BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

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

AMICUS CURIAE BRIEF OF UNITED FOR MISSOURI

Introduction

On February 12, 2014, Noranda Aluminum, Inc. ("Noranda") and 37 individual customers ("Complainants") of Union Electric Company, d/b/a Ameren Missouri ("Ameren Missouri") filed a complaint with the Missouri Public Service Commission ("Commission"), alleging that Ameren Missouri's rates are no longer just and reasonable because Ameren Missouri is earning in excess of its Commission-approved Return on Equity. The Complaint prayed that the Commission "revise Ameren Missouri's electric rates to just and reasonable electric rates consistent with its cost of service and revenues."

The Staff of the Commission ("Staff") provided a preliminary yet lucid road map for the Commission of the proceedings in this case in its "Staff's Response to Complainant's Motion to Set Test year and True-up," filed May 2, 2014 ("Staff's Response"). Citing § 393.260.1, RSMo., Staff's Response opined that the Commission was obligated to investigate the cause of the Compliant. Section 393.260.2 RSMo. That investigation is within the discretion of the Commission. "The Commission may either conduct a limited investigation, with the aim of determining whether or not the allegations of the Complaint are true, or the Commission may

conduct a full investigation in order to determine just and reasonable prospective rates for the service in question. In the latter case, the Commission must consider all relevant factors . . . ." See Staff's Response, p. 3. The Staff concluded that, based on the procedural schedule suggested by the Complainants, the Commission had determined to conduct a limited investigation.

The record is quite clear that the Complainants have not completed or presented a "comprehensive cost of service study"[1] in this case. Complainants' Witness Meyer admitted that neither he nor many complainants are capable of completing a cost of service study as can be conducted by the Staff.[2] The record is replete with the inadequacies in the Complainants' case as compared to such a "comprehensive cost of service study." UFM will not belabor that point. UFM will leave it to Ameren Missouri and Staff to highlight the deficiencies. UFM makes the point merely to highlight the issue it wishes to address in this brief, that granting relief without requiring the Complainants to carry their burden of proof is reversible error.

The hearing now having concluded, the Commission stands at the decision point suggested in Staff's Response. The initial question for the Commission is, have the proceedings in this case up to this point been an adequate "full investigation" in order to set new rates for Ameren Missouri? As the question was cast in the hearing, must a complaint conduct a "comprehensive cost of service study" in order to carry its burden of proof?[3] To this latter question, Complainants' witness Meyer suggests not. He opined that the Commission has the authority to vary that policy.[4] United for Missouri ("UFM") disagrees with Mr. Meyer. This question is of vital concern to UFM because it speaks to the Commission's fulfillment of its

[1] See discussion at page 218, Vol. 2 of the Transcript.
[2] Transcript, Vol. 2, p. 219.
[3] Id.
[4] Id.

responsibility under Missouri law. Will the Commission grant to certain select Complainants the ability to come before it and persuade it to set rates on less than a full record presenting all relevant factors?

It is UFM's position that the Commission may not set new rates based upon the record in this case for three reasons. First, for the Commission to set new electric rates on the existing record would be unlawful in that it would be contrary to its statutory obligation to set just and reasonable rates based on all relevant factors. Second, for the Commission to set new electric rates on the existing record would be arbitrary and capricious in that it would be tantamount to giving certain parties special treatment in rate case proceedings. And third, for the Commission to set new electric rates on less than a complete record based on all relevant factors would send the wrong signal to investors, i.e. that investment in electric services in this state is not respected by the Commission, creating a disincentive to such investments.

Argument

At the outset, UFM recognizes that phrase "comprehensive cost of service study" is ambiguous relative to the burden of proof in this case. *State ex rel. Associated Natural Gas Co. v. Public Service Comm'n., 706 S.W.2d 870 (Mo. App. 1985)* makes it clear that there is no one single formula or combination of formulae in determining rates. It is a pragmatic standard, requiring the balancing of the interests of the investors and customers. And yet, there must be evidence in the record that the Commission has fulfilled its statutory obligation to balance the interests of both investors and customers. The Commission must establish rates based on its consideration of all relevant factors. *State ex rel. Sprint v. Missouri Pub. Serv.*, 112 S.W.3d 20 (Mo. App., 2003). The Commission and its Staff have adopted a form of cost of service study they consider to be a "comprehensive cost of service study" which meets the burden of proof required in setting rates.

Indeed, the dialogue at the hearing indicated a common consensus that the "comprehensive cost of service study" was the acceptable standard.[5] As UFM will discuss in this Brief, if the Commission is to depart from that "comprehensive cost of service study," it must articulate how the new standard meets the Complainants' burden of proof. Without anticipating that decision, UFM will presume the "comprehensive cost of service study" is the burden of proof necessary for the consideration of all relevant factors.

