

**STATE OF MISSOURI
PUBLIC SERVICE COMMISSION**

At a session of the Public Service
Commission held at its office in
Jefferson City on the 19th day of
April, 2007.

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|-------------------------------------|---|-------------------------------------|
| In the Matter of Cheryl L. Fabulae, |) | |
| |) | |
| Complainant, |) | |
| |) | |
| v. |) | <u>Case No. EC-2007-0146</u> |
| |) | |
| Kansas City Power & Light Company, |) | |
| |) | |
| Respondent. |) | |

ORDER DISMISSING COMPLAINT WITH PREJUDICE

Issue Date: April 19, 2007

Effective Date: April 29, 2007

On October 6, 2006, Cheryl L. Fabulae filed a formal complaint against Kansas City Power & Light Company ("KCPL").¹ By order dated November 16, 2006, the Commission granted Staff's motion for expedited treatment and resolution of the complaint and set it for an evidentiary hearing in Room 305 of the Governor Office Building on Monday, November 27, 2006, beginning at 10:00 a.m. No continuance was secured by any party beforehand, and the hearing was convened at the scheduled time. While KCPL and the

¹ Ms. Fabulae amended this complaint on October 12, 2006. On October 24, 2006, the Commission granted Staff's motion to consolidate the amended formal complaint with a separate informal complaint Ms. Fabulae had also filed on October 12.

Commission's Staff appeared for the hearing by their counsel with their witnesses, Ms. Fabulae did not appear, either in person or by telephone.

Since Ms. Fabulae failed to appear at the November 27, 2006 evidentiary hearing without previously having secured a continuance, her complaint against KCPL became subject to dismissal unless she showed good cause for her absence.² On December 14, 2006, Ms. Fabulae filed a pleading explaining that the reason she did not appear at the evidentiary hearing on November 27, 2006 was that she was hospitalized with pneumonia at Liberty Hospital from November 21 through November 30, 2006.

On January 4, 2007, the Commission found that since Ms. Fabulae had clearly made a *prima facie* showing of good cause and no other party had filed an opposing responsive pleading, the evidentiary hearing would be rescheduled. However, the Commission did not reschedule the hearing at that time, citing information from the record requiring it to balance various competing considerations as follows:

As to when the hearing will be held, the Commission is aware that on November 16, 2006, it granted Staff's motion for expedited treatment and resolution of Ms. Fabulae's complaint. The Commission is also aware that in her December 14, 2006 response to the show cause order, Ms. Fabulae stated that she wished to "finalize this matter with the commission as soon as possible" so that she could begin to "pursue other legal options" regarding the subject matter of her complaint. On the other hand, Ms. Fabulae's response to the show cause order also states that because she is "still under close observation as [her] health has significantly deteriorated," she does "not [have] the strength at this time to put forth more energy toward this matter." Accordingly, the date, time, and location of the rescheduled hearing will be specified in a separate order.

² See 4 CSR 240-2.110(2)(B) ("Failure to appear at a hearing without previously having secured a continuance shall constitute grounds for dismissal of the party or the party's complaint, application or other action unless good cause for the failure to appear is shown.")

On January 18, 2007, the Commission reset Ms. Fabulae's complaint for an evidentiary hearing in Room 310 of the Governor Office Building on Friday, February 9, 2007, beginning at 9:00 a.m., explaining:

The Commission notes that it has now been more than a month and a half since Ms. Fabulae was released from the hospital and over a month since she pled that she was "still under close observation" and did "not [have] the strength at this time to put forth more energy toward this matter." Taking this into consideration, along with the facts that the Commission has granted Staff's motion for expedited treatment and resolution of Ms. Fabulae's complaint and that Ms. Fabulae has pled that she wishes to "finalize this matter with the commission as soon as possible," the Commission will reset the complaint for hearing on Friday, February 9, 2007.

The record further indicates that both the Complainant and the Respondent in this matter, as well as their respective witnesses, are located in the greater Kansas City metropolitan area. For that reason, and in light of Ms. Fabulae's health concerns, the Commission finds that the parties may use the videoconferencing capabilities of the Commission's offices in downtown Kansas City, which are located in the Fletcher Daniels State Office Building, 615 East 13th Street, Kansas City, Missouri 64106.³

Finally, in an attempt to prevent yet another pretermitted evidentiary hearing, the Commission's order provided:

Any party seeking a continuance of the hearing date set in this order shall file a pleading with the Commission stating why they are unable to attend the hearing as scheduled, either in person, by videoconference link, or by phone, and shall further provide the Commission with a list of dates on which that party is available to appear. Any party requesting a continuance shall also serve a copy of the request on every party to this case.

The following day (January 19, 2007), Ms. Fabulae filed a letter in which she requested that the Commission reset her case for an evidentiary hearing as soon as possible so as to "finaliz[e] an out come to this complaint at the Commission level." On

³ The Commission's order further provided that the parties could also participate by telephone, and noted that "[a]ny party needing additional accommodations to participate in the hearing by either of these methods should call the Missouri Public Service Commission's Hotline at 800-392-4211 . . . at least 48 hours in advance of the hearing."

