BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

Patricia Schuba and Deane Todd, Complainants,	)	
	)	File No. EC-2014-0342
v.	)	
Union Electric Company, d/b/a Ameren Missouri, Respondent.	)	

MEMORANDUM IN SUPPORT OF AMEREN MISSOURI'S
MOTION FOR SUMMARY DISPOSITION

The Commission's summary disposition rule is intended to promote efficient resolution of matters where there is no genuine dispute as to any material fact. The standard for granting a motion for summary disposition is set forth in 4 CSR 240-2.117(1)(E), which states:

> The commission may grant the motion for summary determination if the pleadings, testimony, discovery, affidavits, and memoranda on file show that there is no genuine issue as to any material fact, that any party is entitled to relief as a matter of law as to all or any part of the case, and the commission determines that it is in the public interest.

The Commission has recognized that "[t]he time and cost to hold hearings on [a] matter when there is no genuine issue as to any material fact would be contrary to the public interest." *Determination on the Pleadings*, issued in Case No. EU-2005-0041 (In the Matter of the Application of Aquila Inc. for an Accounting Authority Order Concerning Fuel Purchases) on October 7, 2004.

In this case, the Complaint is nothing more than a collateral attack on final orders of this Commission. Because there are no genuine disputes of fact and because such collateral attacks are barred by Section 386.550[1], Ameren Missouri is entitled to summary disposition in its favor.

[1] Statutory references are to the Revised Statutes of Missouri (2000), unless otherwise noted.

Complainants claim that the Commission has jurisdiction over their complaint alleging "a utility's violation of a law" because of Section 386.390, the statute authorizing the filing of general complaints alleging violations of Commission's orders. The Complaint itself reveals a different attack altogether—not directed at Ameren Missouri but against this Commission and its final and effective orders that specifically authorize Ameren Missouri to cease paying rebates once the rebate pool is exhausted. Specifically, the Complaint is an attack on the lawfulness of the Commission's orders in File No. ET-2014-0085, including its December 12, 2013 *Order Approving Tariff and Granting Variance*[2] because the heart of the Complaint rests on the Complainants' allegations that:

- " . . . *the Commission* did not make the required determination that the one percent retail rate impact would be reached . . ." [¶ 11]

- "*The Commission* did not make a final determination of whether Respondent would meet or exceed the one percent cap within 60 days of Ameren Missouri's October 11, 2013 filing to suspend payment of rebates." [¶ 13]

- "In the present case, *the Commission* has made no finding that a Missouri utility has reached or will reach the one percent retail rate impact. In Case No. ET-2014-0085, *the Commission's* approval of the Non-Unanimous Stipulation and Agreement contained no statement as to whether Respondent would reach the retail rate impact limit within 60 days of its filing." [¶ 16]

- "To date, *the Commission* has made no finding that Respondent Ameren Missouri has reached or will reach the RES' once percent retail impact limit, either for the year 2013 or for any future year."[¶ 24]

[2] Complainants actually refer to the Commission's November 13, 2013 *Order Approving Stipulation and Agreement* in File No. ET-2014-0085; however, it is the order approving the tariff in that case that authorizes Ameren Missouri to deny Complainants' applications for solar rebates. It makes no difference to the end result, however; the legal effect of Section 386.550 bars Complainants' collateral attack on *any* of the final orders from that case, as explained in this Memorandum.

(emphasis added). Complainants are barred by statute from using Section 386.390 to wage a collateral attack on any of the Commission's orders issued in File No. ET-2014-0085. As a result, Ameren Missouri is entitled to summary disposition in its favor.

Commission orders remain in force and are "prima facie lawful and reasonable until found otherwise in a suit brought for that purpose pursuant to the provisions of [Chapter 386]." Section 386.270; *State ex rel. Pub. Counsel v. Pub. Serv. Comm'n*, 210 S.W.3d 344, 350 (Mo. App. W.D. 2006). Section 386.500 requires an application for rehearing of any order before a "cause or action" may be brought challenging a Commission order. And Section 386.510 "provides the exclusive procedure for judicial review of *all* of the [C]ommission's orders." 210 S.W.3d at 350 (emphasis in original). No one sought rehearing of either the *Order Approving Stipulation and Agreement* nor the *Order Approving Tariff and Granting Variance* in File No. ET-2014-0085 and, consequently, no one sought judicial review of either order. The time to seek judicial review has long since passed, and all of the Commission's orders in File No. ET-2014-0085 are no longer just *presumed* lawful and reasonable -- they *are* lawful and reasonable and are final.

The fact that these orders are final is significant and renders the orders totally immune from attack. Section 386.550 provides that "[i]n all collateral actions or proceedings the orders and decisions of the commission which have become final shall be conclusive." In other words, Commission orders on matters properly within its jurisdiction are not subject to collateral attack by anyone – whether or not a party to the underlying case giving rise to the orders. *State ex rel. Harline v. Pub. Serv. Comm'n*, 343 S.W.2d 177, 184 (Mo. App. W.D. 1960) ("Where a judgment is attacked in other ways than by the proceedings in the original action to have it vacated or reversed or modified or by a proceeding in equity to prevent its enforcement, the attack is a

'collateral attack.'"); *State ex rel. Fischer v. Pub. Serv. Comm'n,* 670 S.W.2d 24, 26 (Mo. App. W.D. 1984), *citing Flanary v. Rowlett,* 612 S.W.2d 47, 49 (Mo. App. W.D. 1981).

