

Caldwell & Singleton, LLC

Attorneys and Counselors at Law
1601 Olive, First Floor
St. Louis, Missouri 63103-2344
314-421-0077
Fax: 314-421-5377
E-Mail: chslaw@mindspring.com

Worsham N. Caldwell**
Richard N. Singleton, Jr.*
Celestine Dotson*

Of Counsel:
Freeman R. Bosley, Jr.
LaRee M. DeFreece
Ellsworth "Tre" Ware, III†

Janet Holbrook, R.N.
*Also Licensed in Illinois
†Also Licensed in Tennessee
**Also Licensed in Virginia

September 9, 2002

Mr. Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge
Missouri Public Service Commission
200 Madison Street, Suite 100
Jefferson City, MO 65101

FILED³

SEP 09 2002

Missouri Public
Service Commission

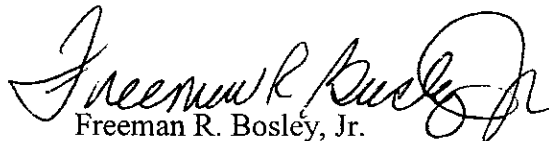
Re: MPSC Case No. EC-2002-112; Sterling Moody, et al., v. Ameren UE, et al.

Dear Judge Roberts:

Enclosed you will find an original and nine (9) copies of Findings of Fact and Conclusions of law on behalf of Complainants:

Please file the original and return a file-stamped copy to me in the enclosed self-addressed stamped envelope.

Sincerely,


Freeman R. Bosley, Jr.

FRB/krt
Enclosures

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

FILED³

SEP 09 2002

Missouri Public
Service Commission

Sterling Moody, Sterling's Market Place,
And Sterling's Place, I

Complainants,

v.

AmerenUE, Union Electric Co. d/b/a
AmerenUE; and Mike Foy, Leroy Ettling,
And Sherry Moshner, as employees of
AmerenUE,

Respondents.

Case No.: EC 2002-112

COMPLAINANTS' INITIAL BRIEF

COME NOW Complainants and, for their Initial Brief, state to the Missouri Public Service Commission as follows:

OVERVIEW

There are four issues in the case: 1) Did Respondents give Complainants notice of the disconnections of electrical service on April 10, 2001 and on April 17, 2001; 2) Did Respondent AmerenUE disconnect the electrical service while there was a dispute between the parties over a delinquent account? 3) Did Respondents properly apply a deposit paid by Complainant Moody to arrearages on Complainants' electric bill? 4) Were the terminations actions taken by Respondents AmerenUE, Ettling, Foy and Moschner willful, wanton and malicious?

The Complainants contend that the disconnections of April 10, 2001 and April 17, 2001 were improper because Respondents did not give Complainants notice of the disconnections as required by law. The Complainants also contend that the Respondents improperly applied a deposit to an arrearage on Complainants' electric bill, rather than holding it as a deposit on the Complainants' account.

BACKGROUND

At the time of the filing of the complaint, Complainant Sterling's Market Place was a grocery store owned by African-Americans and located in North St. Louis. It was the only supermarket located in that particular portion of St. Louis. The supermarket was part of a large strip mall which contained several other businesses.

Complainant Sterling's Market Place began using electric service provided by Respondent AmerenUE sometime in July of 1998. The store began operating as a grocery store in November of 1999. The store was owned by Broadway Supermarkets, Inc. from July of 1998 to September of 1999; Complainant Moody was the president and manager of the store, but not an owner of the corporation. In September of 2000, as the result of a lawsuit, Complainant Moody became the owner of Complainant Sterling's Market Place.

From the time of the opening of Complainant Sterling's Market Place, disputes arose about the amount of the bills and disputes concerning the amount of arrearages on the bill also developed. On numerous occasions, employees of Complainant Sterling's Market Place contacted Respondent to discuss the discrepancies in the bills. Complainant Sterling's Market Place ceased operations in October of 2001, and Complainant Sterling's Market Place and Respondents still had not resolved the discrepancies in the electric bill.

