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AUDIO RECORDING
IN RE: MISSOURI COALITION FOR FAIR COMPETITION AND
COREY MALONE
VS.
UNION ELECTRIC COMPANY, DBA AMEREN MISSOURI
CASE NO. EC-2023-0037
JANUARY 26, 2024
VOLUME 1

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Today's January 26th, 2024. It's 10:00 o'clock a.m. The commission has set this time for a procedural conference in the case captioned as Missouri Coalition for Fair Competition and Corey Malone, complainants, versus Union Electric Company, doing business as Ameren Missouri, respondent. It's the commission file number EC-2023-0037.

My name is Ken Seyer. I'm the regulatory law judge in this matter, and we will begin by the attorneys making their entries of appearance, starting with you, Mr. Barrett.

MR. BARRETT: Thank you, Mr. Seyer.

My name is David Barrett, B as in boy, A-R-R-E-T-T. I'm an attorney here in Jefferson City, and it is my privilege to represent the Missouri Coalition for Fair Competition and Mr. Malone.

LAW JUDGE SEYER: All right. Thank you. Counsel for staff?

MS. KERR: Carolyn Kerr, K-E-R-R, attorney

1 for Missouri Public Service Commission.

2 LAW JUDGE SEYER: All right. And for
3 Ameren Missouri?

4 MS. MOORE: Thank you, Your Honor.

5 Appearing on behalf of Ameren Missouri is
6 Jennifer Moore and Jennifer Hernandez.

7 LAW JUDGE SEYER: All right. Thank you.

8 Are there any matters that the parties want
9 to take up before I get into why I called this
10 procedural conference?

11 MR. POSTON: Judge, this is Marc Poston
12 with OPC.

13 LAW JUDGE SEYER: Oh, I'm sorry.

14 MR. POSTON: This is Marc Poston with OPC.
15 I'm just letting you know I'm here.

16 LAW JUDGE SEYER: Yeah. I'm sorry. I -- I
17 did kind of skip over you.

18 MR. BARRETT: If I might, Mr. Sir.

19 LAW JUDGE SEYER: Yes. Mr. Barrett.

20 MR. BARRETT: I really think that this --
21 for being familiar with the record, I really think
22 this is kind of my fault. I had assumed that the
23 commission's referral of this matter to staff for a
24 report, after Ameren filed its motion to dismiss, that
25 we were sort of in the posture of waiting for what was

1 going to happen, and so I did not take advantage of
2 the time that might have been available to engage in
3 discovery because as I am sure you are well aware,
4 this is actually my first PSC case, and I have to
5 plead ignorance. I've been an attorney for more than
6 30 years, but it has not been my privilege to practice
7 in front of you, and so I made that assumption that
8 may not have been a wise one, and I -- to the extent
9 that an apology is due for that, I extend it.

10 LAW JUDGE SEYER: Well, I don't know that
11 an apology is necessary, but what -- the main reason I
12 wanted to get the parties together today is because --
13 well, let me -- let me back up, and just for the sake
14 of the record, just very briefly, summarize that I
15 believe your complaint on behalf of your clients
16 alleges that Ameren Missouri has violated the Fair
17 Competition Law, Sections 386.754 through 386.764 of
18 the Revised Statutes of Missouri alleging that Ameren
19 Missouri has engaged in HVAC services. But staff --
20 staff's memorandum that was filed back on April 12th
21 of 2023, what is relevant for what I want to cover
22 today, staff states that the commission is the wrong
23 forum in which to file this action and -- and the
24 position is that the commission has no authority to
25 enforce -- enforce the provisions of the Fair

1 Competition Law.

2 So, again, for the sake of the record, back
3 on December 13th, I issued an order on behalf of the
4 commission directing staff to file a joint proposed
5 procedural schedule by January 8th. That would be on
6 behalf of all the parties, and essentially, that is
7 not what I got. What I got was on -- on your behalf,
8 Mr. Barrett, was a proposed scheduling order
9 suggesting that an April 1st deadline for the parties
10 to propound data requests, and a May 17th deadline to
11 conduct depositions, a June 28th deadline for written
12 testimony and deposition designations. And staff and
13 Ameren Missouri filed a joint motion to adopt a
14 procedural schedule that only listed a -- an initial
15 briefs deadline March 21st and April 3rd deadline for
16 reply -- or March 21st deadline for filing initial
17 briefs, and April 3rd deadline for filing reply
18 briefs.

