

FILED

OCT 23 2014

**Missouri Public Service Commission**Missouri Public
Service Commission
10:15 AM DS

Judge or Division: Morris L. Woodruff, Chief Regulatory Judge	Appellate Number:
Appellant: City of O'Fallon, Missouri and City of Ballwin, Missouri	Missouri Public Service Commission File Number: EC-2014-0316
Respondent: Union Electric Company, d/b/a Ameren Missouri	

(Date File Stamp)

Notice of Appeal

Notice is given that City of O'Fallon, Missouri & City of Ballwin, Missouri appeals to the Missouri Court of Appeals ☒ Western ☐ Eastern ☐ Southern District.

Oct. 23, 2014
Date Notice of Appeal Filed
(to be filled in by Secretary of Commission)

Leland B. Curtis
Signature of Attorney or Appellant

The notice of appeal shall include the appellant's application for rehearing, a copy of the reconciliation required by subsection 4 of section 386.420, a concise statement of the issues being appealed, a full and complete list of the parties to the commission proceeding, and any other information specified by the rules of the court. The appellant(s) must file the original and (2) two copies and pay the docket fee required by court rule to the Secretary of the Commission within the time specified by law. **Please make checks or money orders payable to the Missouri Court of Appeals.** At the same time, Appellant must serve a copy of the Notice of Appeal on attorneys of record of all parties other than appellant(s), and on all parties not represented by an attorney.

CASE INFORMATION

Appellant Name / Bar Number: Leland B. Curtis MBE#20550	Respondent's Attorney / Bar Number: Sarah E. Giboney #50299 Wendy K. Tatro #60261
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Date of Commission Decision: July 30, 2014	Date Application for Rehearing Filed: August 28, 2014
Date Application for Rehearing Ruled On: September 24, 2014	

DIRECTIONS TO COMMISSION

A copy of the notice of appeal and the docket fee shall be mailed to the clerk of the appellate court. Unless otherwise ordered by the court of appeals, the commission shall, within thirty days of the filing of the notice of appeal, certify its record in the case to the court of appeals.

Certificate of Service

I certify that on October 22, 2014 (date), I served a copy of the notice of appeal on the following parties, at the following address(es), by the method of service indicated.
Sent via email and U.S. Mail, first class, postage prepaid

Leland B. Curtis
Appellant or Attorney for Appellant

**STATE OF MISSOURI
PUBLIC SERVICE COMMISSION**

At a session of the Public Service
Commission held at its office in
Jefferson City on the 30th day of
July, 2014.

City of O'Fallon, Missouri, and
City of Ballwin, Missouri,

Complainants,

v.

Union Electric Company
d/b/a Ameren Missouri

Respondent.

File No. EC-2014-0316

**ORDER GRANTING MOTION TO DISMISS FOR FAILURE
TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED**

Issue Date: July 30, 2014

Effective Date: August 29, 2014

Syllabus: This order dismisses the above-styled complaint.

Procedural History

On April 28, 2014, the City of O'Fallon, Missouri and the City of Ballwin, Missouri ("the Cities") filed the above-styled complaint. The Cities allege they are street lighting customers of Union Electric Company, d/b/a Ameren Missouri ("Ameren Missouri").

The Cities wish to buy the street lights that Ameren Missouri owns and uses to supply street lighting inside the Cities. Such a sale would allow the Cities to take service

under a different tariff. That, in turn, would lower the Cities' electric rates. But Ameren Missouri does not want to sell those lights.

Ameren Missouri filed an answer and a motion to dismiss. Ameren Missouri states that the Commission does not have authority to force it to sell property it does not wish to sell. The Staff of the Commission ("Staff") concurs in Ameren Missouri's position.

