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

UNITED FOR MISSOURI'S REPLY BRIEF

COMES NOW United for Missouri, Inc. ("UFM"), and for its *Reply Brief,* states as follows:

In its *Initial Brief*, UFM made the case that Ameren Missouri has met the statutory requirement for the Commission's approval of its Cycle 2 MEEIA plan as described in its Non-Unanimous Stipulation and Agreement ("Utility Stipulation"). UFM has found nothing in the initial briefs of the other parties to make it question that conclusion. First, the Utility Stipulation proposes a system of "demand-side programs . . . with a goal of achieving all cost-effective demand-side savings."[1] Therefore, the Commission **shall** approve it. Second, the Utility Stipulation proposes a system of demand-side programs that, "result in energy and demand savings and are beneficial to all customers in the customer class in which the programs are proposed, regardless of whether the programs are utilized by all customers."[2] Therefore, the Commission **may** approve the cost recovery mechanism.

UFM has one matter to raise in this its *Reply Brief.* UFM must take issue with Renew Missouri's request that the Commission corrupt itself by negotiating with Ameren Missouri via the use of regulatory brinkmanship.

---

[1] Section 393.1075.4.
[2] *Id*.

Renew Missouri's initial brief makes for an interesting read. In the first half of Renew Missouri's initial brief, without a citation to authority, it invites the Commission to take unto itself "broad authority"[3] to "signal the direction the State of Missouri will take in energy efficiency."[4] It offers the Commission the mantle of "ultimate authority to decide what is permissible under the law."[5] This invitation for the Commission to do what is right in its own eyes is inviting, but it is also a corruption of the Commission's role.

In reality, the Commission is an agency of limited authority.

> The PSC "is a creature of statute and can function only in accordance with" its enabling statutes. *State ex rel. Monsanto Co. v. Pub. Serv. Comm'n,* 716 S.W.2d 791, 796 (Mo. banc 1986). Its "powers are limited to those conferred by ... statutes, either expressly, or by clear implication as necessary to carry out the powers specifically granted." *Util. Consumers' Council of Missouri, Inc.,* 585 S.W.2d at 49; *see also* § 386.040 (creating the PSC and vesting it with "the powers and duties ... specified, and also all powers necessary or proper to enable it to carry out fully and effectually all the purposes" of its governing statutes). If a power is not granted to the PSC by Missouri statute, then the PSC does not have that power.[6]

And under MEEIA, the powers specifically granted are very limited. The Commission "shall permit" electric corporations to implement demand-side programs if the utility's proposal has a goal of achieving all cost-effective demand-side savings. And the Commission "shall not" permit cost recovery unless certain clearly specified conditions are satisfied. The Commission's discretion in developing policy on energy efficiency is greatly circumscribed by MEEIA.

The Commission should not be enticed by Renew Missouri's claim that the Commission is the final authority on the law. The foundational principle in western jurisprudence goes back to *Marbury v. Madison* and beyond, that the judicial branch of government in a constitutional

---

[3] *Initial Post-Hearing Brief of Renew Missouri*, p. 3.
[4] *Id*., p. 2.
[5] *Id*.
[6] *State ex rel. Mogas Pipeline LLC v. Mo. Pub. Serv. Comm'n*, 366 S.W.3d 493, 496 (Mo., 2012).

republic is the final authority on the law. In *Marbury v. Madison*, Justice Marshall, citing the *Commentaries on the Laws of England* of Sir William Blackstone, propounds:

> In the third volume of his Commentaries, page 23, Blackstone states two cases in which a remedy is afforded by mere operation of law.
>
> 'In all other cases,' he says, 'it is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit or action at law whenever that right is invaded.' And afterwards, page 109 of the same volume, he says, 'I am next to consider such injuries as are cognizable by the courts of common law. And herein I shall for the present only remark, that all possible injuries whatsoever, that did not fall within the exclusive cognizance of either the ecclesiastical, military, or maritime tribunals, are, for that very reason, within the cognizance of the common law courts of justice; for it is a settled and invariable principle in the laws of England, that every right, when withheld, must have a remedy, and every injury its proper redress.'
>
> The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.[7]

Consistent with the English common law, the Missouri Constitution requires that orders of the Commission are reviewable by the courts.

> All final decisions, findings, rules and orders on any administrative officer or body existing under the constitution or by law, which are judicial or quasi-judicial and affect private rights, shall be subject to direct review by the courts as provided by law; and such review shall include the determination whether the same are authorized by law, and in cases in which a hearing is required by law, whether the same are supported by competent and substantial evidence upon the whole record.[8]

All legal issues decided by the Commission are reviewed *de novo* by the courts.[9] This Commission is not the final authority of what is permissible under the law.

Renew Missouri not only invites the Commission to take a corrupting attitude regarding its authority but also invites it to take on a corrupting posture toward Ameren Missouri. At page

---

[7] 5 U.S. at 163.
[8] MO. CONST. art. V, § 18.
[9] *Ag Processing v. Public Service Comm'n*, 120 S.W.3d 732, 734 (Mo., 2003). There is no policy of granting a state agency deference in its interpretation of ambiguous provisions in its enabling legislation as there is with the federal government thankfully.