During the time that Complainant Sterling's Market Place was in operation, Respondents Foy, Ettling and Moschner and Complainant Sterling's Market Place management had worked out agreements to pay the current bill and to pay part of the arrearages, while leaving the electric service connected.

On April 10, 2001, Respondent AmerenUE disconnected the electricity at Complainant Sterling's Market Place. Immediately after the electricity went out, Complainant Moody called Respondent Leroy Ettling, Senior Credit Manager, at Respondent AmerenUE's office and

Respondent AmerenUE restored the electricity. On April 17, 2001, Respondent AmerenUE again disconnected the electricity. The supermarket was without electricity for approximately thirty-one days. Complainant Moody lost inventory, vendors and revenue. After representatives of Complainants and Respondent AmerenUE held a meeting in May of 2001, Respondent AmerenUE restored the electricity. Complainant Moody continued to operate the grocery store until October of 2001.

ARGUMENT

The Disconnection of Electrical Service

Respondent AmerenUE first disconnected the electricity at Complainant Sterling's Market Place on April 10, 2001. The evidence is undisputed that Respondents did not give prior notice of the disconnection to Complainant Sterling's Market Place. See Deposition of Charles M. Foy, page 16, lines 10 through 18; Rebuttal Testimony of Charles M. Foy, page 8, lines 3 through 22; Deposition of Leroy Ettling, page 50, lines 16 through 25; and Deposition of Sherry Moschner, page 14, lines 11 through 18.

Respondent AmerenUE's Tariff Schedule No. 5, Article VII, Section A states that a "company reserves and shall have the right, after written notice to disconnect service supplied by it to an electric customer for payment of an undisputed delinquent account." Schedule No. 5, Article VII, Section D states that "notice of intention to disconnect service for a nonresidential customer under this rule shall state the reason for which service shall be disconnected and shall specify a date after which such disconnection may be affected and such notice shall be mailed to or served upon customer no less than 48 hours prior to such date."

4 CSR 240-10.040(3) states that "no utility shall discontinue the service of any customer for violation of any rule of that utility except on written notice of intention to discontinue service. The notice shall state the reason for which service will be discontinued, specify a date

after which the discontinuance may be affected and shall be mailed or served upon the customer not less than 48 hours prior to that date."

Respondents have violated the above tariffs and state regulations by failing to give proper notice of the disconnection. Complainant Moody testified that Respondent AmerenUE's representative, Judy Rowe, did not hand him any letter or notice of disconnection. See Transcript of Proceedings, Testimony of Judy Rowe, Page 210, lines 6-25.

On April 17, 2001, Respondent AmerenUE again disconnected the electricity of Complainant Sterling's Market Place. Respondents did not mail or deliver a notice of the disconnection to Complainant Sterling's Market Place. Complainant Moody contends that an employee delivered a notice to himself on April 10, 2001, after the electricity had already been disconnected, and that this would qualify as notice. There is conflicting evidence on this issue. Respondent AmerenUE's employee, Judy Rowe, testified that she handed the letters to Complainant Moody. See Transcript of Proceedings, Testimony of Judy Rowe, page 210, lines 6 through 25. Miss Rowe also testified that she did not get any kind of receipt from Complainant Moody. Complainant Moody testified that Judy Rowe did not deliver any letter or notice to him on April 10, 2001. See Direct Testimony of Sterling Moody, page 133, lines 3 through 9. There is also testimony that Respondent AmerenUE and/or Respondents Ettling, Foy and Moschner did not deliver any notice of disconnection to Complainants between the dates of April 10 and April 17, 2001. See Transcript of Proceedings, Testimony of Sterling Moody, page 132, line 25 and page 133, lines 1 through 6. It is Complainants' contention that if Respondents' attempt at giving notice for the April 10th shutoff was defective a new notice needed to be issued for this second disconnection.

