

CITY OF O’FALLON, MISSOURI, and)
CITY OF BALLWIN, MISSOURI,)
)
Complainants,) File No: EC-2014-0316
)
UNION ELECTRIC COMPANY d/b/a)
AMEREN MISSOURI,)
)
Respondent.)

COME NOW City of O’Fallon, Missouri, and City of Ballwin, Missouri (collectively “Cities”), and for their memorandum of law in opposition to Union Electric Company d/b/a Ameren Missouri’s (“Ameren”) motion to dismiss, state as follows:

The Cities filed the instant Complaint seeking the intervention of the Commission with respect to Ameren's unreasonable and economically wasteful decision not to negotiate in good faith with the Cities with respect to selling existing street lighting fixtures. The Cities have approached Ameren about terminating service under the 5(M) Tariff, which provides rates for Ameren-owned fixtures.

Termination under the 5(M) Tariff requires the Cities to pay a \$100 removal fee per fixture, which would result in the Cities having to pay in excess of \$650,000 collectively. Ameren would then have more than 6500 unused fixtures. The Cities would then have to purchase more than 6500 new fixtures, so that they can avail themselves of Ameren's 6(M) Tariff for customer-owned fixtures. Instead of this wasteful process, the Cities wish for Ameren to sell the more than 6500 fixtures to the Cities at fair market value so that customers and taxpayers are not subjected to economic waste and avoidable increases in costs. Ameren has

steadfastly refused to negotiate with respect to the sale of the fixtures, despite the universal benefit that would result. Accordingly, the Cities have now sought the intervention of the Commission.

Argument

I. Count I

Ameren seeks dismissal of Count I, arguing that: (a) the Commission lacks jurisdiction; (b) the Complaint is not signed by the proper persons; (c) the Commission cannot require an involuntary conveyance; and (d) the Commission does not have jurisdiction over condemnation actions. For the reasons set forth herein, Ameren's arguments lack merit.

a. The Commission has jurisdiction over this matter.

Ameren avers that the Complaint falls outside the jurisdiction of the Commission, despite noting the very broad jurisdiction conferred upon the Commission by Section 386.390.1 RSMo. Section 386.390.1 RSMo in pertinent part states:

Complaint may be made by the commission of its own motion, or by the public counsel or any corporation or person, chamber of commerce, board of trade, or any civic, commercial, mercantile, traffic, agricultural or manufacturing association or organization, or any body politic or **municipal corporation**, by petition or complaint in writing, setting forth **any act or thing done or omitted to be done by any corporation, person or public utility**, including any rule, regulation or charge heretofore established or fixed by or for any corporation, person or public utility , **in violation, or claimed to be in violation, of any provision of law**

Section 386.390.1 RSMo (emphasis added).

The Complaint expressly references Section 393.130 RSMo, which in subsection 3 provides:

No gas corporation, **electrical corporation**, water corporation or sewer corporation **shall** make or grant any undue or unreasonable preference or advantage to any person, corporation or locality, or to any particular description of service in any respect whatsoever, or **subject any particular person,**

corporation or locality or any particular description of service to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

Section 393.130.3 RSMo (emphasis added).

The Complaint, therefore, alleges that Ameren has violated the prohibitions established by Section 393.130.3 RSMo, by refusing to negotiate in good faith with the Cities with respect to the sale of the light fixtures. Ameren instead is requiring that Cities terminate service, pay the termination fee, and then pay for new light fixtures, despite the fact that through the 5(M) Tariff the Cities have most likely already paid an amount in excess of the fair market value for the light fixtures.

Furthermore, the Complaint invokes the Commission's jurisdiction pursuant to Section 393.140(5) RSMo, which expressly authorizes the Commission to review Ameren's acts and, where such acts are unreasonable, determine and prescribe the just and reasonable acts and regulations to be done and observed. Pursuant to Section 393.150 RSMo, the Commission can:

(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**; 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.¹

¹ This final clause in the Statute, while inapplicable to the instant case, demonstrates the breadth of the Commission's authority with respect to regulating Ameren's property. The Commission may review the use of

Section 393.140(5) RSMo (emphasis added).

The Court in State ex rel. Laclede Gas Co. v. Public Service Commission, 600 S.W.2d 222, 228-229 (Mo. App. W.D. 1980), recognized that this Statute authorizes the Commission to “examine the methods, practices, regulation and property employed by public utilities.”

The Complaint in this action seeks to further the core purposes of the Commission, namely “to secure uniformity of operating conditions among similar carriers; to secure adequate and sustained service for the public at the least possible cost; to prevent economic waste that follows useless duplication of service; and to protect and conserve investments already made to furnish and maintain such public service.” State ex rel. National Trailer Convoy, Inc. v. Public Service Commission, 488 S.W.2d 942, 944-945 (Mo. App. W.D. 1972). The Complaint falls very much within the jurisdiction of the Commission.

- b. As the Cities are not challenging the reasonableness of a rate or charge, the Complaint need not be signed by the Mayor or other representative of the Cities.**

Section 386.390 RSMo only requires the signature of “the mayor or the president or chairman of the board of aldermen or a majority of the council, commission or other legislative body of any city, town, village or county” where the Complaint is attacking the reasonableness of a rate or charge. The Cities are not alleging that a rate or charge is unreasonable and as such this procedural requirement is inapplicable, and the Complaint is not deficient for lack of such signature. However, should the Commission determine that such signature is required, the Cities will file an amended Complaint.

