BEFORE THE MISSOURI PUBLIC SERVICE COMMISSION

IN THE MATTER OF THE UNION ELECTRIC COMPANY, d/b/a AMEREN MISSOURI'S TARIFFS TO INCREASE ITS REVENUES FOR ELECTRIC SERVICE	)))))	File No: ER-2014-0258

The Cities of O'Fallon and Ballwin's Post Hearing Reply Brief

COME NOW the Cities of O'Fallon, Missouri and Ballwin, Missouri (collectively "Cities") and for their post hearing reply brief following the Missouri Public Service Commission's ("PSC" or "Commission") hearing in consideration of Union Electric Company, d/b/a Ameren Missouri's ("Ameren") request for an increase in the tariff for the provision of electrical service, states as follows:

Introduction

The Cities' reply brief is in response to the arguments made in Ameren's post hearing brief. Ameren, in its post hearing brief, was the only party to take a position contrary to the arguments made, and relief sought, by the Cities. The subtitles in the discussion section of this brief correspond to those utilized by Ameren in its post hearing brief.

Discussion

XI. Street Lighting

A. The Commission can require Ameren to negotiate for the sale of its fixtures for fair market value, as requested by the Cities.

The Commission is vested with broad regulatory authority over Ameren's acts and its property. Section 393.140(5) RSMo, provides in part: "Whenever the commission shall be of the opinion, after a hearing ...that . . . the acts or regulations of any such persons or corporations are unjust, unreasonable, unjustly discriminatory or unduly preferential..., the commission shall determine and prescribe . . . the just and reasonable acts and regulations to be done and observed . . . ." As discussed in the Cities' initial post hearing brief, the Commission has previously ordered similar relief through the sale of depreciated telephone company assets to the companies' customers, in RE: Detariffing of Embedded Customers Premises Equipment owned by Independent Telephone Companies, 90 P.U.R. 4th 428, 1987 WL 258075 (Mo. PSC).

i. The Cities are not claiming to have acquired an interest in Ameren's property.

Ameren misrepresents the arguments made, and positions taken, by the Cities. Indeed the testimony presented by the Cities demonstrates that under the 5(M) Company-Owned Tariff, the Cities are paying rates greatly in excess of mere service costs, such that they likely have paid an amount in many instances equal to, or greater, than the acquisition costs incurred by Ameren. [Direct

Testimonies of Steve Bender and Robert Kuntz]. Compare as an illustration, the differing rates for the 9,500 HPS Post Top ("HPS Post Top") fixtures. Under the 5(M) Company-Owned Tariff, the Cities pay $21.85 per month per fixture, whereas under the 6(M) Customer-Owned Tariff, the Cities would pay $3.43 per month for service and maintenance per fixture.

O'Fallon has 3822 HPS Post Top fixtures. Cities' Exhibit #854 is a picture of a 9500 HPS Post Top streetlight and a copy is attached hereto. At Ameren's current monthly 5(M) rate of $21.85, O'Fallon pays $1,002,128.00 annually for its 3,822 Post Top fixtures. If O'Fallon were allowed to switch to Ameren's 6(M) tariff of $3.43 for service and maintenance on its HPS Post Top fixtures, it would pay only $157,313.00 annually, an annual savings of $845,000.00.

Ballwin has 1,977 HPS Post Top fixtures. At Ameren's current monthly 5(M) rate of $21.85, Ballwin pays $502,637.00 annually just for its Post Top streetlights. If Ballwin were allowed to switch to the Ameren 6(M) tariff, it would pay only $3.43 for service and maintenance on each of its HPS Post Top fixtures, or $78,903.00 annually, a savings of $423,734.00.

Despite this, the Cities are **not** claiming that they have acquired an ownership interest in the fixtures. To the contrary, they seek the Commission's intervention to allow the facilities to be acquired for fair market value. As such, Ameren's attempts to characterize the Cities as seeking to claim a property

interest in the street lighting fixtures, is entirely misplaced.

In a footnote on page 123 of its initial post hearing brief, Ameren questions what the Cities mean by fair market value. Fair market value has a commonly understood definition. "[F]air market value is the price at which the property could be sold by a willing seller to a buyer who is under no compulsion to buy." Shirley's Realty, Inc. v. Hunt, 160 S.W.3d 804, 808 (Mo. App. W.D. 2005). *See also* In re Union Elect. Co., 257 P.U.R.4th 259, 2007 WL 1597782 (Mo. P.S.C.) ("A market price can be described as the price at which a willing seller, under no compulsion to sell, will sell to a willing buyer under no compulsion to buy.") As discussed and cited in the Cities initial brief, Ameren has on countless previous occasions been able to determine the fair market value of its assets when selling them to its customers.

