BEFORE THE PUBLIC SERVICE COMMISSION
STATE OF MISSOURI

Noranda Aluminum, Inc., et al.,	)	
	)	
Complainants,	)	
	)	
vs.	)	**Case No. EC-2014-0223**
	)	
Union Electric Company doing business	)	
As Ameren Missouri,	)	
	)	
Respondent.	)	

Staff's Response and Suggestions in Opposition to Ameren Missouri's Motion to Dismiss

COMES NOW the Staff of the Missouri Public Service Commission, by and through the Chief Staff Counsel, and for its *Response and Suggestions in Opposition to Ameren Missouri's Motion to Dismiss,* states as follows:

Introduction

Noranda Aluminum Company and thirty-seven other electric customers ("Complainants") of Ameren Missouri ("Ameren") filed their *Complaint* on February 12, 2014, alleging that Ameren's rates are no longer just and reasonable because Ameren is now earning more than the Return on Equity ("ROE") authorized by the Commission in Ameren's last rate case.[1] The Commission issued its *Notice of Complaint* on February 13, 2014, directing Ameren to file its *Answer* not later than March 17, 2014. On that day, Ameren filed its *Answer* as directed and also filed its *Motion to Dismiss,* asserting that the *Complaint* fails to state a claim upon which relief may be granted

[1] ***In the Matter of Ameren Missouri,*** Case No. ER-2012-0166 (***Report & Order,*** iss'd Dec. 12, 2012) p. 72: "After considering all the competent and substantial evidence presented on this issue, the Commission finds that an ROE of 9.8 percent is appropriate."

because, "accepting the well-pleaded factual allegations as true, the complaint nevertheless fails to establish that the complainant is entitled to the relief sought."[2] For that reason, Ameren asserts, the *Complaint* must be dismissed.

Ameren's *Motion to Dismiss*

In what way does Ameren claim the *Complaint* is deficient? First, because the *Complaint* alleges that Ameren over-earned in the past, but not in the present or future: "To properly state a claim, the Complaint would have to allege that Ameren Missouri's current rates are unjust or unreasonable in that Ameren Missouri is currently and will be in the future earning more than a fair and reasonable return at its current rates."[3] Second, because the *Complaint* is not based on an analysis of all relevant factors as required by Missouri law:

> Under ***State ex rel. Utility Consumers Council of Missouri v. Public Service Commission,*** 585 S.W.2d 41 (Mo. banc 1979), the appropriate level of rates must be determined based upon a consideration of all relevant factors. The justness or reasonableness of rates must be evaluated in a complaint case the same way they are evaluated in a general rate case: i.e., a reasonable test year must be established; all revenues, expenses, and investment during the test year must be matched and evaluated; and forward-looking evidence regarding a fair rate of return must be considered. But the Complaint here is not based upon that kind of analysis and therefore fails to state a claim upon which relief can be granted.[4]

Third and finally, "[t]he Complaint also fails to state a claim because it contains no

[2] *Ameren Missouri's Motion to Dismiss,* at pp. 1-2, citing ***Tari Christ v. Southwestern Bell Tele. Co. et al.,*** 2003 Mo. PSC LEXIS 37 (Case No. TC-2003-0066, ***Order Regarding Motions to Dismiss*****,** iss'd Jan. 9, 2003), *citing* ***Nazeri v. Missouri Valley College,*** 860 S.W.2d 303, 306 (Mo. banc 1993).

[3] *Id.,* at p. 2, ¶¶ 3-4; citing ***Straub v. Bowling Green Gas Co.,*** 360 Mo. 132, 141-142, 227 S.W.2d 666, 671 (1950): "The ultimate return to respondent as a result of the rate so fixed and subsequently charged and collected [will] necessarily vary from time to time. * * * 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."

[4] *Id.,* at pp. 2-3, ¶ 4.

allegation that there has been a substantial change in circumstances since Ameren Missouri's rates were last set, and therefore the Complaint constitutes an unlawful collateral attack on the Commission's prior rate order and on Ameren Missouri's current lawful and effective rate tariffs."[5] Such a collateral attack is barred by statute.[6]

Staff's Position

As shall be explained in detail below, Staff finds that the *Complaint* is sufficient under the applicable pleading rules, satisfies applicable statutory requirements and has successfully engaged the Commission's ratemaking power. For these reasons, Staff urges the Commission to deny Ameren's *Motion to Dismiss.*

What is the Applicable Standard?

