

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

Craig Mershon,)	
Complainant,)	
)	
vs.)	File No: EC-2013-0521
)	
Union Electric Company, d/b/a)	
Ameren Missouri,)	
Respondent.)	

**AMEREN MISSOURI’S RESPONSE TO COMPLAINANT’S APPLICATION FOR
REHEARING**

COMES NOW Union Electric Company d/b/a Ameren Missouri (the “Company”) and for its Response to Complainant’s Application for Rehearing states as follows.

1. On June 13, 2013, Complainant Craig Mershon (“Complainant”) filed a Complaint against the Company.¹
2. On April 23, 2014, the Commission entered a Report and Order in the Complaint, with an effective date of May 23, 2014, denying all relief requested in the Complaint.²
3. Section 386.500.2 RSMo (2000) provides, in part:

No cause or action arising out of any order or decision of the commission shall accrue in any court to any...person or public utility unless that party shall have made, before the effective date of such order or decision, application to the commission for a rehearing[.]”
4. On May 21, 2014 Complainant filed a pleading titled “Motion to Dismiss the Report and Order Under 4 CSR 240-2.116” (the “Motion”).³
5. On May 22, 2014, in its Order Staying Action, Setting Deadline for Response, and Denying Motion to Dismiss the Regulatory Law Judge (the “Order”), the Commission recognized the Motion as an application for rehearing pursuant to 4 CSR 240-2.160 and Section

¹ EFIS No. 1, *Complaint*, filed June 13, 2013.

² EFIS No. 119, *Report and Order*, Issued April 23, 2014, effective May 23, 2014, ordering ¶2.

³ EFIS No. 124, *Motion to Dismiss the Report and Order Under 4 CSR 240-2.116*.

386.500 RSMo⁴ (Complainant’s Motion hereinafter referred to as the “Application for Rehearing”).

6. In the Order, the Commission ordered that the Company may file a response to the Application for Rehearing no later than June 2, 2014.⁵

Complainant’s Application For Rehearing

7. An application for rehearing of an order or decision of the Commission, “shall set forth specifically the ground or grounds on which the applicant considers said order or decision to be unlawful, unjust or unreasonable.”⁶ Complainant’s Application for Rehearing does not claim the Report and Order is unlawful, unjust or unreasonable, but describes both the Recommended Report and Order issued by Judge Jordan⁷ and the Report and Order issued by the Commission⁸ as “unfair” for the following reasons: Complainant did not participate in a hearing; he was not given an opportunity to complete his discovery; and the Recommended Report and Order and Report and Order were issued without any notice to Complainant.⁹

Lawfulness

8. The allegation of unfairness may be read as an allegation that Judge Jordan, and thereby the Commission,¹⁰ acted unlawfully in denying Complainant the opportunity to complete discovery before holding an evidentiary hearing, holding an evidentiary hearing at which Complainant did not appear, and not providing him notice that a report and order would be issued.

9. The Commission is a creature of statute and it has only the powers conferred on it by the Legislature.¹¹ As such, a Commission decision is *unlawful* if the Commission does not have statutory authority to do what it did.¹²

⁴ EFIS No. 126, *Order Staying Staying Action, Setting Deadline for Response, and Denying Motion to Dismiss the Regulatory Law Judge*, p. 2.

⁵ *Id.*, ordering ¶2.

⁶ Section 386.500.2 RSMo. (2000). All statutory references hereinafter are to RSMo (2000), unless otherwise indicated.

⁷ EFIS No. 108, *Notice of Recommended Report and Order*, March 24, 2014.

⁸ EFIS No. 119, *Report and Order*, Issued April 23, 2014, effective May 23, 2014.

⁹ EFIS No. 124, *Motion to Dismiss the Report and Order Under 4 CSR 240-2.116*, ¶1.

¹⁰ 386.240 and 4 CSR 240-2.070(15) permit the Commission to assign a regulatory law judge to hear small formal complaint cases.

¹¹ *State ex rel. City of St. Louis v. Pub. Serv. Comm’n*, 73 S.W.2d 393, 399 (Mo. banc 1934)

¹² *State ex rel. Atmos Energy Corp. v. Pub. Serv. Comm’n*, 103 S.W.3d 753, 759 (Mo. banc 2003); *State ex rel. Alma Tele. Co. v. Pub. Serv. Comm’n*, 40 S.W.3d 381, 387 (Mo. App. W.D. 2001)

10. The Commission has the statutory authority to hear complaints; to fix the time and place for hearing; the Commission is statutorily required to provide not less than ten days' notice of scheduled hearing, unless public necessity requires that a hearing be held on less notice.¹³ All hearings before the Commission are governed by rules adopted and prescribed by the Commission.¹⁴ The Commission's authority to adopt rules governing hearings includes a broad grant of authority to adopt rules regarding discovery.¹⁵

