BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

JIMMIE E. SMALL, Complainant, v. Union Electric Co. d/b/a AMEREN MISSOURI, Respondent.	))))))))))	Case File No. EC-2012-0050 Hon. J. Purdin Presiding

COMPLAINANT'S RESPONSE TO COMMISSION'S JANUARY 06, 2012 DEFICIENT NOTICE & RESPONDENT'S RESPONSE RAISING ALLEGED STATUTE OF LIMITATIONS DEFENSE

NOW COMES the Complainant and in response to the Commission mislabeled NOTICE entered and served on January 06, 2012 states unto the Honorable Commission the following particulars;

1. On the 06 day of January 2012 the Commission officials caused to be entered at Jefferson City Missouri, a NOTICE

which failed to comport to Missouri Rules of Civil procedure, Rule 43.01(e) (1) through (4). Fed Rule 4,5.

2. Missouri Rules of Civil Procedure 43.01(e) state in relevant part, [" Affidavits of service and counsel's certificates of service shall state the: (1) Name of each person served (2) Date of service; (3) Method of service ; (4) Address of service, such as mailing address, facsimile or electric mail address.

3. Commission official, Hon Secretary Steven C. Reed's January 06, 2012 NOTICE stating in part, [" The Commission will take no further action in this case until the mediator informs the Commission that the mediation has been completed."] The Commission decision entered on January 06, 2012, tends to show Respondent that violation of Rules of Civil Procedure, 43.01(e) and other civil procedural standards are acceptable practice before the Missouri Public Service Commission. Small Objects and vehemently disagrees.

4. The Commission Order entered on January 06, 2012, appears to compel Complainant abide strictly to standards of civil procedure pending before the Commission while selectively excusing the Respondent from compliance with the same rule of law. This omission appears arbitrary in Cause

No. EC-2011-0247 & EC-2012-0050. See *Hernandez v. Texas*, 347 U.S. 475

Arbitrary, in this contested case means, NOTICE to Complainant [his litigation position] founded on prejudice or preference rather than on reason or fact. See Black's Law Dictionary p. 119, Ninth Edition. This type of Quasi Judicial [01/06/2012] NOTICE is often termed arbitrary and capricious.

5. A Commission Order mandating mediation as per the 01/06/2012 NOTICE/ORDER selectively excluding due process protection to data request rules, [April 19, 2011 Subpoena] discovery and Rule 43.01(e), 1-4 standards, is objectionable, under Missouri Administrative Procedures Act Standards.

SUGGESTIONS IN SUPPORT

A properly- return of service is prima facie evidence that service was properly performed, subject to rebuttal by the defendant. Fed R.Civ. P. 4. (1). *Blair v. City of Worchester*, 552 F. 3d 105, 111-12 (1st Cir. 2008)

STATUTE OR RULE-BASED HEIGHTENED PLEADING REQUIREMENTS

At various times, federal judges have developed common law heightened pleading requirements in certain areas, such as civil rights litigation. The Supreme Court has twice overturned these precedents. See *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512, 122 S. Ct. 992, 152 L. Ed 2d 1, 88, 51 Fed. R. serv. 3d 781, 182 A.L.R. Fed 725 (2002) (rejecting heightened pleading in employment discrimination cases); *Leatherman v. Tarrant County Narcotics Intelligence and Coorination Unit*, 507 U.S. 163, 113 S. Ct. 1160, 122 L. Ed 2d 517, 8 I.E.R. Cas. (BNA) 428, 25 Fed R. Serv. 3d 1 (1993) (rejecting heightened pleading in sect. 1983 cases).

The fact remains that Union Electric Company, made business decisions to enter into Federal Lease Contract providing that same utility a commercial/commerce privilege to distribute electrical services and accommodations to various Missouri residential customers.[general public]

This federal license agreement subjected Respondent Ameren Missouri Corporation to various state and Federal laws.

Well after Complainant Small made data request, served an April 19, 2011 subpoena, made Request for production and request to admit, Respondent Utility failed and continues to

Well after Complainant Small made data request, served an April 19, 2011 subpoena, made Request for production and request to admit, Respondent Utility failed and continues to fail to produce its requested Federal Lease Contract which prohibited discrimination in the services and accommodations provided to some one Million Two Hundred Thousand customers subject to MPSC jurisdiction and Federal Question jurisdiction. 28 U.S.C. Sect 1331.

UE. AM.MO. STATUTE OF LIMITATIONS DEFENSE

On the 5th day of January 2012, Respondent Ameren filed its Suggestions in Opposition to Complainant's Motion to Compel & Order of Default.

At paragraph A. 2, Ameren Missouri argues that [" Ameren Missouri is prepared to discuss and defend its objections at the hearing that Complainant has requested (*see* the caption including the notation, " Oral Argument Requested".

