

**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI**

FILED²
AUG 19 2002
Missouri Public
Service Commission

Zoltek Corporation,)	
)	
Complainant,)	
)	
vs.)	Case No. EC-2001-345
)	
Union Electric Company,)	
d/b/a AmerenUE,)	
)	
Respondent.)	

COMPLAINANT'S REPLY BRIEF

COMES NOW Complainant, Zoltek Corporation ("Zoltek"), and for its Reply Brief states as follows:

INTRODUCTION

Zoltek filed its Proposed Findings of Fact and Conclusions of Law and Brief with the Public Service Commission ("PSC") on May 28, 2002. Respondent, Union Electric Company ("Union Electric"), filed its Proposed Findings of Fact and Conclusions of Law and Brief on August 5, 2002. Zoltek will address in its Reply Brief the four major areas of Union Electric's Brief. Zoltek reincorporates by reference, as if more fully set forth herein, its Proposed Findings of Fact and Conclusions of Law and Brief.

DISCUSSION

Burden of Proof

The burden of proof in this matter rests with Zoltek. See Ahlstrom v. Empire District Electric Company, 4 Mo. P.S.C.3d 187, 202 (1995). As fully discussed in Brief of Complainant, Zoltek has demonstrated that Union Electric failed to provide safe, adequate and reliable service, in a timely manner, to Zoltek at its Missouri Research Park facility since 1993.

Section 386.510 of the Revised Statutes of Missouri requires that the PSC's decision be lawful and reasonable. "The question of the [decision's] 'lawfulness' turns on whether the [PSC] had statutory authority to issue it. The question of the [decision's] 'reasonableness' turns on whether it is supported by the competent and substantial evidence on the whole record." State ex rel. Ozark Electric Cooperative v. Public Service Commission, 527 S.W.2d 390, 392 (Mo.App. 1975) (citations omitted). "Substantial evidence is 'evidence that if true has probative force upon the issues; it includes only competent evidence, not incompetent evidence.' Competent evidence is that which is relevant and admissible evidence which is capable of establishing the fact in issue." Hay v. Schwartz, 982 S.W.2d 295, 303 (Mo. App. W.D. 1998), *quoting* Knapp v. Missouri Local Gov't. Employees Retirement System, 738 S.W.2d 903, 913 (Mo. App. 1987).

Union Electric's suggests in its Brief that Zoltek has failed to meet its burden and has only proven that it has been experiencing equipment problems. (Respondent's Brief, p. 25). In order to make this suggestion Union Electric must completely ignore the competent and substantial evidence put forth by Zoltek in this matter. Apparently, Union

Electric still does not believe that Zoltek has experienced problems with its electrical service. (*See* Tr. 992-993, lines 20-25 and 1-3).

Union Electric initially alleges in its Brief that there is insufficient evidence of problems with the service. (Brief, p.25). Zoltek demonstrated that it had experienced numerous problems with its electrical service at the MRP facility. A review of the direct testimony indicates that over 270 service quality incidents were recorded between 1993 and 2001. (*See* Spahn Direct, (DS-2) and Moran Direct, (MM-2)).

David Spahn was the manager of the MRP facility from 1993 until 1995, and was in charge of engineering for the facility from 1993 until 1997. He indicated that he was very familiar with the service quality issues experienced by Zoltek and provided the PSC with a summary of the incidents that occurred during his tenure. (Spahn Direct, p. 2). He also testified to the manner in which the Zoltek employees recorded the incidents. (*Id.*). Finally, he testified to the accuracy of the recordings. (Tr. 417 lines 5-9).

In an effort to suggest that the service quality incidents did not occur, Union Electric has tried, unsuccessfully, to attack the credibility of the process by which they were recorded. (Brief, pp. 27, 30). Michael Moran of Zoltek set the record straight as to this issue. Mr. Moran stated that Zoltek's most experienced employees recorded the incidents. He also made it clear that it is easy to determine whether Zoltek has experienced a service quality incident, with the primary indicator being the plant lights. He also disputed the notion that the incidents were caused by Zoltek's equipment. (Moran Surrebuttal, p. 3). Furthermore, the evidence clearly indicates that Union Electric was first notified in 1993 about problems with the electrical service at Zoltek. (Tr. 414, lines 17-22; Rummy Direct, p. 5, lines 3-12).

