STATE OF MISSOURI
PUBLIC SERVICE COMMISSION

At a session of the Public Service Commission held at its office in Jefferson City on the 8th day of September, 2010.

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

ORDER DISMISSING COMPLAINT

Issue Date: September 8, 2010 Effective Date: September 18, 2010

Background

On June 14, 2010,[1] Tawanda Murphy filed a complaint with the Commission against Union Electric Company, d/b/a AmerenUE ("AmerenUE"). Ms. Murphy asserts a tort claim predicated on the negligence theory of *res ipsa loquitur*. Ms. Murphy is represented by counsel for American Family Insurance Group who is asserting its rights as a subrogee of Ms. Murphy, whose insurance deductible is included in the claim. Ms. Murphy alleges that AmerenUE breached a duty to properly maintain, inspect and repair its equipment supplying electricity to her premises, and because of that negligence a fire ensued caused by resistive heating from an energized neutral conductor. The fire resulted in real and personal property damages totaling $45,824.78.

[1] All dates refer to the year 2010 unless otherwise noted.

AmerenUE filed its answer on July 15, 2010, asserting lack of jurisdiction and requesting the Commission dismiss the complaint for failure to state a claim upon which relief can be granted. AmerenUE argues that the Commission has limited jurisdiction and cannot determine damages, award damages or pecuniary relief or declare or enforce any principle of law or equity. AmerenUE further argues that Complainant fails to allege any act or thing done or omitted to be done claimed to be in violation of any statute, rule, order, or decision within the Commission's jurisdiction. Thus, Complainant, according to AmerenUE, has failed to even properly state a claim pursuant to the requirements of Section 386.390.1, RSMo 2000.[2]

On July 19, the Commission's Staff concurred with the legal arguments made in association with AmerenUE's motion to dismiss and asked that the deadline for its investigation be extended until August 23. The Commission directed Complainant to respond, giving Complainant an opportunity to amend her complaint, and suspended Staff's deadline for completing an investigation. On July 26, Complainant's response was filed. Complainant did not amend her petition. Rather Complainant clarifies that she is seeking any administrative remedy available under her current theories so that she may proceed to circuit court on any grounds not exhausted by this administrative body. Following this response, the Commission directed its Staff to complete its investigation and report to the Commission whether AmerenUE has violated any statute, regulation or tariff provision, the enforcement of which is under the jurisdiction of the Commission. Staff filed its recommendation and verified memorandum on August 23.

[2] All statutory references are to RSMo 2000 unless otherwise noted.

Staff has determined, based upon the best facts available, that a neutral line became energized by one of two possible events: (1) the failure of Ms. Murphy's distribution transformer, or (2) direct contact to the neutral wire itself. Staff observes that the relevant portion of the Company's tariff applicable to the facts in this case is found at Schedule No. 5, 7th Revised, Sheet 138 of the General Rules and Regulations (Part I – Section J), which reads as follows:

> Company will make all reasonable efforts to provide the service requested on an adequate and continuous basis, but will not be liable for service interruptions, deficiencies or imperfections which result from conditions which are beyond the reasonable control of the Company. The Company cannot guarantee the service as to continuity, freedom from voltage and frequency variations, reversal of phase rotation or singlephasing. The Company will not be responsible or liable for damages to customer's apparatus resulting from failure or imperfection of service beyond the reasonable control of the Company. In cases where such failure or imperfection of service might damage customer's apparatus, customer should install suitable protective equipment.

Staff states it cannot definitively establish any violation because the evidence is "long gone, as this incident occurred well over a year ago," Nevertheless, Staff's ultimate conclusion is that, the apparent cause of the fire was an energized neutral that was damaged by a tree limb that fell onto a secondary wire. The tree was not trimmed by AmerenUE because it lies on private property, is customer owned, and is beyond the reasonable control of the company. Consequently, Staff believes there is no violation of any statute, regulation or the relevant tariff provision. Staff recommends the complaint be dismissed.

