

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

EDWARD J. BUSCH AND	)	
ANDREA B. BUSCH,	)	
	)	
Complainants,	)	
	)	
vs.	)	Case No: EC-2013-0421
	)	
UNION ELECTRIC COMPANY d/b/a	)	
AMEREN MISSOURI,	)	
	)	
Respondent.	)	

AMEREN MISSOURI'S MOTION TO DISMISS

COMES NOW Union Electric Company d/b/a Ameren Missouri ("Company" or "Ameren Missouri"), and for its Motion to Dismiss the Complaint filed by the above-captioned Complainants, states as follows:

Introduction

Complainants seek to have this Commission hear a "complaint" or re-open or reconsider the Commission's January 3, 2013 *Order Granting Certificate of Convenience and Necessity* (the "Order" or "CCN" or "line certificate") for an approximately 855-foot portion of sub-transmission line that was located outside the Company's certificated service territory.¹ The 855-foot portion is part of an approximately 12,000-foot sub-transmission line needed to serve an industrial customer, LMV Automotive Systems, whose facility is located within the Company's service territory. It should be noted that none of the 12,000-foot sub-transmission line, including

¹ As the Commission is aware, under *State ex rel. Harline v. Pub. Serv. Comm'n*, 343 S.W.2d 177, 184 (Mo. App. W.D. 1960), a line certificate is only needed for that part of the line located outside the Company's service territory. Complainants' property is located along that part of the line that is within the Company's service territory.

the portion for which Ameren Missouri received a line certificate, will be constructed on the Complainants' property.

The Complaint must be dismissed because Complainants are simply waging a collateral attack on a final order of the Commission (the line certificate), thereby failing to state a claim upon which relief can be granted. Moreover, insofar as the Complaint does not “set forth any act or thing done or omitted to be done . . .” by the Company “in violation of, or claimed to be in violation, of any provision of law, or any rule or order or decision of the commission . . .,” there is no basis for a complaint. Section 386.390.1 RSMo. Finally, the Commission lacks jurisdiction to grant the relief requested.

Argument

The Complaint Fails to State a Claim

On its face, the entirety of the Complaint constitutes an impermissible collateral attack on the Order. The Complaint’s claim is simply that the Commission, in Case No. EA-2013-0316, impermissibly issued the Order for two basic reasons: (a) because of a lack of notice Complainants allege they were entitled to, and (b) because they object to construction of this power line. Regardless of the claimed bases for the Complaint, and even if every allegation in the Complaint is taken as true,² Complainants’ collateral attack on the Order is barred as a matter of law.

Section 386.550 provides that “[i]n all collateral actions or proceedings the orders and decisions of the commission which have become final shall be conclusive.” Commission orders

² When reviewing a Complaint to determine whether there is a failure to state a claim, the Commission must treat the facts contained in the petition as true and construe them liberally in favor of the Complainant. Ste. Genevieve Sch. Dist. R-II v. Bd. of Aldermen of Ste. Genevieve, 66 S.W.3d 6, 11 (Mo. banc 2002). While this is no doubt the law, it does not aid Complainants here.

on matters properly within its jurisdiction are not subject to collateral attack.³ Complainants do not and could not credibly allege that the Commission lacked the jurisdiction to issue a CCN – Section 393.170 expressly confers that jurisdiction on the Commission. Nor do or could Complainants credibly contend that the Order is not final. The Order itself stated that it became effective on January 13, 2013. Even had the Order been silent on its effective time, under Section 393.490.3 the Order would have become effective in 30 days -- on February 2, 2013 -- as a matter of law.⁴

The statutory bar against collateral attacks is so clear that it bars a party from attacking in a later action a prior Commission order even when that party was not given personal notice of the proceeding.⁵ In other words, unlike such common law doctrines as collateral estoppel and *res judicata*, Section 386.550 applies to bar any petitioner, whether or not it was a party in the prior proceeding or has any relationship with any party in the prior proceeding, from the collateral attack of a Commission order.⁶ The bottom line is that the case law is clear: Section 386.550 bars an attack on a final Commission order, including actions brought or purported to be brought as a complaint, as here.⁷

³ Harline, 343 S.W.2d at 184.

⁴ There was only one way and one way alone to challenge the Order: by timely filing an application for rehearing pursuant to Section 385.500, followed by a timely appeal pursuant to Section 386.510, RSMo. State ex rel. Atmos Energy Corp. v. PSC, 103 S.W.3d 753, 758 (Mo. banc 2003); Union Electric Co. v. Clark, 511 S.W.2d 822, 825 (Mo. 1974). A timely challenge was not filed by anyone. The Order is final and immune from collateral attack.

⁵ State ex rel. Ozark Border Elec. Coop. v. Pub. Serv. Comm'n, 924 S.W.2d 597, 301 (Mo. App. W.D. 1996). Complainants do not point to any statute or regulation which would require the Commission (or Ameren Missouri) to provide notice in any event.

⁶ Tari Christ v. Southwestern Bell Tel. Co., Case No. TC-2003-0066 Order Regarding Motions to Dismiss at 22-23 (Mo. P.S.C. January 9, 2003).

⁷ Tari Christ, Order at 23, citing State ex rel. Licata, 829 S.W.2d 515, and Ozark Border, 924 S.W.2d 597.

The Commission Lacks Subject Matter Jurisdiction

Although the Complaint does not cite the authority under which the Complaint was filed, there is only one possible source of that authority – Section 386.390.⁸ Section 386.390 does not provide the necessary subject matter jurisdiction to the Commission over the Complaint. In a broad grant of authority, Section 386.390 first authorizes the Commission to determine complaints as to “any act or thing done or omitted to be done by any corporation, person or public utility . . . in violation, or claimed to be in violation, of any provision of law, or of any rule or order or decision of the commission[.]”⁹ As a consequence, a complaint brought under this authority necessarily must include an allegation of a violation by the utility of a law or of a Commission rule, order or decision.¹⁰

Here, the Complaint does not allege a violation *of* a Commission order but a challenge *to* a Commission order, which is barred by statute.¹¹ For that reason, the Commission does not have subject matter jurisdiction over the Complaint, and it must be dismissed.

WHEREFORE, Ameren Missouri respectfully requests that the Commission dismiss the Complaint with prejudice.

⁸ The only other complaint authority is found in Section 393.260, which allows certain persons or entities (e.g., a group of 25 or more consumers or a municipality) to bring complaints about the quality of their service from the respondent utility, or about the justness and reasonableness of the rates charged by the respondent utility. That statute has no applicability here – Complainants make no claim relating to service from the Company or relating to the Company’s rates.

⁹Section 386.390.1.

¹⁰ Tari Christ, Order at 20, *citing Ozark Border*, 924 S.W.2d 599-600.

¹¹ Section 386.390.1 authorizes complaints alleging violations *of* Commission orders, while Section 386.550 bars complaints *attacking* Commission orders. Licata, 829 S.W.2d at 519. In Licata, the plaintiff attempted to avoid the bar to collateral attack by framing his complaint as an attack on a “utility rule” found in the tariff, rather than an attack on the tariff itself; finding that Licata’s attack on a provision in the tariff was an attack on the order itself, the appellate court affirmed the Commission’s dismissal of Licata’s complaint. 829 S.W.2d at 518-19.

Respectfully Submitted,

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**ATTORNEYS FOR UNION ELECTRIC
COMPANY d/b/a AMEREN MISSOURI**

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Motion to Dismiss was served on the following parties via electronic mail (e-mail) or via certified and regular mail on this 17th day of April, 2013.

/s/ Wendy K. Tatro
Wendy K. Tatro