

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

Eddie Shepherd,

Complainant,

v.

KCP&L Greater Missouri Operations Company,

Respondent.

)  
)  
)  
)  
)  
)  
)  
)  
)  
)  
)

File No. EC-2011-0373

**ORDER REGARDING MOTION  
FOR SUMMARY DETERMINATION**

Issue Date: December 23, 2011

Effective Date: December 23, 2011

The Missouri Public Service Commission is:

- Reserving ruling on *KCP&L Greater Missouri Operations Company's Motion for Summary Disposition* ("motion");
- Ordering a supplement to the motion; and
- Setting a time for responses to the supplemented motion.

Mr. Shepherd filed the complaint.<sup>1</sup> On any complaint, the complainant has the burden of proving<sup>2</sup> that a public utility has violated either a statute; or a Commission regulation, tariff, or order.<sup>3</sup> Mr. Shepherd claims a billing adjustment, on allegations of inaccurate metering, against KCP&L Greater Missouri Operations Company ("GMO"). GMO filed the motion on November 4 and Eddie Shepherd filed a response to the motion on December 7.

---

<sup>1</sup> On May 16. All dates are in 2011.

<sup>2</sup> *State ex rel. Tel-Central of Jefferson City, Inc. v. Public Serv. Comm'n of Missouri*, 806 S.W.2d 432, 435 (Mo. App., W.D. 1991).

<sup>3</sup> Section 386.390.1, RSMo 2000.

## A. Summary Determination

Mr. Shepherd's response to the motion states that GMO "shouldn't mind to go to court to prove me wrong" and "I want my day in court [.]". But the Commission's regulations provide that one party *can* prove another party wrong *without* a day in court:

### 4 CSR 240-2.117 Summary Disposition

#### (1) Summary Determination.

(A) [A]ny party may by motion . . . seek disposition of all or any part of a case by 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 [<sup>4</sup>]

In other words, the Commission will decide this case without an evidentiary hearing if the party filing the motion for summary determination ("movant") meets a certain burden.

But that burden is greater than the burden for winning with an evidentiary hearing. With an evidentiary hearing, the Commission decides a complaint by the preponderance of the evidence.<sup>5</sup> Under that standard, Mr. Shepherd must show that a violation is more likely than not.<sup>6</sup> GMO has no burden of proof and can prevail even without any evidence in its favor on that procedure.<sup>7</sup> The procedure is different for summary determination as 4 CSR 240-2.117(1),<sup>8</sup> and case law discussing that regulation's language,<sup>9</sup> describe.

---

<sup>4</sup> 4 CSR 240-2.117(1)(E) (emphasis added).

<sup>5</sup> State Board of Nursing v. Berry, 32 S.W.3d 638, 641 (Mo. App., W.D. 2000).

<sup>6</sup> Id.

<sup>7</sup> Stiff v. Stiff, 989 S.W.2d 623, 628 (Mo. App., S. D. 1999) (quoting Brown v. Mustion, 884 S.W.2d 365, 369 (Mo. App., S.D. 1994)).

<sup>8</sup> Set forth in full in the Appendix to this order.

Even a movant with no burden of proof on the complaint has a burden when filing a motion for summary determination. That burden is to demonstrate a legal entitlement to relief. Legal entitlement to relief appears when the facts determinative of a claim or defense (“material facts”) are established without genuine dispute. If the movant establishes each material fact, and no genuine dispute appears as to any material fact,<sup>10</sup> the movant *must* win.

The material facts depend on the theory at issue, which party has the burden of proof, and whether the movant is a claimant party or defending party. A defending movant prevails on summary determination by establishing facts: (1) negating at least one element necessary to the claim; or (2) showing that, after discovery, the claimant will be unable to support any one element of the complaint; or (3) constituting the elements of an affirmative defense.<sup>11</sup> In addition summary determination must further the public interest.<sup>12</sup>

Whichever of those characterizations we apply to GMO’s theory, GMO’s motion must fail for lack of evidence establishing the facts material to its defense.

## **B. The Motion**

GMO’s defense is that the meter complies with the tariff provision on meter accuracy and billing adjustments:

### **5.03 Meter Testing**

[GMO]’s meters shall be tested for accuracy in accordance with the Commission’s Rule included in 4 CSR 240-10.030 [.]

---

<sup>9</sup> *ITT Comm. Fin. Corp. v. Mid-Am. Marine Supply Corp.*, 854 S.W.2d 371, 380-82 (Mo. banc 1993). That case discusses Missouri Supreme Court Rule 74.04, which is sufficiently similar to the Commission’s regulation to make cases interpreting the rule helpful in understanding the regulation. *Johnson v. Mo. Bd. of Nursing Adm’rs*, 130 S.W.3d 619, 626 (Mo. App., W.D. 2004).

<sup>10</sup> This, too, makes the burden without a hearing greater than burden with a hearing. A merely genuine dispute bars a decision on summary determination. With a hearing, the Commission resolves disputes of fact and makes a decision.

<sup>11</sup> 854 S.W.2d at 380-82.

