

Stella Lucy,
Complainant,

vs.

The Union Electric Company dba
Ameren Missouri,

Respondent

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Case No. EC-2018-0376

⁴ Tr. v. 2, p. 10-11.

Smith Lewis LLP, represented Ameren.⁵ Kevin A. Thompson, Steve Dottheim, and Ron Irving represented the Staff. The Office of the Public Counsel did not participate.⁶

Issues for Commission Resolution:

The single issue presented for resolution by the Commission is Ms. Lucy's claim for money damages of \$5,151.25 for property damage sustained on October 4, 2017, due to the Company's negligence.

Proposed Findings of Fact:

Based on the pleadings, testimony and exhibits, and the inferences fairly drawn therefrom, Staff recommends that the Commission make the following findings of fact.

1. Stella Lucy owns property near Robertsville, Missouri.⁷
2. Ms. Lucy's property is within Ameren's service area and, prior to October 4, 2017, she and her neighbors received electrical service from Ameren via a single-phase feeder strung along Hendricks Road.⁸
3. On October 4, 2017, an Ameren subcontractor⁹ approached Ms. Lucy and advised her that her electric service would be temporarily interrupted in connection with the installation of three-phase service to her neighbor's shop.¹⁰
4. Ms. Lucy, the only eyewitness to testify, testified that the work crew identified themselves to her as subcontractors rather than as Ameren employees, that they did not wear Ameren uniforms, and that their trucks lacked Ameren insignia.¹¹

⁵ *Id.*

⁶ *Id.*

⁷ *Answer*, ¶ 1; *Staff Report*, p.1.

⁸ *Answer*, ¶ 9.b; Tr. v. 2, p. 130.

⁹ Tr. v. 2, pp. 138-139.

¹⁰ Tr. v. 2, pp. 19-20.

5. After speaking to the worker, Ms. Lucy heard her generator running, indicating that her service had been interrupted.¹²

6. A while later, Ms. Lucy noticed that the generator was no longer running. She went into her house to check on her husband, who was recuperating from heart surgery, and found that the residence was without power and her garage was filled with smoke.¹³

7. Ms. Lucy and her husband drove in their truck to Hendricks Road where a crew was at work on the power lines. When they arrived at the work site, a worker stated, "We didn't do nothing, it ain't our fault."¹⁴

8. Three members of the work crew accompanied Mr. and Ms. Lucy back to their house and examined the generator-switching apparatus which was the source of the smoke. Upon examining the meter, one worker called out, "We've got 270." Another worker responded, "You mean 240." The first worker replied, "Yeah, it was 240."¹⁵

9. Mr. Lucy called the generator service technician, who advised the work crew how to by-pass the generator switching gear to restore service to the premises. As the workers were putting this by-pass in place, one of them stated, "We didn't do nothing and it's not our fault."¹⁶ The same worker then took Ms. Lucy aside and told her, "You need to get ahold of UE, okay, so they can fix your stuff. Okay? [He said,]

¹¹ Tr. v. 2, pp. 138-139, 156-157, 158.

¹² Tr. v. 2, p. 20.

¹³ Tr. v. 2, p. 20.

¹⁴ Tr. v. 2, pp. 20-21.

¹⁵ Tr. v. 2, pp. 21-22.

¹⁶ Tr. v. 2, p. 22.

You could have lost the whole house. It's fortunate that you all were home because don't -- you could have lost the whole thing, you know.”¹⁷

10. The work crew restored the Lucy's service.¹⁸ At that point, for the third time, one of them told Ms. Lucy, “We didn't do nothing, it's not our fault.”¹⁹

11. In the following days, Ms. Lucy discovered that her heater was not working and needed a new switch and that only a single light in the shop worked and it was strobing.²⁰ Upon discovering the latter, Ms. Lucy walked across her yard to the street, where the work crew was still at work, and said, “There's something [wrong] in my shop because we got a strobe light and we don't have a strobe light.” One of the workers replied, “Well, you've got to be hooked to a three-phase.”²¹

12. Ms. Lucy submitted a claim for damages to Consumer Claims Management, Ameren's contractor, speaking to adjuster Margaret Stringer.²² She found Ms. Stringer to be unhelpful and hard to reach, although pleasant in manner.²³ Although Ms. Lucy left several messages for her, Ms. Stringer did not return Ms. Lucy's calls.²⁴

13. Ameren repeatedly rejected Ms. Lucy's claim for damages.²⁵

14. Staff expert Cedric Cunigan investigated Ms. Lucy's informal and formal complaints.²⁶ Mr. Cunigan stated that he spoke to both Ms. Lucy and to Ameren to get

¹⁷ *Id.*

¹⁸ Tr. v. 2, pp. 22-23.