In Transcript of Proceedings Hearing, Louis Biernbaum stated that he was not sure that Judy Rowe handed Complainant Moody a letter, page 168, lines 3 through 22. Respondents are

asking this body to believe one of two possibilities. The first possibility is that Respondents delivered on April 10 what is in effect an Anticipatory [emphasis added] notice of disconnection for April 17. The second possibility proffered by the Respondents is that they delivered a notice of disconnect after the disconnection. The problem for the Respondents is that neither of these delivery possibilities satisfies statutory requirements [insert language].

With regard to the "Anticipatory notice of disconnection," it is not possible to give a notice for disconnection before service is on. Even if we are to accept as credible everything stated by Respondents, e.g., that Ms. Rowe in fact delivered a notice to Complainant Moody (in the dark, by herself without assistance) on April 10 when the electricity was off, the date on the notice was April 9, the day before the termination.

Nowhere in Respondents' testimony does Ms. Rowe or anyone else indicate that it was made clear that this April 9 dated notice would be in effect when the electricity was turned back on and would serve as a new notice of disconnect.

The only conclusion for a reasonable person to draw is that the notice dated April 9 was for the termination that occurred on April 10.

It does not satisfy statutory requirements to give a notice of disconnection when the electricity is already terminated.

As to Respondents' other possibility – "notice after disconnection", it is well settled that the Respondent AmerenUE has a statutory obligation to notify non-residential customers 48 hours before termination. Clearly, Respondent AmerenUE has failed to meet its statutory obligation.

Sherry Moschner, who was Manager of Customer Relations, gave conflicting testimony on this issue. She testified in her deposition, page 15, lines 7 through 10, that she believed Respondent AmerenUE had hand-delivered a second notice prior to the disconnection of April

17. However, in her testimony at the hearing, she testified that they could not document that they had delivered a second notice to Complainant Sterling's Market Place. See Transcript of Proceedings, Testimony of Sheryl Moschner, page 384, lines 2 through 6. Also, Louis Biernbaum stated that he was not sure that Judy Rowe had handed Complainant Moody a letter, page 168, lines 3 through 22.

Adding further confusion was the testimony of Charles Foy that he thought a representative of AmerenUE had photocopied the notice that Judy Rowe claimed she had delivered, and hand-delivered it to Complainant. But, Mr. Foy stated that he was not sure if this had occurred. See Deposition of Charles M. Foy, page 23, lines 45 through 22.

As evidence that Respondent AmerenUE's system of giving notice was ineffective, Sheryl Moschner testified that since the disconnection at Complainant Sterling's Market Place, Respondent AmerenUE now requires a customer to sign a receipt for a hand-delivered termination notice. See Transcript of Proceedings, page 384, lines 13 through 25, and page 384, line 1.

Disconnection While An Account Was Disputed

There is evidence that the amount of the bill from Complainant Sterling's Market Place was in dispute for some time. It is also Complainants' belief that as a result of the ongoing conversation and delivering of partial payments by Complainant Sterling's Market Place to Respondent AmerenUE's headquarters, that there existed a constructive payment arrangement. See Deposition of Charles M. Foy, page 26, lines 19 through 24; Transcript of Proceedings, Testimony of Sterling Moody, page 141, lines 9 through 25 and page 142, lines 1 through 15; and Testimony of Franklin Lefler, page 263, lines 5 through 14.

There is also evidence that Complainants and Respondents entered into an agreement which settled the dispute after Respondent had disconnected Complainant's electrical service on

two occasions. See Rebuttal Testimony of Franklin P. Lefler on Behalf of AmericanUE, Schedule 8, Page 1. The reference section of his letter agreement dated May 18, 2001, in fact reads "Dispute With Respect to Meter Numbers 01859500, 50688215 and 70593313."

Respondent AmerenUE's Tariff Schedule No. 5, Article VII, Section A states "In addition to any other right reserved by company in its schedules and regulations, company reserves and shall have the right, after written notice to disconnect service supplied by it to an electric customer for payment of an undisputed delinquent account." The amount of the bill was in dispute and Respondent's actions in disconnecting Complainant's electrical service were improper and illegal.

