BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

Jimmie E. Small,	)	
Complainant,	)	
	)	
vs.	)	Case No: EC-2015-0058
	)	
Union Electric Company, d/b/a	)	
Ameren Missouri,	)	
Respondent.	)	

AMEREN MISSOURI'S POST-HEARING BRIEF

COMES NOW Union Electric Company d/b/a Ameren Missouri (the "Company") and respectfully submits its post-hearing brief.

I. Introduction

Mr. Small filed a complaint against the Company on August 29, 2014 (the "Complaint"). Although the single-page Complaint was not detailed, the gist of the Complaint was: the morning of that same day, Mr. Small requested that his electric service to Lot #23, 23067 Potter Trail, Kirksville, Missouri be reconnected; the Company took an "adverse act;" and the unnamed act was retaliatory, wrongful, violated unidentified state and federal statutes, and was unconstitutional.[1] In its Answer, the Company stated that it did not retaliate or violate any Missouri or federal law when Mr. Small asked for reconnection. Rather, it simply told Mr. Small what would be required before service could be reconnected, advised him to call the Company's 800 number to request that service be restored, and later advised him in writing that in order to reconnect Mr. Small, he must pay 80% of a past due bill for prior electric service provided by the Company to him at that address.[2] In its defense, the Company stated that its tariffs and the Commission's own rules permit it to deny service to a customer who has a delinquent utility charge.[3]

[1] *Complaint* (August 29, 2014), EFIS Item 1.
[2] *Answer and Motion to Dismiss* (October 2, 2014), EFIS Item 2.
[3] *Id*.

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Ameren Missouri asked that the Commission dismiss Mr. Small's Complaint, but that motion was denied.[4] Mr. Small asked that the Commission grant him summary determination on his Complaint, but that motion was denied.[5]

The Commission set the Complaint for an April 20, 2015 evidentiary hearing.[6] The Commission ordered that the subject matter for hearing was, "whether a bill for service at Lot 23, 2306[7] Potter Trail, Kirksville, Missouri ("service address") remains unpaid and whether such bill supports denial of reconnection to the service address."[7] Less than one month before the hearing date, Mr. Small filed a motion for leave to amend the Complaint, but the Commission denied Mr. Small's motion.[8] Less than five days before the hearing date, Mr. Small filed another motion for leave to amend the Complaint, but the Commission denied that motion, as well.[9] The evidentiary hearing was conducted on April 20, 2015, with Ameren Missouri, Commission Staff, and Mr. Small all appearing and presenting evidence.[10]

Because Mr. Small brought the Complaint, he has the burden of proving that the Company violated a statute, rule, order or Commission-approved tariff .[11] He must prove the violation by a preponderance of the evidence—that it is more likely than not.[12]

Although the Company does not have the burden of proof, because the Company has a duty to maintain records regarding service and payment, the Commission altered the usual sequence of proof and ordered that at the hearing, the Company would go first and present evidence supporting its defense, after which Staff would make its witness available, and finally,

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[4] *Id.*; *Orders for Small Formal Complaint, Denying Motions to Dismiss and Setting Time for Filing* (October 15, 2014) EFIS Item 13.
[5] *Rule 4 CSR 240 - 2.117 Motion for Summary Determination* (November 14, 2014) EFIS Item 25; *Order Denying Motion to Strike and Motion for Summary Determination* (January 27, 2015) EFIS Item 34.
[6] *Notice of Hearing* (February 10, 2015), EFIS Item 41.
[7] *Order Governing Hearing and Prehearing Procedure* (February 10, 2015), EFIS Item 42.
[8] *Complainant's MO.R. Civ. Proc. Rule 55.27(g) (3) Motion to Dismiss Ameren Missouri's September 8, 2014 Alleged Electric Utility Bill Claim in the State Amount of $***.**,* (April 1, 2015), EFIS Item 49; *Order Denying Leave to Amend Complaint and Denying Continuance* (April 3, 2015), EFIS Item 54.
[9] *Complainant's Mo. R. Civ. Proc. RULE 55.33 (b), (d), Supplemental Pleading to Conform to on Commission File Record Evidence* (April 16, 2015), EFIS Item 58; *Order Denying Leave to Amend the Complaint* (April 16, 2015), EFIS Item 60.
[10] *See, Transcript, Evidentiary Hearing Vol. I 4/20/2015*, EFIS Item 64 ("Tr.").
[11] *State ex rel. GS Technologies Operating Co., Inc. v. Pub. Serv. Comm'n of State of Mo.*, 116 S.W.3d 680, 693 (Mo. Ct. App. 2003).
[12] *Bonney v. Environmental Engineering, Inc*., 224 S.W.3d 109, 120 (Mo. App. 2007); *State ex rel. Amrine v.Roper*, 102 S.W.3d 541, 548 (Mo. banc 2003); *Rodriguez v. Suzuki Motor Corp*., 936 S.W.2d 104, 110 (Mo.banc 1996). *Holt v. Director of Revenue, State of Mo*., 3 S.W.3d 427, 430 (Mo. App. 1999); *McNear v. Rhoades*, 992 S.W.2d 877, 885 (Mo. App. 1999*); Rodriguez*, 936 S.W.2d at 109 - 111; *Wollen v. DePaul Health Center*, 828 S.W.2d 681, 685 (Mo. banc 1992).

Mr. Small could present his case.[13] At the evidentiary hearing, the Company presented expert witness testimony and documentary evidence, and cross-examined Staff's expert witness; Staff cross-examined the Company's expert witness and offered its own expert witness; and Mr. Small cross-examined the Company's expert witness, cross-examined Staff's expert witness, testified on his own behalf, and offered documentary evidence.[14]

II. Issues.

a. Whether a bill for service at Lot 23, 23067 Potter Trail, Kirksville, Missouri remains unpaid.

Ms. Cathy Hart, a Company employee, testified on behalf of the Company.[15] Ms. Hart was previously a Company customer service supervisor, handling billing issues and complaints, from 2001 through December, 2013.[16] Her current position, regulatory liason, which she has held since December of 2013, also involves working with informal and formal customer complaints.[17] Ms. Hart has general knowledge of Ameren Missouri's billing practices and recordkeeping, and accesses customer account records on a regular basis.[18] In preparation for the hearing, she reviewed Company documents and records pertaining to residential electric utility service provided to Mr. Small.[19] Through Ms. Hart, the Company offered the following exhibits pertaining to Mr. Small's electric utility service, which were admitted into evidence: Def. Ex. 1HC, the Company Account Activity Statement for Mr. Small's residential electric utility account number *****-***** (the "09 account")[20]; Def. Ex. 2HC, the Company Account Activity Statement for Mr. Small's residential electric utility account number *****-***** (the "018 account")[21]; Def. Ex. 3HC, the Company collection activity screen shot showing all collection activity for Mr. Small's 09 account[22]; and Def. Ex. 4HC, the Company collection activity screen shot showing all collection activity for Mr. Small's 018 account.[23] Exhibits 1HC-4HC are records the Company generates in the ordinary course of its business, to provide general

[13] *Order Governing Hearing and Prehearing Procedure* (February 10, 2015), EFIS Item 42; 4 CSR 240 - 2.110(5)(presiding officer has the authority to alter the usual order of procedure for hearings before the Commision).
[14] *See* Tr., generally.
[15] Tr. p. 6, l. 20 - 21.
[16] Tr. p. 7, l. 5 - 14.
[17] Tr. p. 6, l. 22 – p.7, l. 4; p. 7, l. 13 - 14.
[18] Tr. p. 7, l. 15 - 25.
[19] Tr. p. 8, l. 4 - 18.
[20] Tr. p. 9, l. 3 - p. 13, l.1.
[21] Tr. p. 14, l. 6 - p. 16, l.1.
[22] Tr. p. 16, l. 7 - p. 18, l. 23.
[23] Tr. p. 19, l. 12 - p. 23, l. 13; p. 26, l. 22 - p. 27, l. 10.