On August 31, AmerenUE filed a motion for a determination on the pleadings, and on September 3, AmerenUE clarified that by filing the new motion, it is abandoning its earlier motion to dismiss to the extent that it might be read as a motion to dismiss a claim

for an administrative remedy available under Complainant's current theories. AmerenUE claims that the Commission *must* make factual determinations as to the sufficiency, safety and adequacy of its service before a circuit court could possibly hear Complainant's claim of negligence. AmerenUE further states that if the Commission fails to make such findings, it will oppose Complainant in circuit court by arguing the court lacks subject matter jurisdiction until such time as the Commission makes all factual determinations within the Commission's areas of administrative expertise. Complainant did not respond to AmerenUE's motion for a determination on the pleadings.

Analysis

As the United States Supreme Court articulated in *Woodford v. Ngo*:[3]

> The doctrine of exhaustion of administrative remedies is well established in the jurisprudence of administrative law. The doctrine provides **that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted**. Exhaustion of administrative remedies serves two main purposes. First, exhaustion protects administrative agency authority. Exhaustion gives an agency an opportunity to correct its own mistakes with respect to the programs it administers before it is haled into federal court, and it discourages disregard of [the agency's] procedures. Second, exhaustion promotes efficiency. Claims generally can be resolved much more quickly and economically in proceedings before an agency than in litigation in federal court. In some cases, claims are settled at the administrative level, and in others, the proceedings before the agency convince the losing party not to pursue the matter in federal court. And even where a controversy survives administrative review, exhaustion of the administrative procedure may produce a useful record for subsequent judicial consideration. (Emphasis added.) (Internal citations omitted.)

"The doctrine that one must exhaust his administrative remedies before resorting to the courts is firmly established in the law of this state."[4] Missouri Courts have, at times, referenced the exhaustion doctrine in terms of "primary jurisdiction." As the Court of

[3] 126 S.Ct. 2378, 2384 - 2393 (2006).

[4] *State ex rel. Scott v. Scearce*, 303 S.W.2d 175, 179 -180 (Mo.App.1957)

Appeals has succinctly articulated in *MCI Metro Access Transmission Services, Inc. v. City of St. Louis*:

> Missouri has long recognized the doctrine of primary jurisdiction. Under this doctrine, courts generally will not decide a controversy involving a question within the jurisdiction of an administrative tribunal until after the tribunal has rendered its decision. *Killian v. J & J Installers, Inc.,* 802 S.W.2d 158, 160 (Mo. banc 1991). This policy of self-restraint applies (a) where administrative knowledge and expertise are demanded to determine technical, intricate fact questions and (b) where uniformity is important to the regulatory scheme. *Id.*[5]

Equally important to the exhaustion doctrine, however, is the futility exception. A party may be excused from the requirement to seek administrative relief if seeking any relief from the agency would be futile.[6] And "[a]n administrative remedy will be deemed futile if there is doubt about whether the agency could grant effective relief."[7] Additionally, the exhaustion doctrine does not apply if the issue sought to be resolved poses no factual questions or issues requiring the special expertise within the scope of the administrative agency's responsibility, but instead proffers only questions of law clearly within the realm of the courts."[8] "A failure to exhaust administrative remedies may be justified when the only or

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[5] 941 S.W.2d 634, 644 -645 (Mo. App. 1997). This doctrine was applied by the Missouri Supreme Court in in *State ex rel. Cirese v. Ridge,* 138 S.W.2d 1012, 1013-1016 (1940), where a plaintiff utility company sought an injunction in circuit court against defendant power and light company. The supreme court instructed the trial court to dismiss plaintiff's petition holding that if defendant power and light company was unlawfully operating, plaintiff could file a complaint with the PSC, and if either party was dissatisfied with the PSC's ruling, that party could seek review in the courts. The Supreme Court concluded that it adhered "to the theory of the commission's exclusive jurisdiction in the first instance." *Id*.

[6] *Paric Corp. v. Murphy*, 903 S.W.2d 285, 289 (Mo. App. 1995); *Schierding v. Missouri Dental Bd*., 705 S.W.2d 484, 486 (Mo. App. 1985). Or as it has been stated in other legal contexts: "The law will not require the doing of a useless and futile act." *Guelker v. Director of Revenue*, 28 S.W.3d 488, 491 (Mo. App. 2000). The futility doctrine applies to federal agencies as well. See *Honig v. Doe,* 108 S.Ct. 592 (1988) as but one of many examples.

