

At a session of the Public Service Commission held at its office in Jefferson City on the 5th day of December, 2006.

**Case No. EC-2007-0106**

Effective Date: December 5, 2006

On September 19, 2006, Richard D. Smith filed a complaint with the Commission against Union Electric Company d/b/a AmerenUE (“AmerenUE”). As the basis for his complaint, Mr. Smith states that there have been numerous power outages and power surges and that the crews dispatched to repair these outages had outdated maps slowing the repairs. Mr. Smith further alleges that his area is listed as a “Priority 5” in getting power restored and that repairs are always delayed on this basis. Mr. Smith implies that Black River Electric Cooperative (“Black River”), his former electric service provider, would provide more reliable service, and his requested relief is the reinstatement of Black River as

his electric provider. As part of his complaint, Mr. Smith included a petition signed by approximately 102 individuals referring to themselves as “The Citizens of John Smith Road and the Wallen Creek Area,” who purportedly agree with Mr. Smith’s position and favor the change of electrical supplier. However, Mr. Smith, a *pro se* litigant, is only representing himself in this matter.

Notice of the complaint was issued to AmerenUE on September 20, and Black River was added as a party to this action on October 17. AmerenUE filed its answer to the complaint on October 20, and Black River filed its response to the complaint on November 15. The Staff of the Missouri Public Service Commission filed its Report in this matter on November 20. AmerenUE, Black River and Staff all request that this action be dismissed. This matter is currently set for a prehearing conference on December 6.

### **Joint Applicant’s Motion to Dismiss**

On November 29, AmerenUE and Black River (“Joint Applicants”) filed a Joint Motion to Dismiss and Motion for Expedited Treatment. Joint Applicants argue that Mr. Smith’s complaint should be dismissed for failure to state a claim upon which relief may be granted,<sup>1</sup> and because the remedy requested is not available under Missouri law.

Joint Applicants assert that in order to prosecute a complaint, the complainant must set forth what law, rule or Commission order has been violated. In support of this position, Joint Applicants direct the Commission to Section 386.390,<sup>2</sup> which provides in pertinent part: “Complaint may be made...by any...person...in writing, setting forth any act or thing done or omitted to be done by any...public utility, including any rule, regulation...” Joint

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<sup>1</sup> 4 CSR 240-2.070(6).

<sup>2</sup> All statutory sections throughout this order reference RSMo 2000 unless otherwise noted.

Applicants further direct the Commission to 4 CSR 240-2.070(3), which states: “Complaint may be made by petition or complaint in writing, setting forth any act or thing done or omitted to be done by any...public utility...**in violation or claimed to be in violation of any provision of law or of any rule or order or decision of the commission.**” Thus according to Joint Petitioners, in order to state a claim upon which relief may be granted, a complainant must set forth facts which, if true, constitute a violation of law, regulation or Commission order; a requirement that Joint Applicants allege that Mr. Smith has failed to meet.

Joint Applicants’ second argument for dismissal is that the relief requested by Mr. Smith cannot be granted under Missouri law. Joint Applicants direct the Commission to the “anti-flip-flop” provisions of Section 393.106, which provides that once a utility lawfully commences supplying retail electric service through permanent facilities, no other supplier shall have the right to provide service to that customer. Limited exceptions to this provision are: (1) when there is a municipal annexation pursuant to Sections 386.800 and 394.080; (2) when there is a territorial agreement pursuant to Section 394.312; and (3) when the Commission finds that a change of suppliers is in the public interest. Joint Applicants allege that the only exception that would apply in this instance is if the change of suppliers would be in the public interest, and there is no evidence that the public interest would be better served by granting Complainant a change in electric suppliers. In fact, Joint Applicants note that the Commission has already determined that service to Mr. Smith by AmerenUE is in the public interest, as evidenced by the Commission’s approval of a Territorial Agreement between AmerenUE and Black River on June 7, 1996 in Case No. EO-95-400, et al.