A motion to dismiss for failure to state a claim tests only the legal sufficiency of the complaint.[7] All well-pleaded factual allegations in the complaint must be accepted as true and the facts must be liberally construed to support the complaint.[8] Complainants enjoy the benefit of all reasonable inferences.[9] The complaint should not be dismissed unless it shows no set of facts entitling the complainants to relief.[10]

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[5] *Id.,* at p. 3, ¶ 5; citing ***Christ,*** *supra,* which in turn relied on ***State ex rel. Licata v. Pub. Serv. Comm'n,*** 829 S.W.2d 515 (Mo. App., W.D. 1992) and ***State ex rel. Ozark Border Elec. Coop. v. Pub. Serv. Comm'n,*** 924 S.W.2d 597 (Mo. App., W.D. 1996).

[6] Section 386.550, RSMo.: "In all collateral actions or proceedings the orders and decisions of the commission which have become final shall be conclusive."

[7] For this discussion, *see* J.R. Devine, *Missouri Civil Pleading and Practice,* Section 20-3 (1986), and ***Christ et al. v. Southwestern Bell Telephone Co. et al.,*** 12 MoPSC3d 70, 79-86 (Jan. 9, 2003) (***Order Regarding Motions to Dismiss***), ***Christ,*** *supra,* Case No. TC-2003-0066 (***Order Denying Rehearing and Denying Complainants' Alternative Motion for Leave to Amend,*** iss'd Feb. 4, 2003) at pp. 4-7 (not published in MoPSC reports).

[8] ***Nazeri v. Missouri Valley College,*** 860 S.W.2d 303, 306 (Mo. banc 1993).

[9] *Id.*

[10] *Id.*

Complainants' Cause of Action

A general rate case in Missouri may be initiated in any of three ways, of which the most common is the "file-and-suspend" method in which a utility company files proposed tariffs calling for a general rate increase.[11] The other two ways are by complaint or by motion of the Commission.[12] The file-and-suspend method is so called because the Company files proposed tariffs calling for a general rate increase which the Commission may either allow to become effective or may suspend in order to allow time for proceedings to determine whether they are just and reasonable.[13] However a rate case is initiated, the Commission's obligation under the law is "to fix a rate which is just and reasonable both to the utility and to its customers" after consideration of "all relevant factors including all operating expenses and the utility's rate of return."[14]

Section 393.260.1, RSMo., authorizes the initiation of ratemaking by complaint:

> Upon the complaint in writing 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 within which the alleged violation occurred, or by not less than twenty-five consumers or purchasers, or prospective consumers or purchasers of such gas, electricity, water or sewer [service], as to the illuminating power, purity, pressure or price of gas, the efficiency of the electric incandescent lamp supply, the voltage of the current supplied for light, heat or power, or price of electricity sold and delivered in such municipality, or the purity, pressure or price of water or the adequacy, sanitation or price of sewer service, the commission shall investigate as to the cause of such complaint.[15]

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[11] For the file-and-suspend method, see generally ***State ex rel. Jackson County v. Public Service Commission,*** 532 S.W.2d 20 (Mo. banc 1975).

[12] ***State ex rel. Utility Consumers' Council of Missouri, Inc. v. Public Service Commission,*** 585 S.W.2d 41, 48 (Mo. banc 1979).

[13] *Id.*

[14] *Id.,* at 49.

[15] And see § 386.390.1, RSMo.

Is the *Complaint* Adequate?