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account information or information about collections to customers who might request it and to provide a history of the account to customer care advisors who assist customers.[24] Through Ms. Hart, the Company also offered Def. Ex. 5HC, an exact copy of a letter Ms. Hart sent Mr. Small on September 8, 2014, except for the fact that the copy was unsigned, which was admitted into evidence.[25]

The Company's evidence on this issue was as follows. Ameren Missouri first provided residential electric utility service to Mr. Small at 23 Lakeroad Ct.,[26] Kirksville, Missouri, on May 15, 2002 under the 09 account number, and it continued there April 17, 2007.[27] The service was terminated for nonpayment.[28] Mr. Small's payments became irregular in mid-2006, and the amount in arrears increased steadily from October, 2006 through disconnection in April, 2007.[29] Over the life of account 09, Mr. Small received twelve disconnect notices, with six of those being sent between November, 2006 and April, 2007.[30] The delinquent balance on April 17, 2007 was $***.**.[31] The full amount that had been billed to Mr. Small immediately prior to the April 17, 2007 disconnection, for service through March 28, 2007, was $***.**.[32] Two days after the service was terminated, Mr. Small made a $*** payment.[33] On April 25, 2007, the Company sent a final bill for the 09 account, which netted the $*** payment against the $***.** prior balance and which included an additional charge of $**.** for service from March 28, 2007 through April 17, 2007, resulting in a final bill amount of $***.**. [34] On December 6, 2007, Mr. Small made a payment of $***, which reduced the unpaid account balance on the 09 account to $***.**.[35]

[24] Tr. p. 10, l. 17 - 25; p. 16, l. 21 - p. 17, l. 9.
[25] Tr. p. 33, l. 16 - p. 36, l. 17.
[26] There does not appear to be any dispute that Lot 23, 23067 Potter Trail, and 23 Lakeroad Ct. refer to the same Kirksville, Missouri service address. *See*, e.g. Mr. Small's *Complaint*, which refers to Lot #23, 23067 Potter Trail; Complainant's Exhibit 1HC, which refers to 23 Lakeroad Ct.; testimony of Cathy Hart to the same effect, Tr. p. 25, l. 12 - 15 (23 Lakeroad Ct. is the same as the address Mr. Small set out in his Complaint). And Mr. Small's cross-examination of Ms. Hart, Tr. p. 44, l. 5-7 ("—2009 case—you started in 2002 and turned electricity on there at Lakeroad Village trailer park; is that accurate?").
[27] Tr. p. 25, l. 9 - 20; Def. Ex. 1HC; Def. Ex. 3HC; Tr. p. 76, .25 – p.77, l. 9.
[28] Tr. p. 25, l. 21 - 22; Def. Ex. 3HC (Date: 4/17/07, Activity: Cut Out Non Pay).
[29] Def. Ex. 1HC, Payments/Credits column.
[30] Def. Ex. 3HC.
[31] Def. Ex. 3HC (Date: 4/17/07; Amount(s): $***.**).
[32] Tr. p. 25, l. 23 - 25; Def. Ex. 1HC, entry dated 3/29/2007.
[33] Def. Ex. 1HC, entry dated 4/19/2007.
[34] Def. Ex. 1HC, two entries dated 4/25/2007.
[35] Tr. p. 28, l. 10 - 20; Ex. 1HC, entries dated 12/6/2007 and 12/20/2007.

Mr. Small again began receiving residential electric utility service from the Company at the 23 Lakeroad Ct. address on December 20, 2007.[36] Because the $***.** balance remained unpaid, the Company transferred it to the 018 account, the new account that was established when he began taking service again.[37] Although Mr. Small was sent monthly bills for the service provided under the 018 account,[38] and was sent four disconnect notices to advise him that the 018 account would be disconnected for nonpayment,[39] Mr. Small never made *any* payments for the residential electric utility service he received under the 018 account.[40] As a result, his service was terminated for nonpayment on April 14, 2008.[41] At the time his service was terminated, his delinquent account balance was $***.**.[42] His final bill amount, which included that delinquent balance as well as a late payment charge of $*.**,[43] $**.** for service rendered from February 28, 2008 through March 31, 2008,[44] and $**.** for service rendered from March 31, 2008 through April 14, 2008,[45] was $***.**; the final bill in the amount of $***.** was issued on April 23, 2008, and was printed, dated and mailed to Mr. Small on April 24, 2008.[46] A copy of that final bill was admitted into evidence after Staff's witness, Ms. Gay Fred, testified on cross-examination that she received a copy of it from Mr. Small,[47] and identified Def. Ex. 6HC as the copy he gave her.[48] As of the date of the evidentiary hearing, the entire $***.** balance remained unpaid.[49]

Mr. Small presented no evidence that rebutted the testimony of Ms. Hart, the testimony of Ms. Fred, or the documentary evidence presented by the Company, which together establish that the Company provided residential electric utility service to Mr. Small at 23 Lakeroad Ct., Kirksville, Missouri; the Company billed Mr. Small for that service; the final bill for that service

[36] Tr. p. 28, l. 3 – 9; Def. Ex. 2HC, entry dated 12/20/2007; Tr. p. 77, l. 10-12.
[37] Tr. p. 28, l. 21 - p. 29, l. 11; Ex. 1HC, entries dated 12/20/2007; Ex. 2HC, entries dated 12/20/2007.
[38] Tr. p. 29, l. 12 - 25; Ex. 2HC, entries dated 12/31/2007, 1/31/2008, 2/29/2008, 4/01/2008.
[39] Def. Ex. 4HC, (Date: 1/31/08, Activity: Yellow Disconnect Notice; Date: 2/05/08, Activity: Pink Disconnect Notice; Date: 3/26/08, Activity: Yellow Disconnect Notice; Date 3/31/2008, Activity: Pink Disconnect Notice).
[40] Tr. p. 30, l. 20 - 22; Ex. 2HC, Payments/Credits column, reflecting that no payments were ever received.
[41] Tr. p. 30, l. 1 - 8; Ex. 4HC, (Date: 4/14/08, Activity: Cut Out Non Pay);
[42] Def. Ex. 4HC, (Date: 4/14/08, Amount(s): $***.**)
[43] Def. Ex. 2HC, entry dated 3/28/2008.
[44] Def. Ex. 2HC, entry dated 4/01/08.
[45] Def. Ex. 2HC, first entry dated 4/23/08.
[46] Def. Ex. 2HC, second entry dated 4/23/08; Tr. p. 30, l. 9 – 19.
[47] Tr. p. 86, l. 20 - p. 87, l. 10;
[48] Tr. p. 87, l. 11 - p. 88, l. 6; p. 88, l. 8 - p. 89, l. 24 (including the following exchange: **Mr. Small**: I didn't understand her to say that. Where did [Def. Ex. 6HC] originate from? **Ms. Fred**: It did come from you, Mr.Small.)
[49] Tr. p. 30, l. 20 - 25.

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was $***.**; Mr. Small received that final bill; and as of the date of the evidentiary hearing, the entire $***.** account balance remained outstanding.

