

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

Tawanda Murphy,)	
)	
Complainant,)	
)	
vs.)	Case No. EC-2010-0364
)	
Union Electric Company, d/b/a)	
AmerenUE,)	
Respondent.)	

**REPLY TO COMPLAINANT’S RESPONSE
TO COMPANY’S ANSWER AND MOTION TO DISMISS**

COMES NOW Union Electric Company d/b/a AmerenUE (“AmerenUE” or “Company”), and in response to Complainant’s Response to Company’s Answer and Motion to Dismiss, makes this reply.

The Company files this Reply in order to correct Complainant’s misunderstanding of Company’s position, and to provide additional legal support therefor. The Company believes that the doctrine of primary jurisdiction applies to this matter, just as it applied in ***Brown v. Union Electric Company d/b/a AmerenUE***, Case No. 09SL-AC07430, the case referenced by Complainant in her Response. Complainant, however, overestimates the effect of application of the doctrine.

Primary jurisdiction means that, “[m]atters within the jurisdiction of the [Commission] must first be determined by it in every instance *before* the courts have jurisdiction to make judgments in the controversy.” ***DeMaranville v. Fee Fee Trunk Sewer***, 573 S.W.2d 674, 676 (Mo. App. E.D. 1978). Application of the doctrine has the benefits of utilizing administrative knowledge and expertise where demanded, determining technical, intricate questions of fact, and ensuring uniformity important to the regulatory scheme. ***Killian v. J & J Installers, Inc.***, 802 S.W.2d 158 (Mo. banc 1991). The result is that the Commission may make initial determinations that relate to its regulation of a utility’s operations. ***MCI v. City of St. Louis***, 931 S.W.2d 634 (Mo. App. E.D. 1997). Relevant to a claim of negligence, §§386.390.1 and 393.140(2)(3) and (5), RSMo, confer primary jurisdiction to the Commission to determine the

sufficiency of and the safety and adequacy of a utility's service. In addition, the Commission has promulgated numerous regulations setting specific standards for utility service, and through a utility's tariffs, which must be approved by the Commission, the Commission exercises another type of jurisdiction over a utility's standards for service.

Complainant has alleged that Company breached a duty to Complainant, and that Complainant suffered damages. As acknowledged above, the Commission *does* have primary jurisdiction to determine the sufficiency, safety and adequacy of a utility's service. Complainant, however, asked only that the Commission award damages to her. Where what a petitioner ultimately seeks is a monetary award or some sort of equity, primary jurisdiction requires that Complainant complete a two-step process. First, Complainant must file a complaint with the Commission, alleging and seeking from the Commission a determination that the utility has violated a statute, rule, order or tariff.¹ Then (assuming the Commission finds a violation), Complainant may seek monetary damages or equitable relief in a court of general jurisdiction. This is, of course, because the Commission does not have authority to grant pecuniary awards or equitable relief. *American Petroleum Exchange v. Public Service Commission*, 172 S.W.2d 952, 955 (Mo. 1943); *State ex rel. Fee Fee Trunk Sewer, Inc. v. Litz*, 596 S.W.2d 466 (Mo. App. W.D. 1980). While this two-step process may be cumbersome for Complainant, "[n]either convenience, expediency or necessity are proper matters for consideration" in the determination of whether the Commission is authorized to act, but rather, its powers must "be warranted by the letter of the law or such a clear implication...as is necessary to render the power conferred effective." *State v. Public Service Commission*, 257 S.W. 463 (Mo. banc 1923).

Company's position is *not* that Complainant's petition should have been filed first in Circuit Court, as Complainant's reference to Company's position in the *Brown* case implies. That would be inconsistent with Company's prior positions seeking dismissal of certain circuit court petitions based on the PSC's primary jurisdiction. On the other hand, just because primary jurisdiction dictates that Complainant first bring a complaint with the Commission does not mean that the Commission may not validly dismiss a Complaint if it is deficient. Complainant's Complaint failed to request that the Commission find that Company violated any statute, rule, order or tariff. Additionally, it provided insufficient specific allegations of facts from which

¹ The Commission may also remedy any such violation, of course, by "determin[ing] and prescribe[ing] the safe, efficient and adequate property and equipment...to be used, maintained and operated for the security and accommodation of the public and in compliance with the provisions of law[.]" §393.140(5) RSMo.

AmerenUE, Staff or the Commission could infer a particular alleged violation, and only asked for relief (money damages) that the Commission may not grant. For these reasons, Company still believes that dismissal of the Complaint would be proper. Company did, however, ask in the alternative that Complainant be allowed (in fact ordered), to amend her Complaint to make an allegation that *would properly* invoke the primary jurisdiction of the Commission, recognizing that, “the alleged incident... might potentially give rise to a claim of a violation within [the Commission’s jurisdiction].” See Company’s Answer and Motion to Dismiss, paragraph 15.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing
Reply was served on the following parties via electronic mail (e-mail) or via regular mail on
this 5th day of August, 2010.

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