

Jimmie E. Small,)
)
Complainant,)
)
v.) File No. EC-2015-0058
)
Union Electric Company)
d/b/a Ameren Missouri)
)
Respondent.)

¹ 4 CSR 240-2.070(15)(H).

BEFORE THE PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI

Jimmie E. Small,)	
)	
Complainant,)	
)	
v.)	File No. EC-2015-0058
)	
Union Electric Company)	
d/b/a Ameren Missouri)	
)	
Respondent.)	

RECOMMENDED REPORT AND ORDER

Issue Date: ____

Effective Date: ____

The Missouri Public Service Commission is denying relief on the complaint of Jimmie E. Small against Union Electric Company d/b/a Ameren Missouri (“Ameren”). Mr. Small charges that Ameren unlawfully denied him service and failed to give him notice related to that denial. But Mr. Small has never made a payment on his present account, owes \$846.15 on that account, and has never applied to resume service. Therefore, Ameren owes Mr. Small neither service nor notice. This report and order is subject to an application for rehearing filed no later than the business day before the effective date of this report and order, and is also subject to judicial review, both as set forth in Sections 386.500 to 386.540, RSMo 2000 and RSMo Supp. 2013.

Procedural History

Mr. Small filed the complaint.² Ameren filed an answer.³ The Commission’s staff (“Staff”) filed a recommendation.⁴ The Commission convened an evidentiary hearing on

² Electronic Filing and Information System (“EFIS”) No. 1 (August 29, 2014) complaint. All references to EFIS address this File No. EC-2015-0058 except as otherwise noted.

³ EFIS No. 9 (October 2, 2014) *Answer and Motion to Dismiss*.

the merits of the complaint.⁵ Ameren supplemented the record.⁶ The Commission received a correction to the transcript.⁷

Mr. Small filed an initial brief.⁸ Ameren filed a brief.⁹ Mr. Small filed a reply brief.¹⁰ The Commission denied Mr. Small's post-hearing motions.¹¹ In addition, Mr. Small also made numerous pre-hearing motions and filings, many of them successive.¹² Those filings, the other parties' right to respond, and the related orders, constitute good cause to extend the time for issuing this recommendation.¹³

The regulatory law judge issued a recommended decision.¹⁴ The Commission received timely comments¹⁵ on the recommended decision from ____ .¹⁶ The Commission is ____ the recommended decision ____ .¹⁷

⁴ EFIS No. 11, (October 8, 2014) *Staff Recommendation to Dismiss Complaint with Prejudice*.

⁵ EFIS No. 64 (June 1, 2015) *Transcript – Volume 1*.

⁶ EFIS No. 62 (April 23, 2015) *Ameren Missouri Production of Documents to Presiding Officer Pursuant to 4 CSR 240-2.130(6)*.

⁷ EFIS No. 67 (May 7, 2015) *Notice of Correction Transcript Page*.

⁸ EFIS No. 65 (May 5, 2015) *Complainant's Post Hearing/Suggestions in Support for Commission Order Favoring Applicant Out-of-State Party*.

⁹ EFIS No. 78 (May 19, 2015) *Ameren Missouri's Post-Hearing Brief*.

¹⁰ EFIS No. 81 (June 12, 2015) *Complainant's Post-Hearing Rule 84.(g) Reply Brief*.

¹¹ EFIS No. 82 (June 23, 2015) *Order Denying Post-Hearing Motions*.

¹² Appendix.

¹³ 4 CSR 240-2.070(15)(G).

¹⁴ EFIS No. ____ (____) ____ .

¹⁵ 4 CSR 240-2.070(15)(H).

¹⁶ EFIS No. ____ (____) ____ .

¹⁷ 4 CSR 240-2.070(15)(H).

Standards of Proof

Mr. Small has the burden of proving the allegations in his complaint.¹⁸ The quantum of evidence by which Mr. Small must carry his burden is the preponderance of the evidence.¹⁹ The preponderance means the evidence that weighs more in favor²⁰ than against²¹ the petition and tariff.

The Commission does not specifically discuss matters that are not dispositive. The Commission makes each ruling on consideration of each party's allegations and arguments, and has considered the substantial and competent evidence on the whole record. Where the evidence conflicts, the Commission must determine which is most credible and may do so implicitly.²² The Commission's findings reflect its determinations of credibility, and no law requires the Commission to make any statement as to which portions of the record the Commission believes or disbelieves.²³

Under those standards, the Commission makes the following findings of fact.