## Discussion

Missouri's statutory framework clearly provides the Commission with jurisdiction over AmerenUE and Black River, as well as the authority, to order a change of electrical provider under the limited circumstance described in the statutes.<sup>3</sup>

### **Section 393.106.2 provides:**

Once an electrical corporation or joint municipal utility commission, or its predecessor in interest, lawfully commences supplying retail electric energy to a structure through permanent service facilities, it shall have the right to continue serving such structure, and other suppliers of electrical energy shall not have the right to provide service to the structure except as might be otherwise permitted in the context of municipal annexation, pursuant to section 386.800, RSMo, and section 394.080, RSMo, or pursuant to a territorial agreement approved under section 394.312, RSMo. **The public service commission, upon application made by an affected party, may order a change of suppliers on the basis that it is in the public interest for a reason other than a rate differential.** The commission's jurisdiction under this section is limited to public interest determinations and excludes questions as to the lawfulness of the provision of service, such questions being reserved to courts of competent jurisdiction. Except as provided in this section, nothing contained herein shall affect the rights, privileges or duties of existing corporations pursuant to this chapter. Nothing in this section shall be construed to make lawful any provision of service which was unlawful prior to July 11, 1991. Nothing in this section shall be construed to make unlawful the continued lawful provision of service to any structure which may have had a different supplier in the past, if such a change in supplier was lawful at the time it occurred. However, those customers who had canceled service with their previous supplier or had requested cancellation by May 1, 1991, shall be eligible to change suppliers as per previous procedures. No customer shall be allowed to change electric suppliers by disconnecting service between May 1, 1991, and July 11, 1991.

### **Section 394.080.5, pertaining to rural electric cooperatives provides:**

Notwithstanding the provisions of subsection 2 of this section, **after a public hearing upon a complaint, the public service commission may order**

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<sup>3</sup> AmerenUE is an "electric corporation" and a "public utility" as defined in Section 386.020(15) and (42), and is subject to the jurisdiction, control and regulation of the Commission. Black River, a rural electric cooperative, is subject to Commission regulation with regard to safety issues pursuant to Section 386.310, and is also subject to the Commission's jurisdiction for ordering a change of electric suppliers, Section 394.315.2.

**that service be provided by another supplier if it finds that service from another supplier of electricity is in the public interest for a reason other than rate differential.** Nothing in this section shall be construed as conferring upon the public service commission jurisdiction over the rates, financing, accounting or management of any electric cooperative.

**Section 394.315.2 provides:**

Once a rural electric cooperative, or its predecessor in interest, lawfully commences supplying retail electric energy to a structure through permanent service facilities, it shall have the right to continue serving such structure, and other suppliers of electrical energy shall not have the right to provide service to the structure except as might be otherwise permitted in the context of municipal annexation, pursuant to section 386.800, RSMo, and section 394.080, or pursuant to a territorial agreement approved under section 394.312. **The public service commission, upon application made by an affected party, may order a change of suppliers on the basis that it is in the public interest for a reason other than a rate differential, and the commission is hereby given jurisdiction over rural electric cooperatives to accomplish the purpose of this section. The commission's jurisdiction under this section is limited to public interest determinations and excludes questions as to the lawfulness of the provision of service, such questions being reserved to courts of competent jurisdiction.** Except as provided herein, nothing in this section shall be construed as otherwise conferring upon the commission jurisdiction over the service, rates, financing, accounting or management of any such cooperative, and except as provided in this section, nothing contained herein shall affect the rights, privileges or duties of existing cooperatives pursuant to this chapter. Nothing in this section shall be construed to make lawful any provision of service which was unlawful prior to July 11, 1991. Nothing in this section shall be construed to make unlawful the continued lawful provision of service to any structure which may have had a different supplier in the past, if such a change in supplier was lawful at the time it occurred. However, those customers who had canceled service with their previous supplier or had requested cancellation by May 1, 1991, shall be eligible to change suppliers as per previous procedures. No customer shall be allowed to change electric suppliers by disconnecting service between May 1, 1991, and July 11, 1991.

