

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

In the matter of Union Electric Company,)
d/b/a Ameren Missouri’s Tariff to Increase) Case No. ER-2014-0258
Revenues for Electric Service)

UNITED FOR MISSOURI’S INITIAL BRIEF

COMES NOW, UNITED FOR MISSOURI, INC. (“UFM”), by and through its counsel,
and for its *Initial Brief*, states as follows:

Introduction

“Why isn’t it unduly discriminatory right now for them to be below cost? So why is that any different than taking them even further below cost?”¹

This is an electric rate case filed by Ameren Missouri. It is also a case in which the Commission seeks to address the relationship between its role in setting cost of service based rates and its role in fostering economic development in the state of Missouri.

The First Amended Joint List of Issues, List and Order of Witnesses, Order of Cross-Examination, and Order of Opening Statements identified 31 issues, many of which had significant sub-issues. Many issues in the case have been settled. Many still remain open for the Commission’s determination. UFM addresses two open issues with one common theme, the theme being economic development: issues 21 and 30, Economic Development Rate Design Mechanisms and Noranda Rate Proposal, respectively. Both posit the question what is the relationship between the Commission’s role in economic development and its role in setting rates.

¹ Tr. 31:2319.

As Chairman Kenney observed during the hearing in this case, “there’s no bright line of demarcation” in determining undue discrimination in utility ratemaking.² “Simply put, ‘the fixing of ‘just and reasonable’ rates, involves a balancing of the investor and the consumer interests.’”³

However, that does not mean there are now no bright rules to follow. The Commission itself declared the most central of rules in its *Report and Order* in Case No. EC-2014-0224. Rates must be based on cost causation principles. In this, the Commission’s focus must be exclusively on the service and the conditions of service to the customer.⁴ The Commission’s focus must not be on surrounding conditions such as the customer’s business and circumstances.

Cost of service is the *sine qua non* in electric utility ratemaking and rate design. In *State ex rel. Office of Pub. Counsel v. Public Service Commission of Missouri*, 367 S.W.3d 91 (Mo.App. S.D. 2012), the Commission was confronted with Missouri Gas Energy’s request to maintain its Straight Fixed-Variable(“SFV”) rate design for its residential class and expand it to the small general service class. Office of Public Counsel opposed the proposal, recommending the Commission approve a 55% fixed + 45% volumetric rate design. In its *Report and Order*, the Commission found that the fixed+variable rate design subsidized MGE’s “low-usage” customers and the SFV did not. The Commission approved MGE’s request. The Court found that the Commission’s decision was based on competent and substantial evidence. OPC argued on appeal that the Commission erred because the *Report and Order* was unlawful in that “it

² Tr. 31:2319.

³ *State ex rel. Mo. Office of Public Counsel v. Public Serv. Comm’n.*, 293 S.W.3d 63, 80 (Mo. App., 2009), quoting *Fed. Power Comm’n v. Hope Natural Gas Co.*, 320 U.S. 591, 603, 64 S.Ct. 281, 88 L.Ed. 333 (1944).

⁴ *Noranda Aluminum, Inc., et al., v. Union Electric Company*, File No. EC-2014-0224 (*Report and Order* issued August 20, 2014), p. 22.

subjects customers within each rate class who ‘use lower [-] than [-] average amounts of natural gas to undue and unreasonable prejudice and disadvantage.’”⁵ The Court found that “MGE’s SFV rate design is not ‘unlawful’ under sections 393.130 and 393.140 because it requires payment only of the customer’s true cost of service, and does not prejudice or disadvantage any customer.”⁶ Since the Commission based its decision on cost of service, its decision was proper.

The Missouri Statutes bear this proposition out. On the one hand, charges must be the same for the same or substantially similar services. Section 393.130.2 provides that, “No gas corporation, electrical corporation, water corporation or sewer corporation shall . . . charge, demand, collect or receive from any person or corporation a greater or less compensation for gas, electricity, water, sewer or for any **service** rendered or to be rendered or in connection therewith, except as authorized in this chapter, than it charges, demands, collects or receives from any other person or corporation for doing a **like and contemporaneous service** with respect thereto under the **same or substantially similar circumstances** or conditions.” [emphasis added] In this subsection, the focus is clearly on the service and the circumstances of the service, not the conditions of the customer.

