

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

City of O'Fallon, Missouri, and	)	
City of Ballwin, Missouri,	)	
	)	
Complainants,	)	
	)	
v.	)	<b><u>Case No. EC-2014-0316</u></b>
	)	
	)	
Union Electric Company d/b/a	)	
Ameren Missouri,	)	
	)	
Respondent.	)	

**STAFF'S RESPONSE TO COMPLAINT AND MOTION TO DISMISS**

**COMES NOW**, the Staff of the Missouri Public Service Commission, by and through counsel, and for its *Response to Complaint and Motion to Dismiss*, states as follows:

**INTRODUCTION**

Staff agrees with Respondent, Union Electric Company d/b/a Ameren Missouri's ("Ameren Missouri" or "Company") in that Complainants', City of O'Fallon, Missouri ("O'Fallon") and City of Ballwin, Missouri ("Ballwin"), collectively ("Cities") *Complaint* fails to state a claim upon which relief can be granted.

The Cities fail to state a claim upon which relief can be granted because their *Complaint* does not allege a violation of law, rule, order or decision of the Commission nor does it allege that the Company's rates or charges are unreasonable. The Cities also fail to state a claim upon which relief can be granted, because the Commission lacks the statutory authority to grant the relief requested. For the aforementioned

reasons Staff recommends that the Cities' *Complaint* be denied and the Company's *Motion to Dismiss* be granted.

### **BACKGROUND**

On April 28, 2014, the Cities filed their *Complaint* alleging that Ameren Missouri's refusal to engage in discussions and negotiations with the Cities over the sale of the existing street lights with each respective city is unreasonable, uneconomic, and not in the public interest,<sup>1</sup> and paragraph 7 of its 5(M) Street and Outdoor Area Lighting Company-Owned Tariff Sheet #58.5 ("5(M) Tariff") is unreasonable and unlawful because it does not permit a municipality, upon termination of all or a portion of its street lighting service, to purchase at fair market value the street lights that Ameren Missouri would proceed to remove and dispose of.<sup>2</sup> For its prayer for relief, the Cities request the Commission (1) find that Ameren Missouri's refusal to sell its street lights at fair market value, after termination of its current service agreement with the respective city, is unreasonable, uneconomic and contrary to the public interest, (2) order Ameren Missouri to negotiate in good faith with the Cities to establish fair market value for its street lights and offer to sell said street lights to the Cities at fair market value,<sup>3</sup> (3) order Ameren Missouri to revise and amend paragraph 7 of its 5(M) Tariff to allow any Missouri municipality, after ten years of street lighting service, the option of purchasing the street lights within its city limits at fair market value,<sup>4</sup> (4) or, in the alternative, have

---

<sup>1</sup> Complaint ¶16.

<sup>2</sup> Id. at ¶18.

<sup>3</sup> Id. at p. 5.

<sup>4</sup> Id. at p. 6.

the Commission request Ameren Missouri for its consent to have the Commission serve as arbitrator in this controversy.<sup>5</sup>

On May 29, 2014, Ameren Missouri filed its *Answer* and its *Motion to Dismiss*. In its *Motion* the Company argued that the Cities' Complaint should be dismissed because (1) the Cities' allegation of Company's refusal to exceed its tariff requirement does not invoke the Commission's jurisdiction, (2) any complaint about Company's rates or charges not signed by the proper parties must be dismissed, (3) the voluntary conveyance statute does not give the Commission authority to require an involuntary conveyance, (4) the Commission does not have jurisdiction over condemnation actions, (5) the Commission cannot order a utility to adopt a tariff consenting to condemnation of its property, (6) an attack on a long-standing tariff approved by operation of law is akin to a collateral attack barred as a matter of law, and (7) the Commission's authority to arbitrate is limited to controversies within its jurisdiction.