The Cities wish to pay the fair market value for the fixtures, they do not seek credit for the excessive prior payments. The Cities can no longer sustain, and the Commission should not require the Cities to continue to be trapped under Ameren's excessive 5(M) rates.

ii. Ameren may sell its fixtures *in situ*.

Ameren's arguments under this subsection reside in the hypothetical. The Cities wish to negotiate with Ameren for the purchase of its fixtures. Such negotiations could lead to a number of outcomes. If Ameren is correct and in certain circumstances Ameren could not simply sell the relevant portions of its

conductor systems, the Cities would be faced with making the economic decision as to whether it is financially feasible to transfer the effected fixtures to the 6(M) Customer-Owned Tariff. Such concerns do not prevent the negotiation or sale of street lighting fixtures for fair market value. Ameren seeks to rely on these to justify a complete inability to even consider the sale of the fixtures. It may well be the case that after negotiations, it is only economically beneficial to the Cities to acquire a portion of the street lighting facilities, and continue under the 5(M) Company-Owned Tariff for the remaining street lighting fixtures.

Commissioner Kenney's questioning recognized that it was a business decision for the Cities to make with respect to whether it was economically viable to install a replacement distribution system in order to avail themselves of the 6(M) Customer-Owned Tariff. [Transcript, Volume 26, pps. 1816-1817].

Remarkably, Ameren appears to be suggesting that it is more feasible for: (1) the Cities to terminate under the 5(M) Company-Owned Tariff, have Ameren remove and scrap or salvage the existing fixtures, have the Cities purchase and install new fixtures, and install a new conductor and distribution systems, than (2) the Cities to acquire the fixtures *in situ*, and install where necessary new conductor and distribution systems, where those systems cannot be transferred independently from Ameren's overall distribution network. Ameren's argument is economically absurd.

iv. and v. Ameren states that it may dispose of property that is not necessary or useful without Commission approval and that the Commission does not have the statutory authority to order Ameren to sell its property involuntarily.

Section 393.190.1 (mis-cited by Ameren as Section 393.130.1 several times at page 127 of Ameren's Initial Brief) provides in relevant part that an electrical corporation may not "sell" or "dispose of" any part of its "works or system" necessary or useful in the performance of its duties to the public without prior approval of the Commission. This section clearly applies to Ameren's 5(M) company owned street lighting facilities.

Ameren cites to language in Section 393.190.1 which states that the general prohibition against a sale or disposition of property without prior approval from the Commission does not apply to property "not necessary or useful in the performance of its duties to the public". Ameren then argues that upon termination of 5(M) street lighting by a City, those street lighting facilities are no longer "necessary or useful" in its service to the public and thus can be sold or disposed of by Ameren without any approval from the Commission. The Cities disagree with Ameren's assertion and maintain that the "used and useful" determination is one ultimately reserved for the Commission and cannot be made unilaterally by Ameren.

As the Missouri Court of Appeals for the Eastern District declared in State ex rel. Fee Fee Trust Sewer, Inc. v. Litz, 596 S.W.2d 466 (1980):

> "Before a utility can sell assets that are necessary or useful in the performance of its duties to the public it must obtain approval of the Commission. 393.190 RSMo. (1969). The obvious purpose of this provision is to ensure the continuation of adequate service to the public served by the utility. The Commission may not withhold its approval of the disposition of assets unless it can be shown that such disposition is detrimental to the public interest. State ex rel. City of St. Louis v. Public Service Commission of Missouri, 335 Mo. 448, 73 S.W.2d 393,400 (Mo. banc 1934)." lc 467.

The obvious corollary to the court's reasoning is that if a proposed disposition of utility assets is deemed detrimental to the public interest, such a disposition cannot be approved. In the instant case, the Commission could find that Ameren's unilateral decision to strip, remove and dispose of perfectly good street lights is uneconomic, unreasonable and detrimental to the public interest absent a City's statement that it has no interest in purchasing such street lights.

In other words, the Commission could determine that Ameren's streetlights facilities remain necessary and useful to public service if a City states it has an interest in purchasing said street lights. But, if a City expresses no interest in acquiring its street lights, then the Commission could determine such

street lights not necessary or useful to the public and disposable by Ameren without further Commission oversight.

