

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.

2. 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." The availability of summary judgment

motions, and the legal standard which must be applied to such motions, are contained in both the Missouri Rules of Civil Procedure² and the Federal Rules of Civil Procedure.³ There is no reason why the Commission should not also have a procedure available to parties to obtain summary determination of a contested case, upon the motion of any party, under the same standards contained in both the Missouri and Federal Rules of Civil Procedure.

3. There is one aspect of the Commission's proposed rule regarding summary disposition of contested cases which Southwestern Bell does not believe the Commission should adopt. Section (1)(E) of the Commission's proposed summary determination rule provides that "[T]he commission may order summary determination against the moving party." It is clear that if the Commission determines that a party filing a motion for summary determination fails to establish that such relief is appropriate under the relevant standard, the Commission should deny the motion. That is a far cry, however, from not only denying the moving party's motion, but also from ordering summary determination against the moving party, as proposed by the Commission. 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. As in both federal and state court practice, under any summary determination rule adopted by the Commission, if any party believes that summary determination is warranted, that party may file a motion for summary determination. If an adverse party believes that summary determination is appropriate against the moving party's claim, the second party is free to file its own motion for summary determination. The Commission should not, however, grant summary determination against a party filing a motion for summary disposition, in the absence of a motion filed by an opposing party, supported by

¹ See, Rule 74.04.

³ See, [Fed.R.Civ.P.Rule 56](#).

appropriate affidavits, pleadings, testimony, etc. Such a rule could well deprive a moving party of its right to due process, and should not be adopted.

4. Southwestern Bell believes that the commission should adopt proposed Rule 2.117, with the following modification to subsection (E):

(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 ~~the moving any~~ party is entitled to relief as a matter of law as to all or any part of the contested case.

~~the moving party~~. An order granting summary determination shall include findings of fact and conclusions of law.

WHEREFORE, Southwestern Bell respectfully requests that the Commission adopt new Rule 2.117, as modified as proposed herein, to provide for summary disposition of contested cases.

Respectfully submitted,

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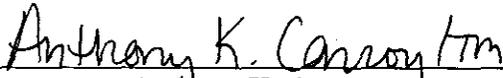
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CERTIFICATE OF SERVICE

Copies of this document were served on the following parties via hand-delivery on May 31, 2002.



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