BEFORE THE PUBLIC SERVICE COMMISSION

OF THE STATE OF MISSOURI

In the matter of D.F.M. Investment Co., a Missouri corporation, doing business as St. Louis Honda,	)	
Complainant,	)	
vs.	)	CASE NO. EC-91-349
Union Electric Company,	)	
Respondent.	)	

APPEARANCES: Brian Bild and Frank Bild, Attorneys at Law, 11648 Gravois Road, Suite 225, St. Louis, Missouri 63126, for D.F.M. Investment Co.

James J. Cook, Attorney at Law, P. O. Box 149, St. Louis, Missouri 63166, for Union Electric Company.

Lewis R. Mills, Jr., First Assistant Public Counsel, P. O. Box 7800, Jefferson City, Missouri 65102, for the Office of the Public Counsel and the Public.

Michaelene A. Knudsen, Assistant General Counsel, P. O. Box 360, Jefferson City, Missouri 65102 for the Staff of the Missouri Public Service Commission.

HEARING EXAMINER: Mark A. Grothoff

REPORT AND ORDER

On May 6, 1991, D.F.M. Investment Co., doing business as St. Louis Honda (DFM), filed a complaint against Union Electric Company (UE) alleging that UE was erroneously billing DFM under the small general service classification 2(M) when it should be billed under UE's 6(M) lighting tariff. On June 7, 1991, UE filed its answer to DFM's complaint denying that DFM qualified for the 6(M) rate.

On October 18, 1991, a prehearing conference was held and on November 7, 1991, an amended stipulation was filed, incorporating by reference a stipulation previously filed on August 30, 1991. The parties had stipulated

to certain facts and tariff information attached to the stipulation. A hearing was held on November 18, 1991 and briefs were subsequently filed by the parties.

On August 26, 1992, the Commission approved tariffs changing the rate application paragraph of UE's 6(M) tariff for service on and after September 1, 1992. The parties subsequently filed supplemental briefs discussing the effect of the new tariffs on DFM's complaint.

Findings of Fact

The Missouri Public Service Commission, having considered all of the competent and substantial evidence upon the whole record, makes the following findings of fact.

DFM is an automobile dealership in the business of selling motor vehicles with three locations in St. Louis County, Missouri. In the spring of 1991, DFM segregated the electrical service at its auto display lot by installing outdoor service for lighting including a separate meter. DFM then requested to be billed under UE's service classification 6(M).

On April 17, 1991, UE advised DFM that it had determined that DFM did not qualify for the 6(M) rate. UE refused such service to DFM stating that the 6(M) rate was generally applicable to governmental units, various municipalities, and subdivision and apartment complex trustee/management entities.

On May 6, 1991, DFM filed a complaint against UE. In its complaint, DFM stated that each of its three locations have customer-owned outdoor area lighting metered service which should be billed under UE's service classification 6(M). DFM also alleged that UE was erroneously billing it under the 2(M) small general service rate. DFM requested that the Commission find that its service should be billed in accordance with service classification 6(M).

On June 7, 1991, UE filed its answer to DFM's complaint. UE denied the allegations that DFM owns outdoor area lighting appropriate for service under the 6(M) service classification and that DFM qualified for the 6(M) rate. UE stated

that application of the lighting rates had been consistent for 25 years. UE also stated that its tariffs had previously distinguished between municipal street lighting and private area lighting; and that in 1985, it filed tariffs which eliminated such distinctions and replaced them with customer-owned and company-owned. UE argued that despite the change, the intent remained the same, which is to provide service under the 6(M) rate for public streets, roads, alleys, thoroughfares, walkways, public parks, and other outdoor locations used by the general public in noncommercial settings. UE further stated that the requested application was not consistent with its rate structure, would affect the application of its rate design and would have a significant adverse financial impact.

On August 26, 1992, the Commission approved tariffs which modified the rate application paragraph of UE's service classification 6(M) with an effective date of September 1, 1992. The tariffs were filed pursuant to a Stipulation and Agreement approved by the Commission in Case No. ER-92-132. The approval of the new tariffs settled the question of the application of the 6(M) rate from the effective date forward, but the issue of the application of the 6(M) rate prior to September 1, 1992, still exists.

At issue in this matter is the rate application paragraph of service classification 6(M) in effect prior to September 1, 1992. The pre-September 1, 1992 rate application paragraph stated:

> Available for automatically controlled, dusk-to-dawn lighting where customer furnishes, installs, owns and maintains all street and outdoor area lighting facilities, and receives metered service, unmetered service and limited maintenance provided by the Company, or unmetered service and energy only as provided for in this Service Classification.

DFM maintains that the 6(M) rate is applicable to its outdoor lighting and contends that it should be billed under the 6(M) tariff because of the changes it made to its outdoor lighting in the spring of 1991. DFM states that

it installed, owns and maintains all of its outdoor lighting and that its outdoor lights are segregated on separate meters and controlled by dusk-to-dawn sensors. DFM argues that its outdoor lights meet the criteria in the rate application paragraph and should receive service under the 6(M) rate.