Section 393.260.3, RSMo., provides that "[t] The form and contents of complaints made as provided in this section shall be prescribed by the commission." However, the Commission has not prescribed any requirements for a rate complaint other than that included in the statutes:

> No complaint shall be entertained by the commission, except upon its own motion, as to the reasonableness of any rates or charges of any public utility unless the complaint is signed by the public counsel, the mayor or the president or chairman of the board of aldermen or a majority of the council or other legislative body of any town, village, county, or other political subdivision, within which the alleged violation occurred, or not fewer than twenty-five (25) consumers or purchasers or prospective consumers or purchasers of public utility gas, electricity, water, sewer, or telephone service as provided by law.[16]

The *Complaint* herein at issue was made by 38 self-described customers, including Noranda, whose signatures and addresses are appended to the *Complaint* in satisfaction of the requirement of § 393.260.3, RSMo.: "[s]uch complaints shall be signed by the officers, or by the customers, purchasers or subscribers making them, who must add to their signatures their places of residence, by street and number, if any." Ameren has not challenged the sufficiency of these signatures and it is apparent that Complainants have satisfied this requirement, elsewhere described by the Commission as "the perfection of the complaint."[17]

Is the *Complaint* sufficient to state a cause of action under § 386.260.1, RSMo.? "[A] complaint under the Public Service Commission Law is not to be tested by the technical rules of pleading; if it fairly presents for determination some matter which falls

[16] Commission Rule 4 CSR 240-2.070(5).

[17] *See* ***Christ,*** *supra,* 12 MoPSC3d at 85.

within the jurisdiction of the Commission, it is sufficient."[18] The Commission has explained the meaning of this sentence:

> The rule of ***Kansas City Terminal Railway*** does not stand for the proposition that complaints filed with this Commission need not meet any pleading requirements nor that they are immune from dismissal for insufficiency. Rather, the case means that the factual allegations of an administrative complaint are generally to be judged against the standard of notice pleading rather than the stricter standard of fact pleading. The Eastern District of the Missouri Court of Appeals has said the same thing:
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> > On appeal, petitioner contends that the charges stated for his dismissal in the letter from Chief Heberer were vague and indefinite. In support of this argument, however, he relies upon cases pertaining to criminal indictments and civil pleadings. These cases obviously deal with judicial proceedings, and they are not controlling in administrative proceedings. The charges made against a public employee in an administrative proceeding, while they must be stated specifically and with substantial certainty, do not require the technical precision of a criminal indictment or information. It is sufficient that the charges fairly apprise the officer of the offense for which his removal is sought.[19]

The *Complaint* herein identifies the thirty-eight Complainants as present customers of Ameren and states that it is brought under the authority of § 393.260.1, RSMo.[20] It alleges that Ameren's rates are "now unjust and unreasonable" and supports that conclusory allegation with specific factual allegations to the effect that (1) Ameren is earning well in excess of its authorized rate of return on equity ("ROE") of 9.80 percent and (2) "[c]ompelling evidence shows that the authorized rate of return on

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[18] ***St. ex rel. Kansas City Terminal Railway Co. v. Public Service Commission,*** 308 Mo. 359, 372, 272 S.W. 957, 960 (banc 1925).

[19] ***Christ,*** *supra,* Case No. TC-2003-0066 (***Order Denying Rehearing and Denying Complainants' Alternative Motion for Leave to Amend,*** iss'd Feb. 4, 2003) at pp. 5-6 (not published in MoPSC reports), quoting ***Sorbello v. City of Maplewood,*** 610 S.W.2d 375, 376 (Mo. App., E.D. 1980), and citing to ***Schrewe v. Sanders,*** 498 S.W.2d 775, 777 (Mo. 1973); *and see* ***Giessow v. Litz,*** 558 S.W.2d 742, 749 (Mo. App.1977).

[20] *Complaint,* ¶¶ 1-10.

equity should now in fact be 9.40 percent."[21] The *Complaint* refers to the prefiled direct testimony of two experts well-known to the Commission whose opinions support the *Complaint.*[22]

The *Complaint* goes on to recite the evidence available concerning Ameren's financial performance, including its Actual Earned Return on Equity, the adjustments, annualizations and normalizations made in analyzing Ameren's performance, and the result of that analysis, namely, that Ameren is overearning and that its rates, consequently, are no longer just and reasonable.[23] Complainants further allege that Ameren is likely to continue to overearn in the future.[24] As relief, the *Complaint* prays that the Commission give notice to Ameren as required by statute, "conduct whatever investigation or hearings it deems appropriate and required by law, and revise Ameren Missouri's electric rates to just and reasonable electric rates consistent with its cost of service and revenues."[25]

Staff believes that the *Complaint* meets the pleading requirements of ***Kansas City Terminal Railway.*** It "fairly apprises" Ameren Missouri of the nature of the action brought by Complainants and states "specifically and with substantial certainty" the factual predicate that supports it.[26] Section 393.260.1, RSMo., requires no allegation other than that the price charged by the utility for its service is not just and reasonable.

