

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

In the Matter of Union Electric Company)
d/b/a Ameren Missouri’s 2nd Filing to)
Implement Regulatory Changes in)
Furtherance of Energy Efficiency as)
Allowed by MEEIA)

File No. EO-2015-0055

**AMEREN MISSOURI’S RESPONSE IN OPPOSITION TO THE OFFICE
OF THE PUBLIC COUNSEL’S MOTION FOR DETERMINATION
ON THE PLEADINGS OF AMEREN’S APPLICATION FOR APPROVAL
OF FLEX PAY PROGRAM PILOT
AND REQUEST FOR ASSOCIATED VARIANCES**

Under authority of and in accordance with 4 CSR 240-2.080, Union Electric Company d/b/a Ameren Missouri (“Ameren Missouri” or “the Company”) responds in opposition to the Office of the Public Counsel’s (“OPC”) March 23, 2018, *Motion for Determination on the Pleadings of Ameren’s Application for Approval of Flex Pay Program Pilot and Request for Associated Variances* (“Motion”). Although the exact basis for OPC’s Motion is unclear, the Commission should deny the Motion because: (1) it fails to comply with filing requirements mandated in 4 CSR 240-2.117(1) and fails to present a compelling reason for determining Ameren Missouri’s application on the pleadings under 4 CSR 240-2.117(2); (2) it fails to establish OPC is entitled to summary determination as a matter of law; (3) one or more issues of material fact related to Ameren Missouri’s November 30, 2017, *Application for Approval of Flex Pay Program Pilot and Request for Associated Variances* (“Application”) remain in dispute between the Company and other parties to this case; and (4) this is not the type of case for which the Commission adopted its rule allowing for summary disposition on the pleadings.

1. The rule governing motions for summary determination – 4 CSR 240-2.117(1) – requires pleadings seeking such relief to: (i) state with particularity each material fact the movant believes is not at issue, including specific references to evidence demonstrating the lack of any

genuine issue, and (ii) include a *separate* legal memorandum explaining why summary judgement should be granted, which must include references to evidence relied on in the motion. OPC's motion fails to satisfy both these requirements.

2. OPC does not identify facts material to Ameren Missouri's Application or explain why those facts are not in dispute. Instead, the Motion repeats and relies on *arguments* of OPC's counsel in a prior rulemaking docket and *opinions* expressed by Dr. Geoff Marke in prefiled rebuttal testimony in this case that the Company's proposed Flex Pay Program Pilot ("Pilot") involves or constitutes "deprivation of service." But neither the arguments of OPC's counsel nor Dr. Marke's opinions are *facts*, and to prevail under 4 CSR 240-2.117(1) OPC must identify facts material to this case and show they are not in dispute.

3. Even if OPC's arguments and opinions could be considered facts for purposes of evaluating the Motion, it still must be denied because questions regarding whether Ameren Missouri's Pilot involves or constitutes "deprivation of service" under 4 CSR 240-20.092(1)(M) most certainly are in dispute. Although, as noted in the preceding paragraph, Dr. Marke opines in his rebuttal testimony the Pilot constitutes "deprivation of service,"¹ surrebuttal testimony filed March 9, 2018, by Ameren Missouri witness William R. Davis strongly challenges that contention. Mr. Davis' testimony states, *inter alia*, "In my opinion, deprivation of service would mean to unfairly withhold service or not allow the customer to obtain the same service offered to other customers . . . I do not believe prepayment of energy in the context of this Pilot can be considered a 'deprivation of service.'"² Although Mr. Davis expressly identifies his testimony regarding the

¹ Prefiled rebuttal testimony of two other witnesses – Staff witness Brad J. Forston and Missouri Division of Energy witness Martin R. Hyman – also question whether the Pilot constitutes a "deprivation of service" under 4 CSR 240-20.092(1)(M). Like Dr. Marke, these witnesses' statements reflect a mixture of some facts with their respective opinions and arguments.

² Appendix A, page 24, lines 4-14.

“deprivation of service” issue as his opinion, those opinions reflect the fact Mr. Davis and Dr. Marke strongly disagree with one another. Therefore, OPC cannot credibly contend evidence material to the Commission’s ultimate decision of that issue is not in dispute. Because the issue remains in dispute, summary disposition cannot be granted under standards prescribed in the Commission’s rules.

