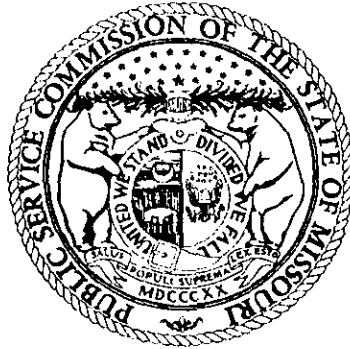


**BEFORE THE PUBLIC SERVICE COMMISSION  
OF THE STATE OF MISSOURI**



Deaconess Manor Association, a Missouri )  
Not-For-Profit Corporation, )  
d/b/a Orchard House, 21 North Old Orchard )  
Avenue, St. Louis, Missouri 63119, )

Complainant, )

v. )

Union Electric Company, 1901 Chouteau )  
Avenue, St. Louis, Missouri 63103, )

Respondent. )

Case No. EC-96-255

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**REPORT AND ORDER**

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**Issue Date:** August 8, 1997

**Effective Date:** August 19, 1997

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Union Electric Company, 1901 Chouteau )  
Avenue, St. Louis, Missouri 63103, )  
 )  
Respondent. )  
 )

**APPEARANCES**

Paul H. Gardner, Goller, Gardner and Feather, P.C., 131 East High Street, Jefferson City, Missouri 65101, for Deaconess Manor Association, d/b/a Orchard House.

William J. Niehoff, Attorney, and James J. Cook, Associate General Counsel, Union Electric Company, 1901 Chouteau Avenue, Post Office Box 149, St. Louis, Missouri 63166, for Union Electric Company.

Lewis R. Mills, Jr., Deputy Public Counsel, and Douglas E. Micheel, Senior Public Counsel, Office of the Public Counsel, Post Office Box 7800, Jefferson City, Missouri 65102, for the Office of the Public Counsel and the public.

Jeffrey A. Keevil, Deputy General Counsel, Missouri Public Counsel, Post Office Box 360, Jefferson City, Missouri 65102, for the staff of the Missouri Public Service Commission.

**ADMINISTRATIVE**

**LAW JUDGE:** Thomas H. Luckenbill, Deputy Chief.

**REPORT AND ORDER**

On February 6, 1996, Deaconess Manor Association, d/b/a Orchard House (Complainant or Orchard House) filed a complaint against

Union Electric Company (Respondent or UE). The complaint is made under Section 386.390<sup>1</sup> and 4 CSR 240-2.070.

The complaint contains two separate counts. First, Orchard House contends that UE's application of the Residential Service Rate Classification 1(M) to Orchard House violated Section 393.140(11). Section 393.140(11) provides that regulated utilities may not charge more than the charges to which they are entitled under their tariffs. Second, Orchard House contends that UE violated Section 393.130 by unlawfully discriminating against Complainant. UE is an electric corporation and public utility under Sections 386.020(15) and (42), RSMo Supp. 1996, and thus is subject to the Commission's jurisdiction.

### **Findings of Fact**

The Missouri Public Service Commission, having considered all of the competent and substantial evidence upon the whole record, makes the following findings of fact.

Orchard House is a retirement facility located at 21 North Old Orchard Avenue, Webster Groves, Missouri. (Ex. 2, p. 1). Orchard House is a component of Deaconess Manor Association, a Section 501(c)(3) Missouri not-for-profit corporation which is fully owned by Deaconess Incarnate Word Health System. (Ex. 4, p. 2). Prior to July, 1993, Orchard House was owned by a partnership consisting of Deaconess Hospital (45 percent ownership), Taylor, Morley and Simon, Inc. (Taylor-Morley-Simon) (45 percent ownership), and a corporation owned by architect Dave Sanders (10 percent ownership). (Tr. 47).

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<sup>1</sup> All statutory references are to the Revised Statutes of Missouri 1994, unless otherwise indicated.

Orchard House opened on August 7, 1989. (Ex. 4, p. 3). There are currently 170 living units at the Orchard House facility. (*Id.*) The units vary in size and configuration, ranging from one-bedroom, 600 square feet, to a two-bedroom, 1,090 square feet expanded living unit. (Ex. 4, pp. 3-4, Sch. B). The basic Orchard House Residency Agreement calls for payment of an initial entrance fee that assures a resident of a place to live as long as the resident is able to live independently and comply with the terms of the Residency Agreement. Residents also pay a monthly fee which covers the expense of utilities (except telephone), maintenance of apartments and public areas, security, and other services. Orchard House has been managed by Life Care Services Corporation (LCS) since October of 1991. LCS is headquartered in Des Moines, Iowa and specializes in the development and management of retirement communities throughout the United States.

