

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

Fred Sauer,)	
)	
Complainant,)	
)	
v.)	<u>File No. EC-2015-0164</u>
)	
Missouri Public Service Commission,)	
)	
and)	
)	
Union Electric Company d/b/a Ameren)	
Missouri,)	
)	
Respondents.)	

**MOTION FOR DETERMINATION ON THE PLEADINGS
DISMISSING THE PUBLIC SERVICE COMMISSION AND/OR DISMISSING
COMPLAINT AND MOTION FOR EXPEDITED TREATMENT**

COMES NOW the Staff of the Missouri Public Service Commission (“Staff”), by and through counsel, and for its *Motion for Determination on the Pleadings Dismissing the Public Service Commission and/or Dismissing Complaint and Motion for Expedited Treatment* respectfully states as follows:

1. On January 13, 2015, Fred Sauer filed a complaint with the Missouri Public Service Commission (“Commission”) against Union Electric Company d/b/a Ameren Missouri (“Ameren Missouri”) and against the Commission itself.

2. On January 15, 2015, the Commission issued, by delegation of authority, its *Notice of Complaint and Order Establishing Time to Respond* (“Notice and Order”) herein. On January 21, 2015, the Commission issued, by delegation of authority, a

Notice of Correction changing the language in Ordered Paragraph 4 of the Notice and Order.

Staff Counsel cannot represent the Commission

3. The Commission itself – not the Commission Staff – is named as a respondent in the subject complaint. In the Notice and Order, the Commission ordered service upon itself by ordering its Data Center to mail a copy of the Notice and Order and the complaint to the *Staff Counsel* (see Ordered Paragraph 2), and initially ordered itself to file its answer to the complaint – presumably through the Staff Counsel – no later than February 17, 2015 (see Ordered Paragraph 4). However, in the Notice of Correction which was subsequently issued, Ordered Paragraph 4 was changed to specifically require the *Staff* to “file an answer to this complaint no later than February 17, 2015.” The essence of Complainant’s complaint is that the *Commission* failed to appropriately respond¹ to Complainant’s request for certain information under “Missouri’s Sunshine Law” contained in Chapter 610 RSMo. Since the Commission (not Staff) is the named respondent, and since it is a Commission response (not a Staff response) which is complained of, Staff respectfully submits that any answer which may ultimately be required herein² must be an answer on behalf of the Commission rather than an answer on behalf of Staff. Therefore, as a preliminary matter, Staff would note that Staff Counsel, by definition, does not represent the Commission and in fact cannot represent the Commission in this proceeding due to the Commission’s *ex parte* rule.

¹ The Commission’s response is set forth in a letter dated December 17, 2014, attached to the complaint. The Complainant’s Sunshine Law request was discussed by the Commission at its December 17, 2014, agenda session.

² As set forth below, the complaint should be dismissed, which would eliminate the need for an answer.

The Commission rule on *Ex Parte and Extra-Record Communications*,
4 CSR 240-4.020, provides in part as follows:

(1) (G) Ex parte communication—Any communication outside of the contested case hearing process between the commission, a commissioner, a member of the technical advisory staff³, or the presiding officer assigned to the proceeding and any party or anticipated party, or the agent or representative of a party or anticipated party, regarding any substantive issue. . . .

* * * *

(1) (K) Party—Any applicant, complainant, petitioner, respondent, or intervenor in a contested case before the commission. Commission staff and the public counsel are also parties unless they file a notice of their intention not to participate in the relevant proceeding within the period of time established for interventions by commission rule or order, or where staff serves in an advisory capacity pursuant to any commission rule.

* * * *

(3) (A) No party or anticipated party shall initiate, participate in, or undertake, directly or indirectly, an ex parte communication.

“Commission,” “Commission staff,” “General counsel,” and “Staff counsel” are defined as:

4 CSR 240-2.010 Definitions

(3) Commission means the Missouri Public Service Commission as created by Chapter 386 of the Missouri Revised Statutes.