He did not, for example, testify or present any evidence to the effect that he had paid the $***.**. Instead, Mr. Small relied on legal argument,[50] as he had in past pleadings,[51] to the effect that because the outstanding account balance is more than five years old, Ameren Missouri is prohibited by Missouri statute of limitations §516.120 RSMo, from claiming that Mr. Small has an unpaid account balance, and is barred from asserting the unpaid account balance as a defense against Mr. Small's allegation that the Company wrongfully refused to reconnect his service. Section 516.120 RSMo does not operate as Mr. Small wishes it would. It would bar Ameren Missouri from filing a civil action against Mr. Small to collect the $***.** unpaid account balance, but it does not erase his unpaid account balance. The statute bars the remedy of instituting a civil suit to enforce an obligation to pay, but it does not extinguish the obligation. ***Baron v. Kurn.***[52] Section 516.120 RSMo does not destroy Ameren Missouri's underlying right to the payment. ***State ex rel. Jones v. Nolte***.[53] The Commission recognized this when it denied reconsideration of Mr. Small's motion for summary determination.[54] Nor can the Commission grant Mr. Small affirmative relief based on the statute—such as an order that his outstanding balance no longer exists.[55] "A statute of limitation may be used as a defense but not as the basis for affirmative relief; or, as it has been stated, as a shield but not as a sword." ***Stock v. Schloman***.[56]

[50] Tr. p. 73, l. 18 - 21 (by Mr. Small)("If there is no—if there's no money due on an account and it was sent to Consumer Collection Management and if the statute of limitations has ran on the debt"); Tr. p. 76, l. 9-11 (by Mr. Small) ("Well apparently I have misread revised statute Missouri 6 and 516.120 five-year statute of limitations.")
[51] *Rule 4 CSR 240 - 2.117 Motion for Summary Determination* (November 14, 2014) EFIS Item 25, ¶22 ("Ameren Missouri[]…is prohibited and foreclosed by the applicable statute of limitations."); *Complainant's MO.R. Civ. Proc. Rule 55.27(g) (3) Motion to Dismiss Ameren Missouri's September 8, 2014 Alleged Electric Utility Bill Claim in the State Amount of $***.**,* (April 1, 2015), EFIS Item 49, ¶4 (referring to a five-year statute of limitations), ¶17 ("the statute of limitations []now bar[s] Company's claim dated September 08, 2014.").
[52] 164 S.W.2d 310, 317 (Mo, 1942) (considering §1014 RSMo 1939, the predecessor to §516.120).
[53] 165 S.W.2d 632, 638 (Mo. banc 1942). Contrast §516.120 RSMo with §516.350 RSMo, for example, which is not an ordinary statute of limitations in that it not only bars the remedy but "wipes out or cancels the debt" by creating a presumption of payment of judgments ten years after original rendition of the judgment (unless the judgment is revived). ***Lanning v. Lanning***, 574 S.W.2d 460, 462 (K.C. Ct. App. 1978).
[54] *Order Denying Reconsideration* (April 10, 2015), EFIS 56.
[55] *See*, Tr. p. 101, l. 25 - p. 102, l. 1, where Mr. Small asserts, "they—they can—they can give me a judgment that it's not owed."
[56] 18 S.W.2d 428, 432 (Mo. 1929).

b. Whether Mr. Small's unpaid bill for residential electric utility service to 23 Lakeroad Ct., Kirksville, Missouri supports denial of reconnection to that service address.

i. Mr. Small's bill for residential electric utility service remained unpaid at the time he went to the Kirksville office to request reconnection.

On this issue, the Company's evidence was as follows. On August 29, 2014,[57] Mr. Small again requested electric utility service from the Company.[58] As noted above, as of the date of the April 20, 2015 evidentiary hearing, the entire $***.** balance remained unpaid.[59] That means that as of August 29, 2014, Mr. Small had an $***.** unpaid bill for residential electric utility service to 23 Lakeroad Ct., Kirksville, Missouri.

ii. Mr. Small's unpaid bill for residential electric utility service was a valid basis on which Ameren Missouri could deny Mr. Small's request for reconnection.

Had Mr. Small applied for service, the unpaid account balance would have been a valid basis on which Ameren Missouri could deny his application for service. An "applicant" is, "an individual(s) or other legal entity who has applied to receive residential service." 4 CSR 240-13.015(1)(A). As Ms. Hart explained, to apply for service with the Company, an applicant needs to call the Ameren Missouri contact center 800 number, or speak with another Ameren Missouri representative who is qualified to process an application for service, like Ms. Hart.[60] Among other things, the applicant has to provide the representative verification of his identity, the representative has to verify account information, and during the application process the applicant would also be advised about optional services such as phone alerts and text alerts.[61]

Mr. Small never did any of those things.[62] He stopped in to the Company's Kirksville field office in person, spoke to a Company marketing employee there, and requested reconnection.[63] Because the Kirksville office is not a customer service office and because personnel there are not trained or qualified to process requests for service, the marketing employee advised him to follow the procedure of calling the Company's contact center 800

[57] *See, Complaint* (August 29, 2014), EFIS Item 1.
[58] Tr. p. 31, l. 1 - 3.
[59] Tr. p. 30, l. 20 - 25.
[60] Tr. p. 31, l. 17 - p. 33, l. 12.
[61] *Id.*
[62] Tr. p. 32, l. 24 - p. 33, l. 15.
[63] Tr. p. 31, l. 4 - 9.

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number to request service.[64] Mr. Small insisted on speaking to someone, so a construction supervisor from the Kirksville office called Mr. Small, to try to be helpful, and to also encourage him to call the contact center.[65] When Mr. Small did not get the result he wanted from the marketing employee or the construction supervisor, rather than call the Company and apply for service, he just turned around that same day and filed a Complaint.[66]

Ms. Hart reviewed the Company's contact records to determine if at any time after Mr. Small's visit to the Kirksville office he called the Company to apply for service.[67] She concluded that he did not, because there was no record of any call from Mr. Small on August 29th or afterward, where a contact center representative verified who he/she was speaking to, looked at the account, explained a requirement that Mr. Small would have to pay a certain percentage of the account before service would be restored, etc., all of which would have been entailed in such a call. [68]

Because Ms. Hart had spoken to Mr. Small in the past, she called Mr. Small on September 2, 2014 and left him a message, asking him to call her back so that she could explain what would be required in order for him to obtain service, but he did not return her call.[69] When she did not hear back from him, she wrote him a letter setting out what would be required.[70] The letter explained to Mr. Small, among other things, that because he had a past due bill for $***.**, the Company required that he pay 80% of that outstanding balance, $***.**, to have his service reconnected. Ms. Hart mailed the letter to Mr. Small's Milton, Iowa address as well as to the 23 Lakeroad Ct. address.[71] Mr. Small never contacted Ms. Hart after she sent the letter.[72]

Even assuming for argument's sake that Mr. Small "applied to receive residential service" by visiting the Kirksville field office and requesting reconnection,[73] his unpaid account

[64] Tr. p. 31, l. 1 - p. 32, l. 5
[65] Tr. p. 32, l. 10 - 20.
[66] *Notice of Contested Case and Order Directing Filings* (September 2, 2014), EFIS Item 2 ("On August 29, 2014, the Commission received the complaint, a copy of which is attached.").
[67] Tr. p. 32, l. 21 - p. 33, l.2.
[68] *Id.*; Tr. p. 33, l. 3 - 15.
[69] Tr. p. 33, l. 16 - 22; Def. Ex. 5HC.
[70] Tr. p. 33, l. 23 - p. 34, l.1.
[71] Def. Ex. 5HC (address line and cc line).
[72] Tr. p. 34, l. 2 - 10.
[73] In the event the Commission determines that Mr. Small did apply for service when he visited the Kirksville office, and that the Company representatives' inability to process his request constitutes a refusal to commence service, the Company submits that Ms. Hart's September 8, 2014 letter to Mr. Small, Def. Ex. 5HC, substantially complies with

balance was a valid basis on which Ameren Missouri could deny his request, and the Company was entitled to insist that he pay all (or a portion) of the balance as a condition of reconnection.

The Commission's Denial of Service rule, 4 CSR 240-13.035(1)(A), permits a utility to:

> refuse to commence service to an applicant for any of the following reasons…Failure to pay a delinquent utility charge for services provided by that utility or by its regulated affiliate that is not subject to dispute under applicable dispute review provisions of 4 CSR 240-13.045.

Mr. Small had a delinquent utility charge. Therefore, the Company is permitted to refuse to reconnect his service unless the charge was "subject to dispute under applicable dispute review provisions…." In other words, the Denial of Service rule protects applicants who have disputed a delinquent utility charge from a utility denial of service, provided the applicant has complied with all the applicable requirements of 4 CSR 240-13.045, the Commission's Disputes rule. When applied to an applicant for service, the Disputes rule requires that prior to requesting reconnection, the applicant must have registered the dispute with the utility and must have paid at least a portion of the charge. Mr. Small did not comply with those requirements.