19 So the way I took those filings was kind of
20 the old quote from a movie, failure to communicate. What
21 we have here is, a failure to communicate. And so I look
22 at those pleadings as -- as unresponsive to the
23 commission's order and -- but I also kind of look at
24 it as possibly the parties disagree on whether the
25 commission is the proper forum and disagree as to the

1 commission's authority in this matter. But that issue
2 is not yet before the commission to decide. What is
3 before the commission is a complaint with facts upon
4 which the parties apparently disagree which, to me, is
5 a contested case which must be decided after a
6 hearing.

7 So I'd kind of like some feedback from the
8 parties as to whether I am wrong in my thinking on
9 that.

10 MR. BARRETT: As the petitioner's attorney,
11 do you want me to go first?

12 LAW JUDGE SEYER: Sure.

13 MR. BARRETT: Yeah. I think you're
14 absolutely correct. Ms. Moore and I had a chance to
15 visit. I have greatly appreciated her cooperation and
16 her courtesies throughout these proceedings long
17 though they may be, but I think that's the difference
18 that we're at. I think it's not to speak for
19 her, but I think Ms. Moore's position is, there's a
20 very narrow issue of jurisdiction, using the term very
21 lightly, to be determined and that -- with all the
22 time that has passed to the extent that I had wanted to
23 collect evidence to present at a contested hearing
24 before the commission, that I had been dilatory in
25 doing that for the reasons I explained -- the reasons

1 I explained previously or the reason that I took no
2 action pending the resolution of what I think was
3 initially a motion to dismiss that they filed.

4 LAW JUDGE SEYER: That's correct.

5 MR. BARRETT: And to the extent that we're
6 going to have a contested issue, we've had several
7 opportunities to meet as parties. We called them
8 settlement conferences for a couple of different
9 reasons, but I think I have a pretty good
10 understanding of the facts. What I need now is an
11 opportunity to collect evidence that supports those
12 facts in a contested hearing posture. And that's all
13 I have to say about that, just so I can pass the
14 baton.

15 MS. MOORE: I -- did you want me to go
16 ahead and --

17 LAW JUDGE SEYER: Sure. If you'd like to
18 weigh in on this.

19 MS. MOORE: Yeah. I think here, when we go
20 to the narrow issue of jurisdiction, the initial
21 complaint is whether --

22 LAW JUDGE SEYER: Let me -- let me
23 interrupt you, and for the sake of the record, you're
24 Ms. Moore on behalf of Ameren; correct?

25 MS. MOORE: Correct. Thank you. I'm

1 sorry, Your Honor. No problem. I should have said
2 that.

3 I think it goes down to the issue, as the
4 complaint alleges that we violated the act, and
5 there's an exemption under the act where we're
6 offering energy efficiency programs where HVAC
7 services are a part of those programs, and under that
8 provision of the law, the company is exempted from
9 violating the act. So the way that the company
10 perceives that is this is a legal issue for the
11 parties to brief. I don't know what contested issues
12 or, you know, what contested facts there are. Just as
13 staff, you know, laid out issues in the report, the
14 company doesn't have any issues or -- you know,
15 doesn't challenge any of those facts. I don't know if
16 it's the complainant's issue that some of those facts
17 can be contestable, but, you know, we -- we have a
18 record before us, and I think the -- the next step now
19 is to brief the commission, and that's why staff and
20 the company came to an agreement on the -- the
21 schedule, and so I don't know, Carolyn, staff, does --
22 do you want to weigh in or at anything?