In Ameren Missouri's response regarding available remedies, certificate of service attached on the 7th day of November 2011, Respondent states in opposition to Small's complaint remedies,[" further, Mr. Small is no longer a customer of Ameren Missouri so there are no grounds by which the Commission might reasonably conclude that Ameren

Missouri is about to subject Mr. Small to undue or unreasonable prejudice or disadvantage. FN2.

[" It is when the Commission, "is of the opinion that a public utility . . . is . . . doing anything or about to do anything or permitting anything or about to permit anything to be done, contrary to or in violation of law or any order or decision of the Commission," that the Commission directs its general Counsel to file suit in circuit court in the name of the Commission to have such violation prevented. Section 386.360.1"]

Ameren Missouri its Agents, assigns and Counsel in Complaint No. EC- 2011-0247 and pending case No.EC- 2012-0050 takes the position that the Utility has not violated any law prior to formal complaint proceeding or after.

Filed and served Staff Report, S/S Mary Duncan allegedly asserting that the contested case centers around an electric bill Mr. Small simply will not pay, tends to show that the Females Duncan a state actor, is acting in collusion with Cathy Hart, Breeze Benton, and other females, and the main focus is to obtain a ***state action finding*** that Respondent is entitled to some $1088.00 U.S. dollars [form ADA pro se] for some 9, 700 KWH allegedly used during some 5 months [Dec. 20, 2007- thru April 14, 2008] while a Red Tag Security seal was firmly attached and still attached in late 2011 undisturbed.

Use of State actors Mary Duncan and State actor Gay Fred favoring females Cathy Hart, Breeze Benton, gives the appearance that the Respondent is in progress of violating its federally ratified contract and used the State of Missouri actors to accomplish violations of 42 U.S.C.A. sect 1983.

By its own admission Small is not a present electrical use customer due to an illegal disconnect.

These admitted facts presents a prima facie showing that Small desired to participate in a federal project [interstate commerce] because of Small's ***Iowa legal resident status.*** U.S. Const. Art. VI clause 2.

At page 17, Lines 18, of the April 19, 2011 prehearing conference Mr. Small, ask, **Mr. Small**: [" Is Cathy Hart available ? **Ms. Hart**: yes I am. **Mr. Small**: Did you ever meet Jim Small? **Ms. Hart**: Yes, I Have; **Mr. Small**: where did you meet—*Interruption by Counsel Tatro*; **Ms. Tatro**: Your Honor, I think this conversation is probably best for when we're off the record. Mr. Small: Off the record?

Respondent Utility was and continues to be successful of actively concealing the Federal Lease contract from Small as per his request on March 04, 2011.

Pro se Small was precluded from cross-examination of Ms. Hart during a formal prehearing conference on April 19, 2011 and continuing as a prejudice of right against the ADA pro se to effectively represent himself in a State Action proceeding by and through the intentional and deliberate concealment of relevant discovery. See Davis V. Washington, _____U.S._____

Additionally, the January 05, 2012 filing by Respondent and the January 06, 2012, next day mislabeled NOTICE by Commission placed the 10 day rule violations well beyond the ADA pro se Small, years after the 2006 Illegal disconnect, and state action effort to collect some $ 1088.00.

Respondent AM. MO. incorporated Case file EC-2011-0247 materials into its answer to contested Case file EC-2012-0050.

Because Respondent Ameren Missouri has elected to make Corporate business decisions to suppress its Federal Lease Agreement to use Bagnell Dam Impounded Waters for Commercial purposes, the undersigned customer in 2002 forward continues to have Federal standing to object, complain and pursue Federal claims such as Harassment by a 25-26 billion dollar giant Utility.

Utility who elected to breach its Lease, Constitutional, and statutory duty not to retaliate, discriminate or Harass a present customer or past customer seeking Federal protection, remedies and damages for example.

See *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101, 153, L. Ed2d 106, 122 S. Ct. 2061 (2002).

There is substantial authority allowing a plaintiff to sue both for sexual harassment under Title VII and for tortuous conduct under state law. Title VI claims follow Title VII proof standards. *Arnold v. United States.* 816 F 2d 1306 (9th Cir. 1987)

Significantly, at the time of the Federal Lease agreement at the Bagnell Dam federal project, Union Electric did agree as a condition to engage interstate commerce, to abide all state and federal laws. *Henry Ford & Son v. Little Falls Fabre Co.*, 280 U.S. 369, 74 L Ed 4839. See also *Federal Waters Power Act* of June 10, 1920, 41 stat. 1063 (U.S. Code, Title 16, c 12 (16 USCA 792-823.)

FEDERAL CONTRACT LAWS

Reformation of a contract is the proper remedy when there is a mistake in accurately expressing the agreement in writing.