Decision

The Commission is an administrative body of limited jurisdiction, having only the powers expressly granted by statutes and reasonably incidental thereto.¹ The Commission may only hear two types of complaints: 1) complaints alleging a utility violation of a statute, rule, order, or decision of the Commission; 2) complaints as to the reasonableness of any utility rate or charge.²

The Cities admit that this complaint is not one concerning the reasonableness of a utility rate or charge.³ Thus, to survive a motion to dismiss, the Cities must allege a utility violation of a statute, rule, order, or decision of the Commission.

The Cities claim that the Commission has jurisdiction over the complaint under Sections 386.390 RSMo, 393.130 RSMo, and Commission Rule 4 CSR 240-2.070. Section 386.390 simply gives the Commission jurisdiction over the two types of complaints discussed earlier. Section 393.130 prevents Ameren Missouri from granting an undue or unreasonable preference, prejudice or disadvantage to any customer. But the Supreme Court of Missouri states that:

¹ See, e.g., *State ex. rel. City of St. Louis v. Missouri Public Service Comm'n*, 73 S.W.2d 393, 399 (Mo. banc 1934); *State ex. rel. Kansas City Transit, Inc. v. Public Service Comm'n*, 406 S.W.2d 5, 8 (Mo. 1966).

² Section 386.390.1 RSMo.

³ See Complainants' Memorandum of Law in Opposition to Ameren Missouri's Motion to Dismiss, p. 4 (filed June 9, 2014)

. . . statutes forbidding unjust discriminations of whatever character are merely declaratory of the common law rule, which is founded on public policy and requires one engaged in a public calling to charge a reasonable and uniform price or rate to all persons for the same service rendered under the same or substantially similar circumstances or conditions.⁴

The Cities do not claim that Ameren Missouri has sold or negotiated to sell its street lights to other municipalities. Instead, they merely want the Commission to order Ameren Missouri to sell or at least negotiate in good faith with the Cities. Section 393.130 RSMo does not allow the Commission to order Ameren Missouri to sell property it does not wish to sell.

Finally, Commission Rule 4 CSR 240-2.070 allows anyone who feels aggrieved by an alleged violation of any tariff, statute, rule order or decision with the Commission's jurisdiction to file a complaint. Again, the Cities have failed to allege any such violation.

The Commission notes that Ameren Missouri has a pending rate case before the Commission.⁵ The Cities may apply to intervene in that case if they wish to further pursue their attempts to obtain lower electric rates.

The Commission will dismiss the complaint.

THE COMMISSION ORDERS THAT:

1. The complaint is dismissed.

⁴ *State ex. rel. Laundry v. Public Service Commission*, 327 Mo. 93, 110; 34 S.W.2d 37, 45 (Mo. 1931).

⁵ Commission File No. ER-2014-0258.

2. This order shall become effective on August 29, 2014.
3. This file shall be closed on August 30, 2014.

BY THE COMMISSION

Morris L. Woodruff
Secretary

R. Kenney, Chm., Stoll, W. Kenney,
Hall, and Rupp, CC., concur.

Pridgin, Deputy Chief Regulatory Law Judge

BEFORE THE MISSOURI PUBLIC SERVICE COMMISSION

City of O'Fallon, Missouri, and)	
City of Ballwin, Missouri,)	
)	
Complainants,)	Case No. EC-2014-0316
)	
v.)	
)	
Union Electric Company)	
d/b/a Ameren Missouri)	
)	
Respondent.)	

APPLICATION FOR REHEARING
OF THE CITIES OF O'FALLON AND BALLWIN

Come now the City of O'Fallon and the City of Ballwin ("Cities") pursuant to Section 386.500 RSMo. and 4 CSR 240-2.160, and for their Application for Rehearing state to the Commission:

1. The Commission issued its Order Granting Motion to Dismiss for Failure to State a Claim Upon Which Relief Can be Granted ("Order") herein on July 30, 2014, with an effective date of August 29, 2014. Cities hereby timely file their Application for Rehearing prior to that effective date.