11. This Complaint proceeded as a small formal complaint,¹⁶ pursuant to the Commission's Small Formal Complaint Case Rule, 4 CSR 240-2.070(15). Under that Rule, the regulatory law judge is not only permitted, but is required, "after affording the parties reasonable opportunity for discovery and a fair hearing" to "issue a recommended report and order within one hundred days (100) following the filing of the complaint, unless the regulatory law judge finds good cause to extend that time or the extension is otherwise agreed to by the parties."¹⁷ The record demonstrates that with respect to discovery, the evidentiary hearing, and filing a report and order, the regulatory law judge and the Commission acted lawfully, in accordance with §386.390 and 4 CSR 240-2.070(15).

12. The 100-day timeline under the Small Formal Complaint Case Rule suggests that 100 days is a reasonable timeframe within which: the parties will complete discovery, an evidentiary hearing will be conducted *and* a recommended report and order will be filed. Judge Jordan afforded Complainant *more* than the ten-day statutory notice of hearing and *more* than a reasonable opportunity for discovery, as the protracted procedural history demonstrates:

- a. This Complaint, which was in part a revival of a complaint filed in 2012 and dismissed in 2013,¹⁸ was filed on June 13, 2013.¹⁹ Complainant had the opportunity to commence discovery any time thereafter.²⁰ The Company filed its answer to the Complaint on July 15, 2013.²¹

¹³ 386.390.1 and .5.

¹⁴ 386.410.1.

¹⁵ *State ex rel. SWBT v. Pub. Serv. Comm'n*, 645 S.W.2d 44 (Mo. App. W.D. 1982).

¹⁶ EFIS No. 2, Notice of Contested Case and Orders for Small Formal Complaint, June 14, 2013, Ord. ¶1.

¹⁷ 4 CSR 240-2.070(15) (G).

¹⁸ File EC-2012-0365.

¹⁹ EFIS No. 1, *Complaint*, filed June 13, 2013.

²⁰ 4 CSR 240-2.090(1);

²¹ EFIS No., *Answer of Union Electric Company d/b/a Ameren Missouri*, filed July 15, 2013; Complainant eventually served requests for production pursuant to the Missouri Rules of Civil Procedure, which may be served after the Company was served with process, entered an appearance, or filed a pleading. Missouri R. Civ. Pro.

- b. Despite the prescribed 100-day timeline for resolving small complaints, well into October of 2013, Judge Jordan agreed to grant Complainant extended time to file pleadings and to re-set a procedural hearing after Complainant failed to appear at an earlier hearing set by the Commission.²²
- c. After two pre-hearing conferences in October and November of 2013 at which the subjects of discovery and discovery deadlines were openly discussed,²³ after giving Complainant until November 22, 2013 to offer a proposed procedural schedule including discovery deadlines,²⁴ and after taking into consideration a procedural schedule late-filed by Complainant on November 26, 2013,²⁵ Judge Jordan set a hearing date of December 16, 2013 with no discovery deadline prior to hearing, the effect of which was to permit Complainant another couple of weeks to conduct discovery.²⁶
- d. However, in response to Complainant's assertion that he still had not been able to complete discovery and would not be available for a hearing on December 16,²⁷ Judge Jordan vacated the December hearing date²⁸ and rescheduled the hearing for January 16, 2014,²⁹ a date previously selected by Complainant,³⁰ effectively granting Complainant another six weeks to conduct discovery.
- e. On January 10, 2014, the January 16 scheduled hearing was cancelled after another request made by Complainant, made to Judge Jordan via telephone, during which Complainant asserted that he had not completed discovery.³¹ On

58.01(b)(2)(B).

²² EFIS No. 41, *Order Granting Extended Response Times and Re-setting Prehearing Conference*, October 9, 2013.

²³ EFIS No. 44, *Pre-hearing Conference Transcript Vol. 2 (October 16, 2013)*, p. 28, l. 13-p. 31, l.15; EFIS Item 66, *Pre-Hearing Conference Transcript Vol. 3 (November 13, 2013)*, p. 64, l. 8- p. 65, l.2.

²⁴ EFIS No. 60, *Post-Conference Order*, Nov. 14, 2013.

²⁵ EFIS No. 64, *Proposed Procedural Schedule*, filed November 26, 2013.

²⁶ EFIS No. 65, *Order Denying Reconsideration of Procedural Schedule*, Nov. 26, 2013.