Under subsection (1) of the Disputes rule, in order to place a charge in dispute, the customer/applicant:

> …*shall* advise a utility that all or part of a charge is in dispute by written notice, in person, or by a telephone message directed to the utility during normal business hours [and the] dispute *must* be registered with the utility at least twenty-four (24) hours prior to the date of proposed discontinuance of service as provided by these rules.[74]

Since an applicant doesn't have service, it makes sense that he must at least have registered his dispute *some* time prior to requesting service (as opposed to twenty-four hours prior to the date of a proposed discontinuance).[75]

Even when a dispute has been registered, subsection (5) of the Disputes rule requires that the customer/applicant:

> …*shall* pay to the utility an amount equal to that part of the charge not in dispute. The amount not in dispute shall be mutually determined by the parties…[.] [76]

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the written notice requirements of 4 CSR 240 - 13.035(1), any provision of which the Commission may waive or vary for good cause. 4 CSR 240 - 13.035(5).

[74] 4 CSR 240-13.045(1). Emphasis added.

[75] A more restrictive interpretation of this rule, as applied to applicants, would require that the applicant must have lodged his dispute twenty-four hours prior to the past discontinuance that resulted from the delinquent utility charge.

[76] 4 CSR 240-13.045(5). Emphasis added.

And if the parties are unable to mutually determine the amount in dispute, under subsection (6) of the Disputes rule, the applicant/customer:

> …*shall* pay to the utility the lesser of an amount not to exceed fifty percent (50%) of the charge in dispute or an amount based on usage during a like period under similar conditions which shall represent the amount not in dispute.[77]

If the applicant/customer fails to pay the amount not in dispute within four (4) working days from the date that the dispute is registered (or by the delinquent date of the disputed bill, whichever is later), subsection (7) provides that the failure "shall constitute a waiver of the customer's right to continuance of service and the utility may proceed to discontinue service…[.]"[78] In the case of an applicant, of course, "right to continuance" must be read to mean right to not be denied service due to the unpaid charges, and "utility may proceed to discontinue" must be read to mean "utility may deny service." In other words, if you don't make a good faith payment related to the charge in dispute, you waive your right to the protection of the Dispute rule, and the Company can deny service based on the unpaid account balance.

There was no evidence presented that Mr. Small complied with the provisions of 4 CSR 240-13.045. Mr. Small did not testify or provide any other evidence to show that he registered a dispute about charges with Ameren Missouri prior to requesting reconnection. The closest he came was badgering Ameren Missouri's witness with his hypothesis that *if* a customer who was *receiving* electric service called Ameren Missouri to advise of a dispute, and if the Company didn't like the sound of the customer's voice, the Company would shut his electricity off.[79]

Even if he *had* registered a dispute, in order to make his unpaid account balance "subject to dispute under applicable dispute review provisions" (and to protect himself from a denial of service based on that balance), he also would have to show that shortly after his dispute was registered, he paid Ameren Missouri "an amount equal to that part of the charge not in dispute."[80] Mr. Small did not testify or present any other evidence to prove: either (i) that he and Ameren Missouri mutually determined the amount not in dispute and he paid that amount,[81] or (ii) that the parties could not agree and so he paid the lesser of 50% of the $***.** or an

[77] 4 CSR 240-13.045(6). Emphasis added.
[78] 4 CSR 240-13.045(7).
[79] Tr. p. 41, l. 2 - 13; which hypothesis Ameren Missouri obviously denied: Tr. p. 41, l. 9 - 13.
[80] 4 CSR 240 - 13.045(5)
[81] 4 CSR 240 - 13.045(5).

amount based on usage during a like period.[82] In fact, the Company's uncontroverted evidence shows that Mr. Small has *never* paid *any* part of the $***.** unpaid account balance.[83] Even if Mr. Small had timely registered a dispute, per 4 CSR 240-13.045(7), he waived any right to not be denied service by failing to pay any part of this past due account balance.

The Company's requirement that Mr. Small pay 80% of his $***.** outstanding account balance in order to have his residential electric utility service restored also comports with the Company's Electric Service Tariff, General Rules and Regulations, I. General Provisions, C. Application for Service, Sheet 101. It provides, "…the Company shall not be required to commence supplying service to a customer…if at the time of application such customer…is indebted to the Company for the same class of service previously supplied at such premises or any other premises *until payment of, or satisfactory payment arrangements for, such indebtedness shall have been made*." (emphasis added).

At the time Mr. Small requested reconnection, he owed the Company $***.**, and he had not made that amount subject to dispute by registering his dispute and paying an appropriate portion of that amount. The Company was entitled to refuse to provide service to him if he applied for it, and was entitled to require that he pay the amount he owed, or make a satisfactory payment arrangement, before it commenced supplying him service. By Ms. Hart's letter dated September 8, 2014, the Company communicated to Mr. Small the partial payment towards the outstanding bill that would be required in order to reconnect his service. Mr. Small chose not to accept the Company's terms.

III. Matters Raised at the Hearing But Not at Issue in the Complaint.

At hearing, Mr. Small spent a considerable amount of effort cross-examining Ms. Hart, testifying, and presenting argument (sometimes all three in the same sentence) concerning if, when, and to what address the Company ever sent him personal notice prior to any *disconnection*, that he could dispute a bill.[84] In other words, Mr. Small concentrated his efforts

[82] 4 CSR 240 - 13.045(6).
[83] Tr. p. 30, l. 20 - 25.
[84] See e.g. Tr. p. 42, l. 18 - 20:

> Q. (by Mr. Small) Do you send him any type of a written notice, that the ordinary common person can understand, what your options are?;

Tr. p. 43, l. 2 - l.10:

> Q. (by Mr. Small) In the United States Supreme Court, in its Memphis Light and Gas Water Division versus Craft, 330—436 U.S.1. This United States Supreme Court, which is a nationwide case, it seems to—just when I read this—that the utility, when there is a dispute, they give the individual customer, when you threaten to shut his electricity off, you tell him specifically the time, date, and location that he might

on attempting to prove matters that were not raised in his one-page Complaint (which concerned his request for *reconnection*)[85], and that were not included in the issues that the Commission ordered would be the subject of the evidentiary hearing.[86]

a. Exchanges Touching on the Notice Issue.

Not surprisingly, on a few occasions Ameren Missouri's witness, and possibly the Presiding Officer, had difficulty comprehending what Mr. Small was asking Ms. Hart, since whether he was entitled to personal notice that he could dispute a bill prior to disconnection, or had received such personal notice, was not at issue in the Complaint. Interjecting this issue into the proceedings caused much confusion, as evidenced by the following exchange. Mr. Small handed Ms. Hart "a page of something."[87] First he asked her, "and my question is: According to your record, *when did any portion of this $***.**—*what year did it *start*?"[88] But then, before she could answer, he changed direction and stated that his purpose was to "*get to the times, the dates and places that [customers] receive a notice* that—you've got a right…to confer with Ameren Missouri Union Electric management about a dispute."[89] The Presiding Officer, however, did not understand Mr. Small to be inquiring about whether the Company gave Mr. Small any such notice, but that Mr. Small had asked her to "look[] for *the first indication in your records of a dispute* with Mr. Small."[90] All of that occurred before Ms. Hart had even begun to respond. Based on Mr. Small's first question, Ms. Hart understood Mr. Small to be asking her to identify what *charges* added up to $***.**, and so began tallying charges by referring to Ameren Missouri's account activity statement.[91] Mr. Small interrupted and instructed her to use the one-page document *he* gave her, explaining, "I'm trying to get into the record accurately *these entries*

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contact the utility and speak with management. Are you management?;

Tr. p. 53, l. 10 - 17:

> Q (by Mr. Small) And I'm trying to get to the times, the dates, and places that [customers] would actually receive a notice that…you have a right to confer with Ameren Missouri Union Electric management about a dispute.