2. The Order rests upon a glaring misstatement of the Commission's complaint jurisdiction that would not withstand judicial review. The Commission should not subject the Cities, and others, to the needless costs of an appeal. Rather it should rehear, reconsider and rescind the Order, and thereupon undertake a full examination of the Cities' Complaint. The Order is incomplete, false, unreasonable, and unlawful.

3. Contrary to the Order, the Commission's jurisdiction is not limited to the two types of complaints referenced therein (i.e. reasonableness of rates and violation of laws). Specific to this matter, the Commission also has express statutory jurisdiction and authority under Section

393.140(5) “upon complaint” to determine that the “acts or regulations” of an electric utility such as Ameren are “unjust, unreasonable, unjustly discriminatory or unduly preferential” and thereupon “prescribe the just and reasonable acts and regulations to be done and observed.”

4. Contrary to the Order, the Complaint invokes the Commission’s jurisdiction under Section 393.140(5).

5. The Commission does not only approve price lists for electric service. It approves lengthy tariffs with detailed rules and regulations. The content of such tariffs is not exempt from subsequent scrutiny, but rather can be the subject of a complaint under Section 393.140. See, e.g., *Fields v. Missouri Power and Light Co.*, 374 SW2d 17, 31 (Mo 1963)(discussing PSC authority to order utility to change tariffed rules).

6. The Commission has routinely exercised its jurisdiction to address complaints about unreasonable tariff provisions and utility practices. A quick search reveals many examples dating back many years, such as *In the Matter of the Investigation of St. Louis Water Company’s Rule 24 Regarding Meter Installation*, 22 Mo PSC NS 152 (1978); *Daniel Crousby & David Harris C&H Package Liquors v. Union Electric Company*, 25 Mo PSC NS 42 (1982); *Page v. Kansas City Power & Light Co.*, 27 Mo PSC NS 363 (1985); *Tel-Central of Jefferson City, Missouri, Inc. v. United Telephone Company of Missouri*, 29 Mo PSC NS 584 (1989); *The Staff of the Missouri Public Service Commission v. Southern Union Company*, 2011 WL 5831348 (Mo. PSC).

7. The Commission has in the past granted precisely the relief sought in the Complaint, ordering telephone utilities to transfer equipment attached to their system to customers who had paid for that equipment for many years. *Re: Detariffing of Embedded Customers Premises Equipment owned by Independent Telephone Companies*, 90 P.U.R. 4th 428, 1987 WL 258075 (Mo. PSC).

8. In considering a motion to dismiss, the Commission must take the allegations as true. See, e.g., *City of Houston Lake v. Missouri-American Water Co*, WC-2014-0260 (Order Denying

Motion to Dismiss Complaint Issued May 28, 2014). But even beyond that basic standard, Ameren's current tariff provisions regarding street lights are patently unreasonable. Once a city becomes a user of street lights owned by Ameren, it must continually pay for the lights no matter how many times over its payments exceed the cost of the lights. Further, it may become subject to a termination fee of \$100.00 per light no matter how many years go by unless it chooses to go totally dark. Further, a city never has the option of acquiring the lights at fair market value, so as to only pay for electricity thereafter.

9. Contrary to the Order, the Cities did provide an example of discriminatory conduct, in a supplemental filing that pointed to the Commission's July 18, 2014 approval of Ameren's proposal to transfer equipment to a customer rather than require the customer to continue to make uneconomic monthly payments for that equipment. (Case No. EO-2014-0296). Cities presume Ameren has engaged in such voluntary transfers before, as the Commission did not appear to regard the proposal as unique, but discovery and/or staff investigation will shed more light on this point. Without Commission oversight, Ameren will be able to continue to arbitrarily pick and choose which customers to treat with such favor, and which ones to force to continue to make uneconomic payments for equipment. Based on its preferential treatment of other customers, Ameren's streetlight tariff provisions are without question discriminatory and unjust as alleged in the Complaint.

10. Commission review of matters such as those presented in the Complaint is essential. "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." *National Food Stores v. Union Electric Co.*, 494 SW2d 379, 383 (Mo App 1973).