Additionally, Union Electric monitored the electrical service at Zoltek's MRP facility in 1993, 1994 and 2000 and recorded several service quality incidents. (Tr. 507, 509 and 420). Zoltek's records reflect the service quality incidents captured by Union Electric's recording equipment. (Rumy Direct, (ZR-3). Union Electric tries to dismiss the consistency in the records by uniquely characterizing the incidents as "minor outages" and suggesting that they do not rise to a level that *Union Electric* finds troubling. (Respondent's Brief, p. 27).

Union Electric complains that it had offered to do additional monitoring at the MRP facility but that Zoltek refused to cooperate. (Respondent's Brief, p. 9). These complaints ring hollow when one considers that Union Electric has never believed that Zoltek was having problems and that it unilaterally determined that the service problems noted during the monitoring that was done were not of a sufficient level for Union Electric. (Tr. 992-993, lines 20-25 and 1-3). By trivializing the recorded electrical problems, Union Electric is asking the PSC to ignore the customer's legitimate complaints and instead only recognize those problems which are at a level deemed significant by the supplier of the service.

Union Electric is saying on one hand that Zoltek did not show that it had problems with its electrical service because Union Electric was unable to perform any additional monitoring, but on the other hand it is dismissing the existing testing results as nothing more than "minor problems." In light of Union Electric's self-serving characterization of the problems experienced by Zoltek, one is left to wonder what purpose additional Union Electric testing would have served. Surely, Union Electric would have dismissed any findings it felt were not in Union Electric's favor.

Union Electric appears surprised that a customer would actually be concerned about the effect an electrical service problem has on the customer's business. (Respondent's Brief, p. 28). Apparently, Union Electric expects its customers to explain to Union Electric what is wrong with Union Electric's system whenever there is a problem. Perhaps Union Electric has attached the "arrogant" label to the wrong party in this action. (Respondent's Brief, p. 28, p. 29).

Union Electric incorrectly characterizes Dean Park's testimony. (Respondent's Brief, p. 28). Mr. Park never agreed that there was nothing that Union Electric could do to resolve Zoltek's problems. Instead, Mr. Park indicated that he did not have any direct knowledge of anything that Union Electric could do *regarding protection from trees, weather, automobiles or animals*. He stated that only Union Electric can furnish such information and it had not done so. (Tr. 612-613, lines 18-25 and 1).

Union Electric also suggests in its Brief that the electrical service at Zoltek was reliable because Zoltek had insufficient (according to Union Electric's calculations) losses in production and material. (Respondent's Brief, p. 26). Union Electric is asking the PSC to adopt a standard of reliability which allows poor electrical service until such time as when the customer loses an amount of money which the *utility*, not the consumer, deems significant. One is left to speculate as to the amount of losses that Union Electric expected Zoltek to suffer before Union Electric would believe that the service was unreliable.

Union Electric clearly ignores the intangible effects that the service quality incidents have had on Zoltek. Wayne Agne of Zoltek reported that the equipment has to be checked after every service quality incident and an incident report completed. (Tr. 310, lines 6-20). Mr. Spahn testified about the effects the service quality incidents had on the Zoltek employees and the procedures that had to be developed as a result of the poor quality of the electrical service. (Tr. 417, lines 10-25).

In a further effort to avoid responsibility, Union Electric has chosen to blame Zoltek for the problems, suggesting that its equipment is too sensitive. (Respondent's Brief, p. 26, p. 30). As discussed below, Union Electric violated a PSC regulation regarding service voltage at least twenty-seven (27) times. However, on several of these occasions Zoltek's equipment rode through the extreme voltage change and stayed on line. (Tr. 445, lines 6-11; Tr. 886-887, lines 25-25 and 1-2; Park Direct, p. 12, lines 3-9). This is not a characteristic of overly sensitive equipment.

Contractual Issues

As set forth in Zoltek's Brief, the PSC does not have jurisdiction over Union Electric's promises, commitments, agreements and representations to Zoltek. In fact, the Missouri Supreme Court has held that "[t]he Missouri Public Service Commission cannot 'enforce, construe nor annul' contracts, nor can it enter a money judgment." Wilshire Construction Company v. Union Electric Company, 463 S.W.2d 903, 905 (Mo.S.Ct. 1971) (citations omitted). *See also* Gaines v. Gibbs, 709 S.W.2d 541, 543 (Mo.App. S.D. 1986).

In its Brief, Union Electric agrees with Zoltek that the PSC does not have jurisdiction to interpret or enforce contractual agreements. Nonetheless, Union Electric has asked the PSC to construe the 1988 Agreement in regard to the issue of reliability and to make specific findings regarding the Agreement. (Respondent's Proposed Conclusions of Law, p. 5).

