

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

Daniel E. Brown)	
)	
Complainant,)	
)	
v.)	
)	Case No. EC-2008-0384
The Empire District Electric Company)	
)	
Respondent.)	

**SUPPLEMENTAL REPORT OF STAFF'S INVESTIGATION
AND STAFF'S RECOMMENDATION**

COMES NOW the Staff of the Missouri Public Service Commission (Staff) and respectfully submits as follows:

1. On June 4, 2008, Daniel E. Brown (Complainant) filed his formal complaint against The Empire District Electric Company (Company, or Empire), alleging that he was without power for five (5) days due to a January 2007 ice storm and eight (8) days due to a December 2007 ice storm. Mr. Brown requested the recovery of money damages for the loss of food items caused by the extended outages. More broadly, Mr. Brown's Complaint alleges inadequate or improper response to ice-storm related outages affecting his residence, implicating the safe and adequate service provisions of § 393.130 RSMo.

2. On June 5, 2008, the Commission issued its Order Directing Staff to Investigate and File a Report no later than three weeks after the Company filed its Answer, which was due no later than July 7, 2008. Thus, Staff's Investigative Report was presumptively ordered due July 28, 2008.

3. On July 7, 2008, the Company filed its Answer, as ordered. On July 9, 2008, the Commission entered its Order Setting Date Certain for Staff to Investigate and File a Report, which directed the Staff to complete its investigation and submit its report no later than July 21, 2008, one week earlier than originally ordered.

4. On July 21, 2008, Staff filed its Report of its Investigation.

5. On August 2, 2008 Mr. Brown submitted a Complaint Form to the Commission's Consumer Services Department. On August 4, 2008, this Form was filed as a Public Comment in Case No. EC-2008-0384. In this document, Mr. Brown discussed his professional experience in the electric utility industry and his frustration with the Staff's Report.

6. On August 12, 2008, the Commission issued its Order Directing Staff to File an Amended Report of Its Investigation. That Order stated, *inter alia*, that:

Staff shall specifically address each item constituting the Complaint and the Respondent's answer to the Complaint. Staff will provide an analysis of what evidence factually supports all of its conclusions and opinions. Staff's amended report should address the "who, what, when, where, why and how" of all pertinent issues raised in the Complaint.

7. Staff finds the pertinent issues raised by this complaint are, exclusively:

a. Did Empire respond appropriately, system-wide, to the January 2007 ice storm?

b. Did Empire respond appropriately, system-wide, to the December 2007 ice storm?

c. Regarding the January 2007 ice storm, was Empire's response to Mr. Brown's outage appropriate in relation to system-wide issues?

d. Regarding the December 2007 ice storm, was Empire's response to Mr. Brown's outage appropriate in relation to system-wide issues?

e. Regarding the January 2007 ice storm, would the restoration plan suggested by Mr. Brown have succeeded in shortening the duration of the outage that he experienced, absent system-wide considerations?

1. If so, should that plan have been executed in light of system-wide considerations?

f. Regarding the December 2007 ice storm, would the restoration plan suggested by Mr. Brown have succeeded in shortening the duration of the outage that he experienced, absent system-wide considerations?

1. If so, should that plan have been executed in light of system-wide considerations?

g. Is the Commission the appropriate forum for the pursuit of money damages?

h. Is a determination by the Commission of whether Empire satisfied its obligation to provide safe and adequate service prerequisite to Mr. Brown obtaining financial relief from a lawsuit?

8. Staff discussed Issues a – b in its July 21 filing. Additionally, the severity of the December 2007 storm and the quality of Empire’s response is the subject of Case No. EO-2008-0215. In the attached Supplemental Memorandum, more extensive discussion is presented concerning Issues c – f.

9. Issue g is a legal issue. The Commission, being an agency of limited jurisdiction, is unable to order the award of money damages. “The Public Service Commission has full authority to investigate complaints about rates or service and can make orders to remedy the situation in the future, but it cannot grant monetary relief for compensation for past overcharges or damages.” *May Department Stores Company vs. Union Electric Light & Power Company et al.*, 107 S.W. 2d 41, 58 (1937). Therefore, the Commission is unable to award the relief that the Complainant has requested.

10. Issue h is also a legal issue, involving whether action by the Commission is prerequisite to Mr. Brown filing a lawsuit for money damages.

11. Section 393.130.1 provides that “...every electrical corporation... shall furnish and provide such service instrumentalities and facilities as shall be safe and adequate and in all respects just and reasonable.”