[7] *Midgett v. Washington Group Intern. Long Term Disability Plan*, 561 F.3d 887, 898 (8th Cir. 2009); *Ace Prop. & Cas. Ins. Co. v. Fed. Crop Ins. Corp.,* 440 F.3d 992, 1000 (8th Cir.2006); *Klaudt v. U.S. Dep't of Interior,* 990 F.2d 409, 412 (8th Cir.1993).

[8] *City of Bridgeton v. City of St. Louis*, 18 S.W.3d 107, 112 (Mo. App. 2000); *Premium Standard Farms, Inc. v. Lincoln Tp. Of Putnam County,* 946 S.W.2d 234, 238 (Mo. banc 1997).

controlling question is one of law, at least where there is no issue essentially administrative, involving agency expertise and discretion, which is in its nature purely administrative."[9]

The Commission does have "primary jurisdiction" over complaints made against a corporation, person or public utility pursuant to Section 386.390, meaning that matters 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.[10] Section 386.390.1 provides:

> Complaint may be made by the commission of its own motion, or by the public counsel or any corporation or person, chamber of commerce, board of trade, or any civic, commercial, mercantile, traffic, agricultural or manufacturing association or organization, or any body politic or municipal corporation, **by petition or complaint in writing, setting forth any act or thing done or omitted to be done** by any corporation, person or public utility, including any rule, regulation or charge heretofore established or fixed by or for any corporation, person or 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**; provided, that no complaint shall be entertained by the commission, except upon its own motion, as to the reasonableness of any rates or charges of any gas, electrical, water, sewer, or telephone corporation, unless the same be signed by the public counsel or the mayor or the president or chairman of the board of aldermen or a majority of the council, commission or other legislative body of any city, town, village or county, within which the alleged violation occurred, or not less than twenty-five consumers or purchasers, or prospective consumers or purchasers, of such gas, electricity, water, sewer or telephone service. (Emphasis Added.)

To plead a proper complaint before the Commission, at minimum, there must be an allegation of a violation of a law, rule, order or decision of the Commission.[11] It is also well settled law that if a petitioner's allegations invoke substantive principles of law which may

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[9] *Id*.

[10] *DeMatanville v. Fee Fee Trunk Sewer*, 573 S.W.2d 674, 676 (Mo. App. 1978).

[11] *State ex rel. Ozark Border Elec. Co-op. v. Public Service Comm'n of Missouri*, 924 S.W.2d 597, 600 (Mo. App. 1996).

entitle them to relief, the petition should not be dismissed even though the cause is imperfectly stated.[12]

Additionally, "[a] pleading is not defective even if plaintiff is not entitled to all of the relief sought, so long as he has averred enough to entitle him to some relief."[13] This Commission, however, cannot grant monetary relief for damages or order a pecuniary reparation or refund.[14] As the court of appeals noted in *State ex rel. GS Technologies Operating Co., Inc. v. Public Service Commission*:

> While the "Commission does have exclusive jurisdiction of all utility rates," "when a controversy arises over the construction of a contract or of a rate schedule upon which a contract is based, and a claim of an overcharge is made, only the courts can require an accounting or render a judgment for the overcharge." *Wilshire Constr. Co. v. Union Elec. Co.*, 463 S.W.2d 903, 905 (Mo. 1971). This is so because the Commission "cannot 'enforce, construe nor annul' contracts, nor can it enter a money judgment." *Id*. (quoting *May Dep't Stores Co. v. Union Elec. Light & Power Co.*, 107 S.W.2d 41, 49 (Mo. 1937)). Likewise, the Commission does not have the authority to do equity or grant equitable relief. *Am. Petroleum Exch. V. Pub Serv. Comm'n*, 172 S.W.2d 952, 955 (Mo. 1943).[15]

While the Commission has the jurisdiction to hear complaints pursuant to Section 396.390, the statute does not authorize the Commission to award monetary damages on the basis of a negligence theory. Indeed, Ms. Murphy is not alleging any there is a billing dispute or that there are issues with the provision of her electric service. As such, she is not invoking any substantive principles of law which may entitle her to a form of relief this Commission could award pursuant to its regulations. The Commission does have authority to seek penalties pursuant to Section 386.570 if a utility violates a statute or a Commission

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[12] *DeMaranville,* 573 S.W.2d at 676.