On the other hand, undue or unreasonable preferences or advantages are differences based on the circumstances of the customer. “No . . . electrical corporation . . . shall make or grant any **undue or unreasonable preference or advantage** to any **person, corporation or locality**, or to any particular description of service in any respect whatsoever, or subject any particular person, corporation or locality or any particular description of service to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.”⁷ [emphasis added] A

⁵ 367 S.W.3d at 106.

⁶ Id.

⁷ Section 393.130.3, RSMo.

violation occurs when rates are set with consideration of the circumstances of the customer in mind.

The Commission must set just and reasonable rates in accordance with this law. “All charges made or demanded by any such . . . electrical corporation . . . shall be just and reasonable and not more than allowed by law or by order or decision of the commission.”⁸ It is the Commission’s responsibility to set just and reasonable rates as directed in these statutes.⁹ As long as the Commission remains focused on cost of service, it is on safe ground. When it deviates in order to accommodate circumstances of the customer, it deviates into the area of undue and unreasonable discrimination and preferences.

The Commission’s role as a surrogate for competition provides additional guidance.

For most businesses, the prices of goods or services that are sold are determined by what the customer or market will bear. In economic terms, markets will "clear" at the point where marginal costs equal the value that consumers, in the aggregate, set for the good or service; that is at the point where supply intersects with demand. A different approach to price-setting is required for utilities, since competition and free enterprise into markets does not exist in natural monopolies. Regulators use a *cost of service* approach to determine a fair price for electric service, by which the aggregate costs (including a reasonable return of, and on, investment) for providing each class of service (residential, commercial, and industrial) are determined. Prices are set to recover those costs, based on the sales volumes for each class.¹⁰

Regulators impose a discipline on natural monopolies that competition is unable to impose.

Regulators impose this discipline by use of cost of service ratemaking. Therefore, the Commission cannot, or at least should not, do in ratemaking what the utility would not do under competitive forces. It cannot, or at least should not, vary its cost of service principles for discriminatory or preferential reasons.

⁸ Section 393.130.1, RSMo.

⁹ Section 393.140(5), RSMo.

¹⁰ *The Regulatory Assistance Project, Electricity Regulation in the US: A Guide 5* (2011).

There are many hypothetical practices that would be considered unreasonable preferences in a free market place: making distinctions between customers based upon whether a customer is a golf buddy of the President, whether the customer gave contributions to the President's favorite charity, whether the customer was a member of the local chamber of commerce or country club, or whether the President of the service provider wanted the customer or geographic region to do well in its business in competition with other market participants or geographic regions. Culture looks askance at industry activities that show such favoritism. The Commission would look askance at Ameren Missouri were it to grant such preferences. The Commission itself should not permit such preferences. The Commission cannot in its role as substitute for free market competition make preferential decisions the free market would not permit. It must remain tied to cost of service principles and Missouri statute as a surrogate for free market forces.

Argument

21. Economic Development Rate Design Mechanisms

UFM believes that the Commission should open a docket to explore the role economic development riders have across regulated industries. But it must do so in its role of acting as a substitute for competition. As discussed in the introduction to this Brief, that role is fulfilled when ratemaking is done with a clear commitment to cost of service principles. It is clear from the record that there is no specific proposal sufficiently detailed to justify the Commission's ruling in this case.¹¹ But beyond that concern, general policy decisions are more suited to a general rulemaking where policy and legal questions may be more thoroughly evaluated rather than in this specific rate case.

¹¹ Tr. 24:1677.

Specifically, it is UFM's position that if economic development riders are to be expanded, they must be expanded consistent with cost of service principles in order to model free market conducts. First, ties to federal, state or other governmental economic development activities must be eliminated. Such governmental economic development activities are typically politically motivated and not motivated on cost of service principles because they are tied to the political process. This is an undue and unreasonable preference for certain potential applicants over other potential applicants.