### **DISCUSSION**

**The Cities fail to state a claim upon which relief can be granted because their *Complaint* does not allege a violation of law or Commission rule, order, or decision nor does it allege that the Company's rates or charges are unreasonable.**

The Cities argue that Ameren Missouri's refusal to sell its street lights to the Cities after termination of their current service agreements is unreasonable, uneconomic and contrary to the public interest. In support of its argument the Cities state that owning their street lights will result in an annual cost savings of \$820,000 to O'Fallon and \$400,000 to Ballwin as opposed to if they continued to pay Ameren Missouri for the use of its street lights. The Cities also state that buying the existing

---

<sup>5</sup> Id.

street lights from Ameren Missouri will reduce economic waste of an unidentified amount as opposed to if the Cities terminated their existing service agreements with Ameren Missouri and the street lights were removed and disposed of under the terms of paragraph 7 of the Company's 5(M) Tariff. While Staff understands the Cities desire to reduce their utility bills, the Cities' Complaint does not allege a violation of law or Commission rule, order or decision.

The Cities cite to the Commission's general complaint statute for Commission authority to hear their *Complaint*; however §386.390.1 RSMo.<sup>6</sup> states a complaint may be made "setting forth any act or thing done or omitted to be done by any corporation, person or public utility...in violation, or claimed to be in violation, of any provision of law, or of any rule or order or decision of the commission" or "as to the reasonableness of any rates or charges". Staff agrees with the Company's argument that the Commission's general complaint statute only authorizes two types of complaints. The first type of complaint requires that a complaint must necessarily include an allegation of a violation of a law or a Commission rule, order, or decision or it does not invoke the Commission's jurisdiction.

The only allegation of a violation the Cities make is that Ameren Missouri violated §393.130.3 by refusing to negotiate in good faith with the Cities with respect to the sale of the light fixtures. Section 393.130.3 requires that no utility may subject any customer "to any undue or unreasonable prejudice or disadvantage". The Supreme Court of Missouri has stated statutes forbidding unjust discrimination require "one engaged in a public calling to charge a reasonable and uniform price or rate to all persons for the same service rendered under the same or substantially similar circumstances or

---

<sup>6</sup> All statutory references are to the Revised Statutes of Missouri (2000).

conditions."<sup>7</sup> Here, the Cities have not alleged that Ameren Missouri has at any time negotiated with any other municipality with respect to the sale of any street lights owned by the Company under the current tariff, or that the Company is treating them differently than it would any other street lighting customer. In fact if Ameren Missouri were to sell its street lights to the respective cities it would open itself up to potential claims of preferential treatment if it did not extend the same offer to other municipalities. The Cities have therefore failed to show that the Company has subjected them to any undue or unreasonable prejudice or disadvantage relative to similarly situated customers. Since the Cities have failed to allege a violation of law, or Commission rule, order, or decision the Commission lacks the jurisdiction to hear Cities' *Complaint*.

The second type of complaint proscribed by §393.130.1 is that regarding the unreasonableness of a utility rate or charge. The Cities by their own admission state that their *Complaint* does not allege that the Company's rates or charges are unreasonable.<sup>8</sup> Therefore, the Commission lacks the jurisdiction to hear Cities' *Complaint*.

**The Cities fail to state a claim upon which relief can be granted because the Commission lacks the statutory authority to grant the relief requested.**

The Cities request that the Commission order Ameren Missouri to negotiate in good faith with the Cities to establish fair market value for its street lights and offer to sell said street lights to the Cities at fair market value, order Ameren Missouri to revise and amend paragraph 7 of its 5(M) Tariff to allow any Missouri municipality, after ten years of street lighting service, the option of purchasing the street lights within its city

---

<sup>7</sup> *State ex rel. Laundry, Inc. v. Public Service Commission*, 327 Mo. 93, 110 (Mo. 1931).

<sup>8</sup> Complainants' Memorandum of Law In Opposition to Ameren Missouri's Motion to Dismiss at 4.

limits at fair market value, or in the alternative, have the Commission ask Ameren for its consent to have the Commission serve as arbitrator in this controversy.

The Staff agrees with Ameren Missouri that the Commission lacks the statutory authority to grant the relief requested because the Commission does not have the authority to order the sale of utility property and the Commission's authority to arbitrate is limited to controversies where both parties have requested it to serve as an arbitrator.