Nichols vs. City of Evansdale, 687 N.W. 2d 562, 570 (Iowa 2004)

In this case [No. EC-2012-0050] there is no dispute that the Federal Contract/Lease was drawn, ratified and delivered.

A problem now for the Commission and Complainant arises because the Giant Utility agents and assigns have willfully and deliberately elected to conceal, suppress that same Federal Lease Contract, making the burden of proof on the AD pro se Male, White, aged complainant, almost impossible to achieve. Achieve without declaratory and injunctive relief in Federal District Court. See *Big River's Telephone Company, LLC, Complainant, vs. Southwestern Bell Telephone Company, d/b/a AT/T Missouri, Case No. TC*-2077-0085.

Where possible ambiguity is found, it is necessary to determine whether, at the time of contracting, the parties agreed upon one of the possible meanings, in which case that is the meaning which will control. Rest.2d Contracts, Section 201(1); *Home Federal Savings and Loan Ass'n of Algona v. Campney*, 357 N.W. 2d 613 (Iowa 1984) (the proper interpretation of contract term cannot include a meaning which neither party actually intended at time of contracting).

Whether or not the federal contract actively concealed from discovery[03/04/2011] so as to take an unfair advantage of the ADA pro se and illegally defeat his right to basis and fundamental due process, is interpreted to permit Respondent to actively conceal a Federal Contract from the discovery of the ADA pro se, would appear relevant to Small's Motion for sanctions and Order of Default, further critical to the Commission's duty to apply the 10 day rule in a fair and impartial manner.

PROMISSORY ESTOPPEL

Promissory Estoppel (1924)

The principle that a promise made without consideration may nonetheless be enforced to prevent injustice if the promisor should have reasonably expected the promisee to rely on the promise and if the promisee did actually rely on the promise to his or her detriment.

."The doctrine of promissory estoppels is equitable in origin and nature and arose to provide a remedy through the enforcement of a gratuitous promise. Promissory is distinct from equitable estoppels in that the representation at issue is promissory rather than representation of fact. ' Promissory estoppels and estoppels by conduct are two entirely distinct

theories. The latter does not require a promise.'" Ann Taylor Schwing, California Affirmative defenses sect 34:16, at 35 (2nd Ed. 1996) (quoting *Division of Labor Law Enforcement v. Transpacific Transp. Co.* 88 Cal. App. 3d 823, 829 (Cal Ct. App. 1979). Blacl's Law Dictionary, Ninth Edition, p. 631.

Respondent's acts concealing its Federal lease Contract, and its political influence over Commission Staff, from April 19, 2011, and continuing, is by design calculated to discourage and dissuade ADA pro se complainants from ever filing informal and later formal complaints against the Giant Utility, a 25-26 Billion dollar Utility Corporation, engaged in federal interstate commerce, selling electricity into the State of Oklahoma, Illinois, and elsewhere, by and through a Federal lease Contract promise, not to discriminate, retaliate or harass persons raising dispute objections over Illegally trumped up billing/Collection practices, as in Fraud, Extortion for example. See Federal Debt Collection Act statute.

Had Small been informed that his request for mediation required the ADA pro se to sacrifice his right to timely discovery and the 10 day rule raised on April 19, 2011, Small would not have requested mediation to begin with.

Further, the Commission should order Ameren Missouri produce its Federal lease contract for commercial use purposes situated at Bagnell Dam.

A written contract specifically obtained for commercial purposes and use of Federally impounded water located at the Bagnell Dam, Osage River basis. See *Henry Ford & Son v. Little Falls Fibre Co.*, 280 U.S. 369, 74 L. Ed 4839.

Moreover, Section 10 (c), of the Federal Water Powers Act (Title 16, U.S. Code, 803 (c), 16 U.S.C.A. 803 (c), provides that licensees 'shall be liable for all damages occasioned to the property of others by the construction, maintenance, or operation' of the licensed project, and by section 27 of the Act. See *Unites States v. Realty Company*, 163 U.S. 427, 16 S. Ct.1120; *Guthrie National Bank v. Guthrie*, 173 U.S. 528, 535, 19 S. Ct. 513. In context to property, Small asserts a liberty interest in services and accommodations, and liberty interest in various federal Constitutional, Statutory and Lease Contract provisions. Federal Rights separate from Iowa and Missouri State laws.

Respondent Utility has advances not a single suggestion why Blacks, Hispanic, Native American, mixed race customers, Female Customers under 40, should have Federal Water

Powers Act protection during discovery in a State Quasi judicial proceeding while selectively excluding the undersigned Male, pro se from the same or similar discovery, and equal right protection to timely reconnect notices prior to reconnection on December 20, 2007 or about that time. Federal Water Powers Act sect 10 (c). Et seq.