Findings of Fact

1. Ameren is authorized to sell electrical service at retail for profit.²⁴
2. On April 14, 2007, Ameren terminated Mr. Small's residential service ("previous account") for failure to pay.²⁵ Mr. Small later paid amounts toward the

¹⁸ *AG Processing, Inc. v. KCP & L Greater Missouri Operations Co.*, 385 S.W.3d 511, 515-16 (Mo. App., W.D. 2012).

¹⁹ *Spencer v. Zobrist*, 323 S.W.3d 391, 398 (Mo. App., W.D. 2010).

²⁰ *State Board of Nursing v. Berry*, 32 S.W.3d 638, 642 (Mo. App., W.D. 2000).

²¹ *Hager v. Director of Revenue*, 284 S.W.3d 192, 197 (Mo. App., S.D. 2009).

²² *Stone v. Missouri Dept. of Health & Senior Services*, 350 S.W.3d 14, 26 (Mo. banc 2011).

²³ *Stith v. Lakin*, 129 S.W.3d 912, 919 (Mo. App., S.D. 2004).

²⁴ Ameren's tariff: Mo. PSC Schedule No. 6, Sheet 96, paragraph I.A.

²⁵ EFIS No. 64 (May 1, 2015) *Transcript - Volume 1*, page 25 line 16 to 22.

balance due on the previous account.²⁶ Ameren transferred the balance due under the previous account to a new account (“present account”).²⁷

3. On December 20, 2007, Ameren resumed residential service to Mr. Small under the present account.²⁸ Ameren sent Mr. Small monthly bills²⁹ but Mr. Small made no payment under the present account. On April 14, 2008, Ameren terminated Mr. Small’s residential service for failure to pay.³⁰ As of that date, Mr. Small owed \$846.15 on the present account.³¹ Mr. Small received Ameren’s bill for that amount.³²

4. On February 4, 2011, Mr. Small filed a complaint to which the Commission assigned File No. EC-2011-0247.³³ After Mr. Small failed to respond to three Commission orders, the Commission issued its order dismissing that action without prejudice, effective August 7, 2011.³⁴

5. On August 15, 2011, Mr. Small filed a document, which the Commission treated as a new complaint and assigned File No. EC-2012-0050.³⁵ After Mr. Small failed to appear at the hearing that the Commission convened on the merits of the

²⁶ EFIS No. 64 (May 1, 2015) *Transcript - Volume 1*, page 28 lines 10 to 20.

²⁷ EFIS No. 64 (May 1, 2015) *Transcript - Volume 1*, page 28 line 21 to page 29 line 29.

²⁸ EFIS No. 64 (May 1, 2015) *Transcript - Volume 1*, page 28 line 7 to 9.

²⁹ EFIS No. 64 (May 1, 2015) *Transcript - Volume 1*, page 29 line 6 to 25.

³⁰ EFIS No. 64 (May 1, 2015) *Transcript - Volume 1*, page 1 to 22.

³¹ EFIS No. 64 (May 1, 2015) *Transcript - Volume 1*, page 23 to 25.

³² EFIS No. 71 (May 11, 2015) Respondent’s Exhibit 1HC, *Ameren Account Activity Statement (Written Off) 02/10/11*.

³³ File No. EC-2011-0247 EFIS No. 1 (February 4, 2011) *Complaint*.

³⁴ File No. EC-2011-0247 EFIS No. 53 (July 27, 2011) *Order Dismissing Complaint Without Prejudice*.

³⁵ File No. EC-2012-0050 EFIS No. 1 (August 15, 2011) *complaint*.

complaint, the Commission issued its order dismissing that action without prejudice effective August 30, 2013.³⁶

6. Ameren has a contact center that houses Ameren personnel who are authorized to process applications for residential service and are available by a toll-free telephone number.³⁷

7. In Kirksville, Missouri, Ameren has a field office that houses an Ameren construction supervisor and marketing representative.³⁸ The marketing representative has authority only as to commercial accounts.³⁹ No personnel authorized to process applications for residential service are housed in the field office.⁴⁰

8. On August 29, 2014, Mr. Small went to the Kirksville field office.⁴¹ Mr. Small asked the commercial marketing representative to connect his service.⁴² The commercial marketing representative told Mr. Small that she lacked authority to process a residential account and instructed him to call Ameren's contact center at the toll-free number.⁴³ Later that day, the construction supervisor telephoned Mr. Small and instructed him to call Ameren's contact center at the toll-free number.⁴⁴

³⁶ File No. EC-2012-0050 EFIS No. 152 (July 31, 2013) *Order Dismissing Complaint*.

