

BEFORE THE MISSOURI PUBLIC SERVICE COMMISSION

CITY OF O'FALLON, MISSOURI, and)	
CITY OF BALLWIN, MISSOURI,)	
)	
Complainants,)	File No. EC-2014-0316
)	
Vs.)	
)	
UNION ELECTRIC COMPANY)	
D/B/A AMEREN MISSOURI,)	
)	
Respondent.)	

**COMPLAINANTS' MEMORANDUM OF LAW IN RESPONSE TO STAFF'S
RESPONSE TO COMPLAINT AND AMEREN MISSOURI'S MOTION TO DISMISS**

COME NOW City of O'Fallon, Missouri and City of Ballwin, Missouri (collectively "Cities"), pursuant to 4 CSR 240-2.080(13), and for their memorandum of law in response to Staff's Response to Complaint and Ameren Missouri's Motion to Dismiss, state as follows:

Staff's Response incorrectly states:

"The Cities fail to state a claim upon which relief can be granted because their Complaint does not allege a violation of law, rule, order or decision of the Commission nor does it allege that the Company's rates or charges are unreasonable. The Cities also fail to state a claim upon which relief can be granted, because the Commission lacks the statutory authority to grant the relief requested."

The Cities' Complaint avers in its Jurisdictional Statement that the Commission has jurisdiction under Section 393.140 RSMo and 393.130 RSMO, among other authorities. Section 393.140 is entitled "General Powers of Commission in respect to gas, water, electric and sewer services". Section 393.140.5 provides, in pertinent 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,... the commission shall determine and prescribe ... the just and reasonable acts and regulations to be done and observed;” (emphasis added)

Count I of the Cities’ Complaint alleges that Ameren’s act of refusing to sell its street lights at fair market value to the Cities, after termination by the Cities pursuant to Paragraph 7 of Ameren’s Tariff Sheet No. 58.5, is “unreasonable, uneconomic and contrary to the public interest.”

The Cities’ Complaint alleges that Ameren’s acts are unreasonable and unjust under Section 393.140.5 and, therefore, properly invokes the statutory authority for the Commission’s jurisdiction and sufficiently states a claim upon which relief can be granted. The Commission’s jurisdiction is not limited solely to matters of direct violation of law and unreasonable rates, as Staff and Ameren contend.

In Count II of their Complaint, the Cities request that the Commission order Ameren to revise and amend Paragraph 7, entitled “Termination”, (sheet 58.5) of its 5(M) Company-owned Street Lighting Tariff to allow any Missouri municipalities, after ten years of street lighting service, the option of purchasing, at fair market value, in situ, the street lights within its city limits.

Section 393.140(5) RSMo expressly authorizes the Commission to review Ameren’s “acts and regulations” (e.g. tariffs) and, if it finds them to be unreasonable or unjust, “...prescribe...the just and reasonable acts or regulations to be done and observed...” The Commission has the authority and jurisdiction to do these things under the statute “on its own motion or upon complaint”. In their Complaint, the Cities have properly invoked the Commission’s jurisdiction and have sufficiently stated a claim (unreasonable and unjust acts by Ameren) upon which relief can be granted.

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 this 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 telephone companies objected to the Commission's order requiring the transfer of ownership of the embedded CPE to their customers on two grounds:

- 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 are willing to pay the remaining depreciated book value or fair market value for the transfer of the streetlights after ten years of payments.

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.

Ameren's Paragraph 7 (Sheet 58.5) provides:

“7. **Termination**

If customer requests in writing the termination of all or a portion of any lighting service, not paid for in advance, within three years of the installation of the lamps being terminated, or within ten years of the installation of post top luminaires, wood poles or cable being terminated, customer shall pay in advance to Company \$100.00 per lamp for both the removal costs associated therewith and the loss of the remaining life value of such facilities. If said request for termination of lighting service is made after the above three and ten year in-service periods, as applicable, and customer requests a new lighting installation within twelve months after the removal of the prior terminated lighting facilities, customer shall pay the amount specified earlier in this paragraph for all facilities previously removed prior to Company making any new lighting installation.”

Complainants aver that this tariff provision is unjust and unreasonable because it requires them to pay Ameren for the removal of street lights with the concomitant obligation, as stated by Ameren, to purchase and install new street lights if they want to continue street lighting under Ameren's 6(M) customer owned street lighting tariff. Under this Termination clause, Ameren would insist on removing and disposing of the terminated street lights, an economically absurd result, as opposed to the Cities paying Ameren fair market value for the street lights without Ameren having to remove them.

It would be akin to the independent telephone companies in the 1987 PSC case (Re: Detariffing of Embedded CPE, op cit.), telling their customers that they were going to come into houses and remove all of the Company-owned equipment for an additional fee

on top of years of charges and then if the customers wanted to continue receiving telephone service, the customers would have to purchase and install their own telephones and equipment after the companies had removed their CPE. Such a position would have been absurd, uneconomic, unjust and unreasonable then as it is now with Ameren's "Termination" tariff and stated policy. The Commission has jurisdiction to order Ameren to be reasonable and rewrite its "Termination" tariff so as to allow Cities, after ten years of service, to purchase the street lights at fair market value.

The Cities' Complaint meets applicable pleading standards under Section 536.063 RSMo. and State ex rel Chicago, Burlington & Quincy Railroad v. PSC, 334 SW2d 54, 58 (Mo 1960). The Complaint clearly identifies the issues, applicable law, and relief sought, and "fairly presents for determination some matter which falls within the jurisdiction of the Commission." However, if the Commission nonetheless applies a more stringent standard, then in turn it should also freely allow leave to clarify and amend the Complaint, as would be allowed in court under Rule 55.33.

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

Respectfully submitted,

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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 7th day of July, 2014

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