

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

City of O’Fallon, Missouri, and	)	
City of Ballwin, Missouri,	)	
Complainants,	)	
	)	
vs.	)	File No: EC-2014-0316
	)	
Union Electric Company, d/b/a	)	
Ameren Missouri,	)	
Respondent.	)	

AMEREN MISSOURI’S MOTION TO DISMISS

COMES NOW Union Electric Company, d/b/a Ameren Missouri (“Ameren Missouri” or “Company”), and for its Motion to Dismiss, pursuant to 4 CSR 240-2.070(6), states as follows:

On April 28, 2014, counsel for the cities of O’Fallon and Ballwin, Missouri ("Complainants" or "the Cities") initiated this proceeding against Company (the “Complaint”). The Cities seek an order from the Commission (1) finding that a Company business decision not to sell assets that the Cities want to buy is unreasonable, uneconomic and contrary to the public interest, (2) ordering the Company to negotiate in good faith with the Cities and to offer to sell them assets that the Company does not want to sell, (3) finding that a provision in the Company's lawful tariff that does not require the Company to sell those assets is unreasonable and unlawful, (4) revising that tariff to require the Company to grant an option to the Cities to purchase those assets, and (5) asking the Commission for an order inviting the Company to consent to arbitration to be conducted by the Commission regarding the proposed forced sale.

The entire Complaint should be dismissed because the Counts, variously, fail to state a claim upon which relief can be granted, constitute a collateral attack on a final order of this Commission that is barred as a matter of law, and because the Commission lacks the statutory authority to grant the relief requested.

Count I

1. Allegation of Refusal to Exceed Tariff Requirements Does Not Invoke Commission's Jurisdiction.

In Count I of the Complaint, Cities complain about the “[Company’s] refusal to engage in discussions and negotiations with O’Fallon and Ballwin over the sale of the existing street lights within each respective city.”¹ They request “this Commission to find and order that [Company’s] refusal to sell its street lights at fair market value, after termination by the two cities, pursuant to paragraph 7 of Ameren’s Company Owned Street Lighting Tariff Sheet No. 58.5 is unreasonable, uneconomic and contrary to the public interest[.]”² However, the cited tariff does not *require* the Company to sell its street lights to the Cities after termination, at any price. A complaint fails to state a claim upon which relief can be granted if, accepting the well-pleaded factual allegations as true, the complaint nevertheless fails to establish that the complainant is entitled to the relief sought.³

The Cities cite to §386.390.1. RSMo.⁴, the general complaint statute, for the Commission’s jurisdiction to hear this Complaint. While said section contains a somewhat broad grant of authority, no authority is conferred where the complaint is that the Company is acting in an unreasonable, uneconomic way contrary to the public interest. There are only two types of complaints that may be brought pursuant to the general complaint statute: (1) a complaint alleging a utility violation of a statute, rule, order or decision of the Commission; and (2) a complaint as to the reasonableness of any utility rate or charge. §386.390.1. A complaint of the first type must *necessarily* include an allegation of a violation by the utility of a law or of a Commission rule, order or decision or it does not invoke the Commission’s jurisdiction.⁵ Otherwise put, when the subject of a complaint is not one contemplated by §386.390.1, the complaint has failed to invoke the Commission’s jurisdiction.⁶

¹ Complaint at ¶16.

² Complaint, Count I prayer for relief.

³ See, e.g. *Tari Christ v. Southwestern Bell Tele. Co. et al.*, 2003 Mo. PSC LEXIS 37 (Case No. TC-2003-0066, *Order Regarding Motions to Dismiss*, Jan. 9, 2003)(citing *Nazeri v. Missouri Valley College*, 860 S.W.2d 303, 306 (Mo. banc 1993)).

⁴ All statutory references are to the Revised Statutes of Missouri (2000), unless otherwise noted.

⁵ *Tari Christ* at 22-23 (citing *State ex rel. Ozark Border Elec. Coop. v. Pub. Serv. Com’n*, 924 S.W.2d 597, 599-600 (Mo. App. W.D. 1996).

⁶ *MCI Telecom. V. SWBT*, 1997 Mo. PSC LEXIS 126 (Mo. PSC 1997).

Cities' complaint about the Company's refusal to sell its street lights fails to allege a violation of a statute, rule, Commission order or tariff. Rather, it is a complaint that the Company is not willing to go *beyond* what is required by its lawfully ordered tariff. For this reason, it fails to state a claim upon which relief can be granted under the general complaint statute.