* * * *

(5) Commission staff means *all personnel employed by the commission* whether on a permanent or contractual basis *except* commissioners; commissioner support staff, including technical advisory staff; personnel

³ As the Commission is aware, “technical advisory staff” is separate and distinct from “commission staff.” “Technical advisory staff” is defined in 4 CSR 240-4.020(1)(P) and Section 386.135 RSMo; “commission staff” is defined in 4 CSR 240-2.010(5) and expressly excludes technical advisory staff.

in the secretary's office; and personnel in the general counsel's office, including personnel in the adjudication department. *Employees in the staff counsel's office are members of the commission staff.* (Emphasis added)

* * * *

(8) General counsel means *the attorney who serves as counsel to the commission* and includes the general counsel and all other attorneys who serve in the office of the general counsel, but *does not include attorneys employed in the staff counsel's office.* The general counsel appears for the commission and performs all duties and services as attorney and counsel to the commission which the commission may reasonably require. (Emphasis added)

* * * *

(21) Staff counsel means *any attorney employed to represent the commission staff* in proceedings before the commission. . . .the staff counsel's office performs its advocacy functions independently, under the direction of the chief staff counsel in consultation with executive director and the directors of the operations and utility services divisions. (Emphasis added)

As shown above, *Staff Counsel represents the Commission Staff* in proceedings before the Commission, whereas *the General Counsel represents the Commission* and by definition expressly excludes attorneys in the Staff Counsel's office. Furthermore, as a member and representative of Commission Staff – a party to cases before the Commission – Staff Counsel cannot represent the Commission without violating the Commission's rule against *ex parte* communications. Therefore, Staff Counsel cannot represent the Commission, and the General Counsel should be notified to represent the Commission and file an answer to the complaint on behalf of the Commission if the complaint is not dismissed – at least as to the Commission itself. Further, the requirement in the Notice of Correction that Staff file an answer should be removed since no action of Staff is complained of and Staff is not a respondent herein.

Motion for Determination on the Pleadings/Motion for Dismissal

4. Staff relies on Rules 4 CSR 240-2.116(4), 4 CSR 240-2.117(2), and 4 CSR 240-2.070(7). Rule 4 CSR 240-2.116(4) provides: “A case may be dismissed for good cause found by the commission after a minimum of ten (10) days notice to all parties involved.” Rule 4 CSR 240-2.117(2) provides: “Except in a case seeking a rate increase or which is subject to an operation of law date the commission may, on its own motion or on the motion of any party, dispose of all or any part of a case on the pleadings whenever such disposition is not otherwise contrary to law or contrary to the public interest.” Rule 4 CSR 240-2.070(7) provides: “The commission, on its own motion or on the motion of a party, may after notice dismiss a complaint for failure to state a claim on which relief may be granted or failure to comply with any provision of these rules or an order of the commission, or may strike irrelevant allegations.”

5. On April 29, 2014, in the case of *The City of Houston Lake, Missouri v. Missouri-American Water Company and The Missouri Public Service Commission*, File No. WC-2014-0260, Staff filed a *Motion for Determination on the Pleadings Dismissing the Public Service Commission* because, as Staff stated in that motion, “there is no statutory authority, and no practical way, for the Commission to adjudicate a complaint case *against itself*.” In support of its motion in the *Houston Lake* case Staff cited Section 386.390.1 RSMo, which addresses the parties subject to the Commission’s complaint case jurisdiction – that jurisdiction extends to “any act or thing done or omitted to be done *by any corporation, person or public utility. . .*” (Emphasis added) The Commission is not a corporation, person or public utility under the

definitions applicable to Chapter 386 (see Section 386.020). As Staff stated in *Houston Lake*, “Because the Commission is not named as an entity that could be subject to a complaint, it is beyond the statutory authority of the Commission to hear a complaint against itself.”

In response to the Staff’s motion in *Houston Lake*, less than one year ago (on May 14, 2014) the Commission issued an *Order Dismissing Complaint Against the Commission* in File No. WC-2014-0260, in which the Commission stated:

As an administrative agency, the Commission has only those powers that are granted to it by statute. Section 386.390, RSMo 2000 authorizes the bringing of a complaint before the Commission against any “corporation, person, or public utility”. Such a complaint must set forth “any act or thing done or omitted to be done ... in violation, or claimed to be in violation, of any provision of law, or any rule or order or decision of the commission.” That is a very broad grant of authority to hear complaints, but that broad grant of authority must also be limited to hearing complaints against those persons and corporate entities that are subject to the Commission’s jurisdiction.

Chapter 393 of the Missouri statutes gives the Commission authority to regulate water corporations, such as Missouri-American. However, *there is nothing in Missouri’s statutes that would give the Commission authority to consider a complaint against itself. Therefore, Houston Lake’s complaint against the Commission must be dismissed.* (Emphasis added)

The Commission went on to order that the City of Houston Lake’s complaint against the Commission be dismissed. As it did in *Houston Lake*, the Commission should order that the complaint against the Commission in the instant case be dismissed.

