

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

Donna L. Reseck and On The Line, L.L.C.)	
Complainants,)	
)	
v.)	<u>File No. EC-2012-0320</u>
)	
Union Electric Company, d/b/a Ameren)	
Missouri,)	
Respondent.)	

**MOTION TO SHOW CAUSE WHY COMPLAINT SHOULD NOT BE DISMISSED FOR
FAILURE TO STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED**

COMES NOW the Staff (“Staff”) of the Missouri Public Service Commission (“Commission”), and moves the Commission issue an order directing the complainants to show cause why this matter should not be dismissed for failure to state a claim upon which this Commission may grant relief. In support thereof, Staff respectfully states the following:

1. On March 26, 2012, Donna Reseck and On the Line, L.L.C. (“Complainants”) filed a formal complaint against Union Electric Company, d/b/a Ameren Missouri alleging damage to various electrical appliances at Complainants’ place of business, On The Line, L.L.C., a Laundromat, bait and tackle, and small engine repair shop, 309 N. Main Street, Elsberry, Missouri, on October 20, 2011 (“Complaint”).

2. The only relief requested in the Complaint is “[r]eplacement costs for my damaged equipment. Income loss from Oct[.] 21 to present or a reasonable offer thereof.”

3. The Complaint does not allege violation of any statute, rule, tariff, or Commission order.

4. As stated by the Western District in *Evans v. Empire Dist. Elec. Co.*, 346 S.W.3d 313, 317 -318 (Mo.App. W.D.,2011):

Generally, a litigant must exhaust his available administrative remedies before a court will assume jurisdiction (now authority over an action). *Premium Standard Farms, Inc. v. Lincoln Tp. of Putnam Cnty.*, 946 S.W.2d 234, 237 (Mo. banc 1997). “Our Supreme Court has determined that the regulation and fixing of rates or charges for public utilities, and the classification of the users or consumers to whom the rates are chargeable is the function of the [PSC].” *Inter-City Beverage Co., Inc. v. Kansas City Power & Light Co.*, 889 S.W.2d 875, 877 (Mo.App. W.D.1994) (citing *318 *State ex rel. Kansas City Power & Light Co. v. Buzard*, 350 Mo. 763, 168 S.W.2d 1044, 1046 (Mo. banc 1943)).

5. However, the Commission has previously taken up the concept of exhaustion of administrative remedies. As the Commission articulated in its Order Dismissing Complaint in File No. EC-2010-0364, *Tawanda Murphy v. Union Electric Company, d/b/a Ameren UE* regarding the doctrine of administrative exhaustion:

Equally important to the exhaustion doctrine, however, is the futility exception. A party may be excused from the requirement to seek administrative relief if seeking any relief from the agency would be futile.¹ And “[a]n administrative remedy will be deemed futile if there is doubt about whether the agency could grant effective relief.”² Additionally, the exhaustion doctrine does not apply if the issue sought to be resolved poses no factual questions or issues requiring the special expertise within the scope of the administrative agency's responsibility, but instead proffers only questions of law

¹ *Paric Corp. v. Murphy*, 903 S.W.2d 285, 289 (Mo. App. 1995); *Schierding v. Missouri Dental Bd.*, 705 S.W.2d 484, 486 (Mo. App. 1985). Or as it has been stated in other legal contexts: “The law will not require the doing of a useless and futile act.” *Guelker v. Director of Revenue*, 28 S.W.3d 488, 491 (Mo. App. 2000). The futility doctrine applies to federal agencies as well. See *Honig v. Doe*, 108 S.Ct. 592 (1988) as but one of many examples.