Its difficult to envision exactly how Respondent Utility personnel could connect-disconnect –reconnect electrical services and accommodations at a complaining customers location, pending a 2006 ongoing Bill dispute over monies, without involving aspects of that same Utilities operation under Section 10 (c) of the Federal Water Powers Act.

In addition to violations of section 10 (c), the Utilities acts and conduct engaged to reconnect electric service in absence of any written customer directive to do so on or about December 20, 2007 facing a disputed Bill circumstance, appears entirely inconsistent with Federal Ant Trust Laws and in contravention of Federal public policies and practices.

By the acts of actively concealing its Federal License during relevant discovery time periods and continuing, Respondent Ameren Missouri is likely to continue with its anti- trust violations where the unlawful billing practices

increases its status as a 25-26 billion dollar company, while the MPSC provides the jurisdiction its needs for said unlawful practices. *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101, 153 L. Ed 2d 106, 122 S. Ct. 2061 (2002)

Once the Commission rules on Small's Motion for sanctions and default, it would better foster genuine prospects of potential mediation between the adversary parties.

Presently in early 2012 the prejudice visited the Complainant due to repeated discovery violations, [UE. AM. MO.] is significant where the April 2006 discriminatory disconnect by Respondent did occur some six (6) years earlier.

Prosecution is vindictive and violates due process, if it is undertaken to punish a person for exercising a protected statutory or constitutional right. U.S.C.A. 5, 14. *U.S. v. Napure*, 834 F 2d 1209.

The mislabeled NOTICE entered by the Commission on 01/06/2012, next day after Respondent's filing in opposition, was entered with such speed its failed to include any factual basis for not attaching a mandated Certificate of Service and omitted any findings as to Small's Iowa Residential status and Motion ruling, prior to mediation. Fed R. Civ. Proc. R.37(b)(2).

Had Small not injected Iowa Resident [constitutional right claims] into No. EC-2012-0050, the Commission would have ruled on Small's Motion for sanctions before mediation proceedings not after.

See *Dennis v. Sparks*, 449 U.S. 24, 29 (1980) Immunity does not change the character of the judge's action or that of his co-conspirators.

Here, the record evidence demonstrates that the Commission as well as Respondent elected not to comply with Certificate of service mandate, without reasonable or rational basis.

Sanctions are proper where moving party demonstrates that opponent has abused right of free access to courts by pleading untrue statements of fact which he knew, or reasonably should have known, were untrue. *In re Estate of Wernick*, 104 Ill Dec. 486, 502 N.E. 2d 1146, 151 Ill. App. 3d 234.

We are incapable of determining whether or not the actions of the trial court or the administrative agency were appropriate because of the missing exhibits. The record is insufficient. *People ex rel McDonough v. Sherwin* (1935), 361

Ill. 403, 198 N.E. 343; See *also Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402.

The 01/06/2012 Commission filing fails to state a factual or legal basis for its decision to schedule mediation proceedings while Respondent's remain in default.

A party or his attorney cannot use ignorance of the law or legal procedure as an excuse. The rule was designed to prevent abuse caused not only by bad faith but negligence and, to some extent professional incompetence. (quoting *Gaiardo v. Ethyl Corp.* 835 F. 2d 479, 482 (3rd Cir. 1987).

A party must reasonably investigate before responding. A party may not respond by asserting lack of information or belief without first conducting an inquiry reasonable under the circumstances. *Pantalpa Macau Commercial Offshore, Ltd v. Reddy*, 2005 WL 2562624 at 2, (N.D. Cal 2005)("With even the most minimal conferring with his client, [the]attorney should have known that he needed to admit some of these facts.")See also *Diourabchi v. Self*, 240 F.R.D. 5, 12, 67 Fed R. Serv. 3d 136 (D.D.C. 2006) (party must exert reasonable effort to obtain knowledge of a fact before denying it or claiming lack of knowledge).

At page 17 of the prehearing conference, EC-2011-0247, the Commission law Judge D, Jordan stood moot while Attorney Tatro interrupted Small's inquiry of basic fact discovery.

When Small attempted to inquire of expert witness Cathy Hart as to the progress made in locating, delivery and service of the Federal Lease Contract promised by Utility expert on March 04, 2011, Tatro elected to interfere and was successful to selectively exclude said cross examination or discovery of relevant evidence, thus making sanctions by default or striking Respondents evidence in defense on the merits.

The April 19, 2011 [prehearing conference] promises by Counsel Tatro to ALJ D. Jordan have not been complied with.

The March 04, 2011 promises to deliver the Federal Commercial Contract, mentioned above has knowingly been concealed by expert witness Cathy Hart, and Counsel Tatro, making sanctions by Default appropriate nearly one year following the March 04, 2011 promises at the Utility location 101 Madison Street, Jefferson City.