The exception to the so-called “anti-flip-flop” provisions of Sections 393.106 and 394.315.2 that would serve as the basis of Mr. Smith’s requested relief is whether the Commission finds that the change of suppliers would be in the public interest for a reason other than a rate differential. The Commission has ruled on prior applications of this nature and has determined that the burden of proof in change-of-supplier cases is on the

applicant.<sup>4</sup> While discussing the burden of proof *In the Matter of Cominco American, Inc. for Authority to Change Electrical Suppliers*, the Commission made clear that customer preference would not suffice as a singular basis for ordering a change in electrical suppliers:

The Commission does not believe that customer preference by itself is sufficient reason to find that it is in the public interest to change suppliers. The Commission notes that the legislative intent of Sections 393.106 and 394.315, RSMo Supp. 1984, is to prevent duplication of facilities and the waste inherent in competing for customers. The purpose of these statutes would be defeated if customer preference alone was considered sufficient reason to change suppliers . . . Under the statutes, the customer or utility requesting a change of suppliers has the burden of proof to show that there is a reason for changing suppliers other than a differential in rates that would result in a benefit to the public.<sup>5</sup>

The Commission does not use a single factor test when determining whether an application for a change of electric suppliers should be granted. Instead, it conducts a case-by-case analysis applying a ten-factor balancing test.<sup>6</sup> Those ten factors are:

- (A) Whether the customer's needs cannot adequately be met by the present supplier with respect to either the amount or quality of power;
- (B) Whether there are health or safety issues involving the amount or quality of power;
- (C) What alternatives a customer has considered, including alternatives with the present supplier;
- (D) Whether the customer's equipment has been damaged or destroyed as a result of a problem with the electric supply;
- (E) The effect the loss of the customer would have on the present supplier;

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<sup>4</sup> *In the Matter of Cominco American, Inc. for Authority to Change Electrical Suppliers*, 29 Mo. P.S.C. (N.S.) 399,405-407 (1988), Case No. EO-88-196. See also Case Numbers EO-97-314, EO-93-170, EO-93-295.

<sup>5</sup> *Id.*, citing to, *Cuivre River Electric Cooperative, Inc. v. Union Electric Company*, 29 Mo. P.S.C. (N.S.) at 25.

<sup>6</sup> *Id.* at 405-407. See also Case Numbers EO-97-314, EO-93-170, EO-93-295.

(F) Whether a change in supplier would result in a duplication of facilities, especially in comparison with alternatives available from the present supplier, a comparison of which could include:

(i) the distance involved and cost of any new extension, including the burden on others -- for example, the need to procure private property easements, and

(ii) the burden on the customer relating to the cost or time involved, not including the cost of the electricity itself;

(G) The overall burden on the customer caused by the inadequate service including any economic burden not related to the cost of the electricity itself, and any burden not considered with respect to factor (F)(ii) above;

(H) What efforts have been made by the present supplier to solve or mitigate the problems;

(I) The impact the Commission's decision may have on economic development, on an individual or cumulative basis; and

(J) The effect the granting of authority for a change of suppliers might have on any territorial agreements between the two suppliers in question, or on the negotiation of territorial agreements between the suppliers.<sup>7</sup>

## Decision

The Missouri Supreme Court recently articulated the standard for reviewing a motion to dismiss in *Grewell v. State Farm Mut. Auto. Ins. Co.*, stating:

A motion to dismiss for failure to state a cause of action is an assertion that, while taking all factual allegations as true, plaintiff's pleadings are insufficient to establish a cause of action. [It] is solely a test of the adequacy of the plaintiff's petition. It assumes that all of plaintiff's averments are true, and liberally grants to plaintiff all reasonable inferences therefrom. No attempt is

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<sup>7</sup> *Id.* See also *In the Matter of the Application of Martin J. Sinclair for Change of Electric Supplier*, 4 Mo. P.S.C. 3d 46, Case No. EO-95-165; and the consolidated cases of *In the matter of the application of Carol June Tyndall for change of electric supplier*; *In the matter of the application of Gene Hunt for change of electric supplier*; *In the matter of the application of Shirley Jones for change of electric supplier*; *In the matter of the application of Norma Hull for change of electric supplier*; *In the matter of the application of Tom Riley for change of electric supplier*; *In the matter of the application of Abbott A. Williams for change of electric supplier*; *In the matter of the application of David and Sharon Michael for change of electric supplier*; *In the matter of the application of Elmer A. Scott for change of electric supplier*; *In the matter of the application of Luette K. Collins for change of electric supplier*; *In the matter of the application of Craig and Pam Skinner for change of electric supplier*; *In the matter of the application of Darrell Proctor for change of electric supplier*; Case No. EO-93-295; Case No. EO-93-303; Case No. EO-93-312; Case No. EO-93-313; Case No. EO-93-314; Case No. EO-93-317; Case No. EO-93-319; Case No. EO-93-320; Case No. EO-93-321; Case No. EO-93-323; Case No. EO-93-333; Consolidated at 3 Mo. P.S.C. 3d 28, (1994).

