

**STATE OF MISSOURI  
PUBLIC SERVICE COMMISSION**

At a session of the Public Service  
Commission held at its office in  
Jefferson City on the 29<sup>th</sup> day of  
July, 2008.

Michael and Paula Sexton,                     )  
  )  
                          Complainants,            )  
  )  
v.    )  
  )  
Empire District Electric Co.,                 )  
  )  
                          Respondent.             )

**Case No. EC-2008-0315**

**ORDER DISMISSING COMPLAINT WITHOUT PREJUDICE**

Issue Date: July 29, 2008

Effective Date: August 8, 2008

Michael and Paula Sexton filed a formal complaint against The Empire District Electric Company (“Empire”) on April 4, 2008.<sup>1</sup> They alleged that on February 12, while performing restoration activities a day or two after an ice storm caused a power outage in their Ozark, Missouri neighborhood, Empire or its contractors “clear cut” a number of trees located on the Sextons’ private residential property (both inside and outside the utility right of way) over their strenuous objections, including a verbal warning that Paula Sexton had a gun and wanted them to leave the property immediately. The Sextons sought the following relief: (1) “[a]cknowledgment by Empire District that they do not have the right to destroy private property without permission”; and (2) “[c]ompensation for the damage to [their] property and the cost of cleaning up [their] property.”

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<sup>1</sup> Unless otherwise specified, all dates in this order refer to the calendar year 2008.

Section 386.390, RSMo 2000, authorizes persons, such as the Sextons, to bring a complaint before the Commission regarding a public utility. "In cases where a complainant alleges that a regulated utility is violating a law, its own tariff, or is otherwise engaged in unjust or unreasonable actions, the complainant has the burden of proof."<sup>2</sup>

On April 7, the Commission notified Empire of the complaint and allowed it thirty days in which to answer as provided by 4 CSR 240-2.070(7). The same day, pursuant to 4 CSR 240-2.070(10), the Commission ordered its Staff to commence an investigation of the Sextons' formal complaint and to file a report concerning the results of its investigation no later than two weeks after Empire filed its answer to the complaint, which was due no later than May 7.

Empire timely filed its answer to the Complaint on May 6. Empire admits that it cut trees, in this situation, that were outside its twenty-foot easement (ten feet on either side of its power line); however, it asserts that it had the right to do so in accordance with its tariffs. Specifically they contend that the trees at issue had bent over to a position beneath the power line because of the ice load, and that when melting occurred the trees would spring back into position and into the power line thereby causing yet another outage. Some other trees were cut because they obstructed access to the downed trees and had to be removed to ensure crew safety and provide access to the downed trees.

Empire's easement across the Sexton's property was granted in 1989 and provides Empire:

. . . a permanent right-of-way to construct, repair, replace, inspect operate and maintain lines for the transmission and distribution of electrical energy

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<sup>2</sup> *David A. Turner and Michele R. Turner, Complainants, v. Warren County Water and Sewer Company, Respondent*, 9 Mo. P.S.C. 3d 548 (Mo. PSC 2001), *citing to*, *Margolis v. Union Electric Company*, 30 Mo. P.S.C. (N.S.) 517, 523 (1991); *Michaelson v. Wolf*, 261 S.W.2d 918, 924 (Mo. 1953); *Farnham v. Boone*, 431 S.W.2d 154 (Mo. 1968).

and joint communication lines, including the necessary poles, crossarms, wires, guy wires, anchors, markers, aerial and underground cable, conduits, vaults, equipment foundations and pad mount transformers, and all appurtenances thereto as may in the opinion of the Company be required from time to time upon, over and under land.

The easement further provides that Empire is:

Granted the right and permission to clear, remove and keep cleared of trees, limbs, roots and other obstructions which in the opinion of the Company might damage, endanger, or interfere with the operation or safety of said lines for a distance of 10 feet on each side of centerline of said lines, and to enter upon said land and right-of-way for the purpose of repairing and replacing said lines and keeping same in order, and in making examination thereof at any time so long as such lines shall be maintained and operated.

Empire's tariffs provide that:

In order to permit proper operation of Company's service lines and feeder lines serving the customer, the Company shall have the right, when and as necessary, to trim and keep trimmed any trees located upon the customer's premises which may interfere with service to customer or service to any other customer. Sheet No. 17c, Sec. 5.

