

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

Eric E. Vickers, Personally and on Behalf of)
All Customers of Ameren Missouri Who)
Have Sought Relief Under the Cold Weather)
Rule,)

Complainant,)
)

vs.) Case No: EC-2011-0326
)

Union Electric Company, d/b/a)
Ameren Missouri and Missouri Public)
Service Commission,)
Respondents.)

ANSWER AND MOTION TO DISMISS

COMES NOW, Union Electric Company, d/b/a Ameren Missouri (“Ameren Missouri” or “Company”), and for its Answer and Motion to Dismiss filed in this proceeding, states as follows:

Count I

1. On April 4, 2011, Mr. Eric E. Vickers, with a service address of 1100 Wyoming, St. Louis, Missouri 63118 (Complainant), initiated this proceeding against the Company.

2. Any allegation not specifically admitted herein by the Company should be considered denied.

3. Paragraph 1 of the Complaint fails to allege any fact or the nature of the Complaint, but rather states only a conclusion of law, and therefore Company offers no response.

4. Paragraph 2 of the Complaint fails to allege any fact or the nature of the Complaint, but rather states only a conclusion of law, and therefore Company offers no response.

5. Paragraph 3 of the Complaint fails to allege any fact or the nature of the Complaint, but rather states only a conclusion of law, and therefore Company offers no response.

6. Paragraph 4 of the Complaint fails to allege any fact or the nature of the Complaint, but rather states only a conclusion of law, and therefore Company offers no response.

7. With regard to paragraph 5 of the Complaint, Company admits that on March 15, 2011, Complainant contacted Company. Company denies the remaining allegations of paragraph 5. In further answer, Company states as follows:

- a. On October 5, 2010, Complainant made a payment on his account for electric utility service in the amount of \$** **. This left a prior balance of \$** **.
- b. Complainant continued to receive electric utility service at the 1100 Wyoming address throughout the Cold Weather period, despite the fact that Complainant did not make another payment until March 15, 2011. Service continued because although periodic disconnect notices were properly issued to Complainant for nonpayment, the temperature was predicted to drop below, or was below, 32 degrees Fahrenheit on the days when disconnection could have otherwise occurred pursuant to the notices.
- c. On January 6, 2011, Complainant and a Company representative entered into a verbal payment agreement via telephone, pursuant to the Cold Weather Rule. Pursuant to the agreement, Complainant was required to make an initial payment of \$** **.
- d. Complainant defaulted on said agreement by failing to pay the initial \$** ** payment.
- e. Complainant's outstanding balance continued to increase and on March 11, 2011, a disconnect notice was sent to Complainant, advising him that unless the then \$** ** delinquent balance was paid, his service would be disconnected for nonpayment after March 28, 2011.
- f. On March 15, 2011, a debit/credit card payment was made by a ** ** on Complainant's behalf, in the amount of \$** **. Complainant contacted the Company, demanded a (new) Cold Weather Rule payment agreement, and alleged the \$** ** payment was an initial payment under a (new) Cold Weather Rule payment agreement. On that date, the Company representative Michael Horn advised Complainant that he had already entered into a Cold Weather Rule payment agreement on January 6, 2011, had defaulted on

that agreement, and that the \$** ** payment amount was insufficient to reinstate the defaulted Cold Weather Rule payment agreement.

- g. Also on March 15, and again on March 16, 2011, Company representative Michael Horn verbally offered to Complainant to reinstate Complainant's January 6, 2011 Cold Weather Rule payment agreement upon Complainant's payment of \$** **, the remaining amount required to reinstate the payment agreement. That amount was calculated as follows:

\$**	**	January CWR payment agreement payment
\$**	**	February CWR payment agreement payment
\$**	**	January bill for electric utility service to 1100 Wyoming
\$**	**	February bill for electric utility service to 1100 Wyoming
\$**	**	January late pay charge
\$**	**	February late pay charge
\$**	**	<u>two months of deposit installments</u>
\$**	**	** (rounded to \$** **), less
\$**	**	<u>** March 15, 2011 payment</u>
\$**	**	** Total Due to reinstate CWR payment agreement

Due to a calculation error by Company, the above figure should have, but did not, included an additional \$** **—the initial Cold Weather Rule payment never paid by Complainant.

- h. On March 16, 2011, a second automatic disconnect notice was sent to Complainant, advising him that unless the then remaining \$** ** delinquent balance was paid (credit having been given for the \$** ** payment), his service would be disconnected for nonpayment after March 28, 2011.
- i. On March 17, 2011, a payment in the amount of \$** ** was made toward Complainant's account via online debit/credit card payment under the name ** **, which payment was in an amount sufficient to reinstate Complainant's January 6, 2011 Cold Weather Rule payment agreement and to prevent discontinuance of electric service to Complainant at the 1100 Wyoming service address.
- j. After receipt of the remainder of the remaining amount required to reinstate the Cold Weather Rule payment agreement, Company did confirm the terms of the payment agreement to Complainant in writing via email and U.S. Mail, a copy of

which written terms are attached hereto as **Exhibit A** and incorporated herein by this reference.