Respondent's response to Commission Subpoena produced 2007-2008 field orders, Computer stored data, actively concealing relevant 2006 computer stored proof of facts.

42 U.S.C. sect 61.01 federal law prohibits age discrimination against persons or individuals who participate or attempt to participate in federally funded projects.

The U.S. Army Corp of Engineers Bagnell Dam facility, is in fact a federally funded project presently in use by UE.AM.MO serving electrical customers under 40 years of age and without illegal disconnect treatment and continuing Harassment. See *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 67 L. Ed 2d 207, 101 S. Ct. 1089, 1095 (1981)

" The plaintiff retains the burden of persuasion. She now must have the opportunity to demonstrate that the proffered reason was not the true reason for the employment decision. This burden now merges with the ultimate burden of persuading the court that she has been the victim of intentional discrimination. She may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence"

Respondent's motive for its act maintaining Account number 7009, # 22, 23067 Potter Trail, in a Gross Negligent manner thus permitting discrimination to occur is more akin to material facts during an ongoing billing dispute.[2006 forward]

Respondent's Business policies and practices of having 5-6-7 Utility offices [Locations] and numerous employees access to Small's account data, invites a disaster Utility circumstance waiting to alight, 2006 time period and continuing unresolved.

Generally speaking, the Federal Interstate Commerce Commission processes complaint[s] of discrimination similar to the present complaints issues arbitrarily postponed by the Commission NOTICE dated January 06, 2012, absent any Certificate of Service document required for due process requirements. U.S.C.A. Const Amend. 14. See *Hernandez v. Texas*, 347 U.S. 475.

The 01/06/2012 COMMISSION ORDER MISLABLED AS A COMMISSION NOTICE

While such an order is required by the law of this case and no additional authority is needed, such an order would be entirely consistent with Rule 2.117(2) (4 CSR 240-2.117(2)) (stating that "the [C]ommission may, on its own motion or on the motion of any party, dispose of all or any part of a case on the pleadings . . . .")

The Certificate of Service requirement of R. 43.01 appears similar to Federal rule requirements.

The maixbox rule has been extended to pro se prisoner filings in other types of cases (e.g. sect 1983 actions.) See *Douglas v. Noelle*, 567 F3d 1103, 1107, 732 Fed R. Serv. 3d 1105(9th Cir. 2009)(canvassing circuit case law); *Price v. Philpot*, 420 F. 3d 1158, 1164 (10th Cir. 2005); *Casanova v. Dubois*, 304 F. 3d 75, 79, (1st Cir. 2002).

In a recent phone conversation, according to Staff Counsel Ms. Hernandez, the 10 day violation Rule to respond to a Motion for Sanctions and Default, first commenced when the commission file stamped Small's Motion. Days after the mailbox rule under federal law was triggered. Small disagrees.

If the state actor Ms. Hernandez was correct, under the 10 day Rule, this would place Respondent Utility much closer to its effort to accomplish an illegal debt collection by use of State sponsored proceedings, while ignoring well established Rules of civil procedure.

The U.S. Supreme Court has ruled that under federal law, harassment may be viewed as one long, discriminatory act that does not end until the harassment ceases. Thus, in many cases a charge timely filed after the last act of harassment, even though they may have occurred years before the filing of the

charge. *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101, 153 L. Ed2d 106, 122 S Ct. 2061 (2002).

Respondent's suggestions of potential remedies is rejected under National Railroad Passenger Corp holding, which relies on Federal law not state law remedies.

PRETEXT

By prohibiting all background evidence that employee planned to use to show he was fired because of his complaints, district court made employee's claim nearly impossible to prove, employee realized this and decided his only viable course of action was to acquiesce to ruling and file interlocutory appeal; accordingly, entry of judgment as matter of law in favor of employer was improper as employee had not been fully heard on issue. *Mendenhall v. Mueller Streamline Co.* (2005, CA 7 Ill) 419 F3d 686, 96 BNA FEP Cas 496.

By prohibiting all background evidence in the form of Federal Lease Contract entered into by Respondent Utility, and continuing in 2012, some 10 months after the April 19, 2011 prehearing conference and served subpoena, in addition to the March 04, 2011 promises by Cathy Hart to produce, deliver and served said contract lease documents, did in fact result in prejudice to the ADA pro se party making proof of

Small's claims on the merits almost impossible to establish while engaging in a state action proceeding. *Hernandez v. Texas*, 347 U.S. 475.

Respondent cites *Trotter v. Distler*, 260 S.W. 3d 913 (Mo. App. ED 2008) in support of its opposition.

That because Small is pursuing violations of Federal Contract law under the Federal Water Powers Act, Rule 16 of Federal Rules of Civil Procedure apply.