made to weigh any facts alleged as to whether they are credible or persuasive. Instead, the petition is reviewed in an almost academic manner, to determine if the facts alleged meet the elements of a recognized cause of action, or of a cause that might be adopted in that case. The petition is sufficient to withstand the motion if it "invokes substantive principles of law entitling plaintiff to relief and alleges ultimate facts informing defendant of that which plaintiff will attempt to establish at trial." It should not be dismissed for mere lack of definiteness or certainty or because of informality in the statement of an essential fact. (Citations Omitted).<sup>8</sup>

The Court of Appeals provided additional clarity with this standard in *Truck Ins. Exch. v. Prairie Framing, LLC*, when it held:

Thus, a motion to dismiss for failure to state a claim focuses solely on the factual allegations in the petition. The court will not resort to extrinsic facts, and allegations suggesting possible or potential liability are not sufficient to withstand a motion to dismiss for failure to state a claim.<sup>9</sup>

Addressing the Joint Applicants' claim that Mr. Smith has not stated a claim upon which relief can be granted, it is true that Mr. Smith has not articulated any facts which, if true, constitute a violation of law, regulation or Commission order. In fact, Staff found in its investigation that there was "no evidence of any tariff, rule or statute violations by AmerenUE associated with this formal complaint." While a complaint should not be dismissed for mere lack of definiteness or certainty or because of informality in the statement of an essential fact,<sup>10</sup> extrinsic facts and allegations suggesting possible or potential liability are not sufficient to withstand a motion to dismiss for failure to state a claim.<sup>11</sup> Nevertheless, keeping in mind that Section 386.610 provides, in pertinent part, that: "The provisions of this chapter shall be liberally construed with a view to the public

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<sup>8</sup> *Grewell v. State Farm Mut. Auto. Ins. Co.*, 102 S.W.3d 33, 35-36 (Mo. Banc 2003).

<sup>9</sup> *Truck Ins. Exch. v. Prairie Framing, LLC*, 162 S.W.3d 64, 83 (Mo. App. 2005).

<sup>10</sup> *Grewell*, 102 S.W.3d at 35-36.

<sup>11</sup> *Truck Ins. Exch.*, 162 S.W.3d at 83.



welfare, efficient facilities and substantial justice between patrons and public utilities,” it is the Commission’s policy to allow complainants wide latitude with pursuing a complaint. Mr. Smith’s complaint should not be cut short at this early stage of the process.

It is also not correct to say that the relief Mr. Smith has requested is unavailable under Missouri law. The Commission has examined multiple cases where parties have requested a change of electric supplier and has delineated a very specific ten-part balancing test for making those determinations. There are simply not enough facts in the record before the Commission at this time for it to rule conclusively that it is not in the public interest to grant a change in electric supplier to Mr. Smith.

The Joint Applicants requested expedited treatment of the motion to dismiss because of the pending prehearing conference scheduled for December 6. The Commission will grant that motion and rule expeditiously on the motion to dismiss so that the prehearing conference may proceed as scheduled.

**IT IS ORDERED THAT:**

1. The Joint Motion for Expedited Treatment filed by Union Electric Company d/b/a AmerenUE and Black River Electric Cooperative filed on November 29, 2006, is granted.

2. The Joint Motion to Dismiss filed by Union Electric Company d/b/a AmerenUE and Black River Electric Cooperative is denied.

3. This order shall become effective on December 5, 2006.

**BY THE COMMISSION**

A handwritten signature in black ink, appearing to read 'Colleen M. Dale', written over a horizontal line.

Colleen M. Dale  
Secretary

( S E A L )

Davis, Chm., Gaw and Clayton, CC., concur  
Murray and Appling, CC., absent

Stearley, Regulatory Law Judge