Tr.p.62, l. 22 - p. 63, l. 2:

> Q. (by Mr. Small) Does Ameren Missouri Union Electric Company have any place in their records that pertain to Jim Small's complaint over the past five years where you've sent written notices—written notices that Mr. Small could go to management with a dispute to resolve disconnect threat or any other—do you have a written notice?

[85] *Complaint* (August 29, 2014), EFIS Item 1
[86] *Order Governing Hearing and Pre - hearing Procedure* (February 10, 2015), EFIS Item 42.
[87] Tr. p. 53, l. 25.
[88] Tr. p 52, l. 24 - p. 53, l. 2.
[89] Tr. p. 53, l. 10 - 17.
[90] Tr. p. 55, l. 14 - 18. (Emphasis added).
[91] Tr. p. 56, l. 7 - 10.

[i.e., on the document he handed her] which total $***.**, excluding the rest of the figures…I'm asking you—and take all the time you want—to *point out which of these entries total up to $***.**.*"[92] After she indicated that she could not answer the question by looking at that single page,[93] he reversed course and asked her to look at, "*your account records*"[.][94] Then he asked her if Ameren Missouri's exhibits 1HC and 2HC were incomplete,[95] at which point Ms. Hart finally explained to Mr. Small that it was *his* single-page document that was incomplete. [96]

Causing similar confusion were Mr. Small's questions/soliloquies that equated the Company's issuance of a disconnect notice, or issuance of any correspondence to Mr. Small, or actual disconnections of his service, with the existence of a dispute.[97] This despite the fact that Ms. Hart had tried to explain to Mr. Small that disconnect notices are prompted by the *delinquency of an account*. [98] That is, disconnect notices are not issued in retaliation for a customer calling and lodging a dispute, as Mr. Small had intimated.[99] As Ms. Hart clarified on redirect, the tally of disconnection notices issued by the Company, Complainant's Exhibit 1, was simply that, and did not reflect dates that any disputes were lodged.[100]

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[92] Tr. p. 57, l. 23 - p. 58, l. 4. (Emphasis added).
[93] Tr. p. 58, l. 5 - 14.
[94] Tr. p. 58, l. 16 - 20.
[95] Tr. p. 58, l. 22 - 25.
[96] Tr. p. 59, l. 14 - 20.
[97] See, e.g., Tr. p. 53, l. 10 - 18:

> Q (by Mr. Small)…And I'm trying to get the times, the dates and places that [customers] would actually receive a notice that…you have a right to confer with Ameren Missouri Union Electric management about a dispute. *You're calling it a dispute. We call it a turn - off, shut - off. It ain't no dispute*. (Emphasis added);

Tr. p. 61, l. 7 - 12:

> Q. (by Mr. Small) Ms. Hart, I'm going to hand you what's marked Complainant's Exhibit Item 1 and ask you to review that. Then I'm going to ask you if it accurately reflects the number on account 2009 [sic] and 2018 [sic]—*the number of disputes or notices* that Ameren Missouri provided the complainant in this case in regard—in regard to this Ameren notice…[.] (Emphasis added);

Tr. p. 64, l. 11 - 13:

> Q. (by Mr. Small) Does that [Defendant's Exhibit Item 5HC, Ms. Hart's September 8th, 2014 letter detailing the conditions on which service would be reconnected] reflect, in your judgment, in your position and years of experience, *does that reflect any type of a dispute*, Defendant's Exhibit Item 5HC? (Emphasis added);

Tr. p. 72, l. 13 - 19:

> Q. (by Mr. Small) Yeah. Plaintiff's Exhibit Item 1, so out of these 12 plus 4—out of *these 16 entries that reflect a disagreement, a notice of disconnect, a notice of possible disconnect*, you don't have a notice or a document of record that we could show the Commission where you provided Mr. Small an opportunity if you're dissatisfied with any of these decisions on your account, you have a right to contact on appeal with Ameren Missouri management? (Emphasis added)

[98] Tr. p. 49, l. 1 - 4.
[99] Tr. p. 41, l. 2 - 8.
[100] Tr. p. 79, l. 1 - 12.

b. Mr. Small's Misplaced Reliance on *Memphis Light, Gas & Water Division v. Craft*.

At the conclusion of the evidentiary hearing, the Presiding Officer instructed Ameren Missouri to provide written argument, "to address Mr. Small's reading of the court case that he cited, the United States Supreme Court case which he reads as providing a due process right to a discussion with Ameren's management."[101]

Mr. Small appears to believe that disconnection of his residential electric utility service deprived him of a property right in continued utility services, such that the lack of opportunity for a hearing with Ameren Missouri management, or even notice of his right to a hearing, prior to disconnection, violated rights granted to him under the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution. He also appears to believe that the alleged violation of his Due Process rights would support a private cause of action for damages under 42 USC §1983.[102]

The Due Process Clause of the Fourteenth Amendment to the U.S. Constitution provides, "[Nor] shall any State deprive any person of life, liberty, or property, without due process of law." 42 U.S.C §1983 creates a private cause of action (hereafter, a "1983 action") for violations of Fourteenth Amendment rights:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress…[.]

Mr. Small relies[103] on the decision of the United States Supreme Court in ***Memphis Light, Gas & Water Division v. Craft***[104] holding that a *municipal utility* violated a customer's Fourteenth Amendment Due Process rights. Mr. Small has read too much into ***Memphis Light***. The Fourteenth Amendment only constrains the actions of *government*, and ***Memphis Light*** did not address what makes a utility a "state actor" for purposes of the Fourteenth Amendment. State law determines whether an interest is a protected property interest for purposes of the Due Process Clause of the Fourteenth Amendment, and ***Memphis Light*** only addressed whether

[101] Tr. p. 113, l. 19 - 24.
[102] See, *Complainant's Mo. R. Civ. Proc. Rule 55.33 (B), (D),Supplemental Peading To Conform To On Commission File Record Evidence* (April 16, 2015) EFIS Item 58, ¶11.
[103] Tr. p. 98, l. 12 - 15; Tr., p. 43, l. 2 - 10.
[104] 436 U.S. 1 (1978).

public utility service was a protected property interest under *Tennessee* law. Finally, in a subsequent case not cited by Mr. Small, ***City of W. Covina v. Perkins***,[105] the Supreme Court clarified that Due Process does *not* entitle a party to individualized notice of remedies and procedures that are set forth in documents accessible to the public.

Simply briefing ***Memphis Light*** and applying its holdings to the facts related to Mr. Small's complaint would not provide the Commission much assistance in analyzing Mr. Small's Due Process violation claim (if that is what the Commission wants to do). Because the Presiding Officer specifically asked Ameren Missouri to address ***Memphis Light***, however, Ameren Missouri will first address it, and the notice of due process issue to which it pertains, before addressing other elements of such a claim.

i. Individualized Notice of Due Process

Memphis Light

In ***Memphis Light***, customers brought a 1983 action against the utilities division of the city of Memphis, Tennessee and its officers and employees, seeking relief for termination of the customers' utility service without due process of law.[106] The municipal utility had disconnected plaintiffs' electric utility service for nonpayment several times.[107] Although the municipal utility sent disconnection notices prior to cut, the notices did not advise the customers that the municipal utility had an internal process that the customers could participate in to dispute the unpaid bills that were prompting the disconnections.[108] The internal process was governed by policies, rules and regulations adopted by the board of commissioners for the municipal utility, and included credit counseling, referral to management personnel if customers were not satisfied with the credit counseling, referral to a supervisor in credit and collections, and if the customer were still dissatisfied, an appeal to the board of commissioners.[109] The municipal utility was "subject to the ultimate control of the municipal government", but was statutorily exempt from regulation by the Tennessee public service commission. [110]

[105] 525 U.S. 234 (1999).
[106] ***Memphis Light***, 436 U.S. at 3.
[107] ***Id.*** at 5.
[108] ***Id.***
[109] ***Id.*** at n.4.
[110] ***Id.*** at 4.

