

**STATE OF MISSOURI
PUBLIC SERVICE COMMISSION**

At a session of the Public Service
Commission held at its office in
Jefferson City on the 21st day of
May, 2013.

N&N Farms, Inc., and Robert T. Noland)	
Trust, and Tom and Bonita Tarwater,)	
)	
Complainants,)	
)	
v.)	
)	
Union Electric Company d/b/a)	
Ameren Missouri,)	
)	
Respondent.)	

File No. EC-2013-0420

ORDER GRANTING MOTION TO DISMISS

Issue Date: May 21, 2013

Effective Date: June 20, 2013

On March 15, 2013, N&N Farms, Inc., the Robert T. Noland Trust, and Tom and Bonita Tarwater ("Complainants") filed a complaint with the Missouri Public Service Commission ("Commission") against Union Electric Company d/b/a Ameren Missouri ("Ameren Missouri"). The complaint requested that the Commission "hear this formal complaint and/or reopen Case Number AE-2013-0316 [sic] to take testimony and evidence ... Complainants seek a cease and desist order ... until this Complaint is resolved". On April 17, 2013, Ameren Missouri filed a motion to dismiss the complaint. The Commission's Staff and Complainants filed responses addressing the motion to dismiss.

This complaint case arises out of the Commission's *Order Granting Certificate of Convenience and Necessity* issued on January 3, 2013 in File No. EA-2013-0316. That

order granted Ameren Missouri approval to construct, install, own, operate, control, manage and maintain an 885-foot electric sub-transmission line in Clay County, Missouri. The order became effective on January 4, 2013 and is now final. In the complaint, Complainants assert that they did not intervene in that case because they had no notice of the action; that they would have requested intervention had they been provided notice; that the transmission line approved under the order will go through their properties, thereby directly impairing and impacting that property; and that Ameren Missouri has not yet obtained easements over their property or commenced construction of the transmission line.

Ameren Missouri argues that the complaint must be dismissed because it fails to state a claim upon which relief may be granted, the Commission lacks subject matter jurisdiction to hear the complaint, and the Commission does not have the statutory authority to order Ameren Missouri to cease and desist taking legal action. The standard for review for consideration of a motion to dismiss has been clearly established by Missouri's courts as follows:

A motion to dismiss for failure to state a cause of action is solely a test of the adequacy of the plaintiff's petition. It assumes that all of plaintiff's averments are true, and liberally grants to plaintiff all reasonable inferences therefrom. No attempt is made to weigh any facts alleged as to whether they are credible or persuasive. Instead, the petition is reviewed in an almost academic manner to determine if the facts alleged meet the elements of a recognized cause of action, or of a cause that might be adopted in that case.¹

The Commission will assume that the facts alleged in the complaint are true for the purposes of considering Ameren Missouri's motion to dismiss the complaint.

Complainants are required to set forth in their complaint before the Commission "any act or thing done or omitted to be done by any corporation, person or public utility, including

¹ *Bosch v. St. Louis Healthcare Network*, 41 S.W.3d 462, 463-464 (Mo. Banc 2001).

any rule, regulation or charge heretofore established or fixed by or for 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.”² The complaint does not allege that Ameren Missouri violated any statute, rule or Commission order, but rather that the Commission itself has violated Complainants’ constitutional due process rights by granting the application without notice to Complainants. However, the complaint statute, Section 386.390, RSMo, does not authorize actions against the Commission.

In addition, the complaint constitutes an impermissible collateral attack on the final order issued by the Commission in EA-2013-0316. Section 386.550, RSMo 2000, provides that “[i]n all collateral actions or proceedings the orders and decisions of the commission which have become final shall be conclusive”. The complaint is clearly collateral to the proceedings in EA-2013-0316 within the meaning of Section 386.550, as it is not an extension of that action, but is instead a separate, independent action which is subsidiary to it.³ The order granting Ameren Missouri a certificate of convenience and necessity regarding the electric sub-transmission line in Clay County has become final and is, therefore, immune from attack by this complaint proceeding, even if Complainants did not receive personal service of the notice⁴ or the complaint includes allegations of constitutional violations⁵.

Finally, the Commission does not have the statutory authority to grant Complainants a “cease and desist” order preventing Ameren Missouri from taking future legal actions while the complaint is pending. The Commission is a body of limited jurisdiction and has

² Section 386.390.1, RSMo 2000.

³ See, *State ex rel. Mo. Div. of Transp. v. Sure-Way Transp., Inc.*, 884 S.W.2d 349, 353 (Mo. App. W.D. 1994).

⁴ *State ex rel. Ozark Border Elec. Co-op. v. Pub. Serv. Comm’n of Missouri*, 924 S.W.2d 597, 601 (Mo. Ct. App. 1996). Also, Complainants have not alleged a substantial change in circumstances since the final order sufficient to create an independent basis for a complaint proceeding. *Id.*

⁵ *State ex rel. Licata, Inc. v. Pub. Serv. Comm’n of State*, 829 S.W.2d 515 (Mo. Ct. App. 1992).

only such powers as are expressly conferred upon it by the statutes and powers reasonably incidental thereto.⁶ The Commission is not a court of law and cannot declare or enforce principles of law or equity.⁷ For all the reasons above, the Commission concludes that the complaint should be dismissed with prejudice.

Complainants have also requested, in the alternative, that the Commission re-open File No. EA-2013-0316 to take testimony and evidence from Complainants. The Commission cannot take any action in this order to affect the final order in EA-2013-0316. However, the Commission hereby notifies the parties that the Commission will be vacating the final order in that case in order to correct the effective date of the order, which was in error. The Commission will re-issue the order with a new effective date, and any interested persons will have an opportunity to file an application for rehearing under Section 386.500, RSMo 2000, prior to the new effective date.

THE COMMISSION ORDERS THAT:

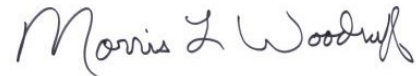
1. Union Electric Company d/b/a Ameren Missouri's *Motion to Dismiss* is granted.
2. The complaint filed on March 15, 2013 by N&N Farms, Inc., the Robert T. Noland Trust, and Tom and Bonita Tarwater is dismissed with prejudice.

⁶ *State ex rel. & to Use of Kansas City Power & Light Co. v. Buzard*, 350 Mo. 763, 766, 168 S.W.2d 1044, 1046 (1943).

⁷ *State ex rel. Cass County v. Pub. Serv. Comm'n*, 259 S.W.3d 544, 547 (Mo. Ct. App. 2008).

3. This order shall become effective on June 20, 2013.
4. The file may be closed on June 21, 2013.

BY THE COMMISSION

A handwritten signature in cursive script, reading "Morris L. Woodruff".

Morris L. Woodruff
Secretary

R. Kenney, Chm., Jarrett, Stoll,
and W. Kenney, CC., concur.

Bushmann, Regulatory Law Judge