

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

In the Matter of Noranda Aluminum, Inc.’s)
Complaint Regarding Union Electric)
Company d/b/a Ameren Missouri’s Excess)
Earnings and Request for Decreased Rates for)
Electrical Service) Case No. EC-2014-0223

**COMPLAINANTS’ SUGGESTIONS IN OPPOSITION TO AMEREN MISSOURI’S
MOTION TO DISMISS COMPLAINT**

COME NOW Complainants, and for their Suggestions in Opposition to Ameren Missouri’s Motion to Dismiss the subject Complaint, state as follows:

Introduction

This Complaint seeks to reduce Ameren Missouri’s rates so that they are just and reasonable by collecting \$67.1 million less per year from all of its ratepayers. The linchpin of the Complaint is Ameren Missouri’s own Surveillance Monitoring Report for the twelve month period ending September 30, 2013 (“Report”), the most recent such report at the time of filing the Complaint. The Commission wisely requires submission of such reports as a condition of Ameren’s continued use of a fuel adjustment clause (“FAC”).¹ Until very recently, that report was deemed highly confidential. It has now been declassified.² The Commission’s requirement for submission of the report on a quarterly basis by utilities that have FACs is obviously to advise regulators, and consumer advocates such as Public Counsel and the undersigned, of the earnings of a utility. The Commission requires the utility to calculate and report, among other things, the utility’s “Actual Return on Equity” (“ROE”).

¹ See 4 CSR § 240-20.090(1).

² See EC-2014-0223, Commission Order Granting Motion To Make Earnings Report Public (March 25, 2014).

The authorized ROE that this Commission set in Ameren Missouri’s last rate case is 9.8 percent.³ The “Actual” ROE reported in the Report for the twelve months ending September 2013 is 10.32 percent, over a half percent higher.⁴ Slightly over a half of one percent for Ameren Missouri over the course of a year is a very large number.⁵ Complainants rely on the direct testimony of Greg Meyer to analyze the financial information in the Report.⁶ Meyer has over 29 years of experience as a former utility regulator and another six years as a private consultant.⁷ Complainants also rely on the direct testimony of Mike Gorman as to the appropriate return on equity given two more years of low capital market costs since his testimony filed in Ameren Missouri’s last rate case. Gorman is a nationally recognized cost of capital expert, as evidenced by his numerous testimonies nationally on that issue.⁸

Complainants did not take this ROE figure from the Report at face value with no further analysis. Rather, Meyer ran as much of an “all relevant factors” analysis as he could perform with the information available to him (calling it “a very thoughtful and conservative earnings review”).⁹ He considered 14 different adjustments to the “actual” earned ROE to “annualize” and “normalize” Ameren Missouri’s earning results.¹⁰ After those adjustments, Meyer concluded that on an annualized and normalized basis, Ameren Missouri should have its rates reduced by \$67 million a year.¹¹ The Complaint alleges that the rates resulting in such normalized over-earning are not just and reasonable.¹² The Complaint further alleges that

³ See EC-2014-0223, Meyer Direct Testimony at p. 3.

⁴ *Id.* at 4.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*, App. A, p. 1.

⁸ See EC-2014-0223, Gorman Direct Testimony at App. A. pp. 1-4.

⁹ *Id.* at 8.

¹⁰ *Id.* at 5-7.

¹¹ *Id.*

¹² See EC-2014-0223, Complaint, para. 11.

“without a reduction in the rates it charges, Ameren Missouri will likely have continued to over-earn ... into the remainder of 2013 and into 2014.”¹³

In the face of these allegations and evidence derived from Ameren Missouri’s own Report, Ameren Missouri still predictably opposes the Complaint and filed the subject Motion to Dismiss (“MTD”). The MTD asserts three, and possibly four, grounds for dismissal. First, the MTD alleges that the Complaint fails to state a claim because it does not allege that the rates are now and in the future unjust or unreasonable. The MTD later spins that ground into Commission “discretion” to dismiss the Complaint even if it does state a claim. Next, the MTD argues that the Complaint does not include an “all relevant factors” analysis. Last, the MTD asserts that the Complaint is a collateral attack on Ameren Missouri’s existing rate because it does not allege a “substantial change in circumstances” since the current rate was established.¹⁴

The MTD is flawed in many respects and must be denied. First, its arguments are not appropriate for a motion to dismiss because they require consideration of facts outside of the Complaint. Second, its arguments are both factually and legally flawed as set forth in detail below.

Argument

1. Ameren Missouri’s Factual Arguments are Not Appropriate for a Motion to Dismiss

As this Commission is well aware, the standard for a motion to dismiss is whether the allegations of the Complaint, all presumed to be true and capable of proof, nevertheless fail to state a legal claim for relief.¹⁵ Ameren Missouri’s arguments rely upon its counsel’s unsworn statements, which is not appropriate at this phase. *See* paras. 8 (making assertions regarding the

¹³ *Id.* at para. 18.