Cities admit that the Commission has the authority to approve the sale of a utility's property; however, Section 393.190 only grants the Commission authority to approve the sale of a utility's property when the utility agrees to sell it. "The commission is purely a creature of statute, and its powers are limited to those conferred by statute, either expressly or by clear implication as necessary to carry out the powers specifically granted."<sup>9</sup> Since the state legislature has not given the Commission the authority to order the sale of utility property the Commission does not have the authority to order the Company to negotiate the sale of its street lights with the Cities. Additionally, because the Commission does not have the authority to order the sale of utility property it cannot order a utility to adopt a tariff provision requiring the sale of its property upon an order to that effect by the Commission. Cities request in the alternative that the Commission request Ameren Missouri for its consent to have the Commission serve as arbitrator in this dispute; however, Section 386.230 requires all the parties to a controversy to agree in writing to submit a controversy to the Commission as an arbitrator. Ameren Missouri has not consented to have the Commission serve as an arbitrator in this controversy and the Commission cannot act as such until the Company consents. While the

---

<sup>9</sup> *State ex rel. Public Service Commission v. Bonacker*, 906 S.W.2d 896, 899, (Mo. App. S.D. 1995), citing *State ex rel. Util. Consumers Council, Etc. v. P.S.C.*, 585 S.W.2d 41, 49 (Mo. banc 1979).

Commission may request Ameren Missouri to consent to its serving as an arbitrator to the controversy, the Commission has no authority to order the Company to consent to its serving as an arbitrator to the controversy. .

While it is evident that Ameren Missouri's refusal to negotiate the sale of its street lights will result in higher costs for street lighting to the Cities in the near term, based on what Staff knows as stated in its *Memorandum* (attached as Appendix A), if Cities get the relief that they are seeking, the anticipated rate relief may be short lived because Ameren Missouri has informed the Commission it is filing a rate increase request in July.<sup>10</sup>

### **CONCLUSION**

The Cities fail to state a claim upon which relief can be granted because the *Complaint* does not allege a violation of law, rule, order or decision of the Commission nor does it allege that the Company's rates or charges are unreasonable. Further, Cities neither allege, nor has Staff found, statutory authority for the Commission to grant the relief they request.

**WHEREFORE**, Staff recommends that the Commission deny Cities' *Complaint* and grant Company's *Motion to Dismiss*.

---

<sup>10</sup> *Notice of Likely Contested Case*, Case No. ER-2014-0258.

Respectfully submitted,

**/s/ Alexander Antal**

Alexander Antal  
Assistant Staff Counsel  
Missouri Bar No. 65487  
Attorney for the Staff of the  
Missouri Public Service Commission  
P. O. Box 360  
Jefferson City, MO 65102  
(573) 751-8517 (Telephone)  
Alexander.Antal@psc.mo.gov (e-mail)

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing was served electronically, by hand delivery or by First Class United States Mail, postage prepaid, on this 30<sup>th</sup> day of June, 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/ Alexander Antal**



## MEMORANDUM

TO: Missouri Public Service Commission Official Case File  
Case No. EC-2014-0316

FROM: Robin Kliethermes, Regulatory Economist, Energy Economic Analysis  
Sarah Kliethermes, Regulatory Economist, Energy Economic Analysis

/s/ Michael Scheperle    06/30/14                      /s/Alex Antal            06/30/14  
Manager, Economic Analysis / Date                      Staff Counsel's Office / Date

SUBJECT: **Overview and Background of Ameren Missouri Street Lighting Tariff Sheets**

DATE: June 30, 2014

### Requested Relief

On April 25, 2014, the City of O'Fallon, Missouri and the City of Ballwin, Missouri filed a complaint with the Commission against Union Electric Company d/b/a Ameren Missouri. The case was designated EC-2014-0316<sup>1</sup>. The cities of O'Fallon and Ballwin ("Cities") are currently served on the 5(M) Street & Outdoor Area Lighting – Company Owned ("Street Lighting") service classification. Cities request to be served under 6(M) Customer Owned service classification, subsequent to the acquisition of the facilities currently used by Ameren Missouri to provide the 5(M) service. A summary of the current and prior charges under the 5(M) service classification is attached as Schedule 1.

