

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

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

File No. EO-2015-0055

**RESPONSE TO THE OFFICE OF THE PUBLIC COUNSEL'S REPLY TO  
AMEREN MISSOURI'S RESPONSE IN OPPOSITION**

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 to the reply filed by the Office of the Public Counsel's ("OPC") to the Company'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* ("Reply").

1. The Commission rule upon which OPC's original motion is based – 4 CSR 240-2.117(1) – authorizes both summary disposition and determination on the pleadings. But the distinction between those two remedies may not be as clear cut as OPC's Reply suggests. Indeed, relevant case law suggests the ultimate legal standard applicable to both remedies is the same.

2. As Ameren Missouri noted in its previous pleading, summary disposition under 4 CSR 240-2.117(1) is akin to summary judgment under Missouri Rule of Civil Procedure 74.04. Similarly, judgment on the pleadings under 4 CSR 240-2.117(2) is akin to judgment on the pleadings under Missouri Rule of Civil Procedure 55.27(b).

3. The ultimate legal standard governing summary judgment in civil courts was discussed in the Company's previous pleading and will not be repeated here. That standard – whether the moving party is entitled to judgment as a matter of law – also applies to judgments on the pleadings under Rule 55.27(b). Therefore, unless OPC can establish it has a legal right to

summary adjudication of Ameren Missouri's application based solely on the pleadings, the Commission must deny the motion regardless of whether OPC's motion is one for summary determination or determination on the pleadings.

4. A court cannot grant a motion for judgment on the pleadings unless all facts and averments pleaded, together with benefit of all reasonable inferences drawn from them, show the non-moving party could not prevail under any legal theory. *A.R.H. v. W.H.S.*, 876 S.W.2d 687, 688 (Mo. App. 1994). Under case law interpreting Rule 55.27(b), the most critical question a motion for judgment on the pleadings presents is whether the moving party is entitled to judgment on as a matter of law. *State ex rel. Redmond v. State*, 328 S.W.3d 818, 821 (Mo. App. 2011). To make that determination, all the non-moving party's well-pleaded facts and averments – which may include matters outside the pleadings themselves, such as affidavits – are treated as admitted for purposes of the motion. *Twehous Excavating Company, Inc. v. L.L. Lewis Investments, L.L.C.*, 295 S.W.3d 542, 545-6 (Mo. App. 2009). Consequently, a motion for judgment on the pleadings should not be granted where a material issue of fact exists. *Angelo v. City of Hazelwood*, 810 S.W.2d 706, 707 (Mo. App. 1991). And a party seeking judgment on the pleadings can prevail only if the responding party has admitted the moving party's material facts, those facts entitle the moving party to judgment as a matter of law, and the responding party has not asserted any contrary facts by way of defense. *Good Hope Missionary Baptist Church v. St. Louis Alarm Monitoring, Co.*, 306 S.W.3d 185, 191 (Mo. App. 2010). OPC's motion fails to satisfy any of those legal standards.

5. As Ameren Missouri noted in its previous pleading in opposition to OPC's motion, the pre-filed surrebuttal testimony of its witness William R. Davis states the proposed Flex Pay Program Pilot ("Pilot") does not involve or constitute "deprivation of service," as that phrase is

used in 4 CSR 240-20.092(1)(M).<sup>1</sup> Under *Twehous*, statements in that testimony must be taken as admitted by OPC for purposes of granting or denying its motion. Because Mr. Davis testifies Ameren Missouri's Pilot does *not* involve or constitute a "deprivation of service," for purposes of deciding OPC's motion the Commission must assume the Pilot qualifies as a "demand-side program" under 4 CSR 240-20.092(1)(M). Therefore, based solely on facts and averments from Ameren Missouri's pleadings and Mr. Davis's verified testimony, OPC cannot establish it is entitled to a judgment as a matter of law.

6. This case gives the Commission its first opportunity to express whether MEEIA rule amendments that took effect in October 2017 exclude programs allowing customers to prepay for energy. The Commission can thoughtfully resolve key questions related to that issue only after a full evidentiary hearing, where witnesses can testify and be questioned about the meaning of the phrase "deprivation of service" used in 4 CSR 240-20.092(1)(M). The normal hearing process also would give parties the opportunity to fully brief and argue legal issues related to that question, and those legal arguments likely will be critical in guiding the Commission toward the appropriate interpretation and application of that rule.

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.

---

<sup>1</sup> A verified copy of Mr. Davis's pre-filed surrebuttal testimony is attached to this response as Appendix A and is incorporated by reference. Mr. Davis's testimony regarding whether Ameren Missouri's Pilot involves or constitutes "deprivation of service" can be found at pages 13-14 and 24-32.

Respectfully submitted,

/s/ Paula N. Johnson

**Paula N. Johnson** #68963  
Senior Corporate Counsel  
**Wendy K. Tatro** #60261  
Director – Assistant General Counsel  
Ameren Missouri  
1901 Chouteau Avenue, MC 1310  
P.O. Box 66149  
St. Louis, MO 63166  
(314) 554-3484 (Telephone)  
(314) 554-4014 (Facsimile)  
[ameren-service@ameren.com](mailto:ameren-service@ameren.com)

**L. Russell Mitten** #27881  
Brydon, Swearingen & England, P.C.  
312 East Capitol Avenue  
Jefferson City, MO 65102  
(573) 635-7166 (Telephone)  
(573) 634-7431 (Facsimile)  
[rmitten@brydonlaw.com](mailto:rmitten@brydonlaw.com)

ATTORNEYS FOR UNION ELECTRIC  
COMPANY d/b/a AMEREN MISSOURI

**CERTIFICATE OF SERVICE**

This 9<sup>th</sup> day of April 2018 a copy of the *Response to Office of the Public Counsel's Reply to Ameren Missouri's Response in Opposition* was served via electronic mail on each party to File No. EO-2015-0055.

/s/ L. Russell Mitten