¹⁹ Tr. v. 2, p. 22.

²⁰ Tr. v. 2, pp. 23-24.

²¹ Tr. v. 2, p. 24.

²² Tr. v. 2, pp. 24-27, 40, 71-72, 74.

²³ Tr. v. 2, pp. 24-27.

²⁴ *Id.*

²⁵ *Id.*

their story of what happened, going back and forth between them several times.²⁷ He also spoke with the Generac serviceman.²⁸ Mr. Cunigan's process was to take down their stories and piece together what happened on October 4, 2017.²⁹ Mr. Cunigan determined that there was an error, i.e, a failure or malfunction, involving the generator transfer switch, but was not able to say what caused that error.³⁰ The results of Mr. Cunigan's investigation were embodied in Staff's report, which was received as Exhibit 21.³¹

15. Visual inspection of the generator transfer switch revealed fire damage, which corroborated Mr. Cunigan's conclusion.³² Mr. Guehne, an expert witness for Ameren, testified that the photographs show that arcing occurred.³³ Mr. Guehne also testified that pictures of the damaged transfer switch show significant corrosion.³⁴

16. Aubrey Krcmar is an Ameren employee, formerly a customer service supervisor.³⁵ Ms. Krcmar did not personally participate in any of the events of this case, but she did explain Exhibits 10-C and 11-C, which show that Ms. Lucy's initial call was on October 5, 2017, and not on October 4, 2017, as she had testified.³⁶

²⁶ Tr. v. 2, p. 50.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ Tr. v. 2, pp. 50-51, 52-53.

³¹ Tr. v. 2, p. 51; Ex. 21.

³² Tr. v. 2, p. 53; Ex's 41, 42, 43, 46.

³³ Tr. v. 2, p. 136.

³⁴ Tr. v. 2, p. 150.

³⁵ Tr. v. 2, pp. 56-57.

³⁶ Ex's 10-C and 11-C.

Ms. Krcmar was unable to explain why Ms. Stringer was difficult to reach or why she did not return Ms. Lucy's calls.³⁷

17. Edwin Guehne is an Ameren employee, supervisor of electrical operations in the Meramec Valley Division, Franklin District.³⁸ Mr. Guehne testified that he is generally familiar, by virtue of training and experience, with Ameren's distribution system, particularly the conversion of a single-phase service to a three-phase service.³⁹ Mr. Guehne also testified that he is generally familiar with the records produced and maintained by Ameren with respect to line maintenance and conversion work and that he reviewed both Ms. Lucy's complaint and Ameren's associated records.⁴⁰ Additionally, he testified that he is personally familiar with the distribution facilities serving Ms. Lucy and her neighbors and he supervised the crew that installed the three-phase service to Ms. Lucy's neighbor on October 4, 2017.⁴¹

18. Mr. Guehne explained that a "feeder" is a line extending from a substation to serve customers and that most substations have 6 to 8 feeders.⁴² A feeder is typically a three-phase line.⁴³ A "tap" is the attachment of a customer's service line to a feeder.⁴⁴ A service line may be either single-phase or three-phase. Mr. Guehne further

³⁷ Tr. v. 2, p. 72.

³⁸ Tr. v. 2, pp. 76-77.

³⁹ Tr. v. 2, pp. 77-79.

⁴⁰ Tr. v. 2, p. 79-80.

⁴¹ Tr. v. 2, pp. 79-80.

⁴² Tr. v. 2, p. 81.

⁴³ *Id.*

⁴⁴ Tr. v. 2, p. 82.

explained that single-phase is typically fed with one wire, delivering 7,200 volts, while three-phase is fed with three wires, delivering 12,470 volts.⁴⁵

19. Mr. Guehne testified that the October 2017 project on Hendricks Road involved converting a single-phase service to a three-phase service to serve a machine shop that a customer was building.⁴⁶ The crew proceeded to set new poles as follows, going down the line and “laying out the phase,” that is, moving the single-phase line onto some fiberglass arms, further away from the road and over the property lines to allow room to set the new poles.⁴⁷ The line is energized when this work is done.⁴⁸ Then, the crew added crossarms to all of the new poles, and then strung in the two additional phase lines to provide the three-phase service to the Lucys' neighbor.⁴⁹ Once the new lines were in place, the original line was moved to the new poles, using rollers on the crossarms and ropes to pull the wires.⁵⁰ Ropes were also used to pull the new lines into place.⁵¹ Finally, the old poles were removed.⁵²

20. Mr. Guehne further testified that the new three-phase service did not extend all the way to the Lucys' premises, but stopped just short of the driveway of their neighbor on the southern side of their property.⁵³ On October 4, 2017, the crew notified the Lucys that their power would be interrupted for a short time, installed a “normally

⁴⁵ *Id.*

⁴⁶ Tr. v. 2, p. 83.