Among Rule 16, Orders, the court may impose many of the merits sanctions available under Rule 37(b) (2).

The court may hold the party in contempt and enter so-called "merits sanctions" up to and including dismissal of the case or entry of judgment for the other side. Fed R. Civ. Proc. 37(b)(2).

For Rule 37(b) to apply, the court must already have entered a specific discovery order. See *Atkins v. Fisher*, 232 F.R.D. 116, 127, 63 Fed R. Serv. 3d 682 (D.S.C. 2005); *Ellington v. Alemeida*, 2006 WL 3201088 at 1, (E.D. Cal 2006) (balancing directive to "comply with discovery rules" is not a court order for purposes of Rule 37(b).

The court may also preclude a party from offering evidence on a particular point, either to support it or to oppose it. Fed R Civ. P. 37 (b) (2)(A)(ii).

The court may act directly on the merits as well , such as striking the pleadings (including striking claims or defenses), dismissing the case in full or in part, or entering a default judgment against the disobedient party. Fed R. Civ. P. 37(b)(2)(A)(iii),(v),(vi).

The list of merit sanctions contained in Rule 37(b)(2) is not exhaustive; the court may impose any other sanctions as are just under the circumstances. U.S. v. One 1999 *Forty Seven Fountain Motor Vessel*, 240 F.R.D. 695, 697 (S.D. Fla 2007).

The court is not limited to one sanction, but may impose several of the available sanctions at the same time. *Atkins v. Fisher*, 232 F.R.D. 116, 127, 63 Fed R. Serv. 3d 682 (D.D.C. 2005).

Through the Commission acts of taking judicial notice of Respondent's deliberate discovery violations, Rule 37(B)(2) would be justified here.

When Small sought to cross examine Cathy Hart at page 17 Transcript, April 19, 2011, Counsel Tatro interrupted thus

delaying initial discovery, thus further warranting the April 19, 2011 served subpoena.

The April 19, 2011 subpoena became necessary because Cathy Hart on March 04, 2011 and continuing elected to exclude the promised Federal Lease Contract, interfering with the ADA pro se ability to meet his burden of proof on the merits of his complaints 2006 forward and continuing.

CONCLUSION

Complainant is entitled an order of sanctions including a default order, because Federal law under the American with Disabilities Act does not require Small to engage in mediation on a bobtailed & truncated discovery record.

Respectfully submitted

JIMMIE E. SMALL
3535 Locust Street
General Delivery
Quincy, Illinois, 62301

Small v. UE.AM.MO.
NO. EC-2012-0050

CERTIFICATE OF SERVICE

I certify that copies of the foregoing Suggestions/Response was served upon all parties of record, plus copies to data center, at their business address, with postage fully prepaid, all done on this Wednesday, January ~~19~~ 23rd, 2012.

Exceptions: NONE.

Jimmie E. Small

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

Jimmie E. Small, Complainant,	)	
vs.	)	Case No: EC-2012-0050
Union Electric Company, d/b/a Ameren Missouri, Respondent.	)	

SUGGESTIONS IN OPPOSITION TO COMPLAINANT'S MOTION TO COMPEL & ORDER FOR DEFAULT

COMES NOW, Union Electric Company, d/b/a Ameren Missouri, and for its suggestions in opposition to Complainant's Motion to Compel & Order for Default states as follows.

Introduction

1. Ameren Missouri understands from Complainant's Motion to Compel & Order for Default ("Motion") that Complainant has two main concerns regarding discovery; first, that Ameren Missouri has made many objections to discovery that Complainant believes is relevant, and second, that Ameren Missouri did not provide Complainant with copies of "proof of service verification" (certificates of service) related to two specific discovery responses Ameren Missouri served on Complainant. Related to these concerns, Complainant has asked the Commission to impose the extraordinary sanction of entering an order of default against Ameren Missouri. Although Complainant is certainly entitled to request a hearing on the disputed discovery, Complainant is not entitled to the other relief he seeks.

A. Ameren Missouri Has Stated Proper Objections to Complainant's Discovery.

2. Complainant has not specified in his Motion which particular objections he wishes the Commission to overrule or which discovery he wishes the Commission to compel, and he has not filed the discovery and responses with his Motion[1]. Ameren Missouri has not

[1] Missouri Rule of Civil Procedure 57.01(d), and parallel rules 58.01(d) and 59.01(e) allow discovery requests and responses to be filed with the court, "...contemporaneously with a motion placing the request in issue."

included a detailed discussion of each objection in these suggestions, but rather, as an aid to the Commission, has attached as Exhibit A to these suggestions Complainant's discovery and Ameren Missouri's responses.[2] Ameren Missouri's responses included proper objections and the specific bases for those objections. Ameren Missouri is prepared to discuss and defend its objections at the hearing that Complainant has requested (*see* the caption to the Motion including the notation, "Oral Argument Requested").