²⁷ EFIS No. 67, *Objection to Staff of the Missouri Public Service Commission's and Opposing Attorney's from Ameren Missouri Date of the Evidentiary Hearing*, filed December 2, 2013.

²⁸ EFIS No. 68, *Order Granting Second Reconsideration of Procedural Schedule*, December 2, 2013.

²⁹ Amended Notice of Hearing, entered and effective December 3, 2013.

³⁰ EFIS No. 67, *Objection to Staff of the Missouri Public Service Commission's and Opposing Attorney's from Ameren Missouri Date of the Evidentiary Hearing*, filed December 2, 2013, p. 2, "Mr. Mershon will not be available on December 16, 2013 for a hearing if the Regulatory Judge honors that date. Mr. Mershon's proposed January 16, 2014 will be better because of the holiday season everyone's schedule will be hectic during the time of the Thanksgiving holidays and the Christmas holidays. By the time January 16, 2014 comes most of the entire discovery will be completed depending on how swiftly documents will arrive and questions answered."

³¹ EFIS No. 72, *Order Cancelling Hearing*, January 10, 2014.

January 16, 2014, Judge Jordan entered an order setting a procedural schedule that included a deadline of January 20, 2014 for Complainant to serve any discovery, and a hearing date of February 27, 2014—at that point giving the parties 42 days’ notice of the hearing date.³² Despite the January 20 discovery deadline, by January 28, 2014, the date of a pre-hearing conference the purpose of which was to address discovery disputes, Complainant still had served the parties with *any* discovery.³³

- f. Complainant proposed a new discovery deadline of February 7, 2014, to which Company and Staff consented, and on January 31, 2014 Judge Jordan entered yet another revised procedural schedule to accommodate Complainant, setting a February 7 deadline to serve discovery, a February 14 deadline to respond or object to discovery and confirming the February 27, 2014 hearing date.³⁴
- g. Even with this final extension, Mr. Mershon did not serve any discovery on the parties *until February 13, 2014*, six days after the extended deadline to serve discovery and one day before the deadline for Staff and the Company to respond or object to any discovery served.³⁵
- h. Despite Complainant’s late-served discovery, Staff served objections to the discovery on February 13, 2014,³⁶ and the Company served objections to all the discovery and (subject to the objections) responses to about two-thirds of the discovery on February 14, 2014.³⁷ Complainant was dissatisfied with the parties’ respective objections and responses so Judge Jordan held a discovery conference on February 19, 2014 to discuss the discovery served and the responses and objections thereto.³⁸ At the conference, he confirmed that the period to conduct discovery had closed.³⁹

³² EFIS No. 75, *Notice of Hearing, Order Resetting Procedural Schedule, and Order to File Response*, January 16, 2014.

³³ EFIS No. 74, *Transcript, Vol. 4 (Pre-hearing Conference January 28, 2014)* p. 83, l. 20-p. 84, l. 9.

³⁴ EFIS No. 84, *Order Amending Procedural Schedule*, January 31, 2014.

³⁵ EFIS No. 87, *First Set of Documents for Motion to Produce and Documents from Union Electric Company or Ameren Missouri*, filed January 13, 2014.

³⁶ EFIS No. 90, *Staff Objection Email*, February 13, 2014.

³⁷ EFIS No. 88, *Certificate of Service of Ameren Missouri's Objections and Responses to Complainant's First Set of Documents For a Motion to Produce ("Request for Production of Documents")*, February 14, 2014.

³⁸ EFIS 93, *Transcript, Vol. 5 (Discovery Conference February 19, 2014)*.

³⁹ *Id.* p. 125, l. 16-p. 126, l. 1.

- i. In ruling on Staff's and the Company's objections to Complainant's discovery, Judge Jordan overruled the objections to Complainant's discovery as untimely, and addressed those objections relating to the substance of Complainant's discovery.⁴⁰ Judge Jordan sustained Staff's and the Company's objections that the discovery was overbroad, and advised that the evidentiary hearing on the merits would be convened as scheduled.⁴¹
- j. The evidentiary hearing was convened on February 27, 2014, at the Bellefontaine Neighbors City Hall in St. Louis, Missouri.⁴² Staff and the Company appeared in person. When Complainant did not appear at the time the hearing was scheduled to begin, Judge Jordan went off the record for ten minutes or so to give Complainant additional time to appear, but Complainant failed to appear, in person or by telephone.⁴³