Let us be clear, the Cities are not maintaining that as a general proposition, the Commission has the authority to order Ameren to sell any of its property to a customer or anyone else. The Commission does not have such authority. But the Commission does have the authority to find Ameren's tariffs and/or actions "unjust" or "unreasonable" under Section 393.140.5. And upon such findings in these particular circumstances, the Commission can order Ameren to correct and revise its unjust and unreasonable tariffs and/or acts of deliberately engaging in economic waste and destruction to avoid selling depreciated streetlights to willing buyers.

Ameren promulgated its 5(M) company owned and 6(M) customer owned tariffs; and it promulgated its "Termination" paragraph under its 5(M) Tariff. These tariffs and Ameren's refusal to negotiate the sale of depreciated streetlights to the Cities (while threatening to strip and remove such streetlights) serve to trap the Cities in the 5(M) tariff rates and prevent them from moving to the more affordable 6(M) rates. This is the conduct of an unchecked monopoly. The Commission should recognize this abuse and find Ameren's tariff and conduct unreasonable. Upon such a finding, the Commission should order Ameren to change its Termination tariff and permit the Cities the opportunity to purchase it street lights at fair market value as a precondition to a determination of

streetlights being deemed unnecessary or not useful for public service. The Commission has such authority under Section 393.140.5. In fact, the spirit of the policy of the Public Service Commission Act has been recognized by the Missouri Supreme Court as thus:

> "Let it be conceded that the act establishing the Public Service Commission, defining its powers and prescribing its duties, is indicative of a policy designed, in every proper case, to substitute regulated monopoly for destructive competition. The spirit of this policy is the protection of the public. The protection given the utility is incidental." (Emphasis added) State ex rel. Electric Company of Missouri v. Atkinson, 275 Mo. 325, loc. Cit. 337, 204 S.W. 897, 899.

B. Ameren's own evidence suggests that the 5(M) Tariff is too high.

Ameren now asserts that the 5(M) Tariff rates are too high (by approximately 11%), and that there needs to be a gradual adjustment that would cause the 6(M) Tariff rates to double, due to the fewer number of 6(M) customers. [Rebuttal Testimony of William Davis, pps. 40-41]. The fact that Ameren now admits that it is overcharging under the 5(M) Tariff despite the fact that it is also seeking a rate hike is irrelevant to the instant issue. In truth it appears as if Ameren, by arguing that the 6(M) rates should be increased, is attempting to interject this issue in order to dampen any further interest from Cities in moving

to the 6(M) Tariff. If the 6(M) Rate Schedule were to increase, it would be a decision for the Cities to make as to whether changing to the 6(M) Tariff remains in the best interests of their residents. Ameren's present conduct and tariffs prevents the Cities from being able to assess whether transferring to the 6(M) Tariff would be in the best interest of its citizens, and the Cities as ratepayers, by making it unjustly and unreasonably cost prohibitive to transfer to the 6(M) Tariff.

C. The Commission should eliminate the $100 termination fee.

Ameren, despite previously denying that the termination fee was to defray costs, now argue the opposite. Ameren argue that the fee "is reasonable because it offsets the Company's cost to remove the facility being terminated and the loss of the remaining life of the item." [Ameren's initial brief at p. 133]. Ironically, Ameren vehemently reject the notion of selling the fixtures at fair market value, if the Cities were to terminate, which would mean Ameren would not have to incur removal or scrapping costs. Further, Ameren would be able to recoup book value for the fixtures. Allowing the sale of the fixtures is the most economically practical scenario and benefits the rate payers, the Cities and Ameren.

Conclusion

Ameren's current 5(M) street lighting rate schedules and practices are unjust, unfair, uneconomic and unduly preferential. The Cities urge the Commission to alleviate the hardship placed upon the Cities under the existing

rate structures, and order Ameren to revise its 5(M) Termination Tariff and promulgate a new tariff which would allow municipalities the option to negotiate in good faith with Ameren for the transfer of lighting fixtures over ten years of age for fair market value. The Cities are not asking to be given the fixtures for free, but wish to escape the 5(M) tariff ensnarement and enable them to migrate to the more equitable 6(M) Customer-Owned street lighting tariff rates.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A true and correct copy of the foregoing document has been emailed on the 10th day of April, 2015 to all persons on the Commission's service list in this case.

/s/ Leland B. Curtis

Warwick Ln.