5 of its initial brief, Renew Missouri observes something that is true of private business entities: they negotiate. "Parties make many representations in the course of negotiations or trial preparations, which may not necessarily reflect their final positions." It then invites the Commission to enter into these negotiations. "Already in this case, we have seen Ameren Missouri agree to include additional cost-effective programs and raise its savings target during negotiations. The Commission shouldn't treat Ameren Missouri's blanket rejection of the Non-Utility Stipulation as a final indication that each and every modification is not 'acceptable' to the utility." In concluding the first part of its initial brief, Renew Missouri invites the Commission to enter into negotiations with Ameren.

> Renew Missouri requests that the Commission proceed as follows: 1) issue an Order approving and modifying Ameren Missouri's application; then 2) provide Ameren Missouri with a date certain to indicate that the modified plan is unacceptable to the Company. This allows the Commission to articulate its ground rules regarding its implementation of MEEIA. If the modified plan so unacceptable to the Company that it truly prefers to forego profits for its shareholders, it will have the option of refusing to implement the programs. Or the Company may still propose a plan that the parties may be willing to accept, provided that it meets the Commission's clearly expressed expectations.[10]

What follows in its initial brief is Renew Missouri's wish list for how and what the Commission should negotiate with Ameren Missouri. Renew Missouri's proposal is that the Commission condition, prompt, cajole, or negotiate Ameren Missouri into conducting Ameren Missouri's business Renew Missouri's way or the Commission's way. Such a negotiating posture is not becoming and completely beyond an appropriate role for a state agency.

It is well understood that the Commission has no authority over the management or control of any company. This principle was confirmed as recently as April of this year, in *City of O'Fallon v. Union Electric Co.*, WD78067 (Mo. App. 2015). In that case, the cities of O'Fallon

[10] *Initial Post-Hearing Brief of Renew Missouri*, p. 7.

and Ballwin filed a complaint against Union Electric Company, requesting the Commission direct the company to negotiate in good faith to sell them the street lights at fair market value. The Commission granted the company's motion to dismiss, finding that it did not have jurisdiction over the complaint. The cities appealed.

In affirming the Commission's order dismissing the complaint, the court observed,

> "The Commission is 'an administrative body created by statute and has only such powers as are expressly conferred by statute and reasonably incidental thereto.'" *Pub. Serv. Comm'n v. Mo. Gas Energy*, 388 S.W.3d 221, 230 (Mo. App. 2012) (citation omitted). "The Commission's authority, therefore, must come from the statutes." *Id*. "'Neither convenience, expediency or necessity are proper matters for consideration in the determination of whether or not an act of the [C]ommission is authorized by statute.'" *State ex rel. Cass County v. Pub. Serv. Comm'n*, 259 S.W.3d 544, 548 (Mo. App. 2008) (citation omitted). "If a power is not granted to the [Commission] by Missouri statute, then the [Commission] does not have that power." *MoGas Pipeline*, 366 S.W.3d at 496.

In *State ex rel. Harline v. Pub. Serv. Comm'n*, 343 S.W.2d 177, 181 (Mo. App. 1960), the court found the Commission had comprehensive powers over corporate malfeasance, but not over management. The proactive prompting proposed by Renew Missouri would produce an interference with the company's operations and management that is beyond the bounds of the Commission's authority.

Renew Missouri's recommended manipulation by the Commission is in reality a call to lawlessness. The Commission must remember its role and the purpose of all constitutional government,

> to promote the general welfare of the people; that all persons have a natural right to life, liberty, the pursuit of happiness and the enjoyment of the gains of their own industry; that all persons are created equal and are entitled to equal rights and opportunity under the law; that to give security to these things is the principal office of government, and that when government does not confer this security, it fails in its chief design.[11]

The role of constitutional government is to secure individual rights to life, liberty and property. This includes the right to conduct business within the bounds of the law, free from the coercive

[11] MO. CONST. art. I, §2.

power of the state and the interference from other parties. Governmental attempts to infringe those rights through manipulation causes an insecurity in the holding of such rights and causes government to fail in its chief design.

The Commission has a simple task. If it determines the proposal made by Ameren Missouri as outlined in the Utility Stipulation has as its goal the achievement of all cost-effective demand-side savings, it must approve the Utility Stipulation. And, as a corollary thereto, if it determines that such programs actually result in energy or demand savings and are beneficial to all customer, it may approve cost recovery. UFM requests that the Commission not corrupt itself or this simple process by conditioning, prompting or cajoling new political causes upon Ameren Missouri and its customers through this simple plan.

Respectfully submitted,

By: /s/ David C. Linton

David C. Linton, #32198
314 Romaine Spring View
Fenton, MO 63026
Telephone: 314-341-5769
Email: jdlinton@reagan.com

Attorney for United for Missouri, Inc.

Filed: August 26, 2015

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was sent to all parties of record via electronic transmission this 26th day of August, 2015.

By: /s/ David C. Linton