Lawfulness of Setting and Conducting the Hearing

13. The Commission acted lawfully in setting the Complaint for hearing—in addition to setting, postponing and resetting the evidentiary hearing a total of three times to accommodate Complainant, Complainant was given 42 days' notice of the final hearing date, well over the ten days required by §386.390. The Small Formal Complaint Rule requires that the regulatory law judge afford the parties a fair hearing, held in a location reasonably near where the service was rendered, and at which parties may participate in person or by telephone.⁴⁴ Judge Jordan acted lawfully in these respects, as well. The hearing was conducted near Complainant in Bellefontaine and a phone line was made available during the hearing so that Complainant could participate by phone rather than in person, if he desired.⁴⁵ The conduct of the hearing was also lawful. As required by §386.420, that the parties who appeared were given the opportunity to make opening statements, present testimony and introduce other evidence, and question

⁴⁰ EFIS No. 92, *Order Sustaining Objections to Document Production Requests*, February 19, 2014, p. 4.

⁴¹ *Id.*, p. 6-7.

⁴² EFIS No. 97, *Transcript Vol. 6 (Evidentiary Hearing, February 27, 2014)*; 4 CSR 240-2.070(15)(C) and (F) require that small complaints be processed in a "convenient location for the customers" and unless otherwise agreed to, in the county or city not within a county, where the utility service was rendered or within thirty (30) miles of where the service was rendered. Complainant is a resident of St. Louis, Missouri. EFIS No. 1, *Complaint*.

⁴³ EFIS No. 97, *Transcript Vol. 6 (Evidentiary Hearing, February 27, 2014)*, p. 130, l. 1-p. 131, l. 16.

⁴⁴ 4 CSR 240-2.070(15)(E) and (G).

⁴⁵ EFIS No. 97, *Transcript Vol. 6 (Evidentiary Hearing, February 27, 2014)*.

witnesses, etc.⁴⁶ It was not unlawful for a hearing to be held simply because Complainant chose not to appear and participate.

Lawfulness of Imposing a Discovery Deadline

14. As to discovery, the Small Formal Complaint Rule does not require the Commission to continue a complaint case or to give a complainant as many extensions as he desires until he is satisfied that he has completed discovery—it requires that the regulatory law judge afford the parties a *reasonable opportunity* for discovery.⁴⁷ Complainant was afforded far more than the 100 days contemplated by the Small Formal Complaint Rule to conduct discovery—he had at least seven months (June 13, 2013 through February 13, 2014) to do so. Although Complainant failed to serve any discovery until after the extended discovery deadline, was not satisfied with the objections and responses or Judge Jordan’s rulings on discovery objections,⁴⁸ and wanted to continue to conduct discovery beyond the discovery deadline, these facts do not render Judge Jordan’s actions in cutting off discovery unlawful. He acted lawfully because he provided *more* than the reasonable opportunity for discovery required under the Small Formal Complaint Case Rule.

Lawfulness of Issuance of the Recommended Report and Order and the Final Report and Order

15. Nor was it unlawful for Judge Jordan to issue a recommended report and order, for the Commission to issue a report and order, or for either to be issued without personal advance notice to Complainant. The Small Formal Complaint Case Rule *requires* the regulatory law judge to issue a recommended report and order.⁴⁹ It also requires that the Commission approve or reject the recommended report and order, and if rejected, issue its own order.⁵⁰ The Small Formal Complaint Case Rule does not require that a complainant be given personal advance notice of issuance. The rule itself, however, does provide notice to a complainant that a recommended report and order and a report and order by the Commission will be issued following a hearing.

⁴⁶ *Id.*

⁴⁷ 4 CSR 240-2.070(15)(G).

⁴⁸ *See*, EFIS No. 95, Renewed Objection to the Order For the Motion for Injunctive Relief to Stop The Disconnect Notices, filed on the day of the evidentiary hearing at which Complainant did not appear, February 27, 2014, wherein Complainant requests an extension of time to complete discovery. This motion was denied in the Report and Order.

⁴⁹ 4 CSR 240-2.070(15)(G).

⁵⁰ 4 CSR 240-2.070(15)(H).

Reasonableness

Reasonableness of Imposing Discovery Deadline

16. The allegation of unfairness may also be read as an allegation that the Commission acted unreasonably in denying Complainant the opportunity to conduct additional discovery.