The complaint in this action is just such a collateral attack on a final Commission order. The basis for Complainants' complaint against *Ameren Missouri* is founded upon their argument that the *Commission orders* in File No. ET-2014-0085, including the order approving the tariff which authorizes Ameren Missouri to deny Complainants' rebate applications, are deficient in that the Commission failed to make certain findings of fact that Complainants contend must be made. This claim is one that can only be raised in direct review of that order. Because there was no motion for rehearing filed pursuant to Section 386.500 and no appellate review was sought under Section 386.510, Complainants' claim cannot be heard in this collateral proceeding by virtue of Section 386.550, RSMo. *See State ex rel. Mid-Missouri Tel. Co. v. Pub. Serv. Comm'n*, 867 S.W.2d 561, 564-565 (Mo. App. W.D. 1993) (applying Section 386.550 to bar a collateral action challenging certain Commission orders approving a new policy for charges for telephone calls between telephone exchanges by asserting that the underlying Commission orders "did not allege, find, or contain evidence that any of appellants' existing rates, services, or revenues are excessive, unreasonable or unlawful, and also failed to consider any relevant financial factors."). Consequently, Complainants' view of the particular sufficiency of orders in File No. ET-2014-0085 is irrelevant to the applicability of Section 386.550.

Complainants' attempt to hide the true nature of this attack by framing it as an attack against Ameren Missouri rather than a Commission order simply won't work. In *State ex rel. Licata, Inc. v. Pub. Serv. Comm'n*, 829 S.W.2d 515 (Mo. App. W.D. 1992), the complainant attempted to avoid the statutory bar found in Section 386.550. by framing its complaint, filed under Section 386.390, as a constitutional attack on the utility, and more specifically, on a

"utility rule" found in a tariff rather than an attack on the order of the Commission approving that tariff. The Western District Court of Appeals rejected this attempt to distinguish the utility's tariff from the Commission order authorizing the tariff as illusory:

> Licata contends that it is not attacking the order which the Commission made in 1985, but is simply attacking a utility rule approved by the Commission. Licata contends that the utility rule, Article 10, is not the order of the Commission but is simply a utility rule. However, Licata fails to note that the only purpose of the order of the Commission in 1985 was the approval of Article 10. Thus, it is impossible to separate Article 10 from the order of the Commission. When Licata attacks Article 10, it must necessarily attack the order which enabled KPL to adopt and enforce Article 10. By § 386.550, Licata cannot collaterally attack the order of the Commission by which Article 10 was adopted. For that reason Licata may not in this proceeding attack Article 10 but is bound by the requirements of Article 10.

829 S.W.2d at 518. Finding that Licata's attack on a provision in the tariff was an attack on the order itself, the appellate court affirmed the Commission's dismissal of Licata's complaint. *Id.* at 518-19; *see also State ex rel. MoGas Pipeline LLC v. Pub. Serv. Comm'n*, 395 S.W.3d 562, 567 (Mo. App. W.D. 2013) (rejecting MoGas' effort to avoid the collateral attack bar of Section 386.550 based on MoGas' argument that it sought only to limit the authority of a Commission order rather than attack its validity because MoGas's complaint clearly demonstrated otherwise). Similarly, the Commission must reject Complainants' attempt to evade the bar of Section 386.550.

The fact that Complainants were not parties to File No. ET-2014-0085 is irrelevant under Section 386.550. The statutory bar against collateral attacks is so comprehensive it bars a party from attacking in a later action a Commission order regardless of whether that party participated in the original Commission proceeding or had any notice of it. *Harline*, 343 S.W.2d at 184 (collateral attack bar applies even if a party chose not to seek review); *Licata*, 829 S.W.2d 515 (Licata's attack on tariff in subsequent action barred by Section 386.550 even though he was not

a party in the tariff proceeding at all). In other words, unlike such common law doctrines as collateral estoppel and res judicata, Section 386.550 applies to bar any complainant—whether or not it was a party in the prior proceeding or has any relationship with any party in the prior proceeding—from collaterally attacking a Commission order.[3]

Allowing the lawfulness of Ameren Missouri's tariff to be challenged at any point after a Commission order has become final would allow multiple chances for attacks on Commission orders, and such a rule could result in "potentially endless litigation." *MoGas Pipeline*, 395 S.W.3d at 568. The General Assembly foreclosed the opportunity for multiple attacks through Section 386.550. The order approving Ameren Missouri's tariff (as well as the order approving the stipulation) is final, conclusive, and binding and, consequently, cannot be attacked in a collateral proceeding. Under that order Ameren Missouri is allowed—indeed, is *required*—to cease paying rebates once it exhausts the Rebate Pool. There are no genuine issues of material fact and the complaint in this case is barred by Section 386.550; consequently, Ameren Missouri is entitled to summary disposition in its favor.

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[3] It is worth noting that Complainants could have filed an application for rehearing and appealed the Commission orders in File No. ET-2014-0085 even though they were not parties to that case.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 13th day of November, 2014, served the foregoing document either by electronic means, or by U. S. Mail, postage prepaid addressed to all parties of record.

/s/ James B. Lowery
James B. Lowery