

**STATE OF MISSOURI
PUBLIC SERVICE COMMISSION**

At a session of the Public Service
Commission held at its office in
Jefferson City on the 20th day of
June, 2012.

Albert Silk,)	
)	
Complainant,)	
)	
v.)	<u>File No. IC-2012-0268</u>
)	
Embarq Missouri, Inc.)	
d/b/a CenturyLink,)	
Respondent.)	

ORDER DISMISSING COMPLAINT WITHOUT PREJUDICE

Issue Date: June 20, 2012

Effective Date: June 30, 2012

On February 1, 2012, Albert Silk filed a complaint against Embarq Missouri, Inc. d/b/a CenturyLink ("CenturyLink") with the Missouri Public Service Commission ("Commission"). CenturyLink filed a timely answer to that complaint on March 2, 2012, including a motion to dismiss the complaint for failure to state a claim upon which relief may be granted. On May 11, 2012, the Commission's Staff filed a report following an investigation into the allegations of the complaint. The Staff report identified no actions of CenturyLink that violated any statute, rule, order or tariff and recommended that the Commission dismiss the complaint.

A prehearing conference was scheduled for May 22, 2012, beginning at 10:00 a.m. CenturyLink and the Commission's Staff appeared for the conference by their counsel. Mr. Silk did not appear in person or by telephone and did not contact the Commission prior

to the prehearing conference to request a continuance. During the prehearing conference the regulatory law judge attempted to contact Mr. Silk by telephone at the telephone number Mr. Silk had provided in his complaint, but no person answered the call.

On May 22, 2012, the Commission issued an order that directed the Mr. Silk to show cause why his complaint should not be dismissed for his failure to appear at the prehearing conference. That order required Mr. Silk to respond by June 1, 2012. No response has been filed.

Two Commission rules deal with the failure of a party to appear for a prehearing conference. First, Commission rule 4 CSR 240-2.116(3) provides as follows:

A party may be dismissed from a case for failure to comply with any order issued by the commission, including failure to appear at any scheduled proceeding such as a public hearing, prehearing conference, hearing, or mediation session.

Second, Commission rule 4 CSR240-2.090(5) provides that:

Failure to appear at a prehearing conference without previously having secured a continuance shall constitute grounds for dismissal of the party or the party's complaint, application or other action unless good cause for the failure to appear is shown.

Mr. Silk failed to appear for the scheduled prehearing conference and failed to comply with a Commission order to show good cause for not appearing. Therefore, as provided by the Commission's rules, his complaint will be dismissed for failure to appear and failure to comply with Commission orders.

In addition, CenturyLink has also filed a motion to dismiss Mr. Silk's complaint. The standard for review for consideration of a motion to dismiss has been clearly established by Missouri's courts as follows:

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.¹

The complainant is required to set forth “any act or thing done or omitted to be done by any corporation, person or public utility, including any rule, regulation or charge heretofore established or fixed by or for any corporation, person or 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.”²

In his complaint, Mr. Silk alleges that CenturyLink made “errors” regarding his Lifeline eligibility and expressed his general wish that the Commission not permit CenturyLink to “abuse consumers” and “exploit the system”. He also stated that he hopes he is not getting billed for two telephone numbers. However, Mr. Silk does not specifically allege that CenturyLink violated any statute, rule, order of the Commission, or tariff provision, as required by Section 386.390.1, RSMo. While an error by CenturyLink could conceivably rise to the level of a violation of law, Mr. Silk has failed to allege facts that might establish such a violation. Therefore, the complaint fails to plead facts that meet the elements of a recognized cause of action. The Commission will grant CenturyLink’s motion to dismiss the complaint for failure to state a claim upon which relief may be granted.

THE COMMISSION ORDERS THAT:

1. For all the reasons stated above in the body of this order, the complaint of Albert Silk against Embarq Missouri, Inc. d/b/a CenturyLink is dismissed without prejudice.

¹ *Bosch v. St. Louis Healthcare Network*, 41 S.W.3d 462, 463-464 (Mo. Banc 2001).

² Section 386.390.1, RSMo 2000.

2. This order shall become effective on June 30, 2012.
3. This file shall be closed on July 1, 2012.

BY THE COMMISSION

A handwritten signature in black ink, appearing to read 'S. C. Reed', is written over a faint, larger signature.

Steven C. Reed
Secretary

(S E A L)

Gunn, Chm., Jarrett, Kenney,
and Stoll, CC., concur.

Bushmann, Regulatory Law Judge