³⁷ EFIS No. 64 (May 1, 2015) *Transcript - Volume 1*, page 31 line 17 to page 32 line 13; page 81 line 5 to 13.

³⁸ EFIS No. 64 (May 1, 2015) *Transcript - Volume 1*, page 31 line 10 to 16.

³⁹ EFIS No. 64 (May 1, 2015) *Transcript - Volume 1*, page 31 line 10 to 16.

⁴⁰ EFIS No. 64 (May 1, 2015) *Transcript - Volume 1*, page 31 line 17 to page 32 line 5.

⁴¹ EFIS No. 1 (August 29, 2014) complaint.

⁴² EFIS No. 64 (May 1, 2015) *Transcript - Volume 1*, page 31 line 1 to 9.

⁴³ EFIS No. 64 (May 1, 2015) *Transcript - Volume 1*, page 32 line 10 to 13.

⁴⁴ EFIS No. 64 (May 1, 2015) *Transcript - Volume 1*, page 32 line 14 to 20.

9. Later by telephone and by letter dated September 28, 2014, Ameren's regulatory liaison instructed Mr. Small to call Ameren's contact center at the toll-free number.⁴⁵

10. Mr. Small never called Ameren's contact center.⁴⁶

11. On the present account, Mr. Small has never made a payment, and still owes Ameren \$846.15.⁴⁷

Conclusions of Law

The Commission has jurisdiction to determine whether Ameren violated any statute, regulation, tariff, or Commission order.⁴⁸ Mr. Small alleges that Ameren denied him service, and that such denial constitutes retaliation and unlawful discrimination. Mr. Small also argues that Ameren failed to give him notice of his rights as required by law. Ameren responds that it did not deny service to Mr. Small. Ameren is correct and that conclusion negates all other charges in the complaint. Nevertheless, in the interest of administrative efficiency and judicial economy, the Commission will determine the other claims and defenses under the complaint.

A. Discriminatory Denial

Mr. Small charges Ameren with retaliatory discrimination, which is contrary to the following Commission regulation:

[Ameren] shall not discriminate against a customer or applicant for service for exercising any right granted by this chapter. [⁴⁹]

⁴⁵ EFIS No. 75 (May 11, 2015) Exhibit 5, letter.

⁴⁶ EFIS No. 64 (May 1, 2015) *Transcript - Volume 1*, page 32 line 21 to page 33 line 15.

⁴⁷ EFIS No. 64 (May 1, 2015) *Transcript - Volume 1*, page 23 to 25.

⁴⁸ Section 393.360.1, RSMo 2000.

⁴⁹ 4 CSR 240-13.010(2).

Mr. Small alleges that Ameren denied him service in retaliation for filing the actions in File Nos. EC-2011-0247 and EC-2012-0050. Mr. Small also argues that Ameren is discriminating against him in violation of various provisions of law because he is a senior white male, a disabled Viet Nam veteran, and a resident of Iowa.

Ameren responds that it did not deny Mr. Small any application for residential service. In support, Ameren cites the Commission regulation that defines denial of service, which means refusing the request of an applicant:

Denial of service means the utility's refusal to commence service upon an applicant's request for service at a particular location [⁵⁰]

An applicant is one who has applied to receive residential service:

Applicant means an individual(s) or other legal entity who has applied to receive residential service [⁵¹]

Mr. Small is not an applicant, Ameren argues, because he did not apply to receive residential service.

An application for residential service under Ameren's tariff includes the following:

Any customer requesting electric service within [Ameren]'s authorized service area will provide [Ameren] with appropriate information regarding the quantity and characteristics of the anticipated electric consumption and location of the premises to be served. Appropriate personal customer identification may also be required at the request of [Ameren]. Customer or customer's agent shall select the rate, and any applicable riders, from [Ameren]'s currently applicable rate schedules, for which customer qualifies at that time. [⁵²]

⁵⁰ 4 CSR 240-13.015(1)(K).

⁵¹ 4 CSR 240-13.015(1)(A).

⁵² Ameren's tariff: Mo. PSC Schedule No. 6, Sheet 101, paragraph I.C.

That language assumes the engagement of Ameren personnel, authorized to procure and process the information described, such as are present at the contact center.