### Applicable Service Classifications

Street Lighting service is available from Ameren Missouri under three service classifications:

- 5(M) Street & Outdoor Area Lighting – Company Owned
- 6(M) Street & Outdoor Area Lighting – Customer Owned
- 7(M) Municipal Street Lighting – Incandescent (Closed to new installations)

Listed below are Street Lighting revenues and percentage of Street Lighting revenues from Ameren Missouri's last general rate increase, Case No. ER-2012-0166:

5(M)	\$ 34,410,900	89.14%
6(M)	\$ 4,188,600	10.85%
7(M)	\$ 4,800	.01%
Total	\$ 38,604,300	100.00%

---

<sup>1</sup> Complaint was originally designated Case No. EO-2014-0310.

Under the 5(M) service classification Ameren Missouri owns, operates and maintains the lighting facilities used by the customers served under the tariff as an extension of the Company's distribution system.<sup>2</sup> Customers served under the 5(M) tariff pay a monthly per lamp charge that varies depending upon the type of lamp installed. Under the current version of the 5(M) tariff sheets, the customer also pays in advance for the installation of the poles and cables; however, the Company will provide replacement facilities. Prior to Case No. ER-2011-0028, customers with lighting facilities installed prior to 1988 were not required to make advance payment for the installation, but were subject to monthly pole and span charges. This service is offered on Mo.P.S.C. Schedule NO. 6 Original Sheet NOS. 58 -58.5.

Under the 6(M) service classification the customer provides and owns the lighting facilities rather than Ameren Missouri. If a customer receives unmetered service under the 6(M) tariff the customer pays a monthly customer charge and a monthly per lamp charge that varies depending upon the type of lamp installed. If a customer receives metered service under the 6(M) tariff the customer pays a monthly customer charge (per meter) and a per kWh charge. This service is offered on Mo.P.S.C. Schedule NO. 6 1<sup>st</sup> Revised Sheet NOS. 59 -59.3.

#### Background Regarding Ameren Missouri Street Lighting

- Case No. ER-2010-0036 – Commission ordered to exempt Street Lighting service classifications from the utility's rate increase, pending a class cost of service study in the next rate case. Ameren Missouri's overall increase was 10.43% with Street Lighting services receiving a zero percent increase.
- Case No. ER-2011-0028 – The Commission decided to gradually eliminate the pole and span charge on the 5(M) classification tariff by reducing the charge to half (50%) and completely eliminate the charge in the next rate case. The Commission also decided that the reduced revenue from the reduction in the pole and span charge be collected from the 5(M) service classification as a whole. Further, the lighting class as a whole received a greater than system average increase on an interclass cost of service basis. This partially undid the zero percent increase from Case No. ER-2010-0036.
- Case No. ER-2012-0166 – Compliance tariff sheets eliminated the pole and span charge from the 5(M) service classification. The Street Lighting class received a revenue-neutral adjustment of a positive 3.93% increase. This again partially undid the zero percent increase from Case No. ER-2010-0036. However, the total increase granted Ameren Missouri was 10.05% with the total street lighting class receiving a 10.79% increase. The rate design detailed a four-step process of 1) a revenue-neutral adjustment, 2) a Pre-MEEIA<sup>3</sup> allocation, 3) a MEEIA allocation and 4) a retail portion. Street Lighting is not included in the Pre-MEEIA and MEEIA allocation.

---

<sup>2</sup> Pursuant to the Termination provision of Mo.P.S.C. Schedule NO. 6 Original Sheet NO.58.5, Cities have the right request termination of lighting service. However, the Termination section further provides that charges are applicable should a customer request termination and reapply within 12 months of the termination.

<sup>3</sup> Missouri Energy Efficiency Investment Act ("MEEIA") adopted by the Missouri Legislature in 2009.

- Case No. ER-2013-0367 – Light Emitting Diodes (LED) street lighting option was added to the 6(M) service classification, but no other rate design changes were made to Street Lighting.