17. An order or decision is reasonable only if supported by competent and substantial evidence of record and if the Commission has not abused its discretion.⁵¹ As to discovery specifically, “the justness of a discretion exercised against a request for more discovery before adjudication...depends upon the history of the case as well as upon the conduct of the parties and the good faith of the request. It is measured, above all else, by the purposes the discovery process are meant to accomplish.”⁵² Where a party is less than diligent in conducting discovery, after that party raised the issue of the need for discovery, and where the party has not shown that any uncompleted discovery is material to the outcome of the case, there is no abuse of discretion in not permitting further discovery.⁵³

18. Although Complainant repeatedly raised the issue of his need to conduct discovery, Complainant has been less than diligent doing so. He did not serve any discovery until February 13, 2014, six days after the close of discovery, despite: proposing on November 26, 2013 that the evidentiary hearing take place on January 16, 2014 because he needed to conduct discovery;⁵⁴ asserting on December 2, 2013 that he would be “sending out interrogatories within the very near future”,⁵⁵ reiterating on December 13, 2013 a need to “gather information and have questions answered to support his case”⁵⁶; citing to incomplete discovery on January 10, 2014, as the basis for requesting cancellation of a rescheduled evidentiary hearing;⁵⁷ openly admitting on January 28, 2014, “I haven’t done any discovery. I’m working on

⁵¹ *Alma*, 40 S.W.3d at 387.

⁵² *VBM Corp., Inc. v. Marvel Enterprises, Inc.*, 842 S.W.2d 176, 179-180 (Mo. Ct. App. 1992).

⁵³ *Curnutt v. Scott Melvin Transp.*, 903 S.W.2d 184, 193 (Mo. Ct. App. 1995)(citing *VBM Corp.*).

⁵⁴ EFIS No. 64, *Proposed Procedural Schedule*, filed November 26, 2013.

⁵⁵ EFIS No. 67, *Objection to Staff of the Missouri Public Service Commission’s and Opposing Attorney’s from Ameren Missouri Date of the Evidentiary Hearing*, filed December 2, 2013.

⁵⁶ EFIS No. 70, *Motion to Set Aside the Regulatory Law Judge’s Order for a Evidentiary Hearing on December 16, 2013*, filed December 13, 2013.

⁵⁷ EFIS No. 72, *Order Cancelling Hearing*, January 10, 2014.

the documents at this time[;]”⁵⁸ and finally, requesting a deadline to “[b]egin [d]iscovery on January 27, 2014.”⁵⁹

19. Complainant has also not explained, in any of the above cited pleadings or in his Application for Rehearing, how the discovery he felt he has not completed is material to his Complaint.

20. The Commission acted reasonably, and did not abuse its discretion, in cutting off discovery and conducting an evidentiary hearing on February 27, 2014, even though Complainant argues he did not have the opportunity to complete discovery, because Complainant was afforded months to complete discovery in a small formal complaint case, because Complainant was less than diligent in conducting discovery despite his assertions that he needed to conduct discovery, and Complainant has failed to show how any incomplete discovery is material to his Complaint.

Reasonableness of Report and Order

21. The allegation of unfairness may also be read as an allegation that the Report and Order was unreasonable because it was based on evidence presented at a hearing in which Complainant did not appear.

22. An order or decision is reasonable only if supported by competent and substantial evidence of record and if the Commission has not abused its discretion.⁶⁰ The Commission’s Report and Order is reasonable because it was based on competent and substantial evidence presented at the hearing on February 27, 2014, by those parties who chose to appear, which evidence included the testimony of Carol Gay Fred, the consumer services manager of the Commission, whom Judge Jordan called to testify;⁶¹ Ms. Fred’s report, admitted into evidence as Staff’s Exhibit A; the testimony of the Company’s witness Cathy Hart, regulatory liason and former supervisor of customer service for the Company;⁶² and various electric utility service

⁵⁸ EFIS No. 74, *Transcript, Vol. 4 (Pre-hearing Conference January 28, 2014)* p. 83, l. 20-p. 84, l. 2-4.

⁵⁹ EFIS No. 78, *Motion of Objection For Notice of Hearing[,]* *Order Resetting Procedural Schedule and Order to File Response*, filed January 30, 2014.

⁶⁰ *Alma*, 40 S.W.3d at 387.

⁶¹ EFIS No. 97, *Transcript Vol. 6 (Evidentiary Hearing, February 27, 2014)*, p. 132, l. 2-p. 134, l. 23; the Small Formal Complaint Case Rule places an affirmative obligation on the regulatory law judge to determine the merits of claims and defenses of the parties and permits the judge to question parties and witnesses. 4 CSR 240-2.070(15)(F)3.

⁶² EFIS No. 97, *Transcript Vol. 6 (Evidentiary Hearing, February 27, 2014)*, p. 136, l. 18-p. 167, l. 25.

records related to Complainant's account with the Company, admitted into evidence as Ameren Missouri Exhibits 1HC through 4 HC.

Wherefore, Ameren Missouri respectfully requests that the Commission deny Complainant's application for rehearing.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Response to Complainant's Application for Rehearing was served on the following parties via electronic mail (e-mail) or regular mail on this 2nd day of June, 2014.

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