23 MS. KERR: Sure. This is Carolyn Kerr on
24 behalf of staff. I mean, we agree with -- with Ameren
25 as far as that issue goes. Excuse me.

1 In addition, I mean, we -- you know, after
2 we submitted our report, there has been, you know,
3 months to do discovery, ask follow-up questions.
4 We've tried to have some settlement discussions.
5 Those really have gone nowhere. You know, it's --
6 it's -- staff's not going to get in between, you know,
7 the -- the complainant and the company as to whether,
8 you know, there's any -- any settlement, you know, how
9 they're going to settle this case, but, you know,
10 it -- at one -- at a few points there was, you know,
11 some discussion on, you know, how -- is there a way
12 that the two parties can, you know, work something
13 out, and nothing seemed to -- to work out. So, you
14 know, if we're going to go to a hearing, let's just go
15 to a hearing and try to figure something out, but I
16 don't know that anyone's figured out what the actual
17 issue is. You know, we've had time during those --
18 you know, in between those settlement discussions or
19 whatever you want to call them to -- to do -- you
20 know, send DRs or do depositions or whatever, but it
21 doesn't seem to be -- you know, it -- the question
22 seem to be, what's the legal issue? And -- and not,
23 you know, what the facts are. You know, and so, you
24 know, like our report said, this -- this is really a
25 legal issue, and that's why we submitted the -- the

1 schedule we did. We did ask -- you know, run that by
2 Mr. Barrett to see whether he would sign off on that,
3 so we could have a joint -- a truly joint procedural
4 schedule to be filed with the -- with the commission,
5 and Mr. Barrett didn't want to agree with that, which
6 is, you know, perfectly fine. And so he filed his --
7 his own and that -- that's kind of how we got to where
8 we were, where we are.

9 You know, I don't think this -- if we do go
10 to a hearing, I -- you know, I -- I don't think we
11 should wait, you know, another six months to even
12 start it. We should, you know, go ahead and schedule
13 something, you know, very soon. But, you know, I
14 agree with what Ms. Moore said, this really is a -- is
15 a legal question.

16 MR. BARRETT: If I might, Mr. Sir?

17 LAW JUDGE SEYER: Uh-huh.

18 MR. BARRETT: This is David Barrett again.

19 I completely agree with what Carolyn and
20 Jennifer said. Although we disagree on what the
21 proper positioning is, I don't think there's any
22 disagreement about where we've been or what has gone
23 on. Again, my view was simply, if there's simply a
24 legal issue that is going to be resolved in some sort
25 of summary proceeding, whether -- in civil court, it

1 might be called a motion to dismiss or a motion for
2 summary judgment, then I think the issue -- the legal
3 issues, I agree, are clear.

4 The problem is, as I interpreted your
5 order, you were looking to do a hearing on the merits
6 of the issue and -- with the legal issue being a --
7 one of those things to be resolved, but to the extent
8 that we're going to go into the merits, that's where I
9 think there's a -- a need for the evidence to be
10 memorialized, but if this is a -- if you're going to
11 be reaching a summary decision on whether the
12 commission has authority, there's no need to go
13 through that exercise to gather evidence, if the
14 commission's the wrong place to present the evidence
15 in the first place.

16 LAW JUDGE SEYER: Well, the way I look at
17 the -- the situation is that the commission does not
18 have a -- a motion for summary determination before
19 it. And there are these -- these facts in dispute,
20 and so I believe that there needs to be a procedural
21 schedule that leads to an evidentiary hearing, you
22 know, and has deadlines for direct testimony, rebuttal
23 testimony, et cetera. A list of issues. Position
24 statements. And leading up to an evidentiary hearing
25 to take place no later than the end of July, let's

1 say. That would give you some time for discovery, but
2 would get an evidentiary hearing on the calendar,
3 because our calendar's starting to fill up. So that's
4 kind of the way I look at the case.

