BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

Missouri Coalition for Fair Competition and Corey Malone,	)	
Complainants,	)	File No. EC-2023-0037
v.	)	
Union Electric Company d/b/a Ameren Missouri,	)	
Respondent.	)	

AMEREN MISSOURI'S STATEMENT OF POSITIONS

COMES NOW Union Electric Company d/b/a Ameren Missouri ("Company" or "Ameren Missouri"), and for its Statement of Positions on the issues identified in the parties' *Jointly Proposed List of Issues, etc.* submitted in this docket, states as follows:

Does the evidence establish that Ameren Missouri has engaged in HVAC services in a manner that violates section 386.756.

No. Complainants Missouri Coalition for Fair Competition and Corey Malone (collectively, "MCFFC") have failed, both as a matter of law and as a matter of fact, to meet their burden to establish a violation of Section 386.756. That burden is borne by MCFFC and MCFFC alone. *See, e.g.,* Report and Order*, Beverly A. Johnson, Complainant, v. Missouri Gas Energy,* Respondent, 2008 WL 11310918 (Mo. P.S.C) (Nov. 6, 2008), (*citing David A. Turner and Michele R. Turner, Complainants v. Warren County Water and Sewer Company, Respondent*, 9 Mo. P.S.C. 3d 548 (Mo. PSC 2001), *citing to, Margolis v. Union Electric Company*, 30 Mo. P.S.C. (N.S.) 517, 523 (1991); *Michaelson v. Wolf*, 261 S.W.2d 918, 924 (Mo. 1953); *Farnham v. Boone*, 431 S.W.2d 154 (Mo. 1968) ("In cases where a complainant alleges a regulated utility is violating the law …, the complainant bears the burden of proving the allegations in [its]

complaint.").[1]

While the Complaint in this case, as well as the evidence, is vague and to a significant extent irrelevant to the application of Section 386.756, one thing that is clear is that all of the claimed violations arise from energy efficiency programs offered under Commissions-approved programs and tariffs. Consequently, even if the Commission were to take every word in the Complaint and in Complainants' pre-filed testimony as true, there simply is not, and there cannot be, a violation of Section 386.756 given the plain terms of subsection 8 of the statute which exempts such programs from the statute entirely. Specifically, subsection 8 of Section 386.756 provides,

> The provisions of this section shall not be construed to prohibit a utility from providing emergency service, providing any service required by law or *providing a program pursuant to an existing tariff, rule or order of the public service commission* (emphasis added).

As addressed below, the basis of the Complaint is that Ameren Missouri has violated Section 386.756 by offering and implementing its Pays as You Save and Low-Income Single Family[2] energy efficiency programs, which were established by and exist by virtue of Tariff Sheet Nos. 245 – 245.5 (Pays as You Save)[3] and Tariff Sheet Nos. 242 – 242.1 (Low-Income Single Family).[4] As such, Ameren Missouri's activities under those programs are completely exempt from the provisions of Section 386.756 and the Complaint fails as a matter of law.[5]

The Complaint also fails in any event as a matter of fact and for lack of proof of any

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[1] *See also* Section 386.764, which makes clear Complainants bear the burden in this case as all complainants do in complaint cases.
[2] Marketed as the Community Savers Single Family Program. Harmon Rebuttal pp. 4-5.
[3] Approved by the Commission in 2020 pursuant to its *Order Approving Unanimous Stipulation and Agreement Regarding Implementation of certain MEEIA Programs through Plan Year 2022,* issued August 5, 2020.
[4] Approved by the Commission in File No. EO-2018-0211 pursuant to the December 5, 2018 *Order Approving Stipulation and Agreement and Granting Waivers.*
[5] This case could have been disposed of as a matter of law via summary determination but given the timing of the adopted procedural schedule, which did not require final testimony from Complainants until 30 days prior to the hearing date, summary determination was not available under 20 CSR 4240-2.117 since such motions must be filed at least 60 days prior to the scheduled evidentiary hearing date.

violations of the relevant statute. Complainants first allegation is that Ameren Missouri "upon information and belief" has been and is engaging in HVAC services contrary to Section 386.756. For purposes of this statute, HVAC services are defined by Section 386.754, as follows:

> The warranty, sale, lease, rental, installation, construction, modernization, retrofit, maintenance or repair of heating, ventilating and air conditioning equipment.

Aside from Complainants' conclusory "upon information and belief" claim,[6] Complainants do not even allege, let alone provide any evidence, that Ameren Missouri is warranting, or selling, or leasing, or renting, or installing, or constructing, or modernizing, or retrofitting, or maintaining, or repairing HVAC equipment. Even if subsection 8 did not exist, Complaint paragraph 7 fails for lack of proof.

Complainants next allege (Complaint paragraph 8), again "upon information and belief," that Ameren Missouri has used and is using "its vehicles, service tools, instruments, employees, advertising, or … other utility assets … to engage in HVAC services."[7] Even if subsection 8 did not exist, Complaint paragraph 8 fails for lack of proof. As just noted, there is not a shred of evidence that *Ameren Missouri* is engaged in HVAC services at all. Ameren Missouri advertises its Commission-approved *energy efficiency programs* but it does none of the actions that fall within the definition of HVAC services. Similarly, there is not a shred of evidence that those who are engaging in such actions (e.g., installing HVAC equipment), that is the contractors selected by tariffed energy efficiency program implementers, are using Ameren Missouri vehicles, tools, etc., nor is there any proof that Ameren Missouri employees are performing HVAC services.