Orchard House consists of three interconnected structures designated as Buildings A, B and C. Building A contains 92 dwelling units with electric cooking, electric clothes dryer, laundry circuit, and individual heat pump air conditioning units interconnected to a central system gas boiler and cooling tower by a central water loop. Building A also contains some common areas, including offices and a restaurant. Building A receives electric service through two meters: one meter for the restaurant and one meter for the 92 dwelling units.

Building B contains 79 dwelling units. Building B has one meter for the 79 dwelling units. Building C consists of general office space. The billing of electric service provided to Building C is not in dispute in this case.

Complainant's first allegation is that UE's application of its Residential Service Classification 1(M) to Orchard House Buildings A and

B from the inception of service in August of 1989 until October of 1995 constituted a violation of Section 393.140(11). Complainant argues that UE's rate for Large General Service (LGS) customers is the appropriate rate schedule.

The Commission finds that the application of UE's Residential Service Rate Classification 1(M) to Orchard House Buildings A and B from the inception of service in August of 1989 until October of 1995 did not constitute a violation of Sections 393.140(11), 386.390 or 393.130.

Section 393.140(11) provides: "No corporation shall charge, demand, collect or receive a greater or less or different compensation for any service rendered or to be rendered than the rates and charges applicable to such services as specified in its schedule filed and in effect at the time; . . . ."

UE's Residential Service Rate Classification 1(M) provides, in pertinent part:

1. Rate Application. This rate is applicable to all normal residential service supplied directly by Company for:

. . . . .

b. Apartments. A separately metered individual flat or apartment unit used as the home, residence or sleeping place of one or more persons. Also, for buildings constructed before June 1, 1981, a multiple occupancy building of such units where service is delivered and metered at one point or one at which service is delivered at more than one point for valid engineering reasons. The billing provisions for single metered multiple occupancy residential buildings are as provided in paragraph 4.

. . . . .

4. Single-Metered Multiple-Occupancy Residential Buildings. This paragraph applies only to buildings constructed and served under this provision prior to June 1, 1981. The total monthly bill to each such building to which service is delivered and metered at one

point shall be equal to the total number of dwelling units therein multiplied by the bill per dwelling unit, which bill per dwelling unit shall be calculated by applying the Residential Service Rate to the average kilowatthour use per dwelling unit (equal to the total building use divided by the number of dwelling units, rounded to the nearest kilowatthour). Electrical use for common building services such as hall lights, elevators and laundry areas used exclusively by tenants may be metered and billed through the main building meter. Use for restaurants, arcade shops, retail stores, office space, or any other commercial venture must be separately metered and billed on the appropriate General Service or Primary Service Rate.

(Ex. 10, Sch. 1).

Paragraph 4 by its own language applies only to buildings constructed prior to June 1, 1981. The buildings which are the subject of this complaint were constructed in the late 1980s and, thus, paragraph 4 has no relevance to this matter.

The relevant language from Residential Service Rate Classification 1(M) is the first sentence under the definition of apartments which states: "A separately metered individual flat or apartment unit used as the home, residence or sleeping place of one or more persons."

The Complainant's argument is that since the units in Buildings A and B are not separately metered, then UE's Residential Service Rate Classification 1(M) cannot apply and, thus, another rate such as the LGS Commercial rate must apply. UE defends its actions, contending that Orchard House agreed to the Residential rate and that the Commission thereafter issued a waiver permitting such rate.

UE's evidence shows that Orchard House's developer did not want to incur the expense of purchasing and installing meters in every apartment in Buildings A and B. According to UE, Orchard House understood that if only one meter was installed in each of these two buildings to measure electric service to the apartments, UE's Residential rate would be used.

The testimony provided by Orchard House's consultant on the project, Jerome Kovac, does not firmly indicate that he discussed the Residential and other rates with UE. However, Mr. Kovac was clear that Orchard House wanted to avoid the substantial up-front costs of installing and maintaining individual meters in each apartment. The documentary evidence in the record supports this conclusion.

