

Emma J. McFarlin and Rebecca Shepherd,  
Complainants,  
v.  
KCP&L Greater Missouri Operations Company,  
Respondent.

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<sup>4</sup> Section 386.390.1, RSMo 2000.

show a violation by a preponderance of the evidence.<sup>5</sup> Preponderance means the greater weight—complainants must show that a violation more likely happened than did not happen.<sup>6</sup> KCPL has no burden of proof so it could prevail without offering any evidence.<sup>7</sup>

The purpose of the hearing is to establish facts and resolve disputes of fact. But if a party can establish the facts that determine a claim, and no one raises at least a genuine dispute over those facts, that party may prevail on the claim without an evidentiary hearing. That procedure is the basis of the motion and is called summary determination.

Summary determination is a greater burden than an evidentiary hearing, as the Commission's regulation and case law<sup>8</sup> describe. Even a movant with no burden of proof on the complaint has a burden when filing a motion for summary determination.

#### **4 CSR 240-2.117 Summary Disposition<sup>9</sup>**

##### **(1) Summary Determination.**

(A) [A]ny party may by motion . . . seek disposition of all or any part of a case by summary determination [.]

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(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 [and] that any party is entitled to relief as a matter of law as to all or any part of the case [<sup>10</sup>]

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<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> *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>9</sup> Set forth in full in the Appendix to this order.

<sup>10</sup> 4 CSR 240-2.117(1)(E) (emphasis added).

In addition, summary determination must further the public interest.<sup>11</sup>

Under that language, movant's 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. Any merely genuine dispute bars a decision, and the Commission does not resolve disputes of fact, on summary determination.

For a movant defending against a claim, the material facts are those that: (1) negate at least one element necessary to the claim; or (2) show that, after discovery, the claimants will be unable to support any one element of the complaint; or (3) constitute all the elements of an affirmative defense.<sup>12</sup> Whichever of those we apply to KCPL's theory, the motion fails for lack of evidence establishing the material facts.

## **B. The Motion**

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

### **6.09 Billing Adjustments**

- (a) Where, upon test, the kilowatt-hour meter error is found to be 2% or less, no billing adjustment will be made. [<sup>13</sup>]

To show that complainant's meter is within 2%, KCPL offers meter test documents. To lay a foundation for using those documents, meaning to prove that the documents are what they claim to be, KCPL offers an affidavit.<sup>14</sup>

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<sup>11</sup> 4 CSR 240-2.117(1)(E).

<sup>12</sup> 854 S.W.2d at 380-82.

<sup>13</sup> [KCPL] General Rules and Regulations Applying to Electric Service for Rate Area No. 1-Urban Area & Rate Area No. 3-Suburban Area, P.S.C. Mo. No. 2, Fifth Sheet No. 1.24.

<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).

An affidavit may support a motion for summary determination<sup>15</sup> but KCPL's affidavit offers no first-hand knowledge about the document or the test.<sup>16</sup> An affidavit that merely relays 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 admissible in evidence, and is not sufficient to support a motion for summary determination. [<sup>18</sup>]

KCPL's affidavit supports no exception to the hearsay rule for the documents. The Commission must apply the fundamental rules of evidence,<sup>19</sup> which include the rule against hearsay.<sup>20</sup>

KCPL has not supported its motion with admissible evidence, so the Commission will not grant the motion.

### C. Ruling

The Commission will give KCPL an opportunity to remedy the deficiency<sup>21</sup> because the Commission's regulations provide:

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

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<sup>15</sup> 4 CSR 240-2.117(1)(E).

<sup>16</sup> The affidavit also states that the 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>17</sup> *New Prime, Inc. v. Prof'l Logistics Mgt. Co., Inc.*, 28 S.W.3d 898, 905 (Mo. App., S.D. 2000).

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

<sup>20</sup> *Speer v. City of Joplin*, 839 S.W.2d 359, 360 (Mo. App., S.D. 1992).

<sup>21</sup> This is also the mandated remedy when a best evidence objection is sustained at hearing. Section 536.070(9), RSMo 2000.

3. The regulatory law judge shall assume an affirmative duty to determine the merits of the claims and defenses of the parties [<sup>22</sup>]

Therefore, the Commission will order KCPL 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>23</sup>

**THE COMMISSION ORDERS THAT:**

1. Kansas City Power & Light Company shall file a supplement, as described in the body of this order, to *Kansas City Power & Light Company's Motion for Partial Summary Disposition* no later than April 3, 2013.
2. No later than April 17, 2013, any response to the motion for summary determination, as supplemented, is due.
3. This order is effective immediately upon issuance.

**BY THE COMMISSION**



Shelley Brueggemann  
Acting Secretary

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

Dated at Jefferson City, Missouri,  
on this 21<sup>st</sup> day of March, 2013.

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<sup>22</sup> 4 CSR 240-2.070(15)(F).

<sup>23</sup> Such filings occurred in *Shepherd v. KCP&L Greater Missouri Operations*, File No. EC-2011-0373.