

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

N & N Farms, Inc., and Robert T. Noland	)	
Trust, and Tom and Bonita Tarwater,	)	
	)	
Complainants,	)	
	)	
vs.	)	<b><u>Case No. EC-2013-0420</u></b>
	)	
Union Electric Company d/b/a Ameren	)	
Missouri,	)	
	)	
Respondent.	)	
Edward J. Busch and Andrea B. Busch,	)	
	)	
Complainants,	)	
	)	
vs.	)	<b><u>Case No. EC-2013-0421</u></b>
	)	
Union Electric Company d/b/a Ameren	)	
Missouri,	)	
	)	
Respondent.	)	

**STAFF’S RESPONSE TO ORDER DIRECTING FILING**

**COMES NOW** the Staff of the Missouri Public Service Commission, by and through counsel, and for its *Response* states as follows:

***Statement of the Case:***

1. On March 15, 2013, the Complainants listed above filed complaints praying that the Commission “hear this formal complaint and/or reopen Case No. AE-2013-0316 [sic] to take testimony and evidence” regarding the transmission line that was the subject of Case No. EA-2013-0316. In support thereof, Complainants alleged that the transmission line in question will directly and adversely impact their properties; that they had no notice of the proceedings on Ameren’s

application for a certificate and thus did not seek to intervene; that they would have sought to intervene had they had notice; that their intervention would likely have been granted as their interest is different from that of the general public; that Ameren's application is not in the public interest; that their Constitutional right of Due Process has thus been violated; that construction has not yet begun; and that Ameren has not yet obtained easements over their real property.

2. On April 17, 2013, the Union Electric Company doing business as Ameren Missouri ("Ameren") filed identical *Motions to Dismiss* in each case, arguing that the Complainants had not stated a claim upon which relief may be granted and that the Commission lacks subject matter jurisdiction. Ameren's first argument, supported by the allegation that the proposed transmission line will not cross Complainants' properties, is founded on § 386.550, RSMo, which forbids collateral attacks on "the orders and decisions of the commission which have become final[.]" Ameren's second argument notes a technical defect in the Complaints, that is, their failure to allege the violation of any "Commission rule, order, or decision,"<sup>1</sup> a necessary element of a complaint brought under § 386.390.1, RSMo. ***State ex rel. Ozark Border Electric Cooperative v. Public Service Commission***, 924 S.W.2d 597, 599-600 (Mo. App., W.D. 1996).

3. On April 18, 2013, the Commission issued identical orders in the two cases, directing Staff to respond to Ameren's *Motion to Dismiss* by May 2, 2013. Previously, on March 18, 2013, the Commission had directed its Staff to investigate this matter and report not later than May 2, 2013.

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<sup>1</sup> Motion to Dismiss, p. 4.

4. The two substantially-identical *Complaints* concern Case No. EA-2013-0316. In that case, on January 3, 2013, the Commission issued its *Order Granting Certificate of Convenience and Necessity*, effective one day later on January 4, 2013, granting Ameren “permission, approval, and a certificate of convenience and necessity to construct, install, own, operate, control, manage and maintain an electric sub-transmission line to provide electric service in Clay County, Missouri, as more particularly described in its application.”

5. On April 30, 2013, the Clay County Commission filed a statement “strongly supporting” Complainants’ requests to re-open Case No. EA-2013-0316.

6. The *Complaints* seek as relief only that the Commission re-open Case No. EA-2013-0316 and take evidence and testimony from the Complainants in opposition to Ameren’s application. Although styled “complaint,” each pleading states its object in the alternative, that the Commission “hear this formal complaint and/or reopen Case No. AE-2013-0316 [sic] to take testimony and evidence.” Thus, the *Complaints* have a dual nature; they invoke the Commission’s complaint power and they also request that the Commission reconsider its decision in Case No. EA-2013-0316.

### ***The Motions to Dismiss***

7. Ameren is correct that the *Complaints* cannot proceed under the Commission’s general complaint power at § 386.390.1, RSMo. Ameren correctly notes that § 386.550, RSMo, prohibits the use of the complaint power to collaterally attack

final orders of the Commission.<sup>2</sup> ***State ex rel. Licata v. PSC***, 829 S.W.2d 515 (Mo. App., W.D. 1992). Ameren also contends that the *Complaints* are fatally defective because they do not allege the violation of any statute or order or rule of the Commission; such an allegation is a necessary element of a complaint under the general complaint power at § 386.391.1, RSMo. ***State ex rel. Ozark Border Electric Cooperative v. PSC***, 924 S.W.2d 597, 599-600 (Mo. App., W.D. 1996). However, Ameren is wrong on this point because the *Complaints* do allege a constitutional violation. Nonetheless, the ***Licata*** decision referred to earlier makes it clear that the bar of § 386.550, RSMo, prohibits collateral attacks alleging constitutional violations. ***Licata***, *supra*, 829 S.W.2d at 519. More to the point, the *Complaints* do not charge that some “corporation, person or public utility” has violated Complainants’ constitutional right of Due Process as required by § 386.390.1, RSMo, they charge that the Commission itself has done so by granting Ameren’s application without notice to the Complainants. Staff states that § 386.390.1, RSMo, does not authorize a proceeding to examine the Commission’s own actions.