- c. The Commission has the authority to review the manner in which Ameren utilizes its property.**

property, equipment and appliances and if it finds such use to be unsafe, insufficient or inadequate, the Commission shall determine and prescribe the safe, efficient and adequate property, equipment and appliances to be used. Implicit in this authority, is the Commission’s ability to require the cessation of use, removal, destruction, disposition and acquisition of property and equipment.

Ameren's 6(M) Tariff establishes the rates for customer owned street light fixtures. The Cities currently pay rates under Ameren's 5(M) Tariff, which are the applicable rates for Ameren-owned fixtures. The Cities have approached Ameren about terminating service under the 5(M) Tariff. In order to change to the 6(M) Tariff, the Cities must acquire the fixtures. This can be done in one of two ways: (1) pay Ameren the \$100.00 per lamp removal fee, as required by Tariff Sheet 58.5, and then purchase new fixtures for each location; or (2) the Cities could negotiate with Ameren to purchase the fixtures. Ameren has refused to negotiate with the Cities, which would compel the Cities to pay the removal fee and acquire new fixtures.

The economic waste and harm to customers is evident. The Cities, and therefore the residents, will be forced to bear unnecessary higher costs. Ameren relies upon State ex rel. Harline v. Public Service Commission, 343 S.W.2d 177 (Mo. App. W.D. 1960) in support of its position that the Commission cannot dictate how Ameren is to use its property. However, the Harline Court noted:

The utility's ownership of its business and property includes the right of control and management, subject, necessarily, to state regulation through the Public Service Commission. The powers of regulation delegated to the Commission are comprehensive and extend to every conceivable source of corporate malfeasance. Those powers 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, complies with lawful regulation and does no harm to public welfare.**"

Id. at 181-182 (emphasis added).

Therefore, Ameren's freedom to utilize its property cannot be wielded in a manner that harms the public welfare. Protection of the public welfare is the "dominating purpose in the creation of the Public Service Commission." Harline at 181. Ameren operates within a heavily regulated industry, and therefore, is subject to heightened regulations and greater constraints.

Further, as discussed above, pursuant to Section 393.140(5) RSMo the Commission is vested with power to examine Ameren's practices with respect to the sale of its fixtures, determine if its practices are just and reasonable, and if it concludes they are not, it "shall determine and prescribe" the just and reasonable acts. Therefore, the Commission may indeed order Ameren to negotiate to sell its property in the manner requested by the Cities.

d. This is not a condemnation action.

The Cities agree that the Commission would not have jurisdiction over a condemnation action. The Cities are not seeking to condemn any real property owned by Ameren, but are seeking to have Ameren negotiate in good faith with respect to the sale of light fixtures, which are chattel, based upon the Cities' wish to change to the customer-owned Tariff.

II. Count II

Ameren seeks dismissal of Count II of the Complaint on the basis that the Commission cannot approve a tariff requiring the condemnation of property, and that Count II is a collateral attack on the approved tariffs. Again, the Cities are not seeking any order of condemnation. Further the Cities are not attempting to collaterally attack the approved tariffs.

a. The Commission can investigate the procedures utilized by Ameren with respect to the disposition of Ameren's property.

As discussed above, the Commission is vested with broad powers to investigate the manner in which Ameren operates. *See* Section 393.140(5) RSMo. Further, the Commission is given broad investigatory powers pursuant to Section 386.210 RSMo. *See also* 393.150 RSMo. Ameren again contends that the Cities are seeking some form of condemnation, which is clearly not the case. The Commission has the authority to review existing practices and determine and consider whether revised tariffs, procedures or practices are required.

b. The Cities are not seeking to collaterally attack the applicable Tariffs.

Again as discussed above, the Cities are not attacking the rates or charges approved by the Commission. Instead they are seeking this Commission's review of the practices employed by Ameren, which are harmful to the public welfare. In support of its erroneous contention that the instant Complaint is a collateral attack on the previously approved tariffs, Ameren cites to Harline, *supra*.

Harline, and Section 386.550 RSMo, indeed stand for the proposition that "[i]n all collateral actions or proceedings the orders and decisions of the commission which have become final shall be conclusive." Harline at 184. In Harline, it was contended that an order entered in a prior case was not supported by substantial evidence and, therefore, was null and void. *Id.* at 184. The Court concluded that it could not review the Commission's prior order through a collateral proceeding. *Id.*

However, the instant proceeding is not a collateral attack on previously approved tariffs. Rather, it involves the Commission's ongoing power to review existing tariffs, policies and procedures, and if necessary revisit issues concerning the public interest. For instance, 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), 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. 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).

Similarly, the instant Complaint requests that the Commission review the present conditions, in light of Ameren's actions, and determine whether the public interest requires the Commission's intervention. The Cities are not attacking the validity of the Commission's order adopting the existing tariffs.

Accordingly, the instant action is not a collateral attack on the approved tariffs, but instead falls within the Commission's authority to continually review matters concerning the public interest.

III. Count III

Finally, Ameren seeks dismissal of Count III on the basis that the Commission lacks jurisdiction, which for the reasons set forth above in response to Count I is incorrect. Section 386.230 RSMo clearly authorizes the Commission to act as an arbitrator in this matter. However, the Cities acknowledge that Ameren must agree to any such arbitration.

Conclusion

For the reasons set forth herein, the Cities respectfully request that the Commission enter its Order denying Ameren's Motion to Dismiss.

Respectfully submitted,

CURTIS, HEINZ,
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CERTIFICATE OF SERVICE

A true and correct copy of the foregoing documents was either faxed, emailed, or mailed to the persons listed on the attached list on the 9th day of June, 2014

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