The Commission and the electric utility industry are bound by what is commonly referred to as a regulatory compact. The Indiana Supreme Court has captured this bedrock principle of public utility regulation in the following words:

> [The regulatory compact] arises out of a "bargain" struck between the utilities and the state. As a quid pro quo for being granted a monopoly in a geographical area for the provision of a particular good or service, the utility is subject to regulation by the state to ensure that it is prudently investing its revenues in order to provide the best and most efficient service possible to the consumer. At the same time, the utility is not permitted to charge rates at the level which its status as a monopolist could command in a free market. Rather, the utility is allowed to earn a "fair rate of return" on its "rate base." Thus, it becomes the Commission's primary task at periodic rate proceedings to establish a level of rates and charges sufficient to permit the utility to meet its operating expenses plus a return on investment which will compensate its investors.

United States Gypsum, Inc. v. Indiana Gas Co. Inc., 735 N.E.2d 790, 797 (Ind. 2000), citing *Indiana Gas Co., Inc. v. Office of Utility Consumer Counselor* ("*Indiana Gas I*"), 575 N.E.2d 1044, 1046 (Ind.Ct.App.1991). A simpler way of describing this compact is that it is a mechanism to execute justice. Recognizing the practical implications of the monopolist utility industries, regulation exists to take the place of competition. It constrains the monopoly power, preventing the extraction of monopoly rents. It eliminates favoritism, thus ensuring just and reasonable rates

[5] Transcript, Vol. 2, pp. 218-221.

to all customers. But it also assures investors of a reasonable expectation to earn a return on their investment. It is the Commission's responsibility to enforce the regulatory compact.

In fulfilling its function within the regulatory compact, the Commission must recognize its limited role. No principle is more foundational to the operation of the Commission than this: "[T]he Public Service Commission is a body of limited jurisdiction and has only such powers as are expressly conferred upon it by the Statutes and powers reasonably incidental thereto." *State ex rel. Kansas City Power & Light Co. v. Buzard*, 168 S.W.2d 1044, 1046 (Mo. banc 1943). And its orders must be lawful, and they must be reasonable. "Under section 386.510, the appellate standard of review of a PSC order is two-pronged: first, the reviewing court must determine whether the PSC's order is lawful; and second, the court must determine whether the order is reasonable." *State ex rel. Praxair, Inc. v. Mo. Pub. Serv. Comm'n,* 344 S.W.3d 178, 184 (Mo. banc 2011). PSC orders may not be arbitrary or capricious. *Missouri Gas Energy v. Public Service Commission*, 224 S.W.3d 20 (Mo. App., 2007)

1. Setting rates on less than a complete record of all relevant factors, i.e. a "comprehensive cost of service study," is unlawful.

Missouri statutes focus the Commission on rate matters to assure that justice is executed when the Commission fulfills its role to maintain just and reasonable rates for investors as well as customers. While individuals may bring complaints to the Commission, rate setting complaints are treated differently. The regulatory process is more highly defined when it comes to rate making issues. First, the list of entities that may bring a complaint regarding rates is severely restricted. Section 386.390.1 RSMo. provides that rate complaints may only be brought by a duly authorized governmental entity or no less than 25 customers. See also Section 393.260.1 RSMo. Rate complaints are not easily sanctioned. Second, the process for responding to rate complaints described in statute is highly prescriptive. The Commission must conduct an investigation into the

cause of the complaint. Section 393.260.1 RSMo. Third, statue authorizes the Commission and its Staff to examine the books and papers of the electric utility. It does not grant the same authority to others. Section 393.260.2 RSMo. Fourth, Missouri statutes prescribe standards for the Commission in its analysis of rates in its investigation. Rates must be just and reasonable. Section 393.270.2 RSMo. They must be set "with due regard, among other things, to a reasonable average return upon capital actually expended and to the necessity of making reservations out of income for surplus and contingencies." Section 393.270.4 RSMo. Fifth, the end product must be a "detailed reconciliation containing the dollar value and rate or charge impact of each contested issue decided by the commission, and the customer class billing determinants used by the commission to calculate the rates and charges approved by the commission in such proceeding." Section 386.420.4 RSMo.

This structure was not meant to be easily accessible to any one individual or corporate complainant. Put most simply, a rate complaint is not a civil law suit. A rate complaint before the Commission only initiates the process. There is a reason that the job of setting rates is given to the Commission and its Staff. It is a highly technical and time consuming process, but one that requires a commitment to the balancing of the interests of both customers and investors. It was meant to be structured around the Commission, through its Staff, so that the rates that are set are just and reasonable to all customers and compensatory to investors. There are no vigilante complaints regarding rates.