Ameren also asserts that the *Complaint* is barred by § 386.550, RSMo., "[i]n all

[21] *Id.,* at ¶ 11.

[22] Greg Meyer and Michael P. Gorman.

[23] *Complaint,* ¶¶ 12-17.

[24] *Id.,* ¶ 18.

[25] *Id.,* at p. 7.

[26] *See* ***Christ,*** *supra,* relying on ***Sorbello,*** *supra.*

collateral actions or proceedings the orders and decisions of the commission which have become final shall be conclusive," as a collateral attack on the Commission's *Report & Order* in Ameren's most recent rate case.[27] The Commission has addressed this issue:

> Missouri Courts have read Section 386.390.1 together with Section 386.550, which provides that "[i]n all collateral actions or proceedings the orders and decisions of the commission which have become final shall be conclusive." In ***State ex rel. Licata v. Public Service Commission of the State of Missouri,***[28] the Western District held that Section 386.550 barred a complaint challenging as unlawful a utility company rule that had been approved by the Commission. In its transfer application, the Relator complained that the Court had deprived it of the right of complaint granted in Section 386.390.1. The ***Licata*** Court explained that this contention was erroneous: Section 386.390.1 authorizes complaints alleging violations of Commission orders, while Section 386.550 bars complaints attacking Commission orders. The Court explained, "Section 386.390 and Section 386.550 are not in conflict but address separate problems."[29] In a second case, ***State ex rel. Ozark Border Electric Cooperative v. Public Service Commission of Missouri,***[30] the Western District held that a complaint brought under Section 394.312.6, which authorizes complaints attacking territorial agreements previously approved by the Commission, must include an allegation of a substantial change in circumstances in order to avoid the bar imposed by Section 386.550, despite the fact that Section 394.312 does not expressly require such an allegation.[31] Reading ***Licata*** and ***Ozark Border*** together, it is clear that a complaint seeking to re-examine any matter already determined by the Commission must include an allegation of a substantial change of circumstances; otherwise, Section 386.550 bars the complaint.[32]

Section 386.550, RSMo., is no help to Ameren. The *Complaint* clearly asserts

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[27] ***In the Matter of Ameren Missouri,*** Case No. ER-2012-0166 (***Report & Order,*** iss'd Dec. 12, 2012).

[28] 829 S.W.2d 515 (Mo. App., W.D. 1992).

[29] ***Licata,*** *supra,* 829 S.W.2d at 519.

[30] 924 S.W.2d 597 (Mo. App., W.D. 1996).

[31] 924 S.W.2d at 6001-601.

[32] ***Christ,*** *supra,* 12 MoPSC3d at 82-3.

that Ameren's rates are "now unjust and unreasonable."[33] It cites factual support and expert opinion *subsequent* to Case No. ER-2012-0166. Giving Complainants the benefit of all reasonable inferences and liberally construing the allegations of the *Complaint,* it is clear that the Complainants have pleaded a significant change of circumstances since Case No. ER-2012-0166 was decided.[34]

Conclusion

Staff urges the Commission to deny Ameren's *Motion to Dismiss* because, when considered under the applicable standard, the *Complaint* has met all statutory and other requirements necessary to engage the Commission's ratemaking authority under § 393.260.1, RSMo.

WHEREFORE, Staff prays that the Commission will deny Ameren's *Motion to Dismiss* and enter upon proceedings by which, after consideration of all relevant factors, it will fix just and reasonable rates for electric service by Ameren; and grant such other and further relief as is just in the circumstances.

Respectfully submitted,

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[33] *Complaint,* ¶ 11.

[34] ***Nazeri,*** *supra,* 860 S.W.2d at 306.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served, either electronically or by hand delivery or by First Class United States Mail, postage prepaid, on this **26th day of March, 2014,** on the parties of record as set out on the official Service List maintained by the Data Center of the Missouri Public Service Commission for this case.

/s/ Kevin A. Thompson