6. The essence of Complainant’s complaint is that the Commission failed to appropriately respond to Complainant’s request for certain information under “Missouri’s Sunshine Law” contained in Chapter 610 RSMo. The Commission’s response letter, attached to the complaint and dated December 17, 2014, refers to both

Section 386.480 RSMo⁴ and 4 CSR 240-2.135. However, the complaint fails to set forth any act or thing done or omitted to be done by Ameren Missouri claimed to be in violation of Missouri's Sunshine Law as required by Section 386.390.1 RSMo, or how Missouri's Sunshine Law contained in Chapter 610 RSMo⁵, which applies to public governmental bodies, would even apply to Ameren Missouri. The complaint fails to state a claim for relief against Ameren Missouri, and also fails to seek any relief against Ameren Missouri because the relief ultimately requested in the "Wherefore" clause of the complaint is that "the Missouri Public Service Commission and Ameren reconsider⁶ its December 17, 2014 decision;" however, the complaint fails to explain how Ameren Missouri can reconsider the Commission's December 17 letter. Therefore, not only should the complaint against the Commission be dismissed, but the entire complaint should be dismissed.

7. Although titled "Formal Complaint" and citing 4 CSR 240-2.070 as its basis, the relief ultimately requested in the "Wherefore" clause of the complaint is that "the Missouri Public Service Commission and Ameren **reconsider** its December 17, 2014 decision classifying Sauer's requests as 'highly confidential' and provide him with the information requested in paragraph 5 [of the complaint]." (Emphasis added)

⁴ Section 386.480 provides in part that "No information furnished to the commission by a corporation, person or public utility, except such matters as are specifically required to be open to public inspection by the provisions of this chapter, or chapter 610, shall be open to public inspection or made public except on order of the commission, or by the commission or a commissioner in the course of a hearing or proceeding."

⁵ The Commission should also be aware that Section 610.027 RSMo provides a procedure for obtaining relief for alleged violations of the Missouri Sunshine Law; that procedure is to seek **judicial enforcement** in court rather than an action before the agency alleged to have committed the violation.

⁶ This request for "reconsideration" is discussed further below.

“Reconsideration” is not appropriate relief to seek through a formal complaint pursuant to 4 CSR 240-2.070. Rather, “reconsideration” is governed by 4 CSR 240-2.160 *Rehearings and Reconsideration*, which provides in subsection (2) that:

Motions for reconsideration of procedural and interlocutory orders may be filed within ten (10) days of the date the order is issued, unless otherwise ordered by the commission. Motions for reconsideration shall set forth specifically the ground(s) on which the applicant considers the order to be unlawful, unjust, or unreasonable. At any time before a final order is issued, the commission may, on its own motion, reconsider, correct, or otherwise amend any order or notice issued in the case.

The Commission’s letter regarding Complainant’s Sunshine Law request was dated December 17, 2014, and the complaint was filed on January 13, 2015. Therefore, even *if* the Commission’s letter constituted an order subject to reconsideration, the request for reconsideration via complaint was not filed within ten (10) days and should be dismissed.

Motion for Expedited Treatment

8. As noted earlier, in the Notice of Correction issued herein by delegation of authority on January 21, 2015, Staff was ordered to file an answer to the complaint no later than February 17, 2015. As stated above, any answer required herein must be an answer on behalf of the Commission rather than an answer on behalf of Staff, and the General Counsel should be notified to represent the Commission and file an answer on behalf of the Commission if this complaint is not dismissed – at least as against the Commission itself – since Staff Counsel cannot represent the Commission. In the event that an answer is necessary it will obviously take some time for the General Counsel to prepare and file an answer; under 4 CSR 240-2.070 respondents typically have thirty (30) days in which to answer. Therefore, Staff requests expedited treatment pursuant to

4 CSR 240-2.080(14) of the above *Motion for Determination on the Pleadings Dismissing the Public Service Commission and/or Dismissing Complaint* and respectfully suggests that the Commission act on this motion no later than February 4, 2015. Staff is not aware of any negative effect if the Commission acts by that date. This pleading was filed as soon as it could have been filed after issuance of the Notice of Correction on January 21, 2015.

WHEREFORE, Staff respectfully requests the Commission issue an order no later than February 4, 2015, dismissing the complaint herein in its entirety or at least dismissing the complaint as against the Commission itself. In the event that this complaint is not dismissed, at least as against the Commission itself, Staff requests that the Commission direct its General Counsel, rather than the Staff Counsel, to represent the Commission and file an answer to the complaint on behalf of the Commission and remove the requirement in the Notice of Correction that Staff file an answer herein.

Respectfully submitted,

/s/ Jeffrey A. Keevil

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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 counsel for all parties of record this 22nd day of January, 2015.

/s/ Jeffrey A. Keevil