The District Court held that the plaintiffs had no property interest in their municipal utility service, but considered anyway whether procedural due process had been granted. It found that the plaintiffs hadn't been given adequate *notice* of the procedure, but that no plaintiffs were actually denied a due process opportunity to be heard, except possibly the Crafts. [111] The District Court rendered judgment for the defendants.[112] The Court of Appeals reversed, holding that the municipal utility's procedures did not comport with due process.[113] The U.S. Supreme Court granted certiorari, "to consider this constitutional question of importance in the operation of *municipal utilities* throughout the Nation."[114] Plaintiffs' writ of cert. sought the Supreme Court's determination of (i) whether a municipal utility's termination policies constitute "state action", (ii) whether the municipal utility's termination deprived a customer of property within the meaning of the due process clause, and (iii) assuming "state action" and a "property interest", whether the municipal utility's procedures did afford plaintiffs due process.[115]

Notably, the Supreme Court did *not* actually determine the threshold issue of whether there was state action, because in its brief, the municipal utility abandoned the contention that there was no "state action" involved.[116]

On the issue of the requisite property interest, the Supreme Court explained that *whether* a protected property interest exists is determined under *state* law, but whether that property interest rises to a "legitimate claim of entitlement protected by the Due Process Clause" is determined under federal constitutional law.[117] The Court examined Tennessee case law and found that it drew a line between utility bills that are the subject of a bona fide dispute, and those that are not, in determining when a utility may discontinue service.[118] It found that Tennessee case law obligated public utilities to provide service without discrimination and without denial, except for good and sufficient cause, and prohibited utilities from terminating service, "except for nonpayment of a just service bill."[119] The Court found that "local law" remedies giving a utility customer the right to enjoin a wrongful threat of termination, or to bring a subsequent

[111] ***Id.*** at 5.
[112] ***Id***.
[113] ***Id.*** at 6.
[114] ***Id.*** at 1 (emphasis added).
[115] ***Id***. at 7.
[116] ***Id.*** at 9.
[117] ***Id.*** at 9.
[118] ***Id.*** at 11.
[119] ***Id.***

action for damages or refund, were evidence that the state recognized utility service as a protected interest. [120] Because that protected interest could only be terminated "for cause", the Court found the interest rose to the level of a legitimate claim of entitlement protected by the Due Process clause.[121]

On the issue of what process was due customers prior to termination, the Supreme Court framed the issue as, "whether due process requires that a municipal utility notify the customer of the availability of an avenue of redress within the organization should he wish to contest a particular charge."[122] The municipal utility did send a notice prior to disconnection, but the notice did not mention any procedure to address a disputed claim.[123] The Supreme Court found the notice was adequate to warn of a possible termination but, "was not reasonably calculated to inform them of the availability of an opportunity to present their objections to their bills," and therefore did not meet constitutional requirements, because it did "not advise the customer of the availability of a procedure for protesting a proposed termination of utility service as unjustified."[124] The Supreme Court *declined* to go so far as requiring that plaintiff should have been given "an opportunity to talk with management" or with corporate officers of the utility, though the District Court had suggested as much.[125] The Supreme Court held that due process required that the customers be provided an opportunity to present their complaint about their bill to a designated employee of the municipal utility, and found that such process was not made available to the customers.[126] The Court held that "some administrative procedure for entertaining customer complaints prior to termination is required to afford reasonable assurance against erroneous or arbitrary withholding of essential services."[127] The Supreme Court explained that, "[s]ome kind of hearing" might be as simple as an opportunity to meet with an employee empowered to resolve the dispute, in advance of the date of termination, and the utility would retain the option to terminate service after affording the opportunity and concluding that the bill was just.[128] The Supreme Court held that, "[b]ecause of the failure to provide *notice*

[120] ***Id.*** at 11.
[121] ***Id.*** at 12.
[122] ***Id.*** at 13.
[123] ***Id.***
[124] ***Id.*** at 14-15.
[125] ***Id.*** at n.13.
[126] ***Id.*** at 16.
[127] ***Id.*** at 18.
[128] ***Id.*** at 19.

reasonably calculated to apprise the customers of the *availability* of an *administrative* procedure to consider their complaint of erroneous billing, and the failure to afford them an opportunity to present their complaint to a designated employee empowered to review disputed bills and rectify error, petitioners deprived respondents of an interest in property without due process of law."[129]

W. Covina

Subsequent to ***Memphis Light***, the United States Supreme Court made clear that a particular holding in ***Memphis Light*** (one on which Mr. Small relies) was limited to the facts of that case. In ***W. Covina***, police officers lawfully seized property from the Perkins' home in the course of a homicide investigation.[130] The officers left a "notice of service" detailing that a search had taken place and listing the items that had been seized.[131] Mr. Perkins called the police, attempting to find out how to have the seized property returned, and was told he needed to obtain a court order.[132] He went to the municipal court to see the judge who had issued the warrant, but that judge was on vacation.[133] He asked that another judge release the property but the court was unable to find anything under his name.[134] The Perkinses filed suit, and in the course of hearing their *Fourth* Amendment claim, the district court invited the parties to brief whether there had been a *Fourteenth* Amendment violation of the Perkinses' due process rights. The Perkinses argued that although state law provided a procedure for return of their property, it was unavailable to them because the City did not give them adequate notice of their remedy nor did it give them the information needed to pursue the remedy.[135] The district court granted summary judgment for the City, finding that the remedies available to the Perkinses under California law satisfied due process.[136] The Court of Appeals reversed. Although it found that the remedies themselves satisfied due process requirements, it analogized to ***Memphis Light***, and determined that the Due Process clause *also* required that the City give the Perkinses *notice* of

[129] ***Id.*** at 21. (emphasis added).
[130] ***W. Covina,*** 525 U.S. at 236.
[131] ***Id.*** at 237.
[132] ***Id.***
[133] ***Id.***
[134] ***Id.***
[135] ***Id.*** at 238.
[136] ***Id.***

the state procedures for the return of seized property and the information required to invoke the procedures.[137]

On review, the United States Supreme Court reversed the Court of Appeals and remanded, finding that the Court of Appeals', "expansive argument lacks support in our case law and mandates notice not now prescribed by the Federal Government or by any one of the 50 States."[138] The Supreme Court explained that while individualized notice is required to advise a property owner that his property has been seized by the police, "[n]o similar rationale justifies requiring individualized notice of state-law remedies which, like those at issue here, are established by published, generally available state statutes and case law."[139] In other words, no individualized notice is necessary if the party can, "turn to these public sources to learn about the remedial procedures available to him."[140] The Supreme Court cited with approval its decision in ***Atkins v. Parker***,[141] where it had expressed, "the entire structure of our democratic government rests on the premise that the individual citizen is capable of informing himself about the particular policies that affect his destiny."[142] The Supreme Court in ***W. Covina*** held that ***Memphis Light*** did not hold to the contrary, because in ***Memphis Light***, the Supreme Court had relied on the fact that *no* written version of the municipal utility's dispute resolution procedure was accessible to customers who had complaints about their bills, such that customers could not reasonably be expected to educate themselves about such procedures.[143] The Supreme Court concluded that, "[w]hile ***Memphis Light*** demonstrates that notice of the procedures for protecting one's property interests *may* be required when those procedures are arcane and are not set forth in documents accessible to the public, *it does not support a general rule that notice of remedies and procedures is required*."[144]

Courts in numerous reported cases since have recognized that in ***W. Covina***, the Supreme Court clarified, and narrowed considerably its holding in ***Memphis Light.*** *See* e.g., ***Crum v. Mo. Dir. Revenue***.[145]