11. Cities' Complaint states a claim upon which relief can be granted pursuant to Section 393.140(5), as explained in their prior pleadings which are incorporated herein by this reference. But even if the Commission perceives some deficiency in those pleadings, despite the liberal standards which apply, it should identify such deficiency and grant the Cities leave to amend. The Commission should not abdicate its authority by dismissing this matter. See Section 536.063 RSMo, *State ex rel Chicago, Burlington & Quincy Railroad v. PSC*, 334 SW2d 54, 58 (Mo 1960), Rule 55.33.

12. Cities' Complaint should not be swallowed up by a rate case, but rather deserves the specific scrutiny that Section 393.140(5) authorizes. The two Cities have over 110,000 residents and pay over \$1.5 million per year to Ameren for street lights. This is not a trivial matter.

WHEREFORE, the Commission should recognize that the Order is unlawful, unjust and unreasonable and accordingly reconsider, rehearing and rescind the Order pursuant to Section 386.500 RSMo. and 4 CSR 240-2.160.

Respectfully submitted,

CURTIS, HEINZ,
GARRETT & O'KEEFE, P.C.

/s/ Leland B. Curtis

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Attorneys for the City of O'Fallon and City of Ballwin,

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this document was emailed to the parties listed below on this 28th day of August, 2014.

/s/ Leland B. Curtis

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Missouri Public Service Commission**Existing Case Filing**

Case No.	EC-2014-0316
Style of Case	City of O'Fallon, Missouri and City of Ballwin, Missouri, Complainants v. Union Electric Company d/b/a Ameren Missouri, Respondent
Type of Filing/Submission	Motion External
Testimony Issue	N/A
Testimony Sub Issue1	N/A
Testimony Sub Issue2	N/A
Filing on behalf of	City of O'Fallon, Missouri-(All) City of Ballwin, Missouri-(All)
Related case and/or tracking numbers	N/A
Title of Filing/Submission	Application for Rehearing of the Cities of O'Fallon and Ballwin
Clear and Concise Statement of Relief Requested	Cities request Commission to reconsider and rescind the Order of Dismissal and apply for rehearing of this matter
Indicate Cite for Commission Authority	4 CSR 240-2.160
Is this Filing/Submission to meet a scheduled deadline for today?	Yes
Is this a Response to Previous Filing in this case?	Yes
Date Filed	8/28/2014 3:43:45 PM

**STATE OF MISSOURI
PUBLIC SERVICE COMMISSION**

At a session of the Public Service
Commission held at its office in
Jefferson City on the 24th day of
September, 2014.

City of O'Fallon, Missouri, and
City of Ballwin, Missouri,

Complainants,

v.

Union Electric Company
d/b/a Ameren Missouri,

Respondent.

File No. EC-2014-0316

ORDER DENYING APPLICATION FOR REHEARING

Issue Date: September 24, 2014

Effective Date: September 24, 2014

On July 30, 2014, the Commission issued its Order Granting Motion to Dismiss for Failure to State a Claim Upon Which Relief Can Be Granted.¹ On August 28, the Complainants applied for rehearing.

The Commission shall grant an application for rehearing if "in its judgment sufficient reason therefor be made to appear."² The Commission finds that the applicants failed to establish such a sufficient reason. Thus, the Commission will deny the application.

THE COMMISSION ORDERS THAT:

1. The Application for Rehearing is denied.

¹ Calendar references are to 2014.

² Section 386.500.1 RSMo Supp. 2013).