8. With regard to paragraph 6 of the Complaint, Company admits that on March 15, 2011 and again on March 16, 2011 Company advised Complainant that he had defaulted on an agreement entered into with Company under the Cold Weather Rule on January 6, 2011. Company denies the remaining allegations of paragraph 6 as stated. In further answer, see also paragraphs 7.c. through 7.j., above.

9. With regard to paragraph 7 of the Complaint, Company admits that Complainant has never entered into a writing *signed by both parties* that sets out the terms of the Cold Weather Rule payment agreement entered into by the Company and Complainant. Company denies the remaining allegations of paragraph 7. In further answer, see also paragraphs 7.d. and 7.j., above, and paragraph 12, below.

10. The Company denies the allegations of paragraph 8 of the Complaint. In further answer, the Company states as follows. As of March 15, 2011, Complainant's service had not been disconnected and as such, the Company calculated the payment required in order to reinstate Complainant's Cold Weather Rule payment agreement pursuant to 4 CSR 240-13.055(10)(B)5: "If a customer defaults on a cold weather rule payment agreement but has not yet had service discontinued by the utility, the utility shall permit such customer to be reinstated on the payment agreement if the customer pays in full the amounts that should have been paid pursuant to the agreement up to the date service is requested, as well as, amounts not included in a payment agreement that have become due." In further answer, see also paragraphs 7.c., 7.d, and 7.g., above.

11. The Company denies the allegations of paragraph 9 of the Complaint as stated.

12. Company denies the allegation of paragraph 10 of the Complaint as stated. In further answer, the Company states that it does enter into verbal Cold Weather Rule payment agreements and that once the initial payment required is received from the customer, the Company sends written confirmation of the terms of the payment agreement, as required by the Cold Weather Rule.

13. Company denies the allegations of paragraph 11 of the Complaint. In further answer, see paragraphs 7.g. and 7.j.

14. Company denies the allegations of paragraph 12 of the Complaint.

15. Company denies the allegations of paragraph 13 of the Complaint. In further answer, see paragraph 7.c, above.

Count II

16. The allegations of paragraph 14 of the Complaint do not state a claim against Company and therefore Company makes no response.

Motion to Dismiss Per 4 CSR 240-2.070(6)

17. Complainant purports to file his Complaint on his own behalf, and on behalf of “all customers of Ameren Missouri who have sought relief under the cold weather rule.” See Complaint caption. This is in the nature of a class action, which may be maintained *in our circuit courts* pursuant to Mo. Sup. Ct. Rule 52.08. Setting aside that none of the prerequisites to maintenance of a class action suit under Rule 52.08 have been satisfied, Rule 52.08 does not apply to complaints brought before the Commission, and there is no statute that permits such actions to be brought before the Commission. The Commission is a regulatory body of limited jurisdiction having only such powers as are conferred by statute and is not a court. ***American Petroleum Exchange v. Public Service Commission***, 172 S.W.2d 952, 955 (Mo. 1943). Further, 4 CSR 240-2.070(5)(A) requires that the complaint contain the “name, street address, signature, telephone number, facsimile number, and electronic email address, where applicable, of each complainant and, if different, the address where the subject utility service was rendered.” Complainant has not provided this information for anyone but himself. For these reasons, to the extent Complainant purports to represent the interests of customers of the Company other than himself, and to the extent Complainant seeks relief on behalf of a class of customers of the Company under paragraphs 16, 17, 18, 20 and 21 of the Complaint, his Complaint should be dismissed for failure to state a claim for which relief can be granted.

18. In paragraph 18 of the Relief Requested portion of the Complaint, Complainant asks the Commission, *inter alia*, to require Ameren Missouri to repay every customer on whom Ameren Missouri “imposed” an 80% “charge” for defaulting on a Cold Weather Rule payment agreement, where the Company cannot produce written confirmation of the agreement defaulted on. Payments required to be made under the Cold Weather Rule, 4 CSR 240-13.055, regardless of what percentage they constitute, are attributable to a customer’s balance for utility services already provided. Compelling the Company to forfeit and pay over amounts paid to the

Company for services that have been rendered to such customers and charged pursuant its tariffs is confiscatory and would deprive the Company of its property in violation of its due process rights. *Straube v. City of Bowling Green*, 277 S.W.2d 666, 671 (Mo. 1950)(“When the established rate of a utility has been followed, the amount so collected becomes the property of the utility, of which it cannot be deprived by either legislative or judicial action without violating the due process provisions of the state and federal constitutions.”). For this reason, the Complaint should be dismissed for failure to state a claim for which relief can be granted.