The Deposit Applied To The Arrearage

After the second termination of electric service, which occurred on April 17, 2001, Respondents demanded a deposit from Complainants in order to reconnect the service. The evidence indicates that the Respondents requested a deposit of twenty-five thousand dollars (\$25,000.00). See Deposition of Charles M. Foy, page 35, lines 19 through 25 and page 36, lines 1 through 8. The Respondents later changed the amount of the deposit to forty-five thousand dollars (\$45,000.00). See Deposition of Charles M. Foy, page 32, lines 15 through 2; and Rebuttal Testimony of Charles M. Foy, Schedule 13, e-mail to Sherry P. Moschner. In his deposition, Leroy Ettling stated that a deposit is applied onto a final bill balance and is not applied onto an account that is active. See page 63, line 25 and page 64, lines 1 through 5. Tariff Schedule No. 5, Article VI, Section B states that a "company may at any time, as a condition to furnishing or continuing service, require any customer or applicant for nonresidential service to make a cash deposit, or at company's option, furnish a personal guarantee of a responsible party with established credit satisfactory to company." The Respondent, after accepting a cash deposit of forty-five thousand dollars (\$45,000.00) also

required Complainants to obtain a guarantor on the account. See Deposition of Charles M. Foy, page 38, lines 14 through 24; Transcript of Proceedings, Testimony of Franklin Lefler, page 263, lines 1 through 4.

The Respondents have violated the above tariff by requiring and accepting a deposit, then requiring a guarantor and then applying the deposit to Complainants' bill. There is no provision in the law that the Respondents may do both; it can only require a deposit or "at company's option," furnish a personal guarantee. The Respondents may only use one option or the other. There is evidence that Complainants intended to apply the deposit to past bills prior to the meeting of May 18, 2001. See Rebuttal Testimony of Franklin P. Lefler, Schedule 6 – e-mail from Franklin P. Lefler to Sherry P. Moschner.

Also Respondents violated the PSC rules by requiring Complainant to put up a deposit which was more than twice the highest bill. Staff testimony during the hearing indicates that there was not a bill that Respondents issued to Complainants that justified requiring a \$45,000 deposit. See Transcript of Proceedings, Testimony of Jim Ketter, P.S.C. energy department, page 180, lines 2 through 24.

WRONGFUL TERMINATION

The evidence shows that the Complainant Sterling's Market Place was in arrears on its electric bill after Complainant Moody became the owner. The evidence also shows that representatives of Respondent AmerenUE and representatives of Complainant Sterling's Market Place made payment arrangements and carried out these arrangements for over a year. This constituted a constructive payment arrangement. See Deposition of Leroy Ettling, page 19, lines 18 through 25 and page 20, lines 1 through 7; Rebuttal Testimony of Leroy Etting On Behalf of AmerenUE, page 6, lines 18 through 23, page 7, lines 1 through 9; Deposition of Sherry P. Moschner, page 32, lines 17 through 25, page 24, lines 1 through 12.

Complainants made payments to Respondents from approximately April of 2000 to May of 2001. See Deposition of Leroy Ettling, page 20, lines 5 through 23. In Missouri, to prove the tort of wrongful termination of electrical service the plaintiff must prove the following: 1) the Respondent was engaged in the discharge of a public enterprise or service; 2) the Complainant fell within the class of persons whom the defendant was obligated to serve; 3) the Complainant had performed all conditions entitling them to service; 4) the defendant had wrongfully refused or neglected to supply such service to them; 5) the plaintiffs had been damaged. See Hayman v. Laclede Electric Co-Operative, 827 S.W.2d 200 (Mo.banc. 1992), citing Ellyson et ux. vs. Missouri Power and Light Co., 59 S.W.2d 714, 716 (Mo. App. 1993).

Complainants have met all of the above requirements: 1) Respondent AmerenUE was and is a public utility; 2) Complainant Sterling's Market Place was a commercial customer of Respondent AmerenUE; 3) Complainant had complied with the payment arrangements that the parties had made; 4) Respondent AmerenUE wrongfully or negligently refused to provide electrical service to Complainants; and 5) Complainants suffered monetary and other damages.

COMPLAINANTS' PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

Come now the Complainants and, for their Proposed Findings of Fact and Conclusions of Law, states to the Public Service Commission as follows:

On July 9, 2002, the Commission issued its Scheduling Order, in which it directed the Complainants and the Respondents to file their proposed findings of fact and conclusions of law.

PROPOSED FINDINGS OF FACT

1. AmerenUE is a public utility located in St. Louis, Missouri. It is a public utility engaged in providing electric service to the public in the State of Missouri, and is subject to the jurisdiction of the Commission, pursuant to Chapters 386 and 393, RSMo.

2. Sterling's Market Place was a supermarket, owned by Broadway Supermarkets, Inc. located in St. Louis, Missouri and a customer of AmerenUE.

3. Complainant Sterling Moody became the owner of Complainant Sterling's Market Place in September 2000.

4. Due to arrearages that had developed on the electric bill during the previous ownership and a dispute as to the correct billing amount, Respondent AmerenUE notified Complainant Sterling's Market Place on numerous occasions that it was delinquent on its bill and subject to having the electric service disconnected.

5. Complainants and Respondents made arrangements in which Complainant Sterling's Market Place representatives would periodically deliver payments to Respondents which would insure no interruption of electric service; this arrangement lasted for over one year.

6. On April 10, 2001, Respondent AmerenUE disconnected the electric service at Complainant Sterling's Market Place; Respondent AmerenUE reconnected the electric service within three hours.

7. Respondents did not give or deliver to Complainant Sterling's Market Place any notice of this disconnection of electrical service.

On April 17, 2001, Respondent AmerenUE disconnected the electric service at Complainant Sterling's Market Place; Respondent AmerenUE did not reconnect the electric service for thirty-one days.

8. Respondent AmerenUE did not mail or deliver to Complainant Sterling's Market Place any notice of this disconnection of electrical service.

9. As a result of Respondent AmerenUE's disconnection of electric service, Complainant Sterling's Market Place incurred damages due to spoiled inventories, lost revenues and loss of customers.

10. Prior to restoring electric service, Respondent AmerenUE demanded a deposit of twenty-five thousand dollars (\$25,000.00) from Complainant Sterling's Market Place.

11. When Complainant Moody advised Respondents that he could deliver the amount of twenty-five thousand dollar (\$25,000.00), an employee of Respondent AmerenUE advised Complainant Moody that he would have to deliver to Respondent AmerenUE a forty-five thousand dollar (\$45,000.00) deposit.

12. After Complainant Moody delivered the cashier's checks totaling forty-five thousand dollars (\$45,000.00), Respondent AmerenUE did not deposit the cashier's check, instead demanded that a guarantor be placed on the account of Complainant Sterling's Market Place.

13. After Complainant Moody obtained a guarantor on the account, Respondent AmerenUE restored electric service to the supermarket.

14. Respondent AmerenUE then applied thirty-six thousand dollars (\$36,000.00) to the arrearages on the electric bill and held nine thousand dollars (\$9,000.00) as a deposit on the account.

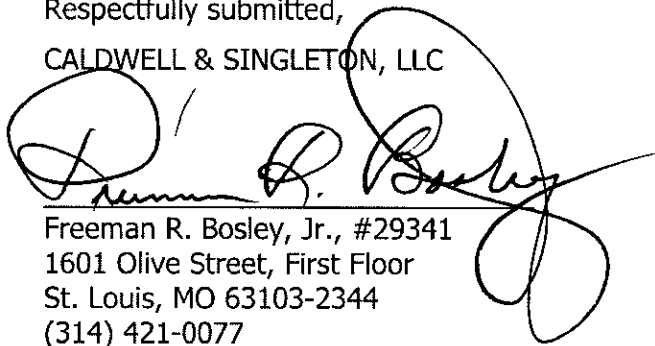
PROPOSED CONCLUSIONS OF LAW

1. Respondent AmerenUE violated its tariffs when, on two occasions, it disconnected Complainant's electric service while the amount of the bill was in dispute.