Union Electric attempts to circumvent this well-settled proposition by suggesting that the PSC must review the 1988 Agreement because it might have an impact on the level of service that the PSC will require that Union Electric provide to Zoltek and that the Agreement may call into question whether Section 393.130 of the Revised Statutes of Missouri is implicated. Union Electric also attempts to argue that Zoltek was not a third party beneficiary of the 1988 Agreement. (Respondent's Brief, p. 33).

As to the level of service that the PSC might require Union Electric to provide, Section 393.130 of the Revised Statutes of Missouri provides that "[e]very . . . electrical corporation . . . shall furnish and provide such service instrumentalities and facilities as shall be safe and adequate and in all respects just and reasonable." The PSC's ultimate decision as to whether the service provided to Zoltek was in compliance with this statutory requirement will be based upon an application of the facts to the law. This particular decision of the PSC is in no way impacted by any contractual agreement between the parties.

The argument regarding preferential treatment is simply a red herring raised by Union Electric in a desperate effort to avoid returning to the Circuit Court. It is clear from the evidence that Union Electric entered into an agreement in 1988 with the Missouri Research Park in which the parties' contemplated the reliability of the electrical

service. As detailed in Zoltek's Brief, it is also clear that Zoltek is a member of the class identified in the contract ("the University's tenants") and therefore is a third-party beneficiary of the 1988 Agreement. *See Peters v. Employers Mutual Casualty Co.*, 853 S.W.2d 300, 301 (Mo. banc 1993)(citation omitted).

In any event, the PSC does not have jurisdiction to decide any contractual issues, even whether a contract exists. "The [PSC] is not a court and it has no power to construe or enforce contracts." *Gaines v. Gibbs*, 709 S.W.2d 541, 543 (Mo. App. S.D. 1986)(citations omitted). *See also Wilshire Construction Company v. Union Electric Company*, 463 S.W.2d 903, 905 (Mo.S.Ct.1971).

Accordingly, this matter should be returned to the St. Louis City Circuit Court for consideration of the contractual issues.

Union Electric's Violations of a PSC Regulation

Evidence was produced at trial demonstrating that Union Electric violated a PSC regulation ("Regulation") regarding the "suitability" and "adequacy" of the service voltages at least twenty-seven times. (Park Surrebuttal, p. 12) Division 240-10 of the Code of State Regulations, paragraph (23)(D), states in pertinent part that

[f]or power service, the voltage, at any time, shall not be greater than ten percent (10%) above or below standard service voltage. The ranges of voltages indicated in this subsection shall be considered as being made up of three (3) voltage zones – namely, the favorable zone, tolerable zone and the extreme zone. The favorable zone shall be that range of voltage variation with four percent (4%) above and five percent (5%) below nominal. The tolerable zone shall be that zone between six percent (6%) above and eight percent (8%) below nominal voltage, and the extreme zone shall not exceed the maximum and minimum range of the tolerable zone more than an additional three percent (3%).

4 CSR 240-10(23)(D).

In its Brief, Union Electric attempts to avoid responsibility for these violations by arguing that the Regulation applies only if the voltage fluctuations lasted at least one (1) minute. It even tries to confuse the issue by briefly suggesting that Zoltek was receiving "lighting service," thereby making the Regulation inapplicable. However, a careful review of this section clearly illustrates that there is no duration requirement associated with "power service," the type of service provided to Zoltek at its MRP facility.

Union Electric's expert witness, J. Derald Morgan, testified that the service provided to Zoltek fell within subparagraph D as power service. (Tr. 856). He also stated that this Regulation prohibits the voltage from varying more than ten percent (10%) from the standard voltage and acknowledged that the service to Zoltek did vary more than ten percent (10%). (Tr. 856-857). Further, he acknowledged that some of these voltage variations were caused by events within Union Electric's control. (Tr. 858). Union Electric's other expert witness, James Burke, agreed that 4 CSR 240-10(23)(D) pertains to "power service" and that there is no mention in this Regulation of a one minute duration requirement. (Tr. 898-899). Finally, Mr. Burke acknowledged that there were incidents where the voltage varied greater than eleven percent (11%). (Tr. 886, lines 20-23).