⁴⁷ Tr. v. 2, pp. 83, 87.

⁴⁸ Tr. v. 2, p. 88.

⁴⁹ Tr. v. 2, p. 83.

⁵⁰ Tr. v. 2, p. 88.

⁵¹ Tr. v. 2, pp. 88-89.

⁵² Tr. v. 2, p. 99.

⁵³ Tr. v. 2, p. 85.

open switch” on the structure where the three-phase feeder terminated, and moved the clamp serving the Lucy residence from the south side of the pole to the north side of the pole so it would be on a different side of the normally open switch.⁵⁴

21. A normally open switch allows work crews to de-energize part of a line so it can be worked on safely.⁵⁵ In addition to the normally open switch installed on October 4, 2017, there was a normally open switch at the intersection of Hendricks Road and Highway 30.⁵⁶

22. The power conducted by the single-phase feeder line that served Hendricks Road prior to October 4, 2017, ran from north to south.⁵⁷ After the construction was completed, the Lucys were still served by that single-phase feeder conveying power south along Hendricks Road.⁵⁸ Since it was first energized on October 9, 2017, the new three-phase feeder conveys power north along Hendricks Road to an end structure just south of the Lucys’ driveway.⁵⁹

23. The new phase lines added to the Hendricks Road feeder were first energized on October 9, 2017.⁶⁰

24. Significantly, Ameren was unable to find the Job Briefing Form describing the work activities performed on Hendricks Road on October 4, 2017.⁶¹

⁵⁴ Tr. v. 2, pp. 90-92, 93-94.

⁵⁵ Tr. v. 2, p. 90.

⁵⁶ Tr. v. 2, pp. 93, 154.

⁵⁷ Tr. v. 2, p. 130.

⁵⁸ Tr. v. 2, pp. 130-131.

⁵⁹ Tr. v. 2, p. 130, 132, 156.

⁶⁰ Tr. v. 2, p. 95; Ex. 3.

⁶¹ Tr. v. 2, pp. 97, 132.

25. None of the other customers on Hendricks Road suffered a power surge on October 4, 2017.⁶²

26. Mr. Guehne testified that detaching, moving and re-attaching the Lucys' s service line clamp could not have caused a power surge because the voltage on the single-phase line involved was constant at about 7,200 volts. Likewise, the transformer on the Lucys' service line, which steps the power down from 7,200 volts to 240 volts, would likely have been damaged.⁶³ The transformer in question is still in place today, functioning normally.⁶⁴

27. Mr. Guehne opined that, "initially when we de-energized the service, the generator transfer switch did transfer correctly to the generator power. But when power was restored to Ameren's transformer, I do not believe the transfer switch correctly transferred back to Ameren's power."⁶⁵

28. Mr. Guehne was not personally present at the Lucys' premises on October 4, 2017, and did not participate in any of the events pertinent to this case.⁶⁶

29. Mr. Guehne reluctantly admitted that the damage to the Lucys' generator transfer switch was consistent with a power surge.⁶⁷

30. The Lucys suffered property damage amounting to \$5,151.25 on October 4, 2017.⁶⁸

⁶² Tr. v. 2, pp. 101-102, 152-153; Ex. 4.

⁶³ Tr. v. 2, pp. 107-108, 108-109, 152-153.

⁶⁴ Tr. v. 2, pp. 114-115.

⁶⁵ Tr. v. 2, p. 118.

⁶⁶ Tr. v. 2, p. 125-126.

⁶⁷ Tr. v. 2, p. 136.

⁶⁸ *Complaint*.

31. The evidence adduced supports an inference that, on October 4, 2017, during the installation of the normally open switch and the movement of the service line clamp serving the Lucys' residence, the Ameren work crew caused a power surge on the Lucys' service line that resulted in the property damage suffered by the Lucys.

Credibility:

Staff recommends that the Commission find Ms. Lucy's testimony to be credible, particularly with respect to those parts of her testimony disputed by Ameren. Although Ameren could have presented the testimony of the personnel actually involved in the events of October 4, 2017, it chose not to do so. Ms. Lucy was personally present on October 4, 2017, and was the only eyewitness that testified. The Commission had an opportunity to see her demeanor, consider her credibility, and hear her eyewitness testimony. Her testimony therefore should be believed over that offered by Ameren where the evidence conflicts. "Evaluation of expert testimony is left to the Commission which 'may adopt or reject any or all of any witnesses' [sic] testimony." ***State ex rel. Associated Natural Gas v. Pub. Serv. Comm'n***, 37 S.W.3d 287, 294 (*quoting State ex rel. Associated Natural Gas Co. v. Pub. Serv. Comm'n*, 706 S.W.2d 870, 880 (Mo.App.1985)). "When the Commission decides, in a proper exercise of its discretion, whether to adopt or reject an expert's testimony, this court will not second-guess that decision." ***State ex rel. GS Technologies Operating Co., Inc. v. Public Service Com'n of State of Mo.***, 116 S.W.3d 680, 690 (Mo. App., W.D. 2003).