B. "Proof of Service Verification" Issue.

3. Complainant also argues that Ameren has failed to comply with Missouri Rule of Civil Procedure[3] 43.01(3)(e)[4] regarding how to show service of pleadings and other papers that are required to be served. In fact, Ameren has complied fully with Rule 43.01(e): Ameren Missouri showed that it served Complainant with responses to his discovery by completing certificates of service that included the Complainant's name, the date of service, the method of service and the address of service. Under the Rule, service may also be shown by acknowledgment of receipt. Ameren Missouri served its responses on Complainant via certified mail, return receipt requested. Copies of the certified mail receipts that Complainant signed as well as the transmittal letters to Complainant enclosing Ameren Missouri's responses, are attached hereto as Exhibit B. In addition, at pages 8 through 11 of his Motion, Complainant has tacitly admitted that in fact he received Ameren Missouri's responses to his discovery. Both Ameren Missouri, and Complainant, have shown service of Ameren Missouri's discovery responses on Complainant.

4. Complainant suggests that Ameren Missouri violated Rule 43.01(e) and denied Complainant due process because it failed to provide certificates of service *to Complainant*. Rule 43.01(e) does not speak to when, how or to whom a party is required to provide a certificate of service regarding discovery responses—43.01(e) speaks only to the information that is to be included in the certificate. Rather, Rules 57.01(c)(6) and (d), 58.01(c)(6) and (d), and 59.01(d)(5) and (e) control. Each of those Rules requires the party responding to discovery to

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[2] In his Motion, Complainant makes reference to discovery requests and responses in Complainant's original complaint against Ameren Missouri, EC-2011-0247, which complaint the Commission previously dismissed without prejudice by its Order issued July 27, 2011, effective August 7, 2011.

[3] Hereinafter, "Rule" or the "Rules." 43.03 e

[4] At page 11 of his Motion, Complainant makes reference to Rule 41.03(e). No such rule exists. At page 12 of his Motion, Complainant makes reference to Rule 41.03(d), but instead excerpts 43.01(e). It is Ameren Missouri's understanding that in both instances Complainant is actually referring to Rule 43.01(e).

serve *the response* on the party that issued the discovery, but to *file* a certificate of service *with the court.* As discussed above, Ameren Missouri served its responses on Complainant. As this is a complaint pending before the Commission, rather than a civil court matter, Ameren Missouri filed its certificates of service *with the Commission*, via EFIS. Copies of the certificates of services filed in EFIS are attached hereto as Exhibit C.

5. Ameren Missouri has fully complied with the Rules with respect to serving its responses to Complainant's discovery on Complainant, and filing certificates of service evidencing such service, with the Commission, via EFIS.

C. Motion to Compel and Requested Discovery Sanctions are Not Warranted.

6. Complainant has styled his Motion a "Motion to Compel & Order for Default" but does not actually ask the Commission to compel Ameren Missouri to respond to any particular discovery request. Even if Complainant had done so, a motion to compel discovery would not be not warranted unless and until the hearing Complainant himself requested has been held and unless and until the Commission has overruled objections to Complainant's discovery.

7. As to sanctions, Ameren Missouri acknowledges that the court (or in this case, the Commission) has the authority under Rule 61.01(b) and (d) to make orders sanctioning a party with respect to failure to answer interrogatories and failure to produce documents, including striking pleadings or rendering a judgment by default. Such orders are only appropriate, however, in the case of interrogatories, "[i]f a party fails to answer...or file objections thereto within the time provided by law, or if objections are filed thereto which are thereafter overruled and the interrogatories are not timely answered[.]" In this Complaint, Ameren Missouri filed timely objections to certain of Complainant's interrogatories, the objections have not been overruled, and likewise no time to answer overruled objections has been set by the Commission. 61.01(b). Sanctions with respect to Ameren Missouri's responses to Complainant's interrogatories are not warranted.

8. The Rule regarding production of documents is similar, conditioning the imposition of sanctions on a party's failure to produce the documents or file objections, or to timely produce documents after objections are overruled. 61.01(d). Again, Ameren Missouri did file objections to certain of Complainant's request for production, those objections have not been overruled, and the Commission has not set any time for Ameren Missouri to produce

documents to which objections were overruled. Sanctions with respect to Ameren Missouri's responses to Complainant's request for production are not warranted.

9. Rule 61.01(c) regarding requests for admissions is somewhat similar. If a party fails to answer or file objections to the request, *then* the truth of relevant and material matters of fact contained in the request shall be admitted. Ameren Missouri *has* objected to certain of Complainant's request for admissions, however, so the Commission should not deem admitted any objected-to admission offered by Complainant. Sanctions with respect to Ameren Missouri's responses to Complainant's request for admissions are not warranted.