2. Any Complaint About Company Rates Not Signed by Proper Parties Must Be Dismissed.

Although the Complaint does not specifically address Ameren Missouri's rates, to the extent that the Cities might argue that the claim in Count I, that the Company's actions are unreasonable and uneconomic, might colorably be read as a veiled complaint about the reasonableness of the Company's rates, it must be dismissed because it was not brought by parties with standing to bring a complaint about rates. A complaint about the reasonableness of any utility rate or charge, if brought by a municipality, *must* be signed by the mayor, president or chairman of the board of alderman or majority of the legislative body. §386.390.1. The Complaint was not signed by any of the persons authorized to bring a complaint about rates. *See* Complaint. A complaint about rates or charges that is not signed by the proper parties must be dismissed.⁷

3. Voluntary Conveyance Statute Does Not Give Commission Authority to Require an Involuntary Conveyance.

Count I must also be dismissed because the Commission does not have regulatory or statutory authority to provide the requested relief, "...order the [Company] to negotiate in good faith with [the Cities] to establish fair market value for its street lights and to offer to sell said street lights to [the Cities] at fair market value."⁸ Cities ignore that "[a] utility's ownership of its business and property includes the right of control and management...[and though t]he powers of regulation delegated to the Commission are comprehensive and extend to every conceivable source of corporate malfeasance[, they] do not, however, clothe the Commission with the general power of management incident to ownership. The utility retains the lawful right to manage its own affairs and conduct its business as it may choose, as long as it performs its legal duty,

⁷ *Id.*

⁸ Complaint, Count I prayer for relief.

complies with lawful regulation, and does no harm to public welfare.”⁹ Cities also attempt to invoke the Commission’s statutory authority under §393.190 RSMo. , which they generically refer to as “jurisdiction to...approve the transfer of property.” However, they themselves allege that Ameren Missouri, “has refused to discuss the sale of its lights to either city[.]” Section 393.190 RSMo can only be read to grant the Commission statutory authority to approve a sale where the seller has *agreed* to sell and sought Commission approval, because it refers to approval after an affirmative, voluntary act by the seller: “[n]o...*electrical corporation*...shall hereafter *sell*...any part of its franchise works or system...without having first *secured* from the commission an order *authorizing* it to do so....” (emphasis added). It is the *seller* that must petition for and secure the Commission’s order. It is noteworthy that other jurisdictions have found that similar statutes apply only to voluntary sales.¹⁰

The Commission’s own regulations also make it apparent that in sales pursuant to §393.190, the electric utility must be the applicant, and the sale must be voluntary. 4 CSR 240-3.110 is titled, “Filing Requirements for Electric Utility Applications for Authority to Sell...Assets.” Subsection 1(B) thereof requires the applicant to submit to the Commission “[a] copy of the contract or agreement of sale.” Subsection 1(C) thereof requires “verification of proper authority by the person signing the application or a certified copy of resolution of the board of directors of such applicant authorizing the proposed action.” Obviously, where the utility is not agreeing to sell, it will not file the necessary application, and there will be no contract and no approval or other authorizing board resolution to attach to the application.¹¹

4. Commission Does Not Have Jurisdiction Over Condemnation Actions.

Finally, Count I must be dismissed because the Commission has no jurisdiction over an action forcing the utility to convey its assets without its agreement so that the Cities can use them for their purposes. The relief sought by the Cities amounts to an attempt by the Cities to appropriate the Company’s property under circumstances where the Company is not willing to sell. “The Commission is purely a creature of statute, and its powers are limited to those

⁹ *State ex rel. Harline v. Public Serv. Com’n*, 343 S.W.2d 177, 182 (Mo. App. 1960).

¹⁰ See *In re. Public Service Corp. of Colorado*, 210 Colo. PUC Lexis 261 2010 (March 10, 2010)(citing to similar decision in *United Water New Mexico, Inc. v. New Mexico Pub. Util. Comm’n*, 910 P.2d 906, 910 (1996), [*73] where New Mexico Supreme Court held that that state’s statute re. sale of utility assets applied only to voluntary sales by a public utility).

¹¹ The Cities appear to fail to recognize that they have no entitlement to these assets, as they simply pay for service, not the assets used to provide it. See, e.g., *State ex rel. The Empire District Elec. Co. v. Pub. Serv. Comm’n*, 100 S.W.2d 509 (Mo. 1936).

conferred by statute, either expressly or by clear implication as necessary to carry out the powers specifically granted.”¹² Authority to order that one entity’s private property be taken for another entity’s public purposes is a matter of condemnation law, and jurisdiction over condemnations rests only with the circuit court of the county where the property to be condemned is located. §523.010.¹³

Count II

1. The Commission Cannot Order A Utility to Adopt A Tariff Consenting to Condemnation of Its Property.

In Count II, Cities complain that a provision of the Company’s tariffs, paragraph 7, Sheet 58.5 of the Company’s 5(M) Company-owned Street and Outdoor Area Lighting Tariffs, “... is unreasonable and unlawful because it does not permit a municipality, upon termination of all or a portion of its street lighting service, to purchase at fair market value the street lights [Company] would proceed to remove and dispose of[.]”¹⁴ Cities request this Commission order [Company] to revise and amend Paragraph 7...to allow any Missouri municipality, after ten years of street lighting service, the option of purchasing, in situ, the street lights within its city limits at fair market value.”¹⁵ Count II fails to state a claim upon which relief can be granted because, as set forth more fully above in response to Count I, the Commission lacks jurisdiction to order the Company to transfer its private property against its will to another entity for that entity’s public purposes.