¹⁴ *See* EC-2014-0223, Ameren Missouri’s Motion to Dismiss Complaint, paras. 3-5.

¹⁵ *Nazeri v. Mo. Valley Coll.*, 860 S.W.2d 303, 306 (Mo. 1993); *Tari Christ v. S.W. Bell Tele. Co.*, 2003 Mo. PSC LEXIS at *37 (Case No. TC-2003-0066, Order Regarding Motions to Dismiss, Jan. 9, 2003).

ratemaking process, Ameren Missouri's current expenses as opposed to previous expenses, and normalization), 9 (making an assertion regarding the cost of service studies), 11 (making an assertion that the data used in the Complaint "have little or no bearing on Ameren Missouri's current cost of service"), 12 (making an assertion that Meyer did not properly analyze advertising expenses), 13 (making an assertion regarding weather normalization), 14 (making an assertion regarding Ameren Missouri's announcements of future activities and concluding that its rates are too low). The cited paragraphs constitute Ameren Missouri's entire argument section for why Complainants' Complaint allegedly fails to state a claim. Whether or not Ameren Missouri's factual assertions are true or false (they are in fact false), they are not appropriate for consideration at the motion to dismiss stage because Ameren Missouri's arguments require that the Commission make assumptions against Complainants' stated facts, which must be presumed to be true.¹⁶

The Complaint recites the applicable statutes authorizing the Commission to consider this Complaint. The Commission has jurisdiction of this Complaint under sections 393.130.1, 386.390, 393.260 and also under regulation 4 CSR 240-2.070(4) and (5).

Section 393.130.1 provides:

Every ... electrical corporation ... shall furnish and provide such service instrumentalities and facilities as shall be safe and adequate and in all respects just and reasonable. All charges made or demanded by any such ... electrical corporation ... for ... electricity ... or any service rendered or to be rendered shall be just and reasonable and not more than allowed by law or by order or decision of the commission. Every unjust or unreasonable charge made or demanded for ... electricity ... or any such service, or in connection therewith, or in excess of that allowed by law or by order or decision of the commission is prohibited. (Emphasis added)

Section 386.390.1 provides:

¹⁶ See *Nazeri*, 860 S.W.2d at 306.

Complaint may be made by ... any corporation or person ... by petition or complaint in writing, setting forth any act or thing done or omitted to be done by any ... public utility, including any ... charge heretofore established or fixed by or for any ... public utility ...; provided, that no complaint shall be entertained by the commission, except upon its own motion, as to the reasonableness of any rates or charges of any ... electrical ... corporation, unless the same be signed by ... not less than twenty-five consumers or purchasers, or prospective consumers or purchasers, of such ... electricity ... service. (Emphasis added)

Section 393.260.1 provides:

Upon the complaint in writing ... by not less than twenty-five consumers or purchasers, or prospective consumers or purchasers of such ... electricity ... as to ... price of electricity sold and delivered ... the commission shall investigate as to the cause of such complaint. (Emphasis added)

The Complaint properly states a claim under these authorities. The Complaint alleges that the current rates allow, and will continue to allow into 2014, Ameren Missouri to earn substantially more each year than it would earn under just and reasonable rates.¹⁷

2. Ameren Missouri Incorrectly Claims that Complainants Did Not Assert that the Present and Future Rates Are Unjust and Unreasonable

As indicated above, the Complaint alleges that “without a reduction in the rates it charges, Ameren Missouri will likely have continued to over-earn ... into the remainder of 2013 and into 2014.”¹⁸ Ameren Missouri’s assertion is thus incorrect.

3. Ameren Missouri Incorrectly Claims that Complainants Did Not Allege Sufficient Analysis of Ameren Missouri’s Rates

Ameren contends that the Complaint does not assert that under an “all relevant factors” analysis, its rates are unjust and unreasonable.¹⁹ That contention is without merit. First, the Complaint directly addresses the adjustments made in order to provide a full context for Ameren Missouri’s over-earning.²⁰ Additionally, the Complaint incorporates Meyer’s Direct Testimony,

¹⁷ See EC-2014-0223, Complaint, paras. 11, 17, 18.

¹⁸ *Id.* at para. 18.

¹⁹ See EC-2014-0223, Ameren Missouri’s Motion to Dismiss Complaint, pp. 2-3.