10. Finally, although in the proper circumstances a tribunal has discretion to impose sanctions, drastic sanctions such as an order of default are not warranted where there is no showing of contumacy or deliberate disregard for the tribunal's authority. *Spacewalker, Inc. v. American Family Mutual Ins. Co.*, 954 S.W.2d 420 (Mo. App. 1997)(order of default reversed where appeals court found no evidence of conduct that reached the level of contumacy or disregard for the trial court's authority—the defendant made proper objections to discovery and when those were overruled, the trial court abused its discretion in granting defendant only 10 days to assemble a large amount of information spanning over 10 years). Furthermore, before imposing such sanctions, the moving party must show he has actually been prejudiced. *Id.* Because the Commission may either sustain Ameren Missouri's objections (in which case Complainant is not entitled to the discovery and has not been prejudiced by the failure to respond), or overrule them and order Ameren Missouri to respond (in which case Complainant can expect to receive responses and has not been prejudiced by the prior objections), Complainant cannot show that at this point he has been prejudiced by Ameren Missouri's objections to certain of his discovery. Entering an order of default at this point goes well beyond what is necessary to enforce whatever discovery the Commission might determine is not objectionable. Imposing such a sanction at this point would constitute an abuse of discretion. *Trotter v. Distler*, 260 S.W.3d 913 (Mo. App. E.D. 2008)(imposition of a sanction that exceeded that necessary to achieve the purposes of discovery was held to be an abuse of discretion).

Conclusion

11. Complainant is entitled to request a hearing on the discovery disputes in this Complaint. As Ameren Missouri has explained in these suggestions, however, absent a hearing,

rulings in Complainant's favor, a subsequent contumacious or deliberate failure by Ameren Missouri to comply with any such ruling, *and* a showing of prejudice to Complainant, Complainant is not entitled to any order sanctioning Ameren Missouri for discovery violations, let alone an order of default against Ameren Missouri.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Suggestions in Opposition was served on the following parties via electronic mail (e-mail) or via certified and regular mail on this 5th day of January, 2012.

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STATE OF MISSOURI

PUBLIC SERVICE COMMISSION

TRANSCRIPT OF PROCEEDINGS

Prehearing Conference

April 19, 2011

Jefferson City, Missouri

Volume 1

Jimmie E. Small Complainant, V. AmerenUE, Respondent.	)	Case No. EC-2011-0247

DANIEL JORDAN, Presiding
SENIOR REGULATORY LAW JUDGE

REPORTED BY:
Jennifer Leibach, CCR No. 1780
TIGER COURT REPORTING, LLC

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I'm -- I really don't want to have to go in to defend the company that -- I will at the hearing, if necessary, I'm not sure it's really necessary now.

JUDGE JORDAN: Right.

MS. TATRO: But I don't want anyone to be left with the feeling that we haven't been anything but completely open and honest with this man.

MR. SMALL: Okay. And having said that --

JUDGE JORDAN: Stop right there, if you please. You certainly have the right to rely on the formal discovery procedures. The benefit of that, Mr. Small, is that everything under -- under that kind of procedure, basically it's documented. They can show what they sent you, when they sent it, and you can do the same, and that way we can be sure that nothing's been left out. So everyone -- everyone has the right to rely on formal and legal procedures, including going to a hearing, if we must do so.

MR. SMALL: Is Cathy Hart available?

MS. HART: Yes, I am.

MR. SMALL: Did you ever meet Jim Small?

MS. HART: Yes, I have.

MR. SMALL: Where did you meet --

MS. TATRO: Your Honor, I think this conversation is probably best for when we're off the record.

MR. SMALL: Off the record?

JUDGE JORDAN: Yeah, you don't want to do -- you don't want to try the case yet. That's what I'm trying to say.

MS. TATRO: And I'm directing Ms. Hart to not talk on the record at this point in time because --

MR. SMALL: Can we talk on the record about the serial number of the meter? Can we talk about that?

MS. TATRO: I don't have that information with me as I --

MR. SMALL: Do you know of any person who does?

MS. TATRO: I do, sir, and we'll get that information.

MR. SMALL: What is the individual's name who might have the serial number?

MS. TATRO: Your Honor, again, this is information that I would be happy to talk with him off the record. I don't think it is appropriate on the record.

MR. SMALL: Off the record?

JUDGE JORDAN: Certainly. That's a good idea. We don't need to do that on the record.

Okay. Let's see. Ms. Tatro, did you have anything else you wanted to do on the record?

MS. TATRO: I do not, sir.

JUDGE JORDAN: Okay. Mr. Ritchie, did you