19. In paragraph 19 of the Relief Requested portion of the Complaint, Complainant asks in part that the Commission enjoin Ameren Missouri from enforcing the 80% payment charged on Complainant. As described more fully in paragraphs 7.g and 10, above, the Company did not require Complainant to make a payment of 80% of his then balance as an initial Cold Weather Rule payment, but rather, required that Claimant to pay in full the amounts that should have been paid under the January 6, 2011 agreement. Further, injunction is an equitable remedy not available in proceedings before the Commission. The Commission is a regulatory body of limited jurisdiction having only such powers as are conferred by statute, is not a court, and has no power to declare or enforce any principle of equity. *American Petroleum Exchange v. Public Service Commission*, 172 S.W.2d 952, 955 (Mo. 1943); *State ex rel. Fee Fee Trunk Sewer, Inc. v. Litz*, 596 S.W.2d 466 (Mo. App. W.D. 1980). In any event, the payment has already been made. To the extent paragraph 19 may be read as a request that the Commission require the Company to refund the payment to Complainant, any such order would be confiscatory and deprive the Company of its property in violation of its due process rights, since the amount paid by Complainant was paid for utility services rendered to Complainant. *Straube*. As to Complainant’s request that the Company be required to enter into the Cold Weather Rule payment sought by Complainant on March 15, 2011, the Company states that it entered into a Cold Weather Rule payment agreement with Complainant on January 6, 2011, defaulted, and the payment agreement was reinstated on March 17, 2011. Complainant has not pointed the Commission to any rule or statute whereunder a customer is entitled to an additional Cold Weather Rule payment agreement. Should Complainant again default under the current Cold Weather Rule payment agreement, Complainant would not be entitled to another such agreement (prior to discontinuance of service for nonpayment) until the Cold Weather Rule period begins again on November 1, 2011. **4 CSR 240-13.055(3)**. For these reasons, the

Complaint should be dismissed for failure to state a claim for which relief can be granted and failure to comply with the provisions of the Commission rules.

20. In response to paragraph 20 of the Relief requested portion of the Complaint, the Company acknowledges that the paragraph does not state a claim for relief directed at the Company, but states that it is the Company's position that at all times Staff has acted in a competent, independent and objective manner in investigating the numerous allegations and informal complaints made by Complainant that preceded this formal Complaint, as well as other complaints filed against the Company.

21. In paragraph 21 of the Requested Relief portion of the Complaint, Complainant asks that "damages be awarded to Complainant and those similarly situated[.]" The Company states that the Commission is a regulatory body of limited jurisdiction having only such powers as are conferred by statute, is not a court, and has no power to determine damages, or award damages or pecuniary relief. *American Petroleum Exchange v. Public Service Commission*, 172 S.W.2d 952, 955 (Mo. 1943); *State ex rel. Fee Fee Trunk Sewer, Inc. v. Litz*, 596 S.W.2d 466 (Mo. App. W.D. 1980). For this reason, the Complaint should be dismissed for failure to state a claim for which relief can be granted.

22. The following attorneys should be served with all pleadings in this case:

Sarah E. Giboney, #50299
Smith Lewis, LLP
111 South Ninth Street, Suite 200
P.O. Box 918
Columbia, MO 65205-0918
(573) 443-3141
(573) 442-6686 (Facsimile)
Giboney@smithlewis.com

Wendy K. Tatro, # 60261
Associate General Counsel
Union Electric Company, d/b/a
Ameren Missouri
1901 Chouteau Avenue, MC-1310
P.O. Box 66149, MC-1310
St. Louis, Missouri 63166-6149
(314) 554-3484 (Telephone)
(314) 554-4014 (Facsimile)
AmerenMOService@ameren.com

WHEREFORE, Ameren Missouri respectfully requests that the Commission issue an order dismissing Complainant's Complaint for failure to state a claim for which relief can be granted, on in the alternative, denying Complaint's requests for relief or, in the alternative, setting the matter for hearing.

SMITH LEWIS, LLP

/s/Sarah E. Giboney
Sarah E. Giboney, #50299
111 South Ninth Street, Suite 200
P.O. Box 918
Columbia, MO 65205-0918
(573) 443-3141
(573) 442-6686 (Facsimile)
giboney@smithlewis.com
Attorney for Ameren Missouri

By: /s/ Wendy K. Tatro
Wendy K. Tatro, # 60261
Associate General Counsel
Ameren Services Company
P.O. Box 66149
St. Louis, MO 63166-6149
(314) 554-3484 (phone)
(314) 554-4014 (fax)
AmerenMOService@ameren.com

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Answer was served on the following parties via electronic mail (e-mail) or via certified and regular mail on this 4th day of May, 2011.

Kevin Thompson, Chief Staff Counsel
Staff of Missouri Public Service Commission
200 Madison Street, Suite 800
P.O. Box 360
Jefferson City, MO 65102
kevin.thompson@psc.mo.gov

Lewis Mills
Office Of Public Counsel
200 Madison Street, Suite 650
P.O. Box 2230
Jefferson City, MO 65102
opcservice@ded.mo.gov
Lewis.mills@ded.mo.gov

Eric E. Vickers
Complainant
1100 Wyoming
St. Louis, MO 63118
eric_vickers@hotmail.com

/s/ Sarah E. Giboney
Sarah E. Giboney