²⁰ See EC-2014-0223, Complaint, paras. 16-17.

where he made adjustments to the “Actual” ROE to be sure that the results “are reflective of ongoing operations” as part of “a very thoughtful and conservative earnings review” with some of the adjustments favoring Ameren Missouri.²¹

In addition to the above-cited statutes, Section 393.270.4 is relevant and provides:

In determining the price to be charged for ... electricity ... the commission may consider all facts which in its judgment have any bearing upon a proper determination of the question although not set forth in the complaint and not within the allegations contained therein, 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. (emphasis added)

As indicated, Complainants provided as much analysis of Ameren Missouri’s rates as they could provide given their access to the relevant information.²² As Section 393.270.4 shows, the Commission can and should consider any factor that it deems relevant in analyzing Ameren Missouri’s rates “although not set forth in the complaint and not within the allegations contained therein.” The Commission makes such a “consider[ation]” after a hearing on the Complaint. Ameren Missouri’s argument here is inconsistent with the statute in this important respect. If the Commission were to dismiss the Complaint because it did not address a certain consideration that Ameren Missouri or this Commission deems appropriate, the language “although not set forth in the complaint and not within the allegations contained therein” would be rendered meaningless. The legislature is presumed not to insert idle or superfluous language into a statute.²³

Moreover, the above-cited statutes certainly contemplate ratepayers filing complaints seeking lower rates. If ratepayers must conduct a full audit of the electric utility as a condition of

²¹ See EC-2013-0223, Meyer Direct Testimony, pp. 4-8.

²² Ameren Missouri criticizes this analysis for not providing weather normalization. See MTD at para 13. Indeed, weather normalization would have increased the over-earnings. See reported cooling degree days compared to normal in the Report, tab “Income total elec-3a.”

²³ *Hyde Park Housing Partnership v. Director of Revenue*, 850 S.W.2d 82, 85 (Mo. banc 1993).

filing such complaints, how could such complaints ever occur? As evidenced by the struggles ratepayers have endured here to obtain public access to just one financial report, the surveillance monitoring report, they would have very limited access, if any, to much of Ameren Missouri's financial information. Accepting Ameren Missouri's argument in this regard is to effectively undo the above statutes granting this Commission the authority to consider ratepayer complaints regarding the reasonableness of rates. Courts do not interpret statutes in ways that "would lead to an illogical result defeating the purpose of the legislature."²⁴

4. Ameren Missouri Incorrectly Claims that the Complaint Is an Improper Attack on Ameren Missouri's Existing Rates

Ameren Missouri incorrectly argues that the Complaint is an improper collateral attack on Ameren Missouri's existing rates because there is allegedly no allegation of a substantial change in circumstances.²⁵ A complaint is an impermissible collateral attack against a previous rate case if it fails to allege a substantial change in circumstances.²⁶ The Commission has explained how a complainant may meet this burden:

The complaint need simply contain an allegation of a substantial change in circumstances. This is not a heavy burden for a pleader to meet. In the case of an earnings investigation, for example, a complaint might be sufficient that did no more than plead the passage of time since the Commission's last rate order and the occurrence of intervening economic fluctuations.²⁷

The Complaint meets this standard. The subject of the Complaint is that Ameren Missouri's current rates have allowed it to over-earn, are allowing it to over-earn, and will allow it to continue to over-earn. The Complaint alleges that the rates resulting in such normalized over-earning are not just and reasonable.²⁸ That paragraph states "[t]his Complaint concerns the

²⁴ *Spradlin v. City of Fulton*, 982 S.W.2d 255, 258 (Mo. 1998).

²⁵ See EC-2014-0223, *Ameren Missouri's Motion to Dismiss Complaint*, para. 15.

²⁶ *Christ v. Southwestern Bell Tel. Co.*, 12 MoPSC 3d 70, 79-86 (Jan. 9, 2003).

²⁷ *Christ v. Southwestern Bell Telephone Co.*, Case No. TC-2003-0066 (*Order Denying Rehearing and Denying Complainants' Alternative Motion for Leave to Amend*, iss'd Feb. 4, 2003), pp. 9-10.

²⁸ See EC-2014-0223, *Complaint*, para. 11.

rates Ameren Missouri currently charges all of its ratepayers Under the circumstances set forth below ... that rate is now unjust and unreasonable because ... Ameren Missouri is currently overearning at a rate of Rates such as the current rate that yield revenues" (emphasis added). This language indicates that the rate that is currently being charged is "now" unjust. Language such as "that rate is now unjust and unreasonable" refers to the current impact of the rate and not the impact contemplated at the time of the order. The Complaint further alleges that "without a reduction in the rates it charges, Ameren Missouri will likely have continued to over-earn ... into the remainder of 2013 and into 2014."²⁹ This is the mirror image of the rate cases Ameren Missouri frequently files except that Complainants assert over-earning rather than under-earning. This language is sufficient and meets the "non-heavy burden."³⁰

Moreover, as indicated above, the linchpin of the Complaint is the Report, the clear purpose of which is to identify for regulators, and consumer advocates, a particular substantial change in circumstances (i.e. "actual" over-earnings) possibly occasioned by the granting of an FAC to the utility.³¹ Obviously, those "actual" over-earnings occurred since rates were last set.