UE's service to DFM's outdoor lights has been metered and billed with all other metered electric service used by DFM on UE's 2(M) small general service and 3(M) large general service classifications. UE maintains that its 2(M) and 3(M) rates are proper for the billing of DFM's total consumption of its three locations.

UE has rendered a number of reasons for refusing to provide service to DFM on the 6(M) rate. UE emphasizes its intent as to the tariff and the historical application of the tariff. UE contends that the 6(M) rate was intended only for lighting for public streets, roads, alleys, thoroughfares, walkways, public parks and other outdoor locations open and accessible to members of the general public and that the intended application was to apply only to municipalities and other governmental units. UE also maintains that its application of the 6(M) rate has been consistent for 25 years. UE argues that the rate application paragraph is ambiguous and that intent and past application should control in determining the meaning. UE further argues that, according to its intent and past application, DFM is not eligible for the 6(M) rate.

The Staff of the Commission (Staff) has taken the position that the language of the rate application paragraph contains no ambiguities and that the language of the tariff should be controlling. Staff contends that UE's intent and historical application of the tariff does not take priority over the actual language on file and approved by the Commission.

Staff also argues that, if the Commission finds the tariff language to be ambiguous, the ambiguity or misunderstanding should be construed against UE as the drafter of the language. Staff further argues that UE's interpretation

is contrary to the Commissions' order in Case No. ER-85-160 which eliminated the "municipal" and "private" designations in UE's tariffs in order to do away with separate rates for the same fixtures.

The Commission is of the opinion that the language of the rate application paragraph of service classification 6(M) is clear and unambiguous. The Commission finds that consideration of intent, previous interpretation, or history is unnecessary.

DFM furnished, installed, owns and maintains metered, automatically controlled, dusk-to-dawn outdoor lighting. DFM's outdoor lighting meets the criteria set out in the rate application paragraph of service classification 6(M). Thus, the Commission finds that, prior to September 1, 1992, DFM should have been billed under the 6(M) service classification.

Conclusions of Law

The Missouri Public Service Commission has arrived at the following conclusions of law:

UE is an "electrical corporation" and a "public utility" under the general jurisdiction of the Commission pursuant to Sections 386.020 and 386.250, RSMo Supp. 1991. The Commission has the authority to make a determination in this case pursuant to Section 386.390, RSMo 1986.

At issue in this proceeding is the determination of which tariffed rate should apply to DFM. The Commission "has the power to determine the classification of the service rendered." ***State ex rel Kansas City Power & Light Co. v. Buzard***, 168 S.W.2d 1044, 1047 (Mo. banc 1943). The Commission "has exclusive jurisdiction to determine and classify which of two approved rates apply to a customer." ***DePaul Hospital v. Southwestern Bell Telephone Co.***, 539 S.W.2d 542, 547 (Mo. Ct. App. 1976).

To determine whether UE's 6(M) rate applies to DFM, the Commission must interpret the 6(M) classification's rate application paragraph. "[T]ariffs are

to be construed according to their language...[T]he intention of the framers, although important, is not necessarily controlling...." ***National Motor Freight Traffic Association v. Interstate Commerce Commission***, 590 F.2d 1180 (D.C. Cir. 1978). "[W]here the language used is clear and unambiguous, [the tariff's] interpretation needs no extrinsic evidence as to intent, previous interpretation, or history." ***In re Columbia Gas Transmission Corp.***, 59 PUR4th 662, 665 (1984).

Where the language of a tariff is unambiguous, evidence of intent or historical interpretation is not needed. The Commission has found that the rate application paragraph of UE's service classification 6(M) is clear and unambiguous. The Commission has also found that consideration of UE's intent or previous interpretation of the rate application paragraph is not necessary.

The Commission has further found that UE's service classification 6(M) applies to DFM's outdoor lighting and that DFM should have been billed under the 6(M) service classification. Thus, the Commission concludes that UE overcharged DFM for electric service to its outdoor lights from April 17, 1991, the date UE refused DFM the 6(M) rate, to September 1, 1992, the date the new 6(M) rate application paragraph became effective.

The Commission cannot order any monetary or pecuniary award or refund. ***B. G. DeMaranville v. Fee Fee Trunk Sewer***, 573 S.W.2d 674 (Mo. App. 1978). Nonetheless, the Commission concludes that DFM should be authorized to seek recovery of the overcharges in circuit court.

IT IS THEREFORE ORDERED:

1. That Union Electric Company overcharged D.F.M. Investment Co., doing business as St. Louis Honda, for service to its outdoor lights from April 17, 1991 to September 1, 1992.

2. That D.F.M. Investment Co., doing business as St. Louis Honda, is hereby authorized to seek recovery of the overcharges found in this Report and Order in circuit court.

3. That this Report and Order shall become effective on November 13, 1992.

BY THE COMMISSION

Brent Stewart

Brent Stewart
Executive Secretary

(S E A L)

McClure, Chm., Mueller, Perkins,
and Kincheloe, CC., Concur.
Rauch, C., Dissents.

Dated at Jefferson City, Missouri,
on this 3rd day of November, 1992.