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.	)	

COMPLAINANTS CITIES OF O'FALLON AND BALLWIN'S RESPONSE TO AMEREN'S SUGGESTIONS IN OPPOSITION TO THE CITIES' APPLICATION FOR REHEARING

COME NOW the City of O'Fallon and the City of Ballwin ("Cities"), and for their Response to Ameren's Suggestions in Opposition to the Cities' Application for Rehearing state to the Commission as follows:

Introduction

The crux of the Cities' Complaint is, as Union Electric Company, d/b/a Ameren Missouri ("Ameren") concedes, that Ameren's tariffed regulations that impose termination fees for use of street lights regardless of duration of use and that do not include any purchase option are unjust, unreasonable and should be changed.

The Commission issued its Order Granting Ameren's 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 timely filed their Application for Rehearing prior to that effective date. The Order rests upon a misstatement of the Commission's complaint jurisdiction that will not withstand judicial review. Therefore, the Order is mistaken, erroneous, and unlawful, requiring the granting of the Cities' Application for Rehearing.

Contrary to Ameren's suggestions in opposition, the Cities' Application should be granted because: (1) the Cities' complaint falls squarely within the Commission's jurisdiction to review Ameren's unreasonable and unjust tariffed regulations and practices; and (2) the Commission has the authority to grant the relief requested, and has previously exercised that authority in a similar case.

Argument

I. The Commission has the authority to review Ameren's unjust and unreasonable tariffed regulations and practices.

Ameren erroneously asserts that as third party complainants, the Cities must demonstrate that the matters complained of violate a law, rule, order or decision of the Commission, pursuant to Section 386.390.1. Ameren ignores the Commission's additional jurisdiction to consider complaints brought pursuant to Section 393.140(5), which expressly provides that the Commission **shall**:

> 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**; and whenever the commission shall be of the opinion, after a hearing had upon its own motion or upon complaints, that the property, equipment or appliances of any such person or corporation are unsafe, insufficient or inadequate, the commission shall determine and prescribe the safe, efficient and adequate property, equipment and appliances thereafter to be used, maintained and operated for the security and accommodation of the public and in compliance with the provisions of law and of their franchises and charters.

(Emphasis added)

Ameren also provides an incomplete citation to Tari Christ, which appears to be to Tari Christ d/b/a ANJ Communications v. Southwestern Bell Telephone Company, 2013 WL 2902643. Nothing in Tari Christ supports Ameren's assertion that a third party complaint must allege a violation of any law, rule, order or decision of the Commission. Moreover, the Ozark Border case cited by the Commission in Tari Christ, supports the Cities' position herein.

In State ex rel. Ozark Border Electric Cooperative v. Public Service Commission of Missouri, 924 S.W.2d 597 (Mo. App. W.D. 1996), the Court held that the Commission correctly considered two statutes as alternative sources of complaint jurisdiction. The Court recognized that where two jurisdictional statutes are potentially applicable to a complaint, they are not to be read together, but instead are to be read as providing separate sources of jurisdiction.

> The Commission's order reflects that it considered two alternative means by which the Commission could have jurisdiction over the complaint. If the complaint had met the requirements of either statute, the Commission would have reviewed the agreement. The Commission did not combine the requirements of the statutes but instead examined each statute separately to determine whether Ozark's complaint asserted actionable allegations under either. Thus, the Commission examined the complaint to determine whether it asserted actionable allegations under the more specific complaint statute for territorial agreements, and whether it invoked the Commission's jurisdiction under the general complaint statute.

Id. at 600. The Court concluded that the Commission's analysis of whether two statutes were each "an alternative manner in which jurisdiction could be invoked was not error." Id.

Accordingly, even assuming *arguendo,* Ameren is correct that a Complaint under Section 386.390.1 must allege that Ameren had violated a law, rule, order or decision of the Commission,[1] that would not eliminate the clear additional jurisdiction granted to the Commission pursuant to Section 393.140(5) to address allegations in a complaint that Ameren's tariffed regulations or acts are unjust, unreasonable, discriminatory, or preferential.

[1] The Cities have alleged sufficient facts to demonstrate that Ameren has indeed violated a law, namely Section 393.130, through its prejudicial treatment of the Cities relative to other electrical customers discussed herein.