2. An Attack on a Long-Standing Tariff Approved by Operation of Law is Akin to Collateral Attack Barred as a Matter of Law.

Count II should also be dismissed because the tariff now alleged to be unreasonable and unlawful has been the law¹⁶ for twenty-five years, originally appearing as Sheet 43 of the Company’s 5(M) Company-owned Street and Outdoor Area Lighting Tariffs, issued August 1, 1998 and effective September 27, 1988. The tariff in its current form was issued in JE-2013-

¹² **Public Serv. Comm’n v. Bonacker**, 906 S.W.2d 896, 899 (Mo. App. S.D. 1995).

¹³ The Company is *not* conceding that a condemnation proceeding brought by Cities to take the streetlights would otherwise be authorized by law, and expressly denies it would, but is making the point that even if it were, the Commission has no jurisdiction over such a proceeding.

¹⁴ Complaint, ¶18.

¹⁵ Complaint, ¶19; and Count II prayer for relief.

¹⁶ Utility tariffs have the force and effect of law. **Midland Realty Co. v. Kansas City Power & Light Co.**, 300 U.S. 109, 114 (1937), *aff’d* 93 S.W.2d 954 (Mo. 1936).

0582 on May 31, 2013, was not suspended by the Commission, and as a result became effective June 30, 2013 by operation of law.¹⁷

Attacking this tariff now is akin to collateral attacks on Commission orders that are barred as a matter of law. Section 386.550 RSMo. provides that “[i]n all collateral actions or proceedings the orders and decisions of the commission which have become final *shall be conclusive*.” (emphasis added). The Commission decided to let the tariffs included in JE-2013-0582 go into effect by operation of law. Commission decisions on matters properly within its jurisdiction are not subject to collateral attack.¹⁸ The statutory bar against collateral attacks is so clear that it bars a party from attacking in a later action a prior Commission decision even when that party was not given personal notice of the proceeding.¹⁹ In other words, unlike such common law doctrines as collateral estoppel and res judicata, §386.550 applies to bar any petitioner, whether or not it was a party in the prior proceeding or has any relationship with any party in the prior proceeding, from such a collateral attack.²⁰

Count III

1. The Commission’s Authority to Arbitrate is Limited to Controversies Within its Jurisdiction.

Count III must be dismissed because the Commission does not have the statutory authority to grant the relief requested. Cities “respectfully request that this Commission ask [Company] for its consent to have the Commission serve as an arbitrator in this dispute.” Count III prayer for relief. Cities cite to §386.230, which gives the Commission the authority and duty to act as arbitrator in a controversy between public utilities. However, that statute also requires that “all the parties to such controversy agree in writing to submit such controversy to the commission as arbitrator[.]” *Id.* The Commission does not have the statutory authority, pursuant to that section, to invite the Company to accept its services as an arbitrator.

Even if the Commission had that authority, what Cities want is to force the Company to offer its street lights for sale, and to sell them, against its will. The Commission has

¹⁷ §393.140(11).

¹⁸ *State ex rel. Harline v. Pub. Serv. Comm’n*, 343 S.W.2d 177, 184 (Mo. App. W.D. 1960).

¹⁹ *State ex rel. Licata, Inc. v. Pub. Serv. Comm’n*, 829 S.W.2d 515, 518 (Mo. App. W.D. 1992); *Ozark Border*, 924 S.W. 597, 301.

²⁰ *Tari Christ v. Southwestern Bell Tel. Co.*, Case No. TC-2003-0066 Order Regarding Motions to Dismiss at 22-23 (Mo. P.S.C. January 9, 2003).

acknowledged that “[e]ven if both parties agree to submit [a] controversy...Section 386.230 RSMo cannot give the Commission authority to hear controversies beyond its jurisdiction.”²¹ The Company tariff at issue does not require it to sell its assets, the Company has not made a request for authority to sell them, and the Commission has no jurisdiction to order the Company, against its will, to sell the assets, and therefore the controversy is not one the Commission has the authority to arbitrate. As such, Count III must be dismissed.

WHEREFORE, Ameren Missouri respectfully requests that the Commission enter an order dismissing the Complaint.

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²¹ *Shawnee Bend Development Company, L.L.C. v. Lake Region Water & Sewer Co.*, 2009 Mo. PSC LEXIS 199 (Mo. PSC 2009)(one utility refused to consent to arbitration and without the consent of both parties, the Commission could not proceed with an arbitration. In any event, as the controversy was a pure contractual dispute between the two parties, it was beyond the Commission’s jurisdiction even if the parties brought it to the Commission to arbitrate, and could only properly be brought before a court).

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Ameren Missouri's Motion to Dismiss was served on the following parties via electronic mail on this 29th day of May, 2014.

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