BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

Noranda Aluminum, Inc. et al.,	)	
	)	
Complainants,	)	
v.	)	File No. EC-2014-0223
	)	
Union Electric Company, d/b/a Ameren Missouri	)	
	)	
Respondent.	)	

AMEREN MISSOURI'S REPLY TO COMPLAINANTS' AND THE STAFF'S[1] SUGGESTIONS IN OPPOSITION TO MOTION TO DISMISS AND REQUEST FOR ORAL ARGUMENT

COMES NOW Union Electric Company, d/b/a Ameren Missouri ("Ameren Missouri" or the "Company") and pursuant to 4 CSR 240.2.080(13) and the Presiding Officer's order granting the Company leave until April 15, 2014 to file replies to other parties' suggestions opposing its Motion to Dismiss,[2] hereby replies to said suggestions and requests oral argument on its Motion, as follows:

Reply to the Complainants' Suggestions

1. The linchpin of the Complaint is the allegation that the Company has "over-earned" because the per-book earned return on equity ("ROE") in a Surveillance Report reflects an ROE above the ROE used to set the revenue requirement in the Company's last rate case. "Ameren Missouri was overearning (exceeding a just and reasonable return) . . . for the twelve month period ending September 31, 2013 . . .." Complaint, ¶ 17. Complainants supplement the Surveillance Report figure in part by including allegations in the Complaint based on several

[1] This filing also replies to Office of the Public Counsel's response to the Company's Motion to Dismiss, which consisted of agreeing with the Staff's response.
[2] *See Notice of Rulings Made at Conference*, issued March 28, 2014.

Staff "adjustments" from the Company's last rate case, which themselves were based on data from as early as October 2011through July 2012.[3]

2. What Complainants fail to appreciate – in the Complaint or in their Suggestions in Opposition to the Company's Motion to Dismiss – is that bare allegations that a utility has in the past or is "currently" earning more than a previously authorized ROE, or will likely earn more than a previously authorized ROE "into 2014," do not constitute allegations that the utility's current rates will be unjust and unreasonable *during the future when any new rates that could be set as a result of a rate proceeding would be in effect*.[4] In order to state a claim upon which relief can be granted Complainants had to allege that their "analysis" (such as it is) reflects an honest and intelligent forecast of the Company's revenue requirement *in the future,* post-the time new rates would take effect.[5] The Complaint contains no such allegation.

3. Indeed, Complainants do not even assert that the circumstances that they say produced alleged past "over-earnings" provide a reasonable proxy for what conditions (revenues, rate base, and expenses) will be *post-the time new rates would be set*. The lack of such an allegation is fatal to the Complainants' ability to state a claim upon which relief can be granted and thus requires dismissal of the Complaint.

4. Complainants make several arguments in an effort to sustain their defective Complaint. First, they claim that evidence upon which they base their allegations was as much of an all relevant factors analysis as they could do.[6] They again miss the point. Conceptually, an "over-earnings" complaint has nothing to do with past "over-earnings" (which Complainants

[3] They also supplement the figure with allegations based upon Mr. Gorman's ROE analysis, which indicates an *increase* in the cost of equity since Mr. Gorman filed his testimony in the Company's last rate case.
[4] Complaint, ¶¶ 11, 18. Even under Complainants' ridiculously aggressive proposed schedule new rates could not take effect until late August of this year. But the Complainants have made no allegation that continuing current rates post-August of this year would be unjust and unreasonable.
[5] *State ex rel. Missouri Water Co. v. Public Service Commission*, 308 S.W.2d 704, 719 (Mo. 1957) (*quoting State of Missouri ex rel. Southwestern Bell Telephone Co. v. Public Service Commission et al.*, 262 U.S. 276, 288 (1922)).
[6] Complainants' Suggestions, p. 2.

would characterize as earnings above a last-authorized ROE).[7] To the contrary, such a complaint must be based upon the claim that the continuation of current rates into the future after new rates can fairly and practically be examined and reset would be unjust and unreasonable. This is why the Commission, on its own motion or as a result of a Staff-initiated investigation has never, to the Company's knowledge, authorized the filing of a complaint claiming that a major utility's rates are unjust and unreasonable without first having in its hands a full cost of service study. The reason? Because until such a study has been done using a proper test period, updated as necessary to account for likely conditions in the future, appropriate rates for a utility simply cannot be developed. And without such an analysis one simply cannot reach the conclusion that the current rate structure will, if it continues into the future, be unjust and unreasonable. As noted, in order to state a claim upon which relief can be granted, Complainants had to allege that current rates would be unjust and unreasonable in the period after the Complaint is resolved, and they do not allege this. Had they alleged this then it would have been appropriate for the Commission to investigate the allegations,[8] but absent that allegation, the Complaint is defective and should be dismissed.[9]

5. Complainants assert that making such an allegation is unnecessary. They assert that this requirement would render portions of the Public Service Commission Law

[7] It must be kept in mind that the phrase "over-earnings" is a misnomer. It is not found anywhere in the Public Service Commission Law. It is a misnomer because when the Commission sets rates it does not set a maximum ROE. To the contrary, it is expected that utilities will sometimes earn above their "authorized" ROE and sometimes earn below their authorized ROE depending on which timeframe is examined. *Straube v. Bowling Green Gas Co.*, 227 S.W.2d 666, 671 (Mo. 1950) ("No maximum or minimum return was determined when the rate was established. The contention and allegation that, if respondent is permitted to retain the said funds, it will result in respondent having charged and collected in excess of the 'maximum return' cannot aid appellants, since the law of the state only provides for the fixing of rates and does not fix the maximum return thereunder.") .

[8] Section 393.260.1

[9] And they can't make that allegation based upon the analysis that they have done, for it does not reflect any kind of a forecast – let alone an honest and intelligent one – of what conditions will probably be in the future.

"meaningless" or that such a result is "illogical."[10] But their assertions reflect a fundamental misunderstanding of the governing statutes. First of all, contrary to their statements otherwise,[11] Section 393.130.1 provides absolutely no "authority" or "jurisdiction" for a complaint about earnings. Section 393.130.1 simply codifies the filed-rate doctrine by prohibiting a utility from charging (or a customer from paying) any rate other than that reflected in the utility's filed and approved rate tariffs. That this is the meaning of the statute was settled decades ago by New York State's highest court, when it construed a similar provision of New York's public service commission law.[12] *See Murphy et al v. The New York Central Ry. Co.*, 122 N.E. 700 (N.Y. 1919) (Where the court rejected an attempt by a customer to recover what the customer claimed were sums collected in excess of just and reasonable rates (although the rates were the ones on file and reflected in the tariff), based on the court's conclusion that even if in a rate complaint proceeding it is determined that the rate has become unjust and unreasonable if continued into the future, this does not mean that the rate *was* unjust and unreasonable in the past while it remained in effect. The statute at issue, which was similar in all material respects to Section 393.130.1, RSMo, was determined to be merely declaratory of the requirement that the filed rate be followed. It provided no basis for a complaint itself.); *accord Purcell v. New York Central Ry. Co.*, 197 N.E. 182 (N.Y. 1935) (Also concluding that just because continued application of rates in the future would be unjust and unreasonable does not mean that application of them in the past was unjust and unreasonable).

Second, Complainants further confirm their misunderstanding of what they had to allege by their reference to Section 393.270.4 and, in particular, their emphasis on the "although not set

[10] Complainants' Suggestions, pp. 6-7.
[11] *Id.* pp. 4-5.
[12] As the Commission is likely aware, Missouri's Public Service Commission Law was modeled on New York's law. *State ex rel. Jackson County v. Pub. Serv. Comm'n*, 532 S.W.2d 20, 30 n.2 (Mo. 1975) (Seiler, J., dissenting).

forth in the complaint and not within the allegations therein" language in that statute.[13] That statute instructs the *Commission* on what it must consider when ruling upon the merits of a complaint, *assuming the Complaint was sufficient in the first place*. The Company is not arguing that *if* a complaint states a claim the Commission is limited to only considering allegations in the Complaint. Of course other evidence may be developed and presented as Section 393.270.4 recognizes. But before we get to the point of the Commission being required to consider "all relevant factors" in setting rates, as is required by Section 393.270.4, the Complaint has to state a proper claim, and to do that, it has to claim that continuation of current rates into the future post-when rates would be changed would be unjust and unreasonable.

Third, Complainants complain that dismissal on the grounds alleged by the Company would "effectively undo the statutes."[14] Aside from the fact that Complainants have misapplied at least two of "the statutes" (as we explained above), this assertion is similarly untrue, even if Complainants are referring to Sections 386.390 and 393.260. As we stated earlier, and as Complainants and the Staff have also contended, *if* a proper complaint is lodged then the Commission is required to investigate it. Such an investigation could consist of docketing the complaint, allowing the parties to conduct discovery necessary to test the allegation that it would be unjust and unreasonable to continue current rates into the future (which as noted is missing here, but which is essential), and it could involve directing its Staff to perform proper cost of service studies (which is what is always or almost always done). It is patently not true that adherence to this process "undoes" a statute or prevents a complainant from initiating a complaint. What it may do is preclude the processing of a complaint in the unreasonably short period of time advocated by Complainants here (barely four months from filing to hearings).

[13] Complainants' Suggestions, pp. 6-7.
[14] *Id.*, p. 7.

That a proper investigation, including the development of a proper cost of service study that if correct could support a *future* rate change, takes longer than Complainants like in no way deprives a complainant of the ability to pursue a proper complaint any more than does the delay experienced by utilities when rate increases are sought deprive the utility of the ability to pursue a rate increase. In this regard, consider that a rate increase case must be given priority over all other Commission matters. Section 393.150.2. However, rate increase case hearings virtually never occur until approximately 9 months into the case, and new rates virtually never take effect until at or very near to the operation of law date in such cases –11 months later. And that is true even though the utility is required to file direct testimony, including a full cost of service study plus a myriad of other data when the case is filed. It is unreasonable and naïve for Complainants to think that they can avoid the development of such information when they file a complaint and that instead they can simply grab a Surveillance Report result and some old data from a prior rate case and rush the Commission to judgment on their Complaint, particularly when it does not even claim that continuation of the current rates into the future would be unjust and unreasonable.

6. The bottom line is that even if the Complaint's allegations are liberally construed to effectively read "as of February 2014 Ameren Missouri's rates are producing earnings above its previously authorized ROE" and "will do so into 2014," that still does not sufficiently allege that the rates will be unjust and unreasonable in the future when new rates would be in effect. This is precisely why the Complaint *is* an unlawful collateral attack on the Company's current rates. The allegation is that the current rates *are* too high because the Company is earning more than it was assumed it would earn when rates were last set. But those current rates – and the earnings they produce – are undeniably lawful because they are the rates that the Commission

approved.[15] It is simply not true that customers are improperly paying more than is just and reasonable today. Under Section 393.130.1, by definition they are paying a just and reasonable rate, as set forth in the Company's tariff.

7. Complainants contend that they have met the "non-heavy burden" necessary to sustain a complaint about the Company's rates without running afoul of the bar against collateral attacks, but that claim also fails for the reasons discussed earlier. Complainants do not allege that the "passage of time" means that in the future when new rates would be set the Company's current rates would be unjust and unreasonable.[16] Complainants do not allege that "intervening economic fluctuations" have occurred that leads to the conclusion that current rates will be unjust and unreasonable if continued into the future.[17] It is not sufficient to plead the *legal conclusion* that rates are "now" unjust and unreasonable. As noted, the pleader must allege that current rates would be unjust and unreasonable post-the resetting of rates at the conclusion of the rate proceeding. Complainants admit they have made no such allegation: "Language such as 'the rate is now unjust and unreasonable' refers to the *current* impact of the rate and not the rate impact contemplated at the time of the order" (emphasis added).[18] That is true, and it is precisely why Complainants have not stated a claim, and why they are unlawfully collaterally attacking the current, lawful and in-effect rates.

8. The Complainants' criticism[19] of the Motion to Dismiss' discussion of the flaws in Complainants' "analysis" that underlies the allegations of the Complaint also misses the mark. The Company's argument was and remains that even if what the Complaint alleges to be true is

[15] Complainants' failure to recognize the collateral attack problem they have is directly related to Complainants' misapplication of Section 393.130.1.
[16] *Order Denying Rehearing and Denyiing Complainants' Alternative Motion for Leave to Amend,* Tari Christ et al v. Southwestern Bell Tele. Co. et al., Case No. TC-2003-0066.
[17] *Id.*
[18] Complainants' Suggestions, p. 8.
[19] *Id.*, pp. 2-3

true a claim is nevertheless not stated as a matter of law, requiring dismissal of the Complaint. Why? Because an "analysis" of the type relied on by Complainants' could never support a conclusion that the Company's rates in the future will be unjust and unreasonable as a matter of law. This is because such an analysis could never constitute the kind of honest and intelligent forecast of probable future conditions that our Supreme Court has ruled must be reflected in any Commission rate order. *Missouri Water, supra.* The Company's discussion of the failure of Complainants' "analysis" to actually provide any meaningful information about what the Company's cost of service would be in the future when new rates would take effect, and about the ratemaking process, is not a rebuttal of the "truth" of Complainants allegations about what the Surveillance Report shows or of what the Staff adjustments in the last rate case were. In summary, the Company's discussion simply illuminates the fact that even if what Complainants say is true it cannot establish cause for a lowering of the Company's rates.[20]

9. Finally, we address Complainants' (and the Staff's) contention that the Commission lacks the authority to dismiss a complaint even if it literally stated a claim. They base this argument on Section 393.260.1, which as we noted above requires the Commission to investigate when a complaint is filed. It is well-settled that the nature of any "investigation" to be undertaken by the Commission is a matter committed to the Commission's discretion. The Staff says so itself, as does the case law.[21] This indicates that the requirement that the Commission conduct an investigation does not impair its ability to dismiss a complaint. Indeed,

[20] We would also note that the "line" between arguments in these circumstances based on "facts" versus law is not as bright as Complainants would have the Commission believe, and as the Commission itself has recognized. In *Tari Christ*, the Commission stated that "[w]hile the determination of such motions [motions to dismiss for failure to state a claim] was, at one time, limited to consideration of matters contained in the four corners of the complaint, the modern trend is to extend consideration to matters outside the complaint, we well." *Order Regarding Motions to Dismiss*, Case No. TC-2003-0066, 2003 Mo. PSC LEXIS 37, p. *25.

[21] *Cf. State ex rel. Public Counsel v. Pub. Serv. Comm'n et al.*, 210 S.W.3d 344, 356 (Mo. App. W.D. 2006) (In applying a telecommunications statute that required the Commission to investigate, the Court recognized that the Commission did conduct the required investigation even though it only reviewed documentation provided by its Staff and filings by Public Counsel, but held no hearing and took no evidence).

the Commission's regulations, which are lawful, in effect and carry the force and effect of law, specifically empower the Commission to dismiss complaints – *any* complaint – for good cause shown. 4 CSR 240-2.116(4). As outlined above, Ameren Missouri's primary contention is that the Complaint fails to state a claim upon which relief can be granted and on that basis (having nothing to do with "good cause") must be dismissed. However, Ameren Missouri also points to the Commission's power to dismiss the Complaint for good cause not as a means to suggest that the Commission should conduct no more investigation than to examine pleadings, but rather, as an alternative for the Commission if it does have any concerns about the continued justness and reasonableness of the Company's rates in the future. The Company's alternative suggestion was for the Commission to open an investigatory docket and order its Staff to do what is virtually always done when a major utility's rates are called into question: investigate and prepare a cost of service study. It is obvious that the most efficient way to do so would be to consolidate such an investigation with the Company's upcoming rate case so that a complete review of the Company's cost of service (and class cost of service) can be conducted based on consideration of all relevant factors.[22]

Reply to the Staff's Suggestions

10. We have already addressed the Staff's incorrect contention regarding the Commission's authority to dismiss the Complaint for good cause shown. We have also addressed the options the Commission has to open an investigation and/or to process the Complaint using a more reasonable timeline and to consider whether interim rates subject to

[22] As indicated in our Response to the Commission's *Order Inviting Responses to Agenda Discussion*, if the Commission determines to process this Complaint more quickly than in parallel with the Company's rate case schedule it could do so through an interim rates proceeding along the lines suggested by the Presiding Officer. As we explained in that filing, that too requires further investigation and analysis, which should be undertaken by the Staff.

refund should be considered. We will briefly address the other contentions in the Staff's Suggestions.

11. In some ways the premise of the Staff's Suggestions reflects the same fundamental flaw as does the Complaint itself: a focus on allegations about what the Company's rates were in the past or even are today, but without considering the lack of allegations that the Company's rates in the future, post-disposition of this case, would in fact be too high (i.e., that continuation of current rates in the future would be unjust and unreasonable). The issue that the Motion to Dismiss raises is not, as the Staff suggests, whether Complainants have "fairly apprised" the Company of their allegations. It is true, they have as we understand the argument they make. We understand that they allege past "over-earnings" and allege "current over-earnings." But we also understand that those allegations do not speak to the appropriateness of the current rates in the future and thus do not state a claim. Staff also makes the same mistake Complainants made by concluding that the mere allegation the rates are unjust and unreasonable "now" ("now" referring to when the Complaint was filed, in February 2014) reflects an allegation of substantial change in circumstances. Alleging that rates are "now" unjust and unreasonable is not an allegation about circumstances at all. It is simply Complainants' flawed legal conclusion that just because a utility has book earnings in excess of its last-authorized ROE during a specified period of time then its current rates are, by definition, "unjust and unreasonable." It reflects their flawed application of Section 393.130.1. It does not allege that the circumstances are that Company's revenues, rate base and expenses have sustainably changed in total so that in the future a lower revenue requirement will now be required. Those are the kinds of substantial changes in circumstances that must be alleged.

Request for Oral Argument

12. The circumstances surrounding the Complaint, and its companion complaint in File No. EC-2014-0224, are unique, as is Complainants' attempt to convince the Commission that it can or should proceed to hear a complaint without the benefit of a proper and full cost of service study that is at least designed to reflect an honest and intelligent forecast of the Company's revenue requirement under probable future conditions. A number of legal and policy issues are presented by Complainants' efforts. Consequently, the Company believes the Commission would benefit from hearing oral argument on the Company's Motion to Dismiss and requests that oral argument be scheduled at the Commission's earliest convenience.[23] Since the Company bears the burden of sustaining its Motion to Dismiss, the Company suggests that it be given a total of 30 minutes (to be split between its initial and reply arguments as it sees fit), with the Complainants to be given 15 minutes, and with any other party supporting or opposing the Motion to be given 10 minutes.

WHEREFORE, Ameren Missouri hereby submits its Reply to the Suggestions filed in opposition to its Motion to Dismiss, and requests oral argument on its Motion as outlined above.

Respectfully submitted,

UNION ELECTRIC COMPANY
d/b/a Ameren Missouri

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[23] The Company suggests that oral argument be scheduled on this Complaint, to be immediately followed by oral argument on the Complaint in File No. EC-2014-0224, which the Company will also request in its Reply to the Suggestions that were filed in opposition to the Company's Motion to Dismiss in that case.

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ATTORNEYS FOR UNION ELECTRIC COMPANY d/b/a AMEREN MISSOURI

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 15th day of April, 2014, served the foregoing either by electronic means, or by U. S. Mail, postage prepaid addressed to all parties of record.

James B. Lowery
James B. Lowery