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[137] ***W. Covina***, 525 U.S. at 239.
[138] ***Id.*** at 239.
[139] ***Id.*** at 241.
[140] ***Id.***
[141] 472 U.S. 115 (1985).
[142] ***W. Covina***, 525 U.S. at 241.
[143] ***Id.***
[144] ***Id.*** at 242. (emphasis added).
[145] 455 F.Supp. 2d 978, 989 (W.D. Mo. 2006)(Missouri Department of Revenue notices advised the plaintiff that his failure to pay taxes might result in loss of his professional license, in which he had a protected property interest

Mr. Small's Notice and Hearing Arguments

Exactly what notice Mr. Small might be constitutionally entitled to prior to termination of his Ameren Missouri electric service is a question that would not be answered without first determining *if* public utilities in Missouri are considered state actors for purposes of the Fourteenth Amendment (see discussion below), and *if* public utility service is a protected property interest under Missouri law (see discussion below). Even assuming the answers to those questions are "yes," Mr. Small is not entitled, on the basis of the Supreme Court's decision in ***Memphis Light***, to individualized notice from Ameren Missouri about the procedures available to him to dispute his Ameren Missouri bill. Those procedures are publically available, such that Mr. Small can, "inform[] himself about the particular policies that affect his destiny."

Unlike the Memphis Light, Gas and Water Division of the City of Memphis, Tennessee, Ameren Missouri (i) is *not* a municipal utility (ii) is *not* exempt from regulation by the state utility commission and (iii) has *not* established its own internal procedures that govern how a customer may lodge a billing dispute, and how the utility will hear and determine the dispute, prior to having their service terminated for nonpayment. Rather, Ameren Missouri is a privately-owned public utility that is subject to regulation by the Missouri Public Service Commission. The C*ommission* has adopted procedures that are available to Mr. Small, and every residential public utility customer in Missouri, to dispute a bill prior to termination for nonpayment. If a customer avails himself of those procedures,[146] then Ameren Missouri must comply with those procedures prior to termination of the customer's service for nonpayment. Ameren Missouri need not give a customer individualized notice of those administrative procedures, because just like in ***W. Covina***, the Commission's procedures are generally available to the public. Namely, the procedures are found in the Commission's Chapter 13 Rules, *Service and Billing Practices for Residential Customers of Electric, Gas, Sewer, and Water Utilities*, which are published in the Missouri Code of State Regulations, at 4 CSR 240-13.

In addition to Mr. Small's assertion that Ameren Missouri must provide him individualized notice of process that he believes is due, Mr. Small's reliance on ***Memphis Light***

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under Missouri law. Citing ***W. Covina***, the court held the Due Process Clause did not mandate that the Department of Revenue also give plaintiff notice of his administrative appeal rights, since Missouri statutes clearly set out the process available).

[146] Mr. Small would have to *follow* the procedures, of course, and could not decline or fail to take advantage of the procedure and then claim a due process violation—"[t] he availability of recourse to a constitutionally sufficient administrative procedure satisfies due process requirements if the complainant merely declines or fails to take advantage of the administrative procedure.'" ***Santana v. City of Tulsa****, 359 F.3d 1241, 1244 (10th Cir. 2004).*

has also led him to the erroneous conclusion that he must be provided with the opportunity to meet with Ameren Missouri management. First of all, the Supreme Court rejected the suggestion that due process required the opportunity to meet with management or corporate officers.[147] Secondly, under the facts in ***Memphis Light***, the plaintiffs were entitled to meet with designated *municipal utility* management to discuss their billing dispute because (i) the municipal utility *was the state actor*, (ii) the municipal utility's established procedure *was* to refer an unsatisfied customer to management, and (iii) the municipal utility was *exempt* from otherwise applicable Tennessee public utility commission regulations. In the case of a Missouri public utility customer who wishes to avoid termination for what he believes is an erroneous bill, the customer and the public utility must follow the *Commission's* procedures. If the customer avails himself of the Commission's procedures, ultimate resolution of a billing dispute does not lie with any Ameren Missouri personnel, let alone management, but with the Commission. Under the Commission's procedures, a customer must first register his dispute by contacting the public utility, but if the utility and customer together are unable to resolve the dispute and the customer wishes to avoid disconnection, then the customer must lodge his informal or formal complaint with the *Commission*, and the *Commission* ultimately determines whether the bill is just. 4 CSR 240-13.045; 4 CSR 240-13.070.

Memphis Light and ***W. Covina*** are not the end of the story, however. Those cases addressed what process a plaintiff was constitutionally entitled to and whether the plaintiff was also entitled to individualized notice of that process. Neither ***Memphis Light*** nor ***W. Covina*** address the threshold Due Process issue of whether a public utility (like Ameren Missouri) even is a state actor or the issue of whether public utility service is a protected property interest under Missouri law.

(ii) State Actor

Metropolitan Edison

As explained by the Supreme Court in ***Memphis Light***, "[t]he Fourteenth Amendment places procedural constraints on the *actions of government* that work a deprivation of interests enjoying the stature of "property" within the meaning of the Due Process Clause."[148] In ***Jackson***

[147] ***Memphis Light***, 436 U.S. n. 13.
[148] ***Memphis Light***, 436 U.S. at 9.

v. Metropolitan Edison,[149] the Supreme Court analyzed whether a privately-owned, state-regulated public utility was a state actor.

In ***Metropolitan Edison***, plaintiff filed a 1983 action after Metropolitan Edison, a privately-owned public utility company subject to the jurisdiction of the Pennsylvania Public Utility Commission, terminated plaintiff's utility service. Plaintiff asserted that under Pennsylvania law, she had a right to reasonably continuous service such that the utility's termination, for nonpayment and in accordance with its tariffs, was state action that deprived her of her right to due process.[150] The District Court found that the utility's conduct did not constitute state action and therefore was not subject to judicial scrutiny under the Fourteenth Amendment.[151] The Court of Appeals affirmed.[152] The U.S. Supreme Court affirmed as well.

It began by acknowledging the "essential dichotomy" of the Due Process Clause of the Fourteenth Amendment, that deprivation of life, liberty or property by the *state* is subject to scrutiny under the clause, but the clause provides no shield against *private* conduct, "no matter how discriminatory or wrongful[.]"[153] Although the Supreme Court found that the utility was a monopoly, conducted a business affected with the public interest, and was heavily regulated, it held that those facts were insufficient to convert the utility's actions into state action.[154] Rather, there must be a sufficiently close nexus between the state and the utility's termination of service to say that the utility was a state actor.[155] Plaintiffs urged that since state law required the utility to *furnish* service, it was a "public function" that made the action of *terminating* service state action. The Supreme Court clarified, however, that where a public function is originally delegated to the state, such as eminent domain, subsequent delegation of the power to an entity may convert that entity into a state actor. But Pennsylvania itself never had a state law obligation to provide public service. So, putting the obligation on public utilities did not convert them into state actors.[156] The Supreme Court also rejected the notion that the Pennsylvania Public Utility Commission's approval of the utility company's termination tariff converted the utility into a state actor. The commission simply allowed a tariff, which had been in place for

[149] 419 U.S. 345 (1974),
[150] ***Id.*** at 348.
[151] ***Id.***
[152] ***Id.*** at 349.
[153] ***Id***.
[154] ***Id.*** at 351.
[155] ***Id***.
[156] ***Id.*** at 353.

several years and had never been the subject of any particular scrutiny, to go into effect. The Supreme Court found that the utility availed itself of a *choice* permitted by state law, to terminate for nonpayment, but since the Pennsylvania Public Utility Commission did not "put its weight on the proposed practice" by *ordering* it to be done, the utility's actions did not transmute into state action.[157]

Just like Metropolitan Edison, Ameren Missouri is a "heavily regulated, privately owned utility, enjoying at least a partial monopoly in the providing of electrical service within its territory…that…elect[s] to terminate service to [customers] in a manner which the…Commission found permissible under state law."[158] That is, Ameren Missouri is permitted, but not *required*, to terminate service for nonpayment. As such, there is not a sufficient connection between the State of Missouri and Ameren Missouri's conduct in terminating Mr. Small's (or any other customer's) electric service to attribute Ameren Missouri's actions to the State. It is notable that because the Supreme Court determined there was no state action, the Supreme Court further held that it had no occasion to determine whether the plaintiff had a state law property interest in her utility service, or whether she was entitled to any due process prior to termination, and affirmed the Court of Appeals' dismissal of the 1983 action.[159] In other words, whether the utility is a state actor is a threshold issue in a 1983 action.[160]

Union Electric

Relying on ***Metropolitan Edison***, our Eighth Circuit Court of Appeals affirmed district court dismissal of a 1983 action against ***Union Electric*** in ***Cody v. Union Electric.***[161]

Northern Nat. Gas Co.