2. Respondent AmerenUE violated State Regulations, when on two occasions, it disconnected Complainants' electric service without giving Complainants proper notice.

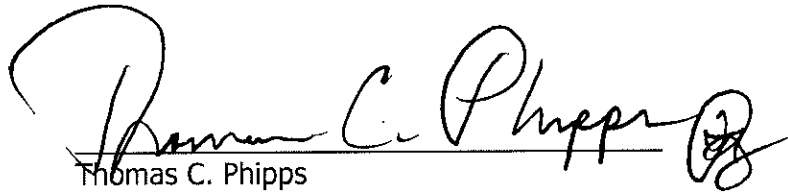
3. Respondent AmerenUE violated State Regulations by requiring Complainants to make a security deposit and then making Complainants place a guarantor on the account.
4. Respondents also violated PSC Regulations by requiring Complainants to put up a deposit more than twice the highest bill.
5. Respondents' disconnections of electric service were wrongful terminations.
6. Complainants suffered damages as a result of Respondents' wrongful disconnection of electric service.
7. Respondents' wrongful termination of electric service was willful, wanton and malicious.
8. Complainants are entitled to an award of damages for the actual damages incurred as a result of the wrongful terminations.
9. Complainants are entitled to an award of punitive damages as a result of Respondents' willful, wanton and malicious termination of Complainants' electric service.
10. Respondents, by violating numerous provisions of law, are to be fined according to the penalties provided in Section 386-570 of the Revised Statutes of Missouri, for each violation that each Respondent has committed.

Respectfully submitted,
CALDWELL & SINGLETON, LLC



Freeman R. Bosley, Jr., #29341
1601 Olive Street, First Floor
St. Louis, MO 63103-2344
(314) 421-0077
(314) 421-5377 Facsimile

*Attorneys for Complainants
Sterling Moody, Sterling's Market Place
And Sterling's Market Place, I*

A handwritten signature in black ink, reading "Thomas C. Phipps" with a stylized flourish at the end.

Thomas C. Phipps
6301 Clayton Avenue
St. Louis, MO 63139
(314) 781-2931
(314) 781-2695

*Co-Counsel for Complainants Sterling Moody,
Sterling's Market Place and Sterling's Market Place I*

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was served via first class, U.S. mail on this 9th day of September, 2002 to all parties of record listed below.

CASE NO. EC-2002-112

General Counsel
Missouri Public Service Commission
P. O. Box 360
Jefferson City, MO 65102

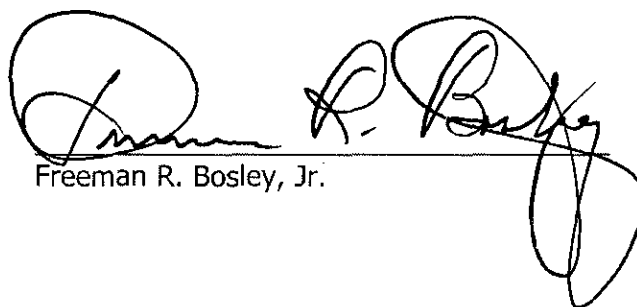
Steve Dottheim
Victoria Kizito
Associate General Counsel
P. O. Box 360
Jefferson City, MO 65102

John B. Coffman
Deputy Public Counsel
Office of the Public Counsel
Governor Office Building, Suite 650
200 Madison Street
Jefferson City, MO 65102

David B. Hennen
Associate General Counsel
Ameren Services Company
One Ameren Plaza
1901 Chouteau Avenue
St. Louis, MO 63166-6149

Michael A. Vitale
James D. Maschoff
HERZOG, CREBS & McGHEE, LLP
One City Centre, 24th Floor
515 North Sixth Street
St. Louis, MO 63101

James J. Cook
Managing Associate General Counsel
Ameren Services Company
One Ameren Plaza
1901 Chouteau Avenue
P. O. Box 661149 (MC 1310)
St. Louis, MO 63166-6149



Freeman R. Bosley, Jr.