Contrary to Union Electric's assertions in its Brief, Martin Eckelkamp, an employee of Union Electric, testified that he had recorded instances during the 2000 monitoring in which the voltage had dropped 15%, 17%, 20% and 35%. (Tr. 495-497). Despite Union Electric's comments in its Brief, Edward Bradley, a Union Electric employee who did monitoring at Zoltek's MRP facility in 1993 and 1994, did not set his monitoring equipment at levels prescribed by the regulations. He specifically testified

that he had set his instruments as a “course of practice,” not because of the Regulation at issue. (Tr. 530-531, lines 23-25 and 1-10). Mr. Bradley also testified that he was not familiar with the Regulation and, in fact, he had seen it for the first time at the trial of this matter. (Tr. 529, lines 19-22).

The PSC Regulation requires that “[w]hen the system voltage variations extend to within the extreme zone, the utility shall take those steps as may be required to improve the system voltages, or the subdivisions of, the utility, as the case may be, to within either the favorable or the tolerable zone.” 4 CSR 240-10(23)(D). As noted in Zoltek’s Brief, Union Electric produced no evidence of the steps taken by Union Electric to specifically address the extreme drops in voltage that Zoltek experienced.

Union Electric also suggests that Zoltek is a recipient of “lighting service” at its MRP facility solely because it uses lights in the plant. This is nothing more than an attempt to confuse the issue and to deflect attention away from the serious, repeated violations of a PSC regulation. Obviously, most, if not all, industrial users have lights inside their plants. Using the presence of light bulbs in a facility as the determining factor of the type of electrical service the user is provided would render the Regulation useless.

The PSC has designated three different types of service. As to lighting service and power service, Union Electric’s argument would render the distinction without a difference. In other words, since such users would fall into the category of lighting service, the power service provision would cease to exist. It is important to note that Union Electric provided no evidence at the trial of this matter to support this aspect of its strained interpretation of the Regulation. Clearly, the evidence that was produced

regarding this issue demonstrates that Zoltek receives “power service” and therefore the Regulation applies in this case.

Union Electric’s Efforts to Address Zoltek’s Complaints

Union Electric suggests that it took action to address Zoltek’s concerns about the quality of the electrical service it was receiving at its MRP facility. (Brief of Respondent, p. 21-22). Specifically, it cites in its Brief the alleged advancement of the Weldon Springs substation upgrade and the unspecified “numerous” other upgrades it made to the system.

Union Electric offered the testimony of William Carr, a company employee, to explain the alleged efforts it made to address Zoltek’s concerns. As to the upgrade of the substation, Mr. Carr admitted that this was designed solely to appease Zoltek and that he believed its effect would be minimal at best. (Tr. 978, lines 17-23). Mr. Carr also discussed the installation of a 400-amp recloser outside the substation and indicated that he believed that it would have a minimal impact. (Tr. 986-987, lines 20-25 and 1-3). Mr. Carr even stated at the hearing that he did not even believe that Zoltek had a reliability problem and that there was nothing his company could do. (Tr. 992-993, lines 20-25 and 1-3).

James B. Hulse also testified on Union Electric’s behalf about the efforts allegedly made to assist Zoltek with its electrical service problems. Mr. Hulse indicated that the substation upgrade referenced in Union Electric’s Brief had been planned for some time and was intended to deal with future load considerations. (Tr. 1056, lines 1-15). It was not done in response to Zoltek’s problems. (Tr. 1057, lines 11-13). The

upgrade was done ahead of schedule only because the necessary equipment had arrived earlier than expected. (Tr. 1056, lines 1-7).

Zoltek demonstrated at the trial of this matter that Union Electric never made a sincere effort to address Zoltek's problems. In fact, Union Electric did not even believe that Zoltek was experiencing problems with its electrical service. The work performed was done to deal with an increase in load growth in the area, not to directly respond to Zoltek's problems. The few changes to the system made by Union Electric appear to have been done solely to appease Zoltek.

CONCLUSION

Zoltek has demonstrated with competent and substantial evidence that the Union Electric's service was unsafe, inadequate and unreliable during these years. Furthermore, the evidence demonstrates that Union Electric has violated the PSC Regulation pertaining to the suitability and adequacy of service voltage. Finally, the evidence shows that Union Electric made representations to the University of Missouri and to Zoltek regarding the reliability of the electric service to be provided. However, it is clear that the PSC does not have jurisdiction to determine contract issues.

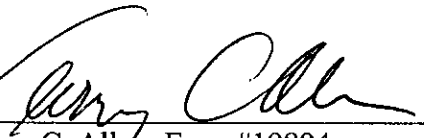
Therefore, Zoltek respectfully requests that the PSC make a finding that the service provided to Zoltek has not been safe, adequate or reliable and that Union Electric has repeatedly violated a PSC regulation and thereafter return this matter to the St. Louis City Circuit Court for consideration of the contractual issues.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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