[13] *U.S. Suzuki Motor Corp. v. Johnson*, 673 S.W.2d 105, 106 (Mo. App. 1984), citing to *City of Creve Coeur v. Creve Coeur Fire Protection District,* 355 S.W.2d 857, 859 (Mo. 1962).

[14] The commission is not a court and cannot enter a money judgment for one party against another. *May Dep't Stores Co. v. Union Elec. Light & Power Co.*, 107 S.W.2d 41, 57-58 (Mo. 1937).

order, decision, decree, rule, direction, demand or requirement. But, while the penalty statute would allow the Commission to seek penalties for a vioaltion of a statute, regulation or tariff provision, all moneys recovered in a penalty action must be paid to the school fund of the state pursuant to Section 386.600. Consequently, the penalty statute provides no effective remedy for Ms. Murphy.

Ms. Murphy's petition, filed by experieinced counsel for American Family Insurance Group, is defective for multiple reasons. The petition does not clearly assert any violation of a law, rule, order or decision of the Commission. Indeed, the doctrine or *res ipsa loquitur* is used in cases in which it is not clear exactly what caused an injury, but all the probable causes are within the control or right to control of defendant.[16] The use of this doctrine does not lend itself to a specific pleading of a violation, but it is the theory advanced at the choice of the Complainant. Indeed, there could be an infinite number of causes for this fire that do not relate to any statute, regulation, tariff provision or Commission order or decision. Without some pleading of a violation, at least some imperfect pleading, it is not a properly pled complaint and it does not trigger the hearing requirement in Section 386.390.[17] Counsel was given the opportunity to amend the complaint and elected not to do so.

Perhaps more importantly, it would also appear from Staff's investigation that even if the complaint were amended, there has been no identifiable violation of any statute, regulation, tariff provision, order or decision by the Commission in relation to the events so

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[15] 116 S.W.3d 680, 696 (Mo. App. 2003).

[16] *Sides v. St. Anthony's Medical Center*, 258 S.W.3d 811, 814 (Mo. Banc 2008).

[17] A complaint brought properly before the Commission under Section 386.390 is a contested case requiring a hearing. Section 386.390; *State ex rel. Div. of Transp. v. Sure-Way Transp., Inc*. 948 S.W.2d 651, 656 (Mo. App. 1997).

described. And the Commission's Staff has observed that the evidence in relation to the cause of the fire is long gone. Even if the petition was liberally construed to have pled a proper complaint, the petition fails to articulate any relief that this Commission has the authority to grant to Ms. Murphy.

Decision

Based upon Staff's investigation, its recommendation and verified memorandum, and the Commission's independent review of the filings, the Commission finds that Ms. Murphy has failed to state a claim upon which the Commission may grant relief. Ms. Murphy has failed to allege, and the Commission's Staff has been unable to establish that AmerenUE has violated any statute, regulation or tariff provision, the enforcement of which is under the Commission's jurisdiction. And, the common law tort theory advanced by Ms. Murphy prays for a remedy this Commission cannot supply.

AmerenUE seems to be under the impression that the Commission must make all possible findings of facts and conclusions of law with regard to Ms. Murphy's complaint in order for her to exhaust her administrative remedies with this Commission. The Commission believes this interpretation of the exhaustion doctrine is too broad. The Commission need only determine if there is any relief within its justification and authority to grant Ms. Murphy in order to satisfy the doctrine. The legal issue concerning liability based upon a theory of *res ipsa loquitur* requires no determination requiring the special expertise within the scope of this agency's responsibility. To the extent Ms. Murphy is required to exhaust all available remedies with this Commission, the Commission finds that she has met that requirement. There is simply no effective available remedy this Commission can grant to Ms. Murphy in relation to her negligence claim.

THE COMMISSION ORDERS THAT:

1. Tawanda Murphy's complaint is dismissed.

2. This order shall become effective on September 18, 2010.

3. This file shall close on September 19, 2010.

BY THE COMMISSION

Steven C. Reed
Secretary

(S E A L)

Clayton, Chm., Davis, Jarrett, Gunn,
and Kenney, CC., concur.

Stearley, Senior Regulatory Law Judge