject to disclosure under the Missouri Sunshine Law in Chapter 610, RSMo 2000? Section 610.010(6), RSMo 2000, defines a "public record":

"Public record", any record, whether written or electronically stored, retained by or of any public governmental body including any report, survey, memorandum, or other document or study prepared and presented to the public governmental body by a consultant or other professional service paid for in whole or in part by public funds;

provided, however, that personally identifiable student records maintained by public educational institutions shall be open for inspection by the parents, guardian or other custodian of students under the age of eighteen years and by the parents, guardian or other custodian and the student if the student is over the age of eighteen years. The term "public record" shall not include any internal memorandum or letter received or prepared by or on behalf of a member of a public governmental body consisting of advice, opinions and recommendations in connection with the deliberative decision-making process of said body, unless such records are retained by the public governmental body or presented at a public meeting[.]

The workpapers in question are "internal memorand[a] . . . prepared . . . on behalf of a member of a public governmental body consisting of advice, opinions and recommendations in connection with the deliberative decision-making process of said body[.]" Thus, they are not subject to Sunshine Law disclosure unless they are either "retained" by the Commission or "presented at a public meeting." As far as retention goes, it appears that any item that actually exists at the moment the Sunshine Law request is made is "retained" for the purposes of the law.¹ Therefore, to the extent that the workpapers still exist, they are subject to disclosure.

Section 610.023.3, RSMo 2000, provides:

Each request for access to a public record shall be acted upon as soon as possible, but in no event later than the end of the third business day following the date the request is received by the custodian of records of a public governmental body. If access to the public record is not granted immediately, the custodian shall give a detailed explanation of the cause for further delay and the place and earliest time and date that the record will be available for inspection. This period for document production may exceed three days for reasonable cause.

¹ See *Hemeyer v. KRCG-TV*, 6 S.W.3d 880, 882 (Mo. banc 1999). In *Hemeyer*, the Court concluded that a videotape routinely re-used within four-and-one-half-days was "retained" within the meaning of Section 610.010, RSMo 2000.

In compliance with Section 610.023.3, RSMo 2000, it is noted that the delay in responding was occasioned by the need to search for surviving copies of the draft workpapers sought by Public Counsel.

Attached hereto is a copy of the text of the proposed rule as retained electronically. This is the only document available within the scope of Public Counsel's request.

BY THE COMMISSION



Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge

(S E A L)

Dated at Jefferson City, Missouri,
on this 14th day of November, 2001.

Thompson, Deputy Chief Regulatory Law Judge

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

PROPOSED RULE

4 CSR 240-2.117 Summary Disposition of Contested Cases

PURPOSE: This rule provides for disposition of a contested case by disposition in the nature of summary judgment or judgment on the pleadings.

(1) Summary determination:

(A) Any party may by motion, with or without supporting affidavits, seek disposition of all or any part of a contested 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 twenty (20) 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 ten (10) 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 shall 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 and that any party is entitled to relief as a matter of law as to all or any part of the contested case. The commission may order summary determination against the moving party. 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 contested 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--On its own motion or on the motion of any party, the commission may dispose of all or any part of a contested case on the pleadings whenever such disposition is not otherwise contrary to law.

AUTHORITY: Section 386.410, RSMo 2000. Original rule filed Nov. 13, 2001.

PUBLIC ENTITY COST: This proposed rule will not cost state agencies or political subdivisions more than \$500 in the aggregate.

PRIVATE ENTITY COST: This proposed rule will not cost private entities more than \$500 in the aggregate.

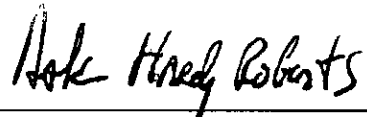
NOTICE TO SUBMIT COMMENTS: Anyone may file a statement in support of or in opposition to this proposed rule with the Missouri Public Service Commission, Dale Hardy Roberts, Secretary, P.O. Box 360, Jefferson City, MO 65102. To be considered, comments shall be filed on or before [DATE]. Comments should refer to Case No. AX-2002-159 and be filed with an original and fourteen (14) copies. No public hearing is scheduled.

STATE OF MISSOURI

OFFICE OF THE PUBLIC SERVICE COMMISSION

I have compared the preceding copy with the original on file in this office and
I do hereby certify the same to be a true copy therefrom and the whole thereof.

WITNESS my hand and seal of the Public Service Commission, at Jefferson City,
Missouri, this 14th day of Nov. 2001.



Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge

