

BEFORE THE MISSOURI PUBLIC SERVICE COMMISSION

IN THE MATTER OF THE UNION ELECTRIC)
COMPANY, d/b/a AMEREN MISSOURI’S)
TARIFFS TO INCREASE ITS REVENUES)
FOR ELECTRIC SERVICE) File No: ER-2014-0258
)

The Cities of O’Fallon and Ballwin’s Post Hearing Brief

COMES NOW the Cities of O’Fallon, Missouri and Ballwin, Missouri (collectively “Cities”) and for their post hearing brief following the Missouri Public Service Commission’s (“PSC” or “Commission”) hearing in consideration of Union Electric Company, d/b/a Ameren Missouri’s (“Ameren”) request for an increase in the tariff for the provision of electrical service, states as follows:

Introduction

The Cities have sought to bring to this Commission’s attention the inequities that exist within Ameren’s street lighting service rates, which are further exacerbated by Ameren’s unreasonable and uneconomic conduct. Compounding the inequities is the fact that the Cities are essentially captive customers of Ameren’s 5(M) Company-Owned Street Lighting Tariff. The Cities have expressed an interest in negotiating to acquire for fair market value with Ameren the street lighting fixtures, which would allow the Cities to transition to Ameren’s 6(M) Customer-Owned Street Lighting Tariff.

The testimony before the Commission was: (1) O’Fallon would save annually approximately \$820,000 by switching to the 6(M) Tariff – reducing

annual street lighting cost from \$1,000,000 to \$180,000. [Direct Testimony of Steve Bender, Exhibit 850]; and (2) Ballwin, as a 5(M) customer, currently pays approximately \$500,000 annually for street lighting, but would pay only \$94,000 annually as a 6(M) customer, a savings of over \$400,000 annually. [Direct Testimony of Robert Kuntz, Exhibit 852].

These monetary reductions and savings are significant and particularly important at a time when municipalities across the state are being asked to consider the manner in which they both derive and expend revenues. Further, this issue is not unique to the intervening Cities, but is applicable to the more than 300 municipalities who take street lighting service from Ameren.

The Cities' proposals would provide an opportunity for the Commission to offer rate relief in a manner that does not negatively impact another class of customer. Allowing municipalities to purchase at fair market value substantially depreciated street light fixtures, in situ, from Ameren would afford substantial rate relief and permit Ameren to realize book value for its assets. The Cities' proposed relief would have no negative impact on other rate classes. This truly is a benefit to all parties concerned, and the general public at large.

Discussion

I. Street Lighting

Ameren and Staff have averred that the Commission has no authority to order Ameren to sell its property. The proper questions are: Does the

Commission have the authority to find “unreasonable” both Ameren’s 5(M) “Termination Tariff” and its refusal to sell depreciated street lights to municipalities upon notice of termination by the municipalities? And, if the Commission finds Ameren’s tariff and acts unreasonable, does the Commission have the authority to require Ameren to change its “Termination Tariff” so as to afford municipalities, upon notice of termination, the opportunity to purchase depreciated streetlights rather than allow Ameren to spitefully insist on its right to strip and remove such street lights?

The Cities contend that the Commission has such authority in Section 393.140(5) RSMo, which provides in part: “Whenever the commission shall be of the opinion, after a hearing had upon its own motion or upon complaint, that . . . the acts or regulations of any such persons or corporations are unjust, unreasonable, unjustly discriminatory or unduly preferential..., the commission shall determine and prescribe . . . the just and reasonable acts and regulations to be done and observed”

During argument, Ameren’s Counsel alluded to a statute precluding the condemnation of utility property by municipalities. [Transcript, Volume 26, p.1782]. It is presumed that the referenced statute is Section 71.525.2(2) RSMo. Section 71.525 RSMo prohibits municipalities from condemning certain property of a public utility, except in limited circumstances. The Cities do not challenge such prohibition, but observe that it is irrelevant to the statutory authority given to

the Commission. The Commission's statutory authority to determine whether Ameren's tariffs and acts are unjust and/or unreasonable, and its authority to remedy such unreasonable conduct is in no way diminished by the prohibition against municipalities seeking to condemn property owned by utility companies. "The courts must reconcile and harmonize statutes that appear to be in conflict if it is reasonably possible to do so." Flarsheim v. Twenty Five Thirty Two Broadway Corp., 432 S.W.2d 245, 251 (Mo. 1968). Section 71.525 RSMo does not even appear to conflict with Section 393.140 RSMo, and as such reconciliation can be made with ease. The Commission retains the power and authority to regulate and approve the manner in which Ameren's property that is dedicated to public service is "disposed of". See Section 393.190.1 RSMo.

The Commission has previously ordered the sale of depreciated telephone company assets to the companies' customers, in RE: Detariffing of Embedded Customers Premises Equipment owned by Independent Telephone Companies, 90 P.U.R. 4th 428, 1987 WL 258075 (Mo. PSC). Ordering Ameren to transfer, at fair market value, fixtures dedicated for public service is well within this Commission's authority and jurisdiction under Section 393.140(5) RSMo.

The evidence before the Commission demonstrated that the "Termination" paragraph of the 5(M) Tariff constitutes an unreasonable impediment to Cities seeking to convert to the 6(M) Tariff. Ameren admitted in its sworn testimony that its Termination paragraph is deliberately designed to serve an impediment, in

that the \$100 termination fee “is to simply give the customer pause before requesting that a light be removed or that lighting service be eliminated” [Rebuttal Testimony of William Davis, at p.43]. The testimony and evidence before the Commission was that this fee would be applicable to approximately 10% of the Cities’ fixtures. [Transcript, Volume 26, p.1861 & 1864].

More obstructive and unreasonable than the termination fee, though, is Ameren’s flat refusal to negotiate for the sale of its depreciated street lighting fixtures. If the Cities were to issue written notice of streetlight termination, Ameren could then proceed to remove its fixtures and either store, scrap, refurbish or reuse them, all of which would cost Ameren (and its ratepayers) substantial sums of money. The Cities, in turn, would then have to pay to purchase and install over 6,500 new street light fixtures at a high cost. Accordingly, the Termination paragraph in the 5(M) Tariff and Ameren’s refusal to sell its depreciated street lights to the Cities serve as unreasonable and uneconomic barriers to cities wishing to change from the 5(M) to the more reasonable 6(M) Tariff. Ameren’s Termination tariff and its refusal to sell depreciated street lights make the 5(M) Cities captive customers.

Ameren’s unreasonable actions in refusing to sell the fixtures, allow Ameren to receive a perpetual windfall. Mr. Bender testified that if O’Fallon could change to the 6(M) Tariff it would see a reduction in its annual street lighting bill of approximately \$820,000.00. [Bender Direct, Exhibit 850]. Said

another way, O'Fallon is paying approximately \$820,000.00 each year for the use of Ameren's 4,442 street light fixtures. [Bender Direct, at p. 3]. This amounts to approximately \$185.00 per fixture within O'Fallon each and every year. [Bender Direct, at p. 3]. Ameren, in response to data requests, stated that they utilize a thirty year depreciation schedule (i.e. 3.33% depreciation per year). [Bender Direct, at p. 3]. As such, the Cities are being charged a fee for the use of the fixtures based upon a projected value of \$5,500.00 per fixture. [Bender Direct, at p. 3]. This is vastly in excess of the valuation that Ameren placed upon the pole, tower and fixtures it sold to Hunter Engineering, where it applied a modernized value of between \$1,205.66 and \$1,945.03 per fixture [Bender Direct, at p. 3].

Not only are Ameren's acts with respect to refusing to negotiating with the Cities unreasonable, they are inconsistent with the manner in which Ameren routinely negotiates for the sale of its assets to other customers rendering its conduct with respect to other customers unduly preferential. Mr. Bender in his direct testimony detailed a number of other instances where Ameren had sold its assets for fair market value:

Q. Have you found cases where Ameren has sold company owned assets to its customers?

Yes. In response to the data requests, Ameren disclosed a number of applications it has filed over the last few years for the Commission to approve the sale of its assets to its customers, when Ameren determined that it would be mutually beneficial. The Hunter matter I mention previously is particularly

relevant, which is Application number EO-2013-0013. In Hunter, Ameren informed this Commission: “Ameren, Missouri has agreed to sell the facilities to Hunter for \$2,210.91, which represents the total installed reproduction cost of the facilities less accumulated depreciation. . . . The proposed transaction is in the best interests of not only Ameren Missouri and Hunter, but the Company’s other ratepayers as well. Hunter benefits because it can continue to use the light fixtures to illuminate its parking lot, and also because it can purchase the existing fixtures at a cost that is less than it would incur to acquire and install new fixtures. Ameren Missouri and its customers benefit because the sale [of] the light fixtures and related equipment will enable the Company to recover the net book value of assets that might otherwise have to be removed from service and sold for salvage. Selling the assets in place will also allow Ameren Missouri to avoid the cost of removing those assets, which further benefits both the Company and its customers.”

Unlike Hunter, which had the option of simply ceasing to utilize the street light fixtures if it could not reach a deal with Ameren, the City is a captive customer with no viable alternative to continuing to utilize Ameren’s services without spending large sums of money for new replacement streetlights.

In Application Number EO-2005-0369, Ameren filed an Application with the Commission to approve the sale of a transformer to its customer, Behen’s Container Service, for \$5,439.70. The Commission approved the sale on June 16, 2005, noting that staff had found the sale price to be the transformer’s book value.

In Application Number EO-2008-0310, Ameren filed a Joint Application with Pemiscot-Dunklin Electric Cooperative, Inc., seeking the Commission’s approval of the transfer of assets from Ameren to the Cooperative. Ameren sought to transfer a significant number of assets to the cooperative including approximately 3,000 poles, 886 distribution transformers and over a hundred miles of distribution and subtransmission facilities. The Commission approved the transfer of assets on February 18, 2009.

In Application Number EO-2013-0044, Ameren filed an Application seeking the approval of the sale of a transformer and related facilities to Bussen Quarries, Inc., for \$9,376.74, which Ameren stated “represents the total installed reproduction cost of the facilities less accumulated depreciation.” The Commission approved the sale on October 24, 2012.

In Application EO-2014-0009, Ameren sought the Commission’s approval for the sale of a transformer to FormPak, Inc. for \$6,215.96 which again “represents the depreciated net book value of the facilities as of the date of the parties’ agreement” – from paragraph 9 of Ameren’s Application. Ameren also noted in paragraph 8 of the Application that “[t]he proposed transaction is in the best interests of both Ameren Missouri and FormPak. Purchasing the transformer at Ameren Missouri’s net book value instead of continuing to pay the monthly rental payments prescribed in the Transformer Rental Agreement would allow FormPak to pursue a course it has determined to be more financially advantageous. Ameren Missouri, and ultimately its customers, would similarly benefit because the sale of the transformer will enable the Company to fully recover the net book value of the assets that it proposes to sell to FormPak.”

Most recently in EO-2014-0296, Ameren sought and received the Commission’s approval for the sale of two transformers to Silgan Plastic Food Containers Corporation. Much of Ameren’s reasoning in the Silgan matter is of equal applicability to the City’s reasons for wanting to purchase Ameren’s street light fixtures. Ameren stated in paragraphs 7 and 8 of its application that:

“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."

[Bender Direct, Exhibit 850 at p. 6-8].

Ameren's witness, David Wakeman, stated that selling fixtures to the Cities is not feasible due to infrastructural concerns related to Ameren's distribution system. [Transcript, Volume 26, p. 1804]. However, this argument is a red herring. Ameren has previously offered to sell certain fixtures to the Cities, and even quoted prices, although transactions never materialized. [Surrebuttal Testimony of Robert Kuntz, exhibit 853; Surrebuttal Testimony of Steve Bender, Exhibit 852]. Ameren raised no such concerns in their offers to sell. Additionally, any difficulties with respect to maintenance and/or repair are matters that could be resolved through good faith negotiation and oversight by this Commission. If the cost to overcome such issues is too great, then the Cities will not proceed with the acquisitions. However, Ameren's steadfast refusal to negotiate in good faith means that the parties can only speculate.

The Cities have cited to a tariff provision of the Kansas City Power and Light Company "KCPL" [Bender Direct, Exhibit 850, pp. 8-9] which provides in part:

"The municipality shall have the right and option to purchase on a mutually agreed specified purchase date, upon one (1) year's written notice to the

Company prior to the specified purchase date, only that portion of the Street Lighting System determined by the Company in use and useful and devoted exclusively to furnishing street lighting service within the corporate limits of the Municipality (the “property to be sold”). The purchase price for the property to be sold shall be and consist of all of the following: [a] the reproduction cost new less depreciation; [b] consequential and severance damages which will result or accrue to the Company from the sale and transfer of said property to the Municipality; [c] an allowance for the loss of a portion of the Company’s going concern value; [d] all materials and supplies related uniquely to the property to be sold; [e] all expenses in connection with such sale; and [f] all other damages sustained by the Company by reason of such sale. The municipality may purchase a portion or portions of the Street lighting System from time to time by giving written notice to the Company at least three months before the intended purchase date. The purchase price for said portion or portions shall be calculated pursuant to the above pricing formula for purchase of the entire system.” [See Bender Direct, Exhibit C, KCPL tariff sheet No. 153, paragraphs 15.12-13].

The Commission could order Ameren to promulgate a tariff similar to KCPL’s or it could order Ameren to adopt the tariff proposed by Mr. Bender [Exhibit D of Bender Direct, Exhibit 840]. Either way, the Commission should find Ameren’s current tariff and its actions unreasonable and order Ameren to promulgate a new tariff that would require Ameren to engage in good faith

negotiations with municipalities wishing to transition to Ameren's 6(M) tariff rates.

II. LED Street Lighting

The issue of LED Street Lighting been continually delayed, and the Cities would urge that this Commission order Ameren to develop and propose an LED street lighting tariff at the end of Ameren's next annual evaluation. Furthermore, the Cities would welcome the opportunity to offer any input and/or assistance with the study. Ballwin has already undertaken several LED outdoor lighting demonstration projects, and the Cities remain interested in exploring the expanded use of LED street lighting facilities.

Conclusion

Ameren's current 5(M) street lighting rate schedules and practices are unjust, unfair, uneconomic and unduly preferential. The Cities urge the Commission to alleviate the hardship placed upon the Cities under the existing rate structures, and order Ameren to revise its 5(M) Termination Tariff and promulgate a new tariff which would allow municipalities to negotiate in good faith with Ameren for the transfer of lighting fixtures over ten years of age for fair market value. The Cities are not asking to be given the fixtures for free, but wish to escape the 5(M) tariff ensnarement and enable them to migrate to the more equitable 6(M) customer owned streetlighting tariff rates.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A true and correct copy of the foregoing document has been emailed on the 31st day of March, 2015 to all persons on the Commission's service list in this case.

/s/ Leland B. Curtis