Mr. Small has not controverted the evidence showing that no such personnel were present in the field office. Mr. Small asked for service from commercial marketing personnel and construction personnel whom he happened to encounter there. Those personnel had no more authority to process an application for residential service than any lineman, secretary, or other random employee of Ameren. Nevertheless, the field office personnel helpfully instructed Mr. Small to call the contact center and gave him the toll-free number. And Mr. Small simply chose not to do so.

The Commission concludes that Mr. Small's actions did not constitute an application for residential service, so no denial of service occurred, and Mr. Small has not shown that Ameren committed any unlawful discrimination.

B. Notice of Denial

Mr. Small also argues that Ameren failed to provide him with a notice of refusal as required by law. A notice of refusal is necessary under Commission regulations:

When the utility refuses to provide service to an applicant, it shall inform the applicant in writing, and shall maintain a record of the written notice [⁵³]

Mr. Small further argues that he has a constitutional right to discuss unpaid charges with Ameren management, and a constitutional right to notice that such discussion is available. Because no denial of service occurred, no notice was due, even under Mr. Small's theory.

In the alternative, even if a denial of service did occur, Mr. Small has not shown any constitutional right to discuss unpaid charges with Ameren management, nor to any

⁵³ 4 CSR 240-13.035(1)

notice that such discussion was available. In support of his theory, Mr. Small cites Memphis Light, Gas and Water Division v. Craft.⁵⁴ That opinion holds that the due process of law entitles a customer to an “opportunity for a meeting with a responsible employee empowered to resolve the dispute”⁵⁵ and notice of that right “prior to”⁵⁶ disconnection from a government-owned utility:

Memphis Light, Gas and Water Division (MLG&W)¹ is a **division of the city** of Memphis which provides utility service. It is directed by a Board of Commissioners appointed by the **City Council**, and is subject to the ultimate control of the **municipal government**. As a **municipal utility**, MLG&W enjoys a statutory exemption from regulation by the state public service commission. [⁵⁷]

The utility was subject to the Due Process clause because it was a unit of government:

The Fourteenth Amendment places procedural constraints on the actions of **government** that work a deprivation of interests enjoying the stature of “property” within the meaning of the Due Process Clause. Although the underlying substantive interest is created by “an independent source such as state law,” federal constitutional law determines whether that interest rises to the level of a “legitimate claim of entitlement” protected by the Due Process Clause. [⁵⁸]

Ameren is not a government utility, and disconnection is not the subject of the complaint, so the holding in Memphis Light does not apply.

Nothing in Memphis Light gives Mr. Small any constitutional right to a discussion with Ameren management. Nothing in Memphis Light gives Mr. Small any constitutional

⁵⁴ Memphis Light, Gas and Water Div. v. Craft, 436 U.S. 1 (1978).

⁵⁵ Memphis Light, Gas and Water Div. v. Craft, 436 U.S. 1, 18 (1978).

⁵⁶ Memphis Light, Gas and Water Div. v. Craft, 436 U.S. 1, 18 (1978).

⁵⁷ Memphis Light, Gas and Water Div. v. Craft, 436 U.S. 1, 3-4 (1978) (emphasis added) (footnote and citation omitted).

⁵⁸ Memphis Light, Gas and Water Div. v. Craft, 436 U.S. 1, 9 (1978) (emphasis added).

right to a notice that such discussion is available. Therefore, the Commission concludes that Ameren did not violate any provision related to notice of refusal.

C. Grounds for Denial

In the alternative, even if application and denial of service did occur, Ameren has shown grounds for its conduct. Refusal of service is subject to the Commission's regulation on refusal of service:

[Ameren] may refuse to commence service to an applicant for any of the following reasons:

(A) Failure to pay a delinquent utility charge for services provided by that utility or by its regulated affiliate that is not subject to dispute under applicable dispute review provisions of 4 CSR 240-13.045 [⁵⁹]

The dispute review provisions of 4 CSR 240-13.045 for "an applicant" state:

When an applicant or customer advises a utility that all or part of a charge is in dispute, the utility shall record the date, time, and place the contact is made; investigate the contact promptly and thoroughly; and attempt to resolve the dispute in a manner satisfactory to both parties. [⁶⁰]

Even if Mr. Small registered a dispute, Ameren's tariff would not require commencement of service under Ameren's tariff.

Under Ameren's tariff, a former customer or an applicant is a "customer:"

Any person, developer, firm, organization, association, corporation or other entity that applies for, or is responsible for payment for electric service from Company, or was responsible for payment for electric service [⁶¹]

No applicant is entitled to service while an amount is due on a previous account as follows:

⁵⁹ 4 CSR 240-13.035(1).