The Commission's Report and Order in Case No. ER-2011-0028 specifically discussed that while the Commission determined (1) that it was reasonable to accept Ameren Missouri's request to discontinue applying a pole and span charges to 5(M) pre-1988 lighting facilities, (2) that it remained necessary to recover the revenue that had been recovered from those charges from the 5(M) service classification, and (3) that to mitigate rate shock, the 5(M) pole and span charges should be phased out and the 5(M) energy charges gradually increased.

12. Even if the company eliminates a particular charge, the amount of revenue Ameren Missouri needs to serve the lighting class in general and the 5M classification in particular does not change. If Ameren Missouri is to continue to recover its cost of service after eliminating the pole and span charge, it must increase some other charge to make up the difference. (Report and Order, page 61.)

In Case No. ER-2011-0028, the cities of O'Fallon and Ballwin, as well as the cities of Creve Coeur, University City, Olivette, St. Ann, Kirkwood, Bellfontaine Neighbors, Florissant, Richmond Heights, Brentwood, St. John, Sunset Hills, the Village of Twin Oaks, the Village of Riverview, and the St. Louis County Municipal League intervened, collectively referred to as the Municipal Group in the Report and Order. The Municipal Group requested that the pole and span charges for pre-1988 customers be eliminated, but that the revenue recovered from those charges not be recovered from the lighting class going forward. The Commission specifically considered and rejected this request.

13. The Municipal Group's suggestion that the revenue lost when the pole and span charge is eliminated not be recovered from the lighting class would mean that Ameren Missouri would have to recover the revenue from some other rate class that the class cost of service studies establish is not responsible for those costs. Such a result would be patently unfair. If the pole and span charge is eliminated, the revenue lost must be collected from the lighting class and the 5M classification in some other manner. The question remains, should the pole and span charge be eliminated as Ameren Missouri proposes?

14. The Municipal Group explains that the elimination of the pole and span charge and the collection of that revenue from the entire 5M rate classification would have a disparate impact on newer and older municipalities. Older cities that installed most of their street lighting years ago and as a result have been paying the pole and span charges for pre-1988 poles would no longer pay that charge and could see their rates go down with the elimination of the pole and span charge. On the other hand, newly developing cities that have installed street lighting since 1998 and thus have paid an upfront charge rather than the pole and span charge, would not benefit from the elimination of the pole and span charge and would see their overall rates increase substantially.

15. Staff suggests that this result is unfair to the newer municipalities and contends the pole and span charge should not be eliminated. However, the same facts imply that the current arrangement is unfair to the older municipalities that have been paying the pole and span charge. Their subsidization of the newer municipalities will

only grow as they continue to pay the pole and span charges and the accumulated revenue Ameren Missouri collects from that charge outstrips the revenue collected through the up-front charges paid by the newer municipalities.

16. The pole and span charge needs to be eliminated, but the rate shock that would cause the newer municipalities that paid up-front charges should also be avoided. Therefore, a gradual elimination of the charge is appropriate. (Report and Order, pages 61-62.)

It is likely that if the Cities were to obtain the relief of transfer from the 5(M) service classification to the 6(M) service classification that the cost of service for both lighting service classifications would be noticeably different in the next Ameren Missouri general rate case. Because Staff does not have full cost of service and class cost of service information for Ameren Missouri, Staff is unable to provide an estimate of what the Cities' bills would be on either service classification after the next general rate case. Staff would note that it is possible that if the Cities change service classifications that the impact of that change on class cost of service may be great enough to offset any current pricing advantage the Cities may observe in the current 6(M) rates as compared to the current 5(M) rates.

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

City of O'Fallon, Missouri and )  
City of Ballwin, Missouri, )  
 )  
Complainants )

v. )

File No. EC-2014-0316

Union Electric Company )  
d/b/a Ameren Missouri, )  
 )  
Respondent )

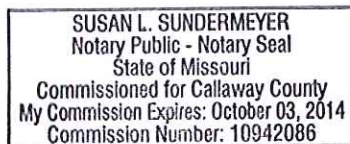
**AFFIDAVIT OF ROBIN KLIETHERMES**

STATE OF MISSOURI )  
 ) ss  
COUNTY OF COLE )

Robin Kliethermes, of lawful age, on oath states: that she participated in the preparation of the foregoing Staff Recommendation in memorandum form, to be presented in the above case; that the information in the Staff Recommendation was provided to her; that she has knowledge of the matters set forth in such Staff Recommendation; and that such matters are true to the best of her knowledge and belief.