The legislature passed § 386.390.1 to allow for complaints regarding the "reasonableness of any rates or charges" of electrical service so long as "not less than twenty-five consumers or purchasers" submit the complaint. Ameren Missouri argues that the evidence Mr. Meyer relied upon is too old and "stale" to support a complaint.³² However, Mr. Meyer relied upon the then most recently-available information.³³ By Ameren Missouri's logic, no information would ever be sufficient because if the most recent information is "stale," then all possible information

²⁹ *Id.* at para. 18.

³⁰ See *Christ*, Order Denying Rehearing pp. 9-10.

³¹ See 4 CSR § 240-20.090(1).

³² See EC-2014-0223, Ameren Missouri's Motion to Dismiss Complaint, paras. 8-10.

³³ See EC-2014-0223, Meyer Direct Testimony, p. 3.

would be “stale” too.³⁴ Such an interpretation would lead to the illogical result that no one could bring this type of complaint that the statute clearly envisioned, thus defeating the purpose of the legislature.³⁵ Accordingly, Ameren Missouri’s argument, that Mr. Meyer’s testimony is irrelevant because it is “stale,” is not valid.

³⁴ See EC-2014-0223, Ameren Missouri’s Motion to Dismiss Complaint, para. 8.

³⁵ See *Spradlin*, 982 S.W.2d at 258.

5. This Commission Does Not Have Authority to Dismiss a Complaint “Stat[ing] a Proper Claim”

Ameren Missouri’s MTD cites a Commission regulation that Ameren Missouri claims allows the Commission discretion for “good cause” to dismiss a complaint that nevertheless “state[s] a proper claim.”³⁶ Oddly then, Ameren Missouri switches back to its legal argument, discredited above under point 2, that the Complaint fails to plead current and future unreasonable rates. Ameren Missouri cites no abandonment of the Complaint nor failure to follow Commission rules nor any other legitimate procedural defect. To the extent that Ameren is arguing that the Commission has discretion to disregard its duty under statutes, it should reject this argument. Perhaps the Staff of the Commission, through its Chief Staff Counsel, phrased it best in Staff’s opposition to Ameren Missouri’s MTD in case No.EC-2014-0224:

Section 393.260.1 states that the Commission, upon complaint by twenty-five or more customers of a utility as to the price of electricity, “shall investigate the cause of such complaint.” The statute is mandatory upon proper invocation and the Commission, in fact, does not have discretion to simply dismiss the *Complaint*. Having received such a complaint from thirty-eight customers, the Commission must now investigate.³⁷

Simply, this Commission does not have the authority to ignore its duties set by statute. By “good cause” in the regulation this Commission obviously intended for there to be a legal insufficiency or specific enumerated grounds in 4 CSR 240-2.116(4), such as abandonment of the case. That construction is consistent with this Commission’s regulation expressly addressing complaints:³⁸

The commission, on its own motion or on the motion of a party, may after notice dismiss a complaint for failure to state a claim on which relief may be granted or failure to comply with any provision of these rules or an order of the commission, or may strike irrelevant allegations.

³⁶ See EC-2014-0223, Ameren Missouri’s Motion to Dismiss Complaint, para. 17 (citing 4 CSR 240-2.116(4)).

³⁷ See EC-2014-0224, Staff’s Response and Suggestions in Opposition to Ameren Missouri’s Motion to Dismiss.

³⁸ See 4 CSR 240-2.070(7).

Conclusion

The Commission should deny the MTD. Its arguments are inappropriate because they require extraneous facts. Its substantive concerns with Mr. Meyer’s methodology are unfounded and work against Ameren Missouri’s position. The Complaint is not a collateral attack because it is based on substantial changes in circumstance. Finally, Ameren Missouri’s arguments result in defeating the purpose of Sections 386.390 and 393.270.4.

WHEREFORE, Complainants pray the Commission deny Ameren Missouri’s Motion to Dismiss.

Respectfully submitted,

BRYAN CAVE, LLP

By: /s/ Edward F. Downey

Diana M. Vuylsteke, # 42419
211 N. Broadway, Suite 3600
St. Louis, Missouri 63102
Telephone: (314) 259-2543
Facsimile: (314) 259-2020
E-mail: dmvuylsteke@bryancave.com

Edward F. Downey, #28866
221 Bolivar Street, Suite 101
Jefferson City, MO 65109
Telephone: (573) 556-6622
Facsimile: (573) 556-7442
E-mail: efdowney@bryancave.com

Attorneys for Complainants

CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the foregoing document has been emailed this 27th day of March, 2014, to all counsel of record, and to counsel for putative Intervenor.

/s/ Edward F. Downey