2. This order shall become effective immediately.
3. This file shall be closed on September 24, 2014.

BY THE COMMISSION

Morris L. Woodruff
Secretary

R. Kenney, Chm., Stoll, W. Kenney,
Hall, and Rupp, CC., concur.

Pridgin, Deputy Chief Regulatory Law Judge

Concise statement of the issues being appealed

COME NOW Appellants/Complainants City of O'Fallon, Missouri and City of Ballwin, Missouri, and submit the following as their joint concise statement of the issues being appealed, pursuant to Section 386.510 RSMo:

The Appellants filed a Complaint alleging that Respondent Union Electric Company d/b/a Ameren Missouri's ("Ameren") tariff relative to the provision and termination of street lighting services is unreasonable, and that Ameren's refusal to tariff or otherwise offer Appellants any opportunity to purchase substantially, if not totally, depreciated street light fixtures is unreasonable and unjust in violation of Section 393.140(5) RSMo. Ameren filed a motion to dismiss for failure to state a claim upon which relief can be granted, which the Missouri Public Service Commission ("Commission") granted on the basis that it lacked jurisdiction to hear the claims brought and to award the relief sought by Appellants.

The Commission dismissed the Complaint stating: "The Commission may only hear two types of complaints: 1) complaints alleging a utility violation of a statute, rule, order, or decision of the Commission; 2) complaints as to the reasonableness of any utility rate or charge." This statement is plainly erroneous as a matter of law, because Section 393.140(5) RSMo expressly vests the Commission with jurisdiction to review claims that Ameren acted unjustly and unreasonably and claims that Ameren's tariffed regulations are unreasonable. Section 393.140(5) RSMo, which Appellants cited in their Complaint, expressly states in pertinent part that the Commission **shall**:

- (5) Examine all persons and corporations under its supervision and keep informed as to the methods, practices, regulations and property employed by

them in the transaction of their business. Whenever the commission shall be of the opinion, after a hearing had upon its own motion or **upon complaint**, that the rates or charges or **the acts or regulations of any such persons or corporations are unjust, unreasonable, unjustly discriminatory or unduly preferential** or in any wise in violation of any provision of law, the commission shall determine and prescribe the just and reasonable rates and charges thereafter to be in force for the service to be furnished, notwithstanding that a higher rate or charge has heretofore been authorized by statute, **and the just and reasonable acts and regulations to be done and observed**

(Emphasis added)

In its Dismissal Order, the Commission erroneously referenced only Section 386.390 RSMo, 393.130 RSMo, and Commission Rule 4 CSR 240-2.070, in examining the Complaint in this matter, and ignored Appellants' express reliance on Section 393.140 RSMo.

Further, in dismissing Appellants' Complaint, the Commission failed to adhere to the liberal pleading requirements to be afforded to Complaints filed before the Commission. *See* Section 386.610 RSMo; and Friendship Village of South County v. Public Service Commission, 907 S.W.2d 339, 345 (Mo. App. W.D. 1995).

The Commission's Dismissal Order states that "Section 393.130 RSMo does not allow the Commission to order Ameren to sell property it does not wish to sell." This is an erroneous conclusion, as the Commission has previously exercised its jurisdiction pursuant to Section 393.140(5) RSMo and granted relief in the nature sought by Appellants. In Re: Detariffing of Embedded Customers Premises Equipment owned by Independent Telephone

Companies, 90 P.U.R. 4th 428, 1987 WL 258075 (Mo. PSC), the Commission ordered, over the objection of the telephone companies, the transfer of ownership of company-owned, substantially-depreciated, customer premises equipment (CPE, i.e. telephones, modems, jacks and inside wiring), from dozens of independent telephone companies to the customers who had been paying for such equipment for years in their monthly telephone rates. The Commission found expressly that it had the necessary statutory authority to order the transfer of ownership of the embedded CPE from the telephone companies to their customers.

Dismissal of the Complaint was further in error because whether Ameren has acted unjustly or unreasonably and whether the regulations in Ameren's tariff are reasonable, are questions of fact requiring discovery and a hearing.

No reconciliation pursuant to subsection 4 of Section 386.420 RSMo is required in the instant matter, as the Commission's Order has not resulted in the establishment of new rates.

Full and Complete List of Parties to the Commission Proceeding

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Represented by:

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