The Commission is very well aware of how the process works. Typically, as described in *AG Processing, Inc. v. KCP&L Greater Mo. Operations Co.*,

> [A] utility's costs are presumed to be prudently incurred.... However, the presumption does not survive "a showing of inefficiency or improvidence."

> ... [W]here some other participant in the proceeding creates a serious doubt as to the prudence of an expenditure, then the applicant has the burden of dispelling these doubts and proving the questioned expenditure to have been prudent.

385S.W.3d 511, 515 (Mo. App. 2012). In that case, Ag Processing filed a complaint against Aquila's proposed rate adjustment under a quarterly cost adjustment. After an evidentiary hearing, the Commission determined that Ag Processing had "raised serious doubts as to the prudence of Aquila's hedging program." Therefore, the Commission determined that the initial presumption was overcome. Finding then that Aquila failed to meet its burden of proof, the Commission ordered KCP&L to refund the net cost of operating Aquila's hedging program to certain affected customer. The Western District Court of Appeals reversed, finding that, in a complaint case, the burden of proof rests with the complainant. "Granting relief without requiring Ag Processing to prove the allegations in its complaint is reversible error." 385 S.W.3d 516. Apparently, serious doubts do not carry the burden of proof in a complaint case.

Admittedly, the burden of proof is extensive when seeking to establish just and reasonable rates and for good cause. Missouri law requires that the interest of both investors and customers be considered. A complainant can certainly take on the burden of prosecuting a complaint case. But a complainant must be prepared to bear that burden as the Commission must be prepared to impose that burden in fulfilling its role. Justice and state statute require no less under the regulatory compact. In the give and take of the evidentiary record, the moving party must be prepared to present a complete record of the evidence so that the respondent can challenge the veracity and completeness of all of the evidence so that the Commission can consider all relevant factors. To set new rates on admittedly insufficient evidence would grant relief without requiring the movant to prove the elements necessary to set rates that are just and reasonable. Such an action is unlawful.

Complainants now argue that the extensive effort required in producing a "comprehensive cost of service study" creates a problem that demands a solution. They believe that the

Commission has the authority to modify its settled practice and accept a lesser quality of evidence than a "comprehensive cost of service study." UFM believes, as has been discussed supra, that the remedy is the process that has been laid down by the Legislature, a process that goes through the Staff and Commission, to investigate and provide a balanced analysis of the utility's cost of service information. The fact that Complainants did not seek to follow this path should not be an excuse to grant relief in the face of a record that fails to consider all relevant factors.

2. Setting new rates based on the record before the Commission would be arbitrary and capricious.

Not only would setting new rates on the record before this Commission be unlawful, it would be arbitrary and capricious. "Arbitrary" is define, in part, as "Without adequate determining principle; not founded in the nature of things; . . . not done or acting according to reason or judgment; depending on will alone." *Black's Law Dictionary* 96 (5th ed. 1979). The principle behind the burden of proof in a rate case is the principle that all relevant factors must be considered by the Commission before it can balance the interests of the customers and investors. A justification beyond or at odds with that principle is arbitrary and not sustainable on appeal. Complainants seek, now having failed to provide a "comprehensive cost of service study," to have the Commission set rates on some diminished burden of proof. Their justification is that the "comprehensive cost of service study" is expensive and time consuming. Such an accommodation would be arbitrary and capricious.

3. Setting rates on less than a "comprehensive service study" is counter to good public policy in that it is injurious to the business climate in Missouri.

The economies of America and Missouri are built on a free marketplace. Part of that free marketplace are the services necessary for the productions of goods and services, including reasonably priced electric services. A vibrant and robust commercial and industrial climate in

Missouri needs plentiful, reliable and reasonably priced electric power. In the final analysis, a vibrant business environment and good governmental policies for maintaining justice in a free economy are the best attractors of economic development. UFM wants reasonably priced electric power. However, cutting corners in setting low electric rates without a full consideration of all relevant factors, is short-sighted. While lowering rates without a full analysis of all relevant factors may produce lower rates in the short run, it will discourage investment and increase rates in the long run. The state of Missouri should not go down that road.

Conclusion

The Commission has the authority and responsibility to set just and reasonable rates for Ameren Missouri. It must do so after a consideration of all relevant factors. There are procedures in place to allow that to happen. The Commission may itself conduct its own comprehensive cost of service study or it may utilize the rate case recently filed by Ameren Missouri to consider all relevant factors. However, it should not make a judgment on less than all relevant factors.

Respectfully submitted,

By: /s/ David C. Linton

David C. Linton, #32198
314 Romaine Spring View
Fenton, MO 63026
Telephone: 314-341-5769
Email: jdlinton@reagan.com

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Application to Intervene was sent to all parties of record in File No. EC-2014-0223 via electronic transmission this 15th day of August, 2014.

/s/ David C. Linton