4. Summary disposition under 4 CSR 240-2.117(1) is akin to summary judgment under Missouri Rule of Civil Procedure 74.04, because both require a showing that no material fact remains in dispute and that the moving party is entitled to judgment in its favor as a matter of law. But while both requirements must be satisfied in order to obtain summary disposition, in *ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp.*, 854 S.W.2d 371 (1993) – which is generally regarded as the leading case on legal standards for summary judgment – the Missouri Supreme Court, *en banc*, held, “[t]he key to summary judgment is the undisputed right to judgment as a matter of law; not simply the absence of a fact question.” *Id.* at 380. Applying the same standard to this case, the Motion must fail because OPC failed to establish it is entitled to summary disposition as a matter of law.

5. On April 4, 2018, in response to a pleading submitted by the Commission's Staff ("Staff"),³ OPC alleged that 4 CSR 240-2.117(2) allows the disposition of "all or any part of a case on the pleadings." Specifically, the OPC claims that if the Commission determines deprivation of service does not qualify as a demand-side program under MEEIA, then it may dispose of this matter without hearing. The OPC's conclusion, however, assumes that Flex Pay Program Pilot constitutes a deprivation of service. And clearly, the OPC and Ameren Missouri are in conflict on this point. Ameren Missouri has clearly maintained that its proposed program does *not* constitute

³ On April 4, 2018, Staff submitted its *Staff Response to Order Directing Filing Regarding Office of Public Counsel Motion for Determination on the Pleadings*, stating it took no position on OPC's Motion and noting that "the issues raised in the Motion were addressed in the prefiled testimony of various parties and could be addressed at hearing."

a deprivation of service. If, as the OPC stated, the Commission is to assume the facts alleged in the pleadings are true, then conflicting facts do indeed exist which require a hearing. OPC and Ameren Missouri cannot both be right regarding whether or not the Flex Pay Program Pilot, as proposed, constitutes a deprivation of service. Therefore, even under 4 CSR 240-2.117(2) the OPC's Motion must fail.

6. Further, although 4 CSR 240-2.117(2) does not specify pleading requirements or standards for deciding motions for determination on the pleadings, it seems implicit determination on the pleadings should be reserved for cases where: (i) no material issues of fact exist; (ii) there is no legal basis for granting relief sought by the applicant; and/or (3) the application raises no matters or issues that should be subjected to an evidentiary hearing and post-hearing briefing before decision by the Commission. The significant policy and legal issues raised by Ameren Missouri's Application cannot – and should not – be disposed of based solely on the pleadings. Those issues are not susceptible to summary disposition in the manner proposed by OPC because the remedy created by 4 CSR 240-2.117(2) was never intended to apply to cases like this one.

7. Although 4 CSR 240-20.092(1)(M) expressly states programs constituting “deprivation of service” do not qualify as demand-side programs, the phrase “deprivation of service” is not defined anywhere in the Commission's rules. Because of this omission, whether Ameren Missouri's proposed Pilot qualifies as a “demand-side program” currently is an open question. This case gives the Commission its first opportunity to express whether MEEIA rule amendments that took effect in October 2017, which included an amendment to the definition of what constitutes a “demand-side program,” were intended to exclude programs that allow customers to prepay for energy. Until that question is answered, OPC cannot establish it is entitled to summary disposition as a matter of law.

8. The Commission can thoughtfully resolve key questions regarding Ameren Missouri's Pilot, including whether it constitutes a "deprivation of service," only after a full evidentiary hearing. Such a hearing would allow witnesses to fully express and explain their opinions regarding the meaning of 4 CSR 240-20.092(1)(M) and would further allow counsel and the Commission to question those witness regarding the bases for their opinions. The normal hearing process also would give parties an opportunity to fully brief and argue legal issues related to the question of whether Ameren Missouri's Pilot qualifies as a "demand-side program" under the Commission's rules. Because facts and opinions related to that question remain in dispute, summary disposition under the 4 CSR 240-2.117 cannot be granted in this case. Even assuming *arguendo* that summary disposition could be granted, full consideration of the important issues raised by this case - including through full evidentiary hearings and post-hearing briefs - is in the best interests of the Commission and all parties.

WHEREFORE, for the reasons stated above, the Commission should issue an order denying OPC's Motion and granting Ameren Missouri such additional relief as may be warranted under the circumstances.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This 4th day of April 2018 a copy of *Ameren Missouri's Response in Opposition to the Office of the Public Counsel's Motion for Determination on the Pleadings of Ameren's Application for Approval of Flex Pay Program Pilot and Request for Associated Variances* was served via electronic mail on each party to File No. EO-2015-0055.

/s/ L. Russell Mitten