⁶⁰ 4 CSR 240-13.045(2).

⁶¹ Ameren's tariff: Mo. PSC Schedule No. 6, Sheet 101, paragraph I.B.5 *Application for Service*.

[Ameren] shall not be required to commence supplying service to a customer . . . if at the time of application such customer . . . is indebted to [Ameren] for the same class of service previously supplied . . . until payment of, or satisfactory payment arrangements for, such indebtedness shall have been made [⁶²]

Therefore, Ameren need not supply Mr. Small until he makes satisfactory payment arrangements for his indebtedness. Mr. Small remains indebted to Ameren for past service, or the amount due, or that he has not made any arrangements for payment. Therefore, the Commission concludes that Ameren has grounds for refusing service to Mr. Small.

THE COMMISSION ORDERS THAT:

1. All relief requested in connection with the complaint is denied.
2. This order shall be effective on ____ .

BY THE COMMISSION



Morris L. Woodruff
Secretary

concur and certify compliance with
Section 536.080, RSMo 2000.

Dated at Jefferson City, Missouri,
on this [].

⁶² Ameren's tariff: Mo. PSC Schedule No. 6, Sheet 101, paragraph I.C. *Application for Service*.

Appearances

For Jimmie E. Small:

Jimmie E. Small
606 W. Highway 2
Milton, Iowa 52570

For Union Electric Company d/b/a Ameren Missouri:

Sarah E. Giboney, Attorney at Law
Smith Lewis, LLP
111 South Ninth Street, Suite 200
P.O. Box 918
Columbia, MO 65205-0918

Matthew R. Tomc, Corporate Counsel
Ameren Missouri
P.O. Box 66149
St. Louis, MO 63166-6149

For the Staff of the Missouri Public Service Commission:

Cydney D. Mayfield, Senior Counsel,
Missouri Public Service Commission,
P.O. 360
Jefferson City, MO 65102

Daniel Jordan, Senior Regulatory Law Judge.

Appendix

<u>EFIS No.</u>	<u>Date</u>	<u>Document</u>
10	10/3/2014	Request for Transcript from EC-2012-0050
15	10/20/2014	Complainant's Rule 65.01 Motion for Continuance to Assimilate and File Objections to Staff's Report and Recommendation to Dismiss and to Respond to Respondent's Pleading to Dismiss, With Prejudice
18	10/27/2014	Complainant's Motion to Strike Respondent's Alleged Debit Due Dated September 8, 2014
21	10/31/2014	Complainant's Motion/Objection/Dispute/Disagreement with Staff's Report/Recommendation to Reconsider Commission's Order to Redact HC/Privacy Act Matters, as a Matter of Existing Missouri and Federal Privacy Act Laws
24	11/13/2014	Motion for Leave to File for Summary Determination Beyond Commission 10/30/2014 Deadline
25	11/14/2014	4 CSR 240-2.117 Motion for Summary Determination
32	12/31/2014	Complainant's Motion for Extension of Time to Respond to Ameren Company's 12/22/2014 Response Filing
44	3/13/2015	Complainant's Rule 59.01 Request to Admit Facts
45	3/17/2015	Complainant Rule 56.01 First Request for Production of Documents and Things - Exhibit 1
49	4/1/2015	Complainant's MO.R. Civ. Proc. Rule 55.27(g) (3) Motion to Dismiss Ameren Missouri's September 8, 2014 Alleged Electric Utility Bill Claim in the State Amount of \$846.15
57	4/13/2015	Letter from Complainant Regarding Interstate Commerce Violations
58	4/16/2015	Complainant's Supplemental Pleading to Conform to on Commission File Record Evidence
61	4/20/2015	Complainant's Data Request Upon Respondent Union Electric Company, an Electrical Utility Entity
63	4/28/2015	Rule 55.33(b) Amendments to Conform to the Evidence; Motion for Leave to Supplement Complainant's April 20, 2015 Testimony by Adding Relevant Respondent's Admissions and Responses Served and Certified April 16, 2015
65	5/5/2015	Complainant's Post Hearing/Suggestions in Support for Commission Order Favoring Applicant Out-of-State Party
67	5/7/2015	Complainant's Mo. R. Civ. Proc. RULE 55.33 (b), (d), Supplemental Pleading to Conform to on Commission File Record Evidence
77	5/15/2015	Interrogatories to Respondent Utility Management, Kathy Hart Agent UE.AM.MO.