

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

In the Matter of Union Electric Company)	
d/b/a AmerenUE for Authority to File)	
Tariffs Increasing Rates for Electric)	<u>Case No. ER-2010-0036</u>
Service Provided to Customers in the)	
Company's Missouri Service Area.)	

MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY DETERMINATION

COMES NOW the Office of the Public Counsel and for its Memorandum in Support of Motion for Summary Determination states as follows:

Introduction:

1. In the concurrently-filed motion, Public Counsel seeks summary disposition of AmerenUE's request for approval of its interim increase tariffs. Summary disposition is appropriate when there are no material facts in dispute and only legal issues need be addressed. It is also appropriate where the moving party is not entitled to relief even when viewing all facts in a light most favorable to the moving party. The latter is the case here.

2. The Commission's rule on summary determination, 4 CSR 240-2.117(B) requires that every such motion be accompanied by separate legal memorandum explaining why summary determination should be granted. Because the granting of summary determination is heavily dependent on the facts and circumstances under consideration, some of the explanation of why summary determination should be granted is necessarily contained in the motion itself rather than this memorandum.

Summary Disposition under Commission rule 4 CSR 240-2.117:

3. Commission rule 4 CSR 240-2.117, “Summary Disposition,” establishes procedures for the Commission to decide cases or specific issues by summary determination under appropriate circumstances. The “Purpose” section of the rule states: “This rule provides for disposition of a contested case by disposition in the nature of summary judgment or judgment on the pleadings.” Both summary judgment and judgment on the pleadings are addressed in the Rules of Civil Procedure, at 74.04 and 55.27, respectively. Because of the Commission’s practice of prefiling testimony, summary disposition in this case is necessarily more like summary judgment than judgment on the pleadings.¹ The Commission’s Summary Disposition rule appears to embrace both summary judgment and judgment on the pleadings; subpart (1) of the rule, although titled “Summary Determination” rather than summary judgment, outlines a process very similar to that addressed by Rule 74.04 and subpart (2) outlines a process very similar to Rule 55.27.

4. Under 4 CSR 240-2.117(1), “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 close of the intervention period.”

5. The standard for granting a motion for summary determination in 4 CSR 240-2.117(1) is:

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.

¹ Indeed, as discussed in the concurrently-filed motion, the most analogous procedure is probably a directed verdict, although such a procedure is not specifically discussed in the Commission’s rules.

This standard is essentially the same as that found in Rule 74.04(c)(6), which provides that: “If the motion, the response, the reply and the sur-reply show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law, the court shall enter summary judgment forthwith.” The Missouri Supreme Court has described the criteria as follows:

When considering appeals from summary judgments, the Court will review the record in the light most favorable to the party against whom judgment was entered. Facts set forth by affidavit or otherwise in support of a party's motion are taken as true unless contradicted by the non-moving party's response to the summary judgment motion. The non-movant is accorded the benefit of all reasonable inferences from the record. The Court's review is essentially de novo. The criteria on appeal for testing the propriety of summary judgment are no different from those that should be employed by the trial court to determine the propriety of sustaining the motion initially.²

The Commission's rule for summary disposition was designed to "make litigation before the Commission more efficient and less costly for each entity and each person involved."³ The Commission has frequently held that: “The public interest clearly favors the quick and efficient resolution of matters before the Commission on the pleadings without an evidentiary hearing when the circumstances dictate.”⁴ Indeed, the Commission has previously recognized that “[t]he time and cost to hold hearings on [a] matter when there is no genuine issue as to any material fact would be contrary to the public interest.”⁵

² Donaldson v. Crawford, 230 S.W.3d 340, 342 (Mo. 2007)

³ In the Matter of the Proposed 4 CSR 240-117, Case No. AX-2002-159, Order Finding Necessity for Rulemaking, September 27, 2001.

⁴ See, e.g., Order Granting Summary Determination and Dismissing Application, issued in Case No. EO-2008-0031 (In the Matter of the Application of Wasatch Investments, LC, for Change of Electric Supplier) on May 29, 2008; 2008 Mo. PSC LEXIS 567

⁵ Determination on the Pleadings, issued in Case No. EU-2005-0041 (In the Matter of the Application of Aquila Inc. for an Accounting Authority Order Concerning Fuel Purchases) on October 7, 2004;

6. The Commission should not consider itself required to hold a hearing in this matter. By definition, a hearing is “required” in contested matters, but nonetheless courts routinely uphold decisions disposing of contested matter on the basis of summary disposition. There is nothing inherently different about a contested case involving tariffs.

7. As set forth in the concurrently-filed motion, the material facts gleaned from the testimony of four witnesses filed on October 20 in support of AmerenUE’s request for an interim increase do not support the granting of the request. At most, the testimony establishes that regulatory lag works in a utility’s favor at some times, against the utility at others, and that currently we are in the latter. It also establishes, if one takes it at face value, that AmerenUE has a certain level of negative impact from regulatory lag at the current time (as do, presumably, all the other utilities that have been filing rate cases in the last few years). Most important is what the testimony does **not** establish: that regulatory lag is so harmful to AmerenUE right now that the Commission should take the extraordinary step of increasing rates without a thorough examination of all relevant factors.

8. What AmerenUE apparently wants is a policy determination that any utility should be awarded an interim increase if it can make a prima facie showing that it is not earning its authorized rate of return because of new investment or increasing costs. AmerenUE wants the award of an interim increase to be a routine rather than an extraordinary procedure. Nonetheless, it has not provided sufficient grounds to justify such a quantum jump in policy. The Commission’s primary role is protecting consumers. "The Commission's principal purpose is to

serve and protect ratepayers."⁶ To allow an interim rate increase under circumstances like AmerenUE alleges here would be to elevate the protection of the utility over the protection of the public. The Commission should not require the parties to devote more time and resources to this issue when the Commission's path is so clear.

WHEREFORE, Public Counsel respectfully submits this Memorandum in Support of Motion for Summary Determination.

Respectfully submitted,

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⁶State ex. rel. Capital City Water Co. v. PSC, 850 S.W.2d 903, 911 (Mo. App. W.D. 1993). The Court in Capital City Water cited to State ex rel. Crown Coach Co. v. Public Service Com., 179 S.W.2d 123, 127 (Mo. Ct. App. 1944), which held that "[T]he dominant thought and purpose of the policy [of regulating utilities] is the protection of the public while the protection given the utility is merely incidental."

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been emailed to parties of record this 28th day of October 2009.

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