### ***Reconsideration***

8. However, as noted above, the *Complaints* also request the Commission to re-open Case No. EA-2013-0316 and engage in further proceedings. Can the Commission do that?

9. Section 386.490.2, RSMo, states:

Every order or decision of the commission . . . shall continue in force either for a period which may be designated therein **or until**

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<sup>2</sup> Unless the complaint alleges a substantial change in circumstances. ***State ex rel. Ozark Border Electric Cooperative v. PSC***, 924 S.W.2d 597, 600-601 (Mo. App., W.D. 1996).

**changed or abrogated by the commission**, unless such order be unauthorized by this law or any other law or be in violation of a provision of the constitution of the state or of the United States.

By the plain language of this statute, the Commission may take up an order it has previously issued, and change it or abrogate it, that is, repeal it or annul it.

10. The Commission has previously exercised this power in cases, like this one, in which the order in question has become effective after such a short interval that an appeal was impracticable. By way of background, judicial review of a Commission order is available only where the appellant has first presented the purported errors to the Commission by way of an application for rehearing *filed before the day on which the order complained of became effective*. Section 386.510.1, RSMo.; ***State ex rel. Alton Railway Co. v. Public Service Commission***, 348 Mo. 780, 789, 155 S.W.2d 149, 154 (1941). In the present case, an application for rehearing was practically impossible because the Commission's order became effective the day after it was issued.

11. In ***State ex rel. Office of Public Counsel v. Public Service Commission***, 236 S.W.3d 632 (Mo. Banc 2007), the Commission exercised its authority under § 386.490.2, RSMo, to vacate its own order pursuant to the peremptory writ of the Missouri Supreme Court: "This Court makes peremptory its alternative writ of mandamus, requiring the PSC to vacate its order granting expedited treatment and approving tariffs issued on December 29, 2006, and allow public counsel reasonable time to prepare and file an application for rehearing on the tariffs." *Supra*, 236 S.W.3d at 636.

12. In ***State Public Service Commission v. Missouri Gas Energy***, \_\_\_\_ S.W.3d \_\_\_\_, 2013 WL 68897 (Mo. App., W.D. 2013), the Court noted without comment

that the Commission had, *sua sponte*, withdrawn an order approving tariffs that it had issued with a one-day effective date and replaced it with an order approving tariffs with a 30-day effective date, the default interval stated by § 386.490.1, RSMo, the statute that authorizes the Commission to determine the date on which an order becomes effective.

13. Some might question whether the Commission can set aside an order granting a certificate of convenience and necessity ("CCN"). In the present case, although the CCN was granted on January 3, 2013, effective January 4, 2013, so far as Staff is aware, Ameren has not yet commenced construction of the transmission line nor even secured all of the necessary easements. This is therefore a different situation than that previously considered by the Missouri Supreme Court, which held "no provision was or ever has been made by the Legislature for the commission to eliminate competition between private companies already in existence and doing business in the same territory . . . except to permit one company to buy the capital stock, franchises, and property of another." ***State ex rel. City of Sikeston v. Public Service Commission***, 336 Mo. 985, 998, 82 S.W.2<sup>nd</sup> 105, 110 (1935). Neither is this case like another prior case in which the Commission, faced with a request that it order Union Electric to cease operating a newly-built transmission line, responded that "From the evidence before it the Commission finds that it has no power to require the respondent to discontinue the operation of its electric line along Highway 100, recently constructed, and has no power to require the respondent to refuse to connect additional customers who may be located along that route or can get service from this line." ***In the Matter of Holtmeier***, 25 Mo.P.S.C. 471, 474 (1941).

### ***Conclusion***

14. In conclusion, Staff states that while the *Complaints* are not sustainable under § 386.390.1, RSMo, the Commission may grant the alternative request to re-open Case No. EA-2013-0316 pursuant to § 386.490.2, RSMo. Perhaps the most prudent course of action would be to withdraw the order of January 3, 2013, and replace it with a similar order with a 30-day effective date, a course of action already approved by the courts, and which would allow Complainants ample time to file an application for rehearing and cure the possible procedural defect in the January 3, 2013, order.

**WHEREFORE**, Staff prays that the Commission will accept the foregoing as its response to the *Orders Directing Filing* referred to above.

Respectfully submitted,

/s/ Kevin A. Thompson  
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Missouri Public Service Commission

### **CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing was served, either electronically or by hand delivery or by First Class United States Mail, postage prepaid, on this **2<sup>nd</sup> day of May, 2013**, on the parties of record as set out on the official Service List maintained by the Data Center of the Missouri Public Service Commission for this case.

/s/ Kevin A. Thompson