Staff's position is that retirement complexes can be classified under a Residential or LGS rate and that UE's tariff is ambiguous on this point. (Ex. 12, p. 19). Staff maintains that the controlling issue is whether UE offered Orchard House appropriate choices. Staff witness Ketter testified that he was aware of Complainant's request for a waiver from the requirement to install single unit meters and that it was his understanding that the Residential tariff would apply. (Ex. 8, p. 32). Staff's recommendation to the official case file in the waiver proceeding, set forth in the Commission's Order Granting Variance, stated that the developer had estimated the additional cost of individual meters to be \$300 per apartment. See In re Union Elec. Co. Variance for Orchard House Retirement Apartments, No. EO-89-7 (Mo. P.S.C. Sept. 2, 1988). With 171 apartments in Buildings A and B, the cost of the meters alone would exceed \$50,000.

An important issue is whether Orchard House was given a choice regarding its rate classification. The Complainant failed to prove that it was not given a choice. The Complainant's witness, Bobby Jo Haden, had no knowledge of the events of 1987 and 1988. (Tr. 23). Ms. Haden was not employed by Orchard House until October 27, 1991 and readily admitted she had no firsthand knowledge of the content of the discussions between Orchard House and UE in 1987 and 1988. (Tr. 22). She did not have any

input on decisions pertaining to metering or rate structuring when the waiver was requested. (Tr. 23).

The Commission is not persuaded by Complainant's argument. The Commission finds that UE should not be held to such a strict constructionist view of this tariff provision because UE obtained a waiver from the Commission of the separate metering requirement. This waiver request was instigated by Taylor-Morley-Simon, one of the three partners involved in the design and construction of Complainant's facilities. Taylor-Morley-Simon insisted that the project have four meters with the residential usage segregated from the commercial usage. The use of four meters rather than at least 176 meters undoubtedly saved the developers a significant amount of money. The application for waiver of the single-meter requirement referred to the usage as residential. If UE had known that the waiver of the single-meter requirement would mean that the commercial rate would apply, then UE may not have agreed to support the waiver request. It would be fundamentally unfair to construe the language of tariff 1(M) against UE and indirectly against UE's other ratepayers in light of the background leading up to the construction of these buildings.

### **Conclusions of Law**

The Missouri Public Service Commission has arrived at the following conclusions of law.

The Commission has jurisdiction regarding this matter under 386.390, RSMo, which provides that a complaint may be made by any corporation or person, by complaint in writing, setting forth any act or thing done or omitted to be done by a public utility, including any charge fixed by a public utility, claimed to be in violation of law or any rule

or decision of the Commission. In this case, Complainant alleges that Respondent misapplied its rate schedules and engaged in unlawful discrimination.

When a public utility has two approved rates of service and renders service to a consumer charging the higher rate, the consumer may file a complaint with the Public Service Commission to determine the proper rate classification. State ex rel. Kansas City Power & Light Co. v. Buzard, 168 S.W.2d 1044, 1046.

Under the circumstances presented in this case, UE's application of the Multiple-Occupancy Residential (007) rate to Complainant's buildings is permitted and did not constitute charges in excess of those allowed by law, order or decision by the Commission. Section 393.130.1.

In instances wherein a complainant alleges that a regulated utility is violating the law, its own tariff, or is otherwise engaging in unjust or unreasonable actions, the burden of proof at hearing rests with complainant. Sheldon Margulis v. Union Electric Co., 30 Mo. P.S.C. (N.S.) 517, 523 (1991).

The Commission concludes that Complainant Deaconess Manor Association, d/b/a Orchard House, has not, for the reasons stated in the findings of fact, successfully discharged its burden of proof against Respondent Union Electric Company.

**IT IS THEREFORE ORDERED:**

1. That the complaint filed by Deaconess Manor Association, d/b/a Orchard House, on February 6, 1996 is hereby dismissed.
2. That any motions or objections made in this case and still pending are hereby denied or overruled.

3. That this Report And Order shall become effective on the 19th day of August, 1997.

BY THE COMMISSION



Cecil I. Wright  
Executive Secretary

( S E A L )

Crumpton, Drainer, Murray and Lumpe, CC., concur and certify compliance with the provisions of Section 536.080, RSMo 1994. Zobrist, Chm., absent.

Dated at Jefferson City, Missouri, on this 8th day of August, 1997.