12. In *National Food Stores, Inc. v. Union Elec. Co.* 494 S.W.2d 379, 383 (Mo. App. STL 1973) the court articulated this tenant as follows:

Public utilities occupy a unique position in our society. They furnish indispensable services while enjoying a privileged legal status. As consumers, our dependency upon their services is almost total. As such it is essential that such companies conduct themselves in a manner that does not take advantage of our dependency on them nor of the privileged status granted to them by the state legislature. While we do not propose that public utilities, in this instance an electrical company, are insurers or guarantors of the safety of persons or of their property, *Henneke v. Gasconade Power Co.*, 236 Mo.App. 100, 152 S.W.2d 667 (1941); *Hamilton v. Laclede Electric Co-op*, 294 S.W.2d 11 (Mo.1956); and *Donovan v. Union Electric Co.*, 454 S.W.2d 623 (Mo.App.1970), we hold there is as a matter of law a duty on Union Electric to protect its customers from foreseeable damage from failure of electrical service.

13. Thus, Empire is charged with a duty to provide safe and adequate service to its customers, such as Mr. Brown, and to protect customers from foreseeable damage from electrical outages.

14. Suits for damages are within the province of the courts, and not of the Commission. As stated in *State ex rel. GS Technologies Operating Co., Inc. v. Public Service Com'n of State of Mo.* 116 S.W.3d 680, 696 (Mo.App. W.D.,2003):

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.*, 341 Mo. 299, 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).

15. When confronted with matters within the exclusive jurisdiction of the Commission, the courts of this state have historically withheld judgement pending appropriate determination by the Commission of issues within the Commission’s exclusive jurisdiction. See *Deaconess Manor Ass’n v. Pub. Serv. Comm’n*, 994 S.W.2d 602, 609 (Mo.App. W.D.1999).

16. Recently, the Commission has promulgated rules relating to electric utility outage prevention and restoration.

17. Given the Commission’s increased specificity in regard to outage prevention and restoration, there *could* be a question as to whether the determination of the adequacy of service in these circumstances is within the exclusive jurisdiction of the Commission. This is the legal question that is raised by Issue.

18. Thus, Mr. Brown’s situation is such that a court – the proper forum for a suit for damages – *might* require a determination by the Commission that Empire failed in its statutory duty to provide safe and adequate service, as a prerequisite to a suit against Empire. There is no precedent on this precise issue since the promulgation of the Commission’s outage mitigation rules.

19. Commission Rule 4 CSR 240-2.070(10) states:

The commission may order, at any time after the filing of a complaint, an investigation by its staff as to the cause of the complaint. The staff shall file a report of its findings with the commission and all parties to the complaint case. The investigative report shall not be made public unless

released in accordance with sections 386.480, 392.210(2) or 393.140(3), RSMo, or during the course of a hearing involving the complaint.

Thus, the Staff's Supplemental Report, attached hereto and incorporated by reference herein, is a non-public document and the Staff is filing it as a "Highly Confidential" document.

20. Based on its investigation and the analysis of information provided by the Complainant and the Company, Staff did not find any facts to indicate that the Company's responses to Mr. Brown's outages were inadequate or inappropriate in light of all the circumstances, including the large numbers of customer outages Empire was dealing with at the times of these severe storms.

21. Based on its investigation and the analysis of information provided by the Complainant and the Company, Staff did not find any evidence that the activities carried out by the Company in the restoration of Complainant's electrical service in these instances constituted a violation of applicable statutes, the Commission's rules, or the Company's tariff.

22. Based on its analysis of the legal issues of this matter, Staff finds that the Commission cannot grant the relief specifically requested by the Complainant – that is, the award of money damages.

23. Since Complainant has requested monetary damages and a court may require a determination by the Commission on the question of whether the Company failed in its obligation to provide safe and adequate service as a prerequisite to making a determination in a lawsuit brought raising the same issues the Complainant raises here, Staff recommends that the Commission make a determination of whether Empire failed to meet its obligation of providing safe and adequate service to the Complainant.

24. Under the circumstances here, Staff believes the Company did not fail to meet its obligation of providing safe and adequate service to the Complainant during the January and December 2007 ice storms.

WHEREFORE, Staff requests that the Commission accept Staff's attached Supplemental Report and Schedules.

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, or transmitted by facsimile or electronic mail to all counsel of record this 29th day of August, 2008.

/s/ Dawn M. Carafeno