² *Midgett v. Washington Group Intern. Long Term Disability Plan*, 561 F.3d 887, 898 (8th Cir. 2009); *Ace Prop.& Cas. Ins. Co. v. Fed. Crop Ins. Corp.*, 440 F.3d 992, 1000 (8th Cir.2006); *Klaudt v. U.S. Dep't of Interior*, 990 F.2d 409, 412 (8th Cir.1993).

clearly within the realm of the courts.”³ “A failure to exhaust administrative remedies may be justified when the only or controlling question is one of law, at least where there is no issue essentially administrative, involving agency expertise and discretion, which is in its nature purely administrative.”⁴

6. Complainants here, much like Ms. Murphy, seek only monetary relief for damages. This Commission cannot grant monetary relief for damages or order a pecuniary reparation or refund.⁵ As the court of appeals noted in *State ex rel. GS Technologies Operating Co., Inc. v. Public Service Commission*:

While the “Commission does have exclusive jurisdiction of all utility rates,” “when a controversy arises over the construction of a contract or of a rate schedule upon which a contract is based, and a claim of an overcharge is made, only the courts can require an accounting or render a judgment for the overcharge.” *Wilshire Constr. Co. v. Union Elec. Co.*, 463 S.W.2d 903, 905 (Mo. 1971). This is so because the Commission “cannot ‘enforce, construe nor annul’ contracts, nor can it enter a money judgment.” *Id.* (quoting *May Dep’t Stores Co. v. Union Elec. Light & Power Co.*, 107 S.W.2d 41, 49 (Mo. 1937)). Likewise, the Commission does not have the authority to do equity or grant equitable relief. *Am. Petroleum Exch. V. Pub Serv. Comm’n*, 172 S.W.2d 952, 955 (Mo. 1943).⁶

7. Thus, the Commission is without jurisdiction and authority to order the award of monetary damages, as prayed by Complainants.

8. In File No. EC-2010-0364, the Commission concluded that administrative exhaustion would be satisfied by a determination that there was no relief within its jurisdiction and authority the Commission could grant to the complainant.

³ *City of Bridgeton v. City of St. Louis*, 18 S.W.3d 107, 112 (Mo. App. 2000); *Premium Standard Farms, Inc. v. Lincoln Tp. Of Putnam County*, 946 S.W.2d 234, 238 (Mo. banc 1997).

⁴ *Id.*

⁵ The Commission is not a court and cannot enter a money judgment for one party against another. *May Dep’t Stores Co. v. Union Elec. Light & Power Co.*, 107 S.W.2d 41, 57-58 (Mo. 1937).

⁶ 116 S.W.3d 680, 696 (Mo. App. 2003).

The Commission found that there was no relief it could grant to the complainant in that case, Ms. Murphy.

9. As was ultimately determined in File No. EC-2010-0364, in this Complaint, there is no relief the Commission can grant to Complainants, who seek only the award of monetary damages.

10. In File No. EC-2010-0364, the Commission concluded that the facts alleged, even if true, required no determination requiring the special expertise within the scope of this agency's responsibility, that the Commission could not grant Ms. Murphy money damages, that there was no effective available remedy the Commission could grant to the complainant in relation to her claim, and, ultimately, dismissed the complaint.

11. In this case, Complainants allege that delay in the resolution of their claim against Ameren Missouri increases the magnitude of Complainants' damages because that delay causes further loss of Complainants' revenues. A prompt exhaustion of administrative remedies before the Commission mitigates the continued accrual of any damages due to Complainants' lost revenues.

12. Since this Commission has previously determined that dismissal of a complaint satisfies the doctrine of administrative exhaustion, Staff moves the Commission to order that Complainants show cause why this Complaint should not be dismissed, and if such cause is not provided, that the Commission promptly dismiss this Complaint.

WHEREFORE, Staff prays that the Commission order Complainants to show cause why this Complaint should not be dismissed for failure to state a claim upon which this Commission may grant relief.

Respectfully submitted,

/s/ Sarah Kliethermes

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been mailed, hand-delivered, transmitted by facsimile or electronically mailed to all counsel of record this 10th day of April, 2012.

/s/ Sarah Kliethermes