<sup>12</sup> 4 CSR 240-2.117(1)(E).

## 5.04 Billing Adjustments

A. For all billing errors, GMO will determine from all related and available information the probable period during which this condition existed and shall make billing adjustments for the estimated period involved [.]

\* \* \*

C. Where, upon test, a meter error is found to be three percent (3%) or less, no billing adjustment will be made. [<sup>13</sup>]

If a meter error is found to be three percent (3%) or less, there is no metering violation, and Mr. Shepherd cannot have a billing adjustment.

To support that defense, GMO alleges compliance with the tariff. To support that allegation, GMO offers documents showing meter inaccuracy less than 3%. To support the use of those documents in a motion for summary determination requires an affidavit demonstrating authenticity.<sup>14</sup> To demonstrate authenticity, GMO offers an affidavit stating only that the affiant's review of the documents convinces him that they are "complete and accurate."<sup>15</sup> GMO's affidavit offers neither any first-hand knowledge of the matters recorded in the documents, nor any exception to the hearsay rule for the documents.

An affidavit may support a motion for summary determination.<sup>16</sup> An affidavit that merely states what the affiant learned from another person is hearsay.<sup>17</sup> "An affidavit which relates information gained from other documents relates hearsay, not such facts as would be

---

<sup>13</sup> KCP&L Greater Missouri Operations Company Tariff, Tracking No. JE-2009-0312, *P.S.C. Mo. No. 1*, Original Sheet Nos. R-32 through R-33.

<sup>14</sup> *Saunders-Thalden and Associates, Inc. v. Thomas Berkeley Consulting Engineer, Inc.*, 825 S.W.2d 385, 387 (Mo. App., W.D. 1992).

<sup>15</sup> The affidavit also states that tests documents record meter tests "performed according to Missouri Public Service Commission rules" but is silent as to which rules the unknown tester used. It is true that inferences reasonably drawn from the record may support a motion for summary determination, but the nature of an inference is discretionary. *Johnson v. Missouri Bd. of Nursing Adm'rs*, 130 S.W.3d 619, 631 (Mo. App., W.D. 2004). And using discretion as a substitute for evidence is not in the public interest.

<sup>16</sup> 4 CSR 240-2.117(1)(E).

<sup>17</sup> *New Prime, Inc. v. Prof'l Logistics Mgt. Co., Inc.*, 28 S.W.3d 898, 905 (Mo. App., S.D. 2000).

admissible in evidence, and is not sufficient to support a motion for summary determination.”<sup>18</sup> The technical rules of evidence do not apply in this action,<sup>19</sup> as they do not apply in any contested case, but the Commission must apply the fundamental rules of evidence.<sup>20</sup> Fundamental rules of evidence include the rule against hearsay.<sup>21</sup> GMO has not supported its motion with admissible evidence, so the Commission will not grant the motion.

### C. Ruling

The Commission will give GMO an opportunity to remedy the deficiency<sup>22</sup> because the Commission’s regulations provide:

Small formal complaint case hearings shall be conducted in an informal summary manner whenever possible [.]

\* \* \*

3. The regulatory law judge shall assume an affirmative duty to determine the merits of the claims and defenses of the parties [.]<sup>23</sup>

Therefore, the Commission will order GMO to file a supplement to the motion supplying the foundational deficiency described in this order. The Commission will also set a time for responses to the motion for showing (i) that the supplemented motion does not establish the material facts of a defense or (ii) that those material facts remain subject to a genuine dispute.

---

<sup>18</sup> *Allen v. St. Luke’s Hosp. of Kansas City*, 532 S.W.2d 505, 508 (Mo. App. K.C.D. 1975).

<sup>19</sup> 4 CSR 240-2.070(15)(F) (1).

<sup>20</sup> *Lagud v. Kansas City Bd. of Police Comm’rs*, 136 S.W.3d 786, 792 (Mo. banc 2004).

<sup>21</sup> *Speer v. City of Joplin*, 839 S.W.2d 359, 360 (Mo. App., S.D. 1992).

<sup>22</sup> This is also the procedure mandated when a best evidence objection is sustained at hearing. Section 536.070(9), RSMo 2000.

<sup>23</sup> 4 CSR 240-2.070(15)(F).

**THE COMMISSION ORDERS THAT:**

1. KCP&L Greater Missouri Operations Company ("GMO") shall file a supplement to *KCP&L Greater Missouri Operations Company's Motion for Summary Disposition* no later than January 13, 2012.
2. No later than February 10, 2012, Eddie Shepherd shall, and any other party may, file a response to the motion for summary determination as supplemented.
3. This order is effective immediately upon issuance.

**BY THE COMMISSION**



Steven C. Reed  
Secretary

( S E A L )

Daniel Jordan, Senior Regulatory Law Judge,  
by delegation of authority pursuant  
to Section 386.240, RSMo 2000.

Dated at Jefferson City, Missouri,  
on this 23<sup>rd</sup> day of December, 2011.

#### **Appendix: 4 CSR 240-2.117(1)**

(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.