  
\_\_\_\_\_  
Robin Kliethermes

Subscribed and sworn to before me this 30<sup>th</sup> day of June, 2014.



  
\_\_\_\_\_  
Notary Public

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

City of O'Fallon, Missouri and )  
City of Ballwin, Missouri, )  
 )  
Complainants )

v. )

File No. EC-2014-0316

)  
Union Electric Company )  
d/b/a Ameren Missouri, )  
 )  
Respondent )

**AFFIDAVIT OF SARAH KLIETHERMES**

STATE OF MISSOURI )  
 ) ss  
COUNTY OF COLE )

Sarah Kliethermes, of lawful age, on oath states: that she participated in the preparation of the foregoing Staff Recommendation in memorandum form, to be presented in the above case; that the information in the Staff Recommendation was provided to her; that she has knowledge of the matters set forth in such Staff Recommendation; and that such matters are true to the best of her knowledge and belief.



Sarah Kliethermes

Subscribed and sworn to before me this 30<sup>th</sup> day of June, 2014.

SUSAN L. SUNDERMEYER  
Notary Public - Notary Seal  
State of Missouri  
Commissioned for Callaway County  
My Commission Expires: October 03, 2014  
Commission Number: 10942086

  
Notary Public

Rate History Summary

5(M) Service Classification

Street & Outdoor Area Lighting - Company Owned

	High Pressure Sodium (HPS)				Mercury Vapor (MV)				Metal Halide (MH)				% Increase
	Lumens	2010 Rate	2011 Rate	Current Rate	Lumens	2010 Rate	2011 Rate	Current Rate	Lumens	2010 Rate	2011 Rate	Current Rate	
Standard horizontal burning, enclosed luminaire on existing wood pole	9,500	\$8.59	\$10.15	\$11.79	6,800	8.59	10.15	11.79					37%
	25,500	\$12.41	\$14.67	\$17.04	20,000	12.41	14.67	17.04					37%
	50,000	\$22.12	\$26.15	\$30.38	54,000	22.12	26.15	30.38					37%
					108,000	44.26	52.32	60.77					37%
Standard side mounted, hood with open bottom galssware on existing wood pole	5,800	\$6.95	\$8.22	\$9.55	3,300	6.95	8.22	9.55					37%
	9,500	\$7.60	\$8.98	\$10.43	6,800	7.6	8.98	10.43					37%
Standard post-top luminaire including 17-foot pole	9,500*	\$15.91	\$18.81	\$21.85	3,300	15.04	17.78	20.65					37%
					6,800	15.91	18.81	21.85					37%
Pole-mounted, direction, flood luminaire; limited to installations accessible to Company basket truck	25,500	\$15.75	\$18.62	\$21.63	20,000	15.75	18.62	21.63					37%
	50,000	\$24.91	\$29.45	\$34.21	54,000	24.91	29.45	34.21					37%

Pole & Span Charges

	2010 Rate	2011 Rate	Current Rate
Wood Pole (per pole)	\$7.68	\$3.84	\$0.00
Ornamental Concrete Pole (per pole)	\$17.21	\$8.60	\$0.00
Steel Breakaway Pole (per pole)	\$51.77	\$25.88	\$0.00
Standard Two-Conductor Overhead Cable (per span)	\$2.38	\$1.19	\$0.00
Underground Cable Installed In and Under Dirt (per foot)	7.06¢	3.53¢	\$0.00
All other Underground Cable Installations (per foot)	13.45¢	6.72¢	\$0.00

\*According to Exhibit "A" and Exhibit "B", attached to the Compliant, the 9,500 HPS standard post-top luminaire including the 17-foot pole makes up approximately 86% and 89% of the City of O'Fallon's and the City of Ballwin's street lights.