The Cities have alleged that Ameren's tariff provisions and actions with respect to termination charges and lack of a purchase option for street light fixtures are unjust and unreasonable, which complaint falls squarely within the Commission's jurisdiction under Section 393.140(5). The statute authorizes the Commission to change tariffed regulations prospectively. In Tel-Central of Jefferson City v. United Telephone Company of Missouri, 29 Mo.P.S.C. (N.S.) 584 (1989), the Commission confirmed such authority, stating:

> Prospectively, the Commission may consider altering telecommunication tariffs by rule or on a case-by-case basis to provide a cut-off period, or time beyond back-bills cannot be sent. Without such a change, and failing reasonable tariff interpretation by each provided, there appears to be virtually no limit on how far back a telecommunications provider can go in assessing additional or incremental charges.

Likewise in Paige v. Kansas City Power & Light Co., 27 Mo.P.S.C. (N.S.) 363 (1985), the Commission concluded that "KCPL's interpretation of its tariff provisions pertaining to customer responsibility was unreasonable prior to the billing modification in 1984" in exercising its jurisdiction pursuant to Sections 393.140. See also, In the Matter of G.S. Texas Ventures, LLC, Tariff FCC No. 1, WCB/Pricing File No. 14-2, Transmittal No. 1, (FCC DA14-1294, Sept 8, 2014)(FCC can review tariffs after they take effect through the complaint process).

Ameren concedes in its memorandum that the Commission "can and sometimes does subject tariffs to subsequent scrutiny," but erroneously relies upon Section 393.150.1 to claim that the Commission may only do so "upon its own initiative." This argument is incorrect for at least two reasons; first, Section 393.150.1 is irrelevant to the instant proceeding as it pertains to the filing of proposed new rates, charges, forms or contracts by Ameren. Secondly, Ameren omits the three words that proceed "upon its own initiative" in the statute which are "upon complaint or." Accordingly review under Section 393.150.1 can be commenced by complaint as is also true with Section 393.140.

Ameren also erroneously asserts that the Cities' complaint is an improper collateral attack on the previously approved tariff. This action does not involve collateral attack on the approved tariff in some other proceeding. Rather, the complaint presents a direct request for the Commission to exercise its ongoing power to review existing tariffs, policies and procedures, revisit issues concerning the public interest, and grant prospective relief.

In State ex rel. Chicago, R. I. & P. R. Co. v. Public Service Commission, 441 S.W.2d 742, 747-748 (Mo. App. W.D. 1969), the Court confirmed the Commission's authority to order prospective changes. In the case, a railroad company contended that a prior Commission ruling regarding the safety of a grade railroad crossing prohibited the Commission from revisiting the safety of the same crossing some years later. The Court held that it was "dealing with a proceeding initiated by the Public Service Commission to determine the present need for safety devices at an existing grade crossing. This is a **direct proceeding** to determine the present conditions of safety at the crossing and does not depend in any way on and does not detract from or in any way affect the prior order." *Id*. at 748 (emphasis added). The Court recognized:

> The action of the Public Service Commission in matters such as this is an exercise of the police power of the state in the interest of public safety. Such power is a continuing power and its exercise in 1950 did not exhaust the power as to this crossing. It continued to be the duty of the Public Service Commission to exercise the police power of the state in the interest of public safety and the authority of the Public Service Commission to act in the present case is not conditioned on a finding of change in conditions subsequent to the prior order. The Public Service Commission does not exercise judicial power or authority, and the doctrine of res adjudicata and the reasoning and philosophy underlying that doctrine has no applicability to the case at bar.

Chicago, R. I. & P. R, at 748 (internal citation omitted).

There is no room for doubt. The Commission has express statutory jurisdiction to address the complaint filed by the Cities pursuant to Section 393.140(5).

II. The Commission has the authority to grant the relief requested by the Cities,

Ameren's second argument, that the Commission lacks the authority to grant the relief requested, is equally and unmistakably without merit. The Commission has broad authority to review and regulate electrical providers, such as Ameren, pursuant to Section 393.140, including to require it to offer to sell equipment to customers after lengthy periods of use.

As Cities have previously informed, the Commission granted similar relief in a case it decided in December, 1987, RE: Detariffing of Embedded Customers Premises Equipment owned by Independent Telephone Companies, 90 P.U.R. 4th 428, 1987 WL 258075 (Mo. PSC). In that case the Commission ordered the transfer of ownership of 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 rejected the telephone companies two objections to the Commission's order requiring the transfer of ownership of the embedded CPE to their customers, which were: (1) the Commission's order was unconstitutional because it was taking of property without compensation; and (2) the Commission lacked the statutory authority to order a transfer of ownership of property from the telephone company to the customers. In its ruling on a Motion for Rehearing, this Commission held:

> "Upon rehearing, the Commission has determined that it has the necessary authority to order the transfer of ownership of the embedded CPE from the telephone companies to customers. This authority is derived from the Commission's broad discretion to set just and reasonable rates and the requirements of the FCC."

With regard to the telephone companies' claim that the Commission order constituted an unconstitutional taking of property without compensation, the Commission noted that by virtue

of the FCC's earlier order mandating accelerated depreciation of the CPE, the book value of all of the CPE would be fully depreciated to zero at the time of the transfer of ownership. The evidence in the instant complaint proceeding may show a similar situation with the streetlights, or at least a substantially reduced depreciated book value. In any event, the Cities have stated they support new regulations that would require them to pay reasonable compensation for the transfer of the streetlights.

While the ancillary FCC order referenced in the CPE case provided underlying direction, it could not and did not confer jurisdiction. In Re: Detariffing of Embedded CPE, the Commission determined that it already had the necessary authority under state law to order the transfer of property owned by telephone companies to their customers under economically fair terms.

III. Cities have demonstrated discrimination by Ameren.

Ameren cannot simply shrug off the example of its decision to negotiate and sell equipment in Case No. EO-2014-0296 (the Silgan matter), whereby Ameren sought and received the Commission's authority to sell two transformers to its client Silgan Plastic Food Containers Corporation ("Silgan"). In its application Ameren disclosed its disparate treatment of customers by stating:

> One of the transformers used to serve Silgan failed recently. The terms of the Transformer Rental Agreement required Silgan to bear various costs of replacing that transformer. The transformer's failure and the resulting costs to Silgan caused both the Company and Silgan to reconsider and re-evaluate whether it was advantageous to continue the rental arrangement. **Both parties concluded that it is more cost-effective for Silgan to purchase the transformers and terminate the rental agreement, which would allow Silgan to avoid future monthly rental payments for the transformers, as required by that agreement.**
>
> The proposed transaction is in the best interests of both Ameren Missouri and Silgan. **As noted in the preceding paragraph, purchasing the transformers would allow Silgan to avoid future monthly lease payments and all other**

> **obligations imposed by the Transformer Rental Agreement.** For example, selling the transformer in place also will allow Silgan to avoid various costs it would incur if Ameren Missouri is required to remove or replace one or both of the transformers in the future, which are among the customer's responsibilities under the terms of the Transformer Rental Agreement. **Ameren Missouri, and ultimately its customers, would benefit because the proposed sale price of the transformers will enable the Company to fully recover the net book value of the transformers.** In addition, authorizing the sale of the transformers is consistent with Ameren Missouri's current policy and approved tariff, which makes the Company responsible for equipment and fixtures required to provide electric service on its side of the customer's meter but makes the customer responsible for equipment and fixtures beyond the customer's meter.

Ameren's application at ¶7&8 (emphasis added).

Ameren's statements in the Silgan matter demonstrate it wishes to pick and choose which customers to force to keep paying perpetually and unfairly for equipment.

The Commission incorrectly concluded that in order to demonstrate the discriminatory conduct prohibited by Section 393.130, the Cities needed to plead that Ameren had actually negotiated and sold its street lights to other similarly-tariffed municipalities. This is incorrect. Section 393.130.3 prohibits electrical companies from "subject[ing] any particular person, corporation or locality or any particular description of service to any undue or unreasonable prejudice or disadvantage in any respect whatsoever." Nothing in Section 393.130 states that such prejudicial treatment can only be demonstrated amongst absolutely identical customers. The Cities' allegations are sufficient to require the Commission to examine whether it is unlawful for Ameren to selectively offer equipment for sale to some customers and not others, regardless of the type of equipment and the granting of a motion to dismiss on this issue was improper.

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

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this document was emailed to the parties listed below on this 17th day of September, 2014.

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