5 And so, you know, I hope to -- at the close
6 of this conference today I would look at it as letting
7 you all know that that's the position of the
8 commission. I'll issue an order that, again, asks for
9 a joint procedural schedule, and hopefully, you all
10 can agree on a procedural schedule that has those
11 types of deadlines, so.

12 MS. MOORE: Your Honor, this is Jennifer
13 Moore. I -- I'm going to go back to the issue. Maybe
14 Mr. Barrett could help. What -- what facts are in
15 dispute? I'm aware we haven't -- we haven't disputed
16 anything in that staff report.

17 MR. BARRETT: And that's where my comfort
18 level is low here. I don't know how much, Mr. Seyer,
19 you want to hear about the facts of the case as I
20 perceive them and what I intend to prove.

21 LAW JUDGE SEYER: Well, you know, I -- I
22 don't think this is the proper -- proper time to hear
23 anything beyond what you've alleged in your complaint.

24 MR. BARRETT: And Ms. Moore has always been
25 very available to me. Just because we're not going to

1 talk about it right now doesn't mean I'm not going to
2 talk to her or Ms. Kerr as we work this out. I've
3 known Ms. Kerr for decades, and Ms. Moore seems to --
4 and Ms. Moore seems to be of the same extraordinary
5 caliber.

6 LAW JUDGE SEYER: All right. So like I
7 said, what I would -- what I would like to do is,
8 issue an order, again, asking for a joint procedural
9 schedule. My question to you is, how long do you --
10 and I'm directing this to everyone. How long do you
11 need to file that schedule?

12 MR. BARRETT: This is David again.
13 Perhaps, being the most ignorant in the room, I might
14 suggest mid-February?

15 MS. KERR: I'm going to be on --
16 unavailable after the 16th, like the second half of
17 February. So if we can get it done by the 15th, I'd
18 be fine.

19 LAW JUDGE SEYER: Ms. Moore, is that
20 acceptable?

21 MS. MOORE: Yes, Your Honor.

22 And I just want to make sure I heard
23 correctly. You're proposing that we work from -- work
24 on a procedural schedule with having hearings in July
25 in mind with a proposed date?

1 LAW JUDGE SEYER: Correct.

2 MS. MOORE: Okay.

3 LAW JUDGE SEYER: And if -- and I --
4 personally, I'm not a -- if I had my preference, I
5 prefer to have a hearing here in our building in the
6 hearing room. But if that is not the consensus, if --
7 if the parties want to conduct the hearing online or
8 some hybrid version of online and in person, make sure
9 you put that in the proposed procedural schedule.

10 All right. Those -- that's really the --
11 the topics that I wanted to cover today. Is there
12 anything else that the parties want to discuss today?

13 MR. BARRETT: Just between counsel, if I
14 might, while we're still on the phone, Mr. Seyer, the
15 rest of my day is full. What I propose doing is
16 sending a -- an e-mail to counsel on Monday so we can
17 get together and sort out these issues.

18 LAW JUDGE SEYER: All right.

19 MS. KERR: That's fine.

20 LAW JUDGE SEYER: Okay. If there is
21 nothing further, then I'll adjourn this conference,
22 and we'll go off the record.

23 MS. KERR: Okay. Thank you.

24 MR. BARRETT: Nothing from the petitioner.

25 LAW JUDGE SEYER: Thank you.

1 (Audio ended.)

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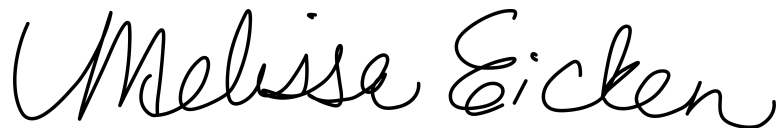
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