Metropolitan Edison considered whether termination under a utility's commission-approved tariffs made the utility a state actor. It did not consider whether utility termination pursuant to a commission-promulgated regulation might constitute state action. The fact that the Commission has enacted a regulation permitting Ameren Missouri to disconnect for

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[157] ***Id.*** at 354-57.
[158] ***Id.*** at 359.
[159] ***Id.***
[160] *See e.g.*, ***Taylor v. Consolidated Edison***, 552 F.2d 39, 42-46 (2nd Cir. Ct. App. 1977)(Due Process clause is directed only against state action; customer's allegations that utility terminated customer's service without providing the opportunity for a hearing state a 1983 claim only if utility's actions are attributable to the state rather than simply to the private utility; since customer failed to adequately allege state action, 1983 action was properly dismissed).
[161] 518 F.2d 978 (8th Cir. 1975) (1983 action portion of plaintiff utility customers' petition was dismissed. The necessary element of state action was not supplied simply because Union Electric was regulated by the state).

nonpayment—specifically, the Commission's Discontinuance of Service rules, 4 CSR 240-13.050—also would not convert Ameren Missouri's actions in disconnecting a customer into state action. That theory was considered and rejected in ***Srack v. Northern Nat. Gas Co.***[162] In that case, the district court found that the plaintiff, a utility customer who filed a 1983 action because of the gas company's termination of service, could not prevail because there was no state action, even though the Iowa State Commerce Commission had adopted a regulation specifying when a utility could terminate service.[163] Because the regulation did not say the utility *must* terminate, but only allowed the utility to do so, any decision to do so originated with the utility and not the state, such that there was no state action involved.[164] Nearly the identical result was reached in ***Taylor v. Consolidated Edison***.[165]

Flagg Bros.

In other words, in order to prove that a private actor acted under color of state law for purposes of making a 1983 claim, a plaintiff must show not only that the actor acted under color of the challenged statute, but also that the act is attributable to the state. ***Flagg Bros. Inc. v. Brooks***.[166]

(ii) Protected Property Interest

Ameren Missouri has not identified any Missouri statute or state or federal caselaw that address directly whether public utility service is a protected property interest under Missouri law. While Missouri law bears some similarities to Tennessee law analyzed in ***Memphis Light***, there are also many important differences.

The Supreme Court in ***Memphis Light*** found that Tennessee common law placed a duty on a public utility to provide service to all inhabitants of the city of the utility's location. ***Memphis Light***.[167] The service was required to be provided, "without discrimination, and

[162] 391 F. Supp. 155 (S.D. Iowa 1975).
[163] ***Id.*** at 158.
[164] ***Id.*** at 159.
[165] 552 F.2d at 44-45 (no sufficiently close nexus between the state and the utility company's termination of plaintiff's service to render the utility a state actor for purposes of a 1983 claim, despite the facts that utility service termination was heavily regulated under state law, the New York Public Service Commission had the power to investigate complaints and control the utility's conduct, and the utility's tariff pertaining to terminations was approved by the Commission. State regulation was not synonymous with state responsibility for lack of a pre-termination hearing.)
[166] 436 U.S. 149 (1978).
[167] 436 U.S. at 12. (citing ***Farmer v. Nashville***, 156 S.W. 189,190 (Tenn. 1912)).

without denial, except for good and sufficient cause."[168] It also found that Tennessee law did not permit termination of service "except for nonpayment of a just service bill[.]"[169]

Missouri's Public Service Commission Law on its face does not grant anyone an absolute right to receive public utility service. Nor does it impose an absolute obligation on a public utility to provide utility service. Similar to the Tennessee law identified in ***Memphis Light*** that prohibited the utility from discriminating, Missouri law does prohibit "undue or unreasonable prejudice or disadvantage" in the provision of service, and grants the Commission remedial powers if a public utility's acts are "unjustly discriminatory." §§393.130.3 and 393.140(5) RSMo. At least one court has found, however, that very similar statutory provisions do *not* support a finding that a public utility is a state actor. ***Kamal v. City of Toledo, Dept of Pub. Utils***.[170]

Chapter 386 RSMo does grant to the Commission the power to adopt rules governing the "conditions of rendering public utility service, disconnecting or refusing to reconnect public utility service and billing for public utility service." §386.250(6) RSMo. As noted above, the Commission has adopted such rules with respect to residential utility service, at 4 CSR 240-13. These rules do not grant an absolute right, or impose an absolute duty. In contrast to Tennenssee law, the Commission's rules do not establish nonpayment of a just service bill as the only just cause for terminating service. Rather, they prescribe a variety of circumstances when a utility may discontinue service, in order to establish, "reasonable and uniform standards" for the discontinuance of service.[171] Other Commission rules establish when a utility may, or may not, discontinue service to a residential customer, even while an informal or formal complaint is pending before the Commission.[172]

Ameren Missouri's own electric utility tariffs set forth when it will provide electric utility service to customers located within the Company's authorized service territory.[173] Even those tariffs, however, impose numerous conditions upon the provision of service.

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[168] ***Memphis Light***, 436 U.S. at 12.
[169] ***Id.*** at 11.
[170] 2014 U.S. Dist. LEXIS 51315 (April 14, 2014)(Ohio law requiring utilities to furnish necessary and adequate services and facilities, in all respects just and reasonable, with all charges to be just reasonable and not unjust or unreasonable, did not create a protectable right in utility service that could not be extinguished at will or without just cause)
[171] 4 CSR 240 - 13.050. *See*, Purpose statement, and subsection (1).
[172] 4 CSR 240 - 13.070.
[173] *See*, e.g., Union Electric Company Electric Service Tariff Sheet 96 et seq. General Rules and Regulations.

In sum, in contrast to Tennessee decisional law, Missouri's Public Service Commission Law, the Commission's Chapter 13 Rules, and even the Company's tariffs, condition the provision of service, and permit termination of service, on a number of circumstances. These differences give a strong indication that public utility service may not be a protected property interest under Missouri law. Even if it is, Ameren Missouri is not a state actor, such that its termination of utility service is not subject to scrutiny under the Due Process Clause.

IV. Conclusion

The uncontroverted evidence presented at the hearing demonstrates that Mr. Small had an outstanding account balance for service at the time that he requested that his service be reconnected. The bill cannot be said to have been "subject to dispute" because there was no evidence presented that Mr. Small complied with any of the requirements associated with making a bill subject to dispute. Even if Mr. Small's request for reconnection constituted an application for service, which the Company contends it did not, the Company was expressly permitted, under 4 CSR 240-13.035(1)(A) to refuse to provide service to him due to his outstanding account balance. The Company is also permitted, under its tariffs, to refuse to provide service to Mr. Small until the outstanding bill is paid or satisfactory arrangements for payment have been made. Since the Company has complied with all applicable rules and tariffs in its dealings with Mr. Small, the Commission should enter an order denying Mr. Small's Complaint on the merits.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Post-Hearing Brief was served on Jimmie E. Small via regular mail and on the remaining parties via electronic mail (e-mail) this 19th day of May, 2015.

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