On May 20, Staff timely filed a verified report based on its investigation. Staff offered no opinion with regard to the conditions that precipitated the decision to trim the trees outside the easement, because at the time of its investigation the trees had already been cut and there is no available evidence contradicting Empire assertions about the weather conditions and the status of the threat posed by the trees on February 12. Staff stated that it appears no Commission rule or tariff provision had been violated by Empire.

Empire and Staff both averred that the complaint should be dismissed because even if the Commission were to find all of the allegations made therein to be true it lacks the legal authority to grant either of the two forms of relief sought by the Sextons. In particular, Staff cited *American Petroleum Exchange v. Public Service Commission*, 172 S.W.2d 952, 955 (Mo. 1943) in which the Missouri Supreme Court held that the Commission lacks the

authority to do equity or grant equitable relief and also has no authority to award pecuniary relief or consequential damages,<sup>3</sup> and one of the Commission's own past cases in which the Commission stated that it is "purely a creature of statute and its powers are limited to those conferred by the [Missouri] statutes, either expressly, or by clear implication as necessary to carry out the powers specifically granted."<sup>4</sup> Accordingly, argues Staff, "both requests for relief by Complainants' are outside the Commission's authority to grant."

On May 30, the Commission issued an Order Directing Filing, explaining that "[a]lthough a prehearing conference is typically the next procedural step in a complaint case such as this, the Commission sees no point in moving forward with the case unless: (1) the Sextons affirmatively demonstrate that the Commission has the legal authority to grant either of the two forms of relief sought by them in their complaint as originally filed; or (2) the Sextons amend their complaint to seek a form of relief the Commission is capable of granting." Accordingly, the Sextons were given two weeks to file an appropriate pleading.

The fourteen-day period expired on June 13, but the Sextons did not file anything in response to the Commission's order. Since the Sextons have declined to amend their complaint and have also failed to demonstrate that the Commission has the legal authority to grant either of the two forms of relief sought by them in their complaint as originally filed,

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<sup>3</sup> Although not cited by the parties here, see also *May Dept. Stores Co. v. Union Elec. Light & Power Co.*, 107 S.W.2d 41, 58 (Mo. 1937) (Commission "cannot enter a money judgment for one party against another" and "cannot grant monetary relief for compensation for past overcharges or damages"); *Wilshire Constr. Co. v. Union Elec. Co.*, 463 S.W.2d 903, 905 (Mo. 1971) (Commission cannot enter a money judgment); *Gaines v. Gibbs*, 709 S.W.2d 541, 543 (Mo. App. S.D. 1986) (Commission "is not a court" and "does not exercise judicial power or authority"); *Soars v. Soars-Lovelace, Inc.*, 142 S.W.2d 866, 871 (Mo. 1940) (Commission cannot do equity).

<sup>4</sup> Report & Order, *GS Technology Operating Co., Inc., d/b/a GST Steel Co. v. Kansas City Power & Light Co.*, Case No. EC-99-553 (July 13, 2000); see also *State ex rel. Utility Consumers Council of Missouri, Inc. v. Pub. Serv. Comm'n*, 585 S.W.2d 41, 47 (Mo. banc 1979) (same); *State ex rel. City of West Plains v. Pub. Serv. Comm'n*, 310 S.W.2d 925, 928 (Mo. banc 1958) (same).

the Commission can only conclude that they intend to continue to seek relief the Commission is unable to grant. As dismissal is generally appropriate when a tribunal is “unable to grant the type of relief requested” by the complainant,<sup>5</sup> the Sextons’ complaint will be dismissed.

**IT IS ORDERED THAT:**

1. Michael and Paula Sexton’s April 4, 2008 formal complaint against The Empire District Electric Company is dismissed without prejudice.
2. This order shall become effective on August 8, 2008 at 12:01 a.m.
3. This case may be closed on August 9, 2008.

**BY THE COMMISSION**



Colleen M. Dale  
Secretary

( S E A L )

Davis, Chm., Murray and Jarrett, CC., concur,  
Clayton and Gunn, CC., dissent.

Stearley, Regulatory Law Judge

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<sup>5</sup> *State ex rel. Royce-St. Louis Ltd. Partnership v. Kraiberg*, 864 S.W.2d 409, 411 (Mo. App. E.D. 1993). See also *State ex rel. Adam Roth Grocery Co. v. Reynolds*, 196 S.W. 1136, 1137 (Mo. 1917) (dismissal appropriate where court is “unable to grant the relief prayed.”)