

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

Richard D. Smith,)	
Complainant,)	
)	
vs.)	Case No. EC-2007-0106
)	
AmerenUE,)	
Respondent.)	

**JOINT MOTION TO DISMISS
AND MOTION FOR EXPEDITED TREATMENT**

COMES NOW Union Electric Company d/b/a AmerenUE (AmerenUE or Company) and Black River Electric Cooperative (Black River), and for their Joint Motion to Dismiss and Motion for Expedited Treatment (Joint Motion), state as follows:

1. On September 19, 2006, Richard D. Smith of 12787 John Smith Road, Potosi, Missouri 63166 (Complainant) initiated this Missouri Public Service Commission (Commission) proceeding by filing a Complaint against AmerenUE.
2. On September 20, 2006, AmerenUE filed its Answer. Black River was joined as a party on October 17, 2006 and filed its Answer on November 15, 2006.

**The Commission Should Dismiss for
Failure to State a Claim upon which Relief may be Granted**

3. AmerenUE and Black River jointly move to dismiss this Complaint for failure to state a claim upon which relief may be granted, as provided by 4 CSR 240-2.070(6). When determining whether or not a complaint states a claim or cause of action, the Commission will consider as true all facts alleged by the complainant and then determine if those facts constitute a recognized claim. Eastwood v. North Central Missouri Drug Task Force, 15 S.W. 3d 65 (Mo. App. W.D. 2000). In this case, even assuming the factual assertions made by the Complainant

are true, the Complaint fails to allege facts sufficient to state a claim upon which this Commission can act.

4. Missouri statutory law is clear, a complainant must set forth what law, rule or Commission order has been violated. “Complaint may be made...by any...person...in writing, setting forth any act or thing done or omitted to be done by any...public utility, including any rule, regulation...” 386.390 RSMo. The applicable Commission regulation contains similar language. “Complaint may be made by petition or complaint in writing, setting forth any act or thing done or omitted to be done by any...public utility...in violation or claimed to be in violation of any provision of law or of any rule or order or decision of the commission.” 4 CSR 240-2.070(3).

5. Accordingly, in order to state a claim upon which relief may be granted, Complainant must set forth facts which, if true, constitute a violation of law, regulation or Commission order.

6. The determination that a statute, regulation or order would be violated under the facts as alleged is the only question the Commission must answer when determining whether or not to grant this Motion to Dismiss.

“[A] motion to dismiss for failure to state a cause of action is solely a test of the adequacy of the plaintiff's petition. It assumes that all of plaintiff's averments are true, and liberally grants to plaintiff all reasonable inferences therefrom. No attempt is made to weigh any facts alleged as to whether they are credible or persuasive. Instead, the petition is reviewed in an almost academic manner, to determine if the facts alleged meet the elements of a recognized cause of action, or of a cause that might be adopted in that case. *Reynolds v. Diamond Foods & Poultry, Inc.*, 79 S.W.3d 907, 909 (Mo. banc 2002). Thus, a motion to dismiss for failure to state a claim focuses solely on the factual allegations in the petition. The court will not resort to extrinsic facts, and allegations suggesting possible or potential liability are not sufficient to withstand a motion to dismiss for failure to state a claim.” *Truck*

Ins. Exchange v. Prairie Framing, LLC, 162 S.W.3d 64, 83, (Mo.App. W.D., 2005).

7. The Complaint asserts very few facts. Complainant asserts the occurrence of numerous power outages and power surges; that an outage occurred in July of 2006; that AmerenUE crews were transferred out of his area after the July 2006 storms; that outside crews which worked in his area had outdated maps and that his area is “Priority 5” for restoration efforts.

8. Assuming these facts are true, Complainant has failed to state how any of the allegations constitute a violation of law, rule or Commission order. There is no citation to any Missouri statute, Commission regulation or Commission order of which Complainant believes AmerenUE is in violation. In fact, even assuming these facts to be true, there is no Missouri statute, Commission regulation or Commission order which would be violated.

**The Commission should Dismiss because the
Remedy Requested is not Available under Missouri Law**

9. Complainant requests to be “reinstated” with Black River. Under Missouri law, Complainant cannot be transferred under current Missouri law under the current circumstances.

10. The transfer request is improper for several reasons. First, the Commission has already determined that service by AmerenUE is in the public interest, as evidenced by the Commission’s approval of a Territorial Agreement between AmerenUE and Black River on June 7, 1996 in Case No. EO-95-400, et. al.

11. Additionally, the anti-flip-flop provisions of Section 393.106 RSMo 2004 provide that once a utility lawfully commences supplying retail electric service through permanent facilities, no other supplier shall have the right to provide service to that customer. The limited exceptions are municipal annexation pursuant to Sections 386.800 RSMo and 394.080 RSMo;

through a territorial agreement pursuant to Section 394.312 RSMo; or when the Commission finds that a change of suppliers is in the public interest.

12. These three exceptions do not apply to the situation before the Commission. This is not a situation involving municipal annexation. There is no territorial agreement other than the one that authorized AmerenUE to service the Complainant, and neither AmerenUE nor Black River desires a transfer of this territory at this time. Finally, there is no evidence that the public interest would be better served by transferring Complainant to Black River.

Request for Expedited Treatment

13. AmerenUE and Black River request the Commission grant this motion expedited treatment. On November 21, 2006, the Commission issued its Order Setting Prehearing Conference and Directing Filing of a Proposed Procedural Schedule (Order). Due to the holiday schedule, counsel for AmerenUE and Black River were not aware of this Order until November 27, 2006. The Commission Order set a prehearing conference for December 6, 2006 at 10:00. AmerenUE and Black River ask that the Commission rule on this Joint Motion no later than December 5, 2006, in order to avoid the necessity for parties to prepare for and attend a prehearing conference which may not be necessary. In the alternative, AmerenUE and Black River ask that the Commission postpone the prehearing conference until after such time as this Joint Motion has been ruled upon. This Joint Motion has been filed as soon as possible after receiving the Commission's Order.

14. AmerenUE and Black River believe the Commission should dismiss this Complaint because the Complainant failed to state a claim upon which relief may be granted in that there is no claim that AmerenUE has violated any law, rule or Commission order and because the remedy requested is not available under Missouri law.

WHEREFORE, AmerenUE and Black River respectfully requests that the Commission issue an order dismissing this Complaint and that the Commission act on this request in an expedited manner.

Respectfully submitted,

UNION ELECTRIC COMPANY,
d/b/a AmerenUE

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Answer was served on the following parties via electronic mail (e-mail) or via regular mail on this 29th day of November, 2006.

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