Second, as is clear from the testimony, if economic development decisions are to be made on cost of service principles, they may not be made on the basis of predetermined geographic or zip code areas of the state. The economic conditions of the various regions of the state are impacted by factors of greater weight than the cost of electric facilities and rates, such as schools, crime rates, property values, etc.¹² The design and use of electric facility are distinctively system driven. Facility capacity does not necessarily track such economic conditions, and electric circuits are idiosyncratic in their potential use. Each individual circuit on the electric transmission and distribution system is loaded based on the design of the system and not on geography.¹³

Third, if economic development is to be a goal of any rider, the economic development decisions must be based on sound business decisions supervised by this Commission. There must be clear requirements that the benefits of the service granted exceed the costs. The tariff must be consistent with cost of service principles and not provide undue preferences or discrimination. Each electrical corporation is in the best position to make these calls with clear

¹² Tr. 24:1652, 1665, 1689

¹³ Tr. 24:1657, 1714 et sec.

guidance in their tariffs and an understanding that their decisions will be subject to later ratemaking scrutiny by the Commission. These policy guidelines require a fully vetted rulemaking proceeding. They should not be made in this rate case.

30. Noranda Rate Proposal

Noranda Aluminum, Inc. and various customer class representatives propose a \$34.00/MWh rate for Noranda, subject to many conditions.¹⁴ While this proposed rate is an increase from the proposed rate of \$32.50/MWh in File No. EC-2014-0224, this new proposed rate fails the cost of service principles the Commission must follow. The customer's characteristics are not an adequate justification for a rate differential; such characteristics are indications of undue discrimination.

It does not matter that Noranda is a member of the Chamber of Commerce or is a good corporate citizen. Many, many other companies are members of a chamber of commerce and good corporate citizens. A distinction for Noranda on such a basis would be undue discrimination. It does not matter that Noranda makes donations to reputable charitable organizations, including the general revenue fund of the state of Missouri or local governments in southeast Missouri. Other companies do likewise. A distinction for Noranda would be undue discrimination. It does not matter that Noranda commits to make additional investments in its business. Many other companies do likewise. A distinction for Noranda would be undue discrimination. It does not matter that Noranda has a liquidity issue. Many other companies

¹⁴ *Nonunanimous Stipulation and Agreement Regarding Economic Development, Class Cost of Service, Revenue Allocation and Rate Design*, filed March 10, 2015.

have liquidity issues. A distinction for Noranda would be undue discrimination. Any distinction made on the circumstances of the customer would be undue discrimination.

Conclusion

In conclusion, UFM would like the Commission to remember the words it cited in its *Report and Order* in File No. EC-2015-0224:

The establishment of the truth of such averment (that rates to manufacturers were below the cost of service) would reveal not only unquestionably unjust discrimination, but also an unreasonable low rate to this class (the manufacturers), and intolerable oppression upon the general metered water users in that they would be compelled to pay in part for water and service furnished to the favored class. The exercise of power crystallized into legislation that unjustly discriminates between users of water in this manner, in effect deprives those discriminated against of the use of their property without adequate compensation or due process of law, and turns it over to the favored class. It is in essence a species of taxation which takes the private property of the general or public metered water users for the private use of metered water users engaged in manufacturing. This is an abuse of power.¹⁵

These are good words. They direct the Commission in its role of executing basic justice in the setting of electric rates.

In this case, the Commission seeks to foster the public interest. This is its statutory obligation. However, the Commission cannot take unto itself every aspect of the public interest. In a free society, every individual and organization has its part to play in fostering the complete public interest. Private industry is the engine that creates wealth. Private charity is the vehicle that provides compassion to the poor and needy. Government executes justice. These all have a rightful role in fostering the public interest. In its realm of authority, the Commission works best for the execution of justice and fostering economic development, and therefore fostering the public interest, when it does its small part, when it assures the citizens of Missouri safe and

¹⁵ *Noranda Aluminum, Inc., et al., v. Union Electric Company*, File No. EC-2014-0224 (*Report and Order* issued August 20, 2014), p. 21.

reliable service at just and reasonable rates based upon cost of service, not preferential rates.
This allows other entities to fulfill their proper roles in a free society.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served the foregoing pleading by email to all parties by their attorneys of record as provided by the Secretary of the Commission on the 31st day of March, 2015.

/s/ David C. Linton
David C. Linton

Dated: March 31, 2015