Proposed Conclusions of Law:

Ameren's Affirmative Defense:

Ameren asserted the following affirmative defense in ¶ 16 of its *Answer*:

In further answer, the Company states that its tariffs filed with and approved by the Commission have the force and effect of law. Tariff Sheet 133, I. General Rules and Regulations Section C. Application for Service, provides in part, "All electric service will be provided subject to the provisions of the Company's tariffs applicable to the service requested and these rules and regulations[.]" Likewise, Tariff Sheet 126, I. General Rules and Regulations Section A. Authorization and Compliance states, in part, "[i]n accepting service provided by Company, a customer agrees to comply with all applicable rules and regulations contained [in the Electric Service Tariff]." In particular, Tariff Sheet 138, I. General Rules and Regulations, Section J. Continuity of Service states, in part, "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." Although the Company denies that there has been any failure or imperfection in the service it has provided to Complainant, to the extent any such failure or imperfection may have occurred, it is Complainant's duty to install suitable protective equipment to protect Complainant's apparatus from damage. The facts suggest, however, that any variation in voltage at the Premises that may have resulted in damage to Complainant-owned wires, breaker panel, lighting or appliances was caused by a malfunction of Complainant's generator or generator transfer switch, which Complainant-owned equipment was and is out of the Company's control. "The utilities will not be held responsible for variations in service voltage at a customer's premises caused by...causes beyond the utility's control." 4 CSR 240-10.030(23)(D).

However, the Missouri Court of Appeals has held, "We find no statute . . . that grants the Commission the authority to limit a public utility's negligence liability involving personal injury or property damage. Nowhere do the statutes establish a policy suggesting that a public utility company should be immune from negligence liability when its negligence is responsible for a customer's death, injury, or damage to property.

***Public Service Comm'n of State v. Missouri Gas Energy*, 388 S.W.3d 221, 230-231**

(Mo. App., W.D. 2012). In light of the guidance provided by the Court, Ameren's tariffs must be interpreted so as to not prevent a claim for damage resulting from the Company's negligence.

Because Ms. Lucy seeks money damages for property damage resulting from the Company's negligence, the tariff provisions cited by the Company are not applicable.

Ms. Lucy's Claim for Money Damages:

With respect to Ms. Lucy's claim for money damages, and the Company's *Motion to Dismiss*, the Commission is not a court and may not award money damages.

American Petroleum Exchange v. Public Service Commission, 172 S.W.2d 952, 955 (Mo. 1943). The Missouri Supreme Court has held:

[T]he complainants herein pray the Public Service Commission to order and require the St. Louis County Water Company to account to complainants for the moneys in excess of the manufacturers' rate which complainants, under protest, have been compelled to pay to the water company since April 1, 1924, and to refund to the complainants the excess moneys so paid, together with interest thereon. The pecuniary relief so prayed by complainants calls for the exercise of a judicial function, by the entry of a judgment or order for the recovery of money, which function is exclusively exercisable only by the judicial branch or department of our state government. The Public Service Commission is an administrative body only, and not a court, and hence the commission has no power to exercise or perform a judicial function, or to promulgate an order requiring a pecuniary reparation or refund. It therefore follows that the Public Service Commission has no power or authority to determine or to award the pecuniary relief prayed by complainants herein.

State ex rel. Laundry, Inc. v. Pub. Serv. Comm'n, 327 Mo. 93, 112, 34 S.W.2d 37, 46 (1931) (internal citations omitted).

While the Commission lacks authority to grant Ms. Lucy's claim, dismissal is also improper. Rather, the Commission should hear and determine Ms. Lucy's claim insofar

as its authority extends. “It has been held that matters within the jurisdiction of the Commission must first be determined by it, in every instance, before the courts will adjudge any phase of the controversy.” ***State ex rel. Cirese v. Ridge***, 345 Mo. 1096, 138 S.W.2d 1012, 1015[5] (banc 1940). Ms. Lucy must now go to her local circuit court and seek recovery against Ameren via a civil lawsuit.

Respectfully submitted,

/s/ Kevin A. Thompson

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing has been served, by hand delivery, electronic mail, or First Class United States Mail, postage prepaid, to all parties of record on the Service List maintained for this case by the Data Center of the Missouri Public Service Commission, on this 6th day of December, 2018.

/s/ Kevin A. Thompson