January 23, 2007, the Commission recognized Ms. Fabulae's request, advising her that no further action was required since the cause had already been reset for February 9, 2007.

The hearing was convened at the scheduled place and time (Room 310 of the Governor Office Building on Friday, February 9, 2007, beginning at 9:00 a.m.), and no continuance was requested by or granted to any party beforehand. While KCPL and the Commission's Staff appeared for the hearing by their counsel with their witnesses, Ms. Fabulae did not appear, either in person, by telephone, or by videoconference link to the Commission's offices in downtown Kansas City. At the conclusion of the hearing, Staff and KCPL both orally moved for the dismissal of Ms. Fabulae's complaint, and the motions were taken under advisement.

Later that day, KCPL filed its Motion to Dismiss with Prejudice, or Alternatively, for a Determination on the Pleadings. Over two months have now passed since then, and, despite the fact that parties are "allowed not more than ten (10) days from the date of filing in which to respond to any pleading unless otherwise ordered by the commission,"⁴ Ms. Fabulae has neither responded to KCPL's motion nor explained why she failed to either seek a continuance or appear at the hearing. In fact, it has been almost three months since Ms. Fabulae made any effort to contact the Commission about her complaint in any manner.⁵

As noted in KCPL's motion, Commission Rule 4 CSR 240-2.116(3) provides that a "party may be dismissed from a case for failure to comply with any order issued by the

⁴ 4 CSR 240-2.080(15).

⁵ Cf. 4 CSR 240-2.116(2) ("Cases may be dismissed for lack of prosecution if no action has occurred in the case for ninety (90) days and no party has filed a pleading requesting a continuance beyond that time.")

commission, including failure to appear at any scheduled proceeding such as a public hearing, prehearing conference, hearing, or mediation session.” Likewise, Commission Rule 4 CSR 240-2.070(6) permits the Commission, on its own motion or the motion of a party, to dismiss a complaint for “failure to comply with any provision of [its] rules or an order of the commission.” Ms. Fabulae's failure to appear at the February 9, 2007 evidentiary hearing or seek a continuance as expressly required by the Commission's order of January 18, 2007 clearly justifies dismissal pursuant to 4 CSR 240-2.116(3) and 4 CSR 240-2.070(6), particularly since that was the *second* scheduled evidentiary hearing at which she did not appear.

Commission Rule 4 CSR 240-2.116(4) states that a “case may be dismissed for good cause found by the commission after a minimum of ten (10) days notice to all parties involved.” In its motion, KCPL urges the Commission to find that good cause exists for a dismissal *with prejudice*, arguing:

KCPL and the Commission have expended considerable resources on two evidentiary hearings at which Ms. Fabulae did not appear. She gave no prior notice in either instance of her inability or unwillingness to appear. Moreover, the Commission made every effort to accommodate Ms. Fabulae in the scheduling of the second evidentiary hearing. In addition to providing three alternative means for participation, as described above, the Commission also delayed the February 9 hearing to accommodate Ms. Fabulae's apparent need for additional time.

Moreover, it appears that Ms. Fabulae does not intend to pursue further action before the Commission. As she states in her December 14, 2006 Response to Order Directing Filing, “[Ms. Fabulae] wish[es] to finalize this matter with the commission as soon as possible so [she] may pursue other legal options which [she] ha[s] been encouraged to pursue.” Considering the foregoing, good cause exists to dismiss Ms. Fabulae's complaint with prejudice.

As illustrated by the extensive procedural history recounted above, all of these observations are fully supported by the record. Indeed, in the six months that have elapsed

since Ms. Fabulae filed her formal complaint, the Commission has given her every reasonable opportunity to prosecute it on an expedited basis, but she has been unable or unwilling to do so, at least in part because she apparently considers it to be merely a prelude to her pursuit of “other legal options” against KCPL.

In short, Ms. Fabulae was afforded ample opportunity to appear and prosecute her complaint, or fail to appear and sleep on her rights with full advance knowledge it could be dismissed. That she took the latter path does not entitle her to yet another bite at the apple at some future time of her choosing. “The law helps those who help themselves, generally aids the vigilant, but rarely the sleeping, and never the acquiescent.”⁶ Accordingly, the Commission finds that there is good cause to dismiss Ms. Fabulae’s complaint against KCPL with prejudice.

IT IS ORDERED THAT:

1. Cheryl L. Fabulae’s complaint against Kansas City Power & Light Company in Case No. EC-2007-0146 is dismissed with prejudice.
2. This order shall become effective on April 29, 2007.

BY THE COMMISSION



Colleen M. Dale
Secretary

(S E A L)

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

Lane, Regulatory Law Judge

⁶ *Hannan v. Dusch*, 153 S.E. 824, 831 (Va. 1930).