Next, Complainants claim (Complaint paragraph 9) that Ameren Missouri is

[6] Complaint, Para. 7. The only provision of Section 386.756 relevant to this aspect of the Complaint is subsection 1, which prohibits the regulated utility (Ameren Missouri here) from engaging in HVAC services "unless otherwise provided in subsection 7 or 8." As noted above, Ameren Missouri could itself engage in such services pursuant to Commission-approved programs and tariffs if it so chose. Regardless, it does not do so.

[7] This claim is obviously based upon subsection 2 of Section 386.756.

unlawfully allowing use of its name by an "affiliate or utility contractor," without providing the disclaimer required by subsection 3 of Section 386.756 and thus has violated subsection 3. By the plain terms of subsection 3, the disclaimer is simply not required:

> [A utility may not allow use of its name] unless the utility, affiliate or utility contractor discloses, in plain view and in bold type … a disclaimer that states the services provided are not regulated by the public service commission.

Under the Low-Income Single Family energy efficiency program, HVAC equipment (or other energy efficiency measures) are installed and paid for using Ameren Missouri energy efficiency funding approved by the Commission via its approval of the Company's MEEIA programs and the associated tariffs. These installations *are de facto* regulated by this Commission because they are paid for with funds authorized for such use by the Commission and installed under programs similarly authorized by the Commission.

Even if by some novel reading of subsection 3 the disclaimer provision would apply, the *only* evidence offered by Complainants of use of Ameren Missouri's name without supplying a disclaimer is a photo purportedly from an HVAC contractor's website captured at some undefined time that Complainants claim shows contractor employees wearing shirts with Ameren Missouri's logo on them (it is impossible to actually discern if this is true from the photos that have been offered)[8] and an allegation by Mr. Malone that such shirts have been worn by contractors.[9] However, to the extent energy efficiency program implementors have provided shirts with an Ameren logo to the contractors they selected (Ameren Missouri has provided no such shirts)[10], the program implementors also require such contractors to display program implementer (not Ameren Missouri)-provided badges

[8] Malone Direct, Exs. 8A and 8B.
[9] *Id.*, p. 6, ll. 5 – 10.
[10] Harmon Rebuttal, p. 16, l. 11.

that state that the contractor employee is an "Authorized Contractor" (not an Ameren Missouri employee) and that further state that the contractor is an "Approved Contractor for the Ameren Missouri Residential Energy Efficiency Program."[11] Mr. Malone's claim about "impersonation" is simply untrue.

Complainants next claim (Complaint paragraph 10) is that Ameren Missouri is assisting an affiliate or utility contractor in engaging in HVAC services.[12] First, there is not a single fact offered that supports a claim that any energy efficiency program administrator, implementor, or HVAC contractor selected by the program implementors are affiliates of Ameren Missouri. *See* Section 386.754(1) (An entity cannot be Ameren Missouri's affiliate unless Ameren Missouri owns it, controls it, or unless it and Ameren Missouri are under common control; there is no proof of any such ownership, control, or common control). Second, there is no proof whatsoever that any of the HVAC contractors have contracted *with Ameren Missouri* to engage in HVAC services. *See* Section 386.754(4), which defines "utility contractor" in a manner that requires that the *utility* and the contractor that is actually engaging in the HVAC services to contract with each other. There is no proof that such a contract, written or verbal, exists. Third, subsection 4 is clearly directed toward preventing the regulated utility from creating an affiliate or otherwise contracting with HVAC contractors in a manner that financially subsidizes the affiliate's or HVAC contractor's operation using utility expenditures that are reflected in the regulated utility's rates. For example, Ameren Missouri would violate the statute if it formed an affiliate to offer unregulated services (e.g., XYZ HVAC company), bought the furnaces and air conditioners the affiliate installed and recorded the costs above-the-line on its

[11] Harmon Rebuttal, Schedule SRH-R3, p. 5.
[12] The claim arises under subsection 4 of Section 386.756.

regulated books, gave them to XYZ and let XYZ charge for them and provide the proceeds of the charge to Ameren Missouri shareholders rather than offsetting the expense with the revenues for ratemaking purposes. Or, a violation would occur if Ameren Missouri contracted with Joe's HVAC and sold such equipment it reflected on its regulated books to Joe's at a discounted price, with Joe's then marking it up for the customer and sharing a portion of the margin with Ameren Missouri, again foisting a cost on regulated customers via its rates by subsidizing Joe's. There is simply no proof that case that any such activities have or are occurring.

Finally, Complainants throw in a catch-all allegation (Complaint paragraph 11) that the claims that it made in paragraphs 7 to 10 of the Complaint also constitute violations of the Commission's implementing regulations for the statute at issue, 20 CSR 4240-20.017. The plain terms of the regulation demonstrate that it does nothing more than codify via rule the terms of the statute itself, which is all its rules can do. *See* Section 386.760 ("the commission shall not impose, by rule or otherwise, requirements regarding HVAC services that are inconsistent with or in addition to those section for in section 386.754 to 386.764…"). For the reasons Complaint paragraphs 7 to 10 fail, paragraph 11 fails as well.

If the answer is "yes," what actions, if any, should the Commission take?

The answer is "no" as a matter of law and fact as discussed above. However, in the hypothetical case where some kind of violation occurred, the absolute most the Commission should do is to require any energy efficiency program changes necessary to ensure compliance prospectively. The Commission has no power whatsoever to adjudge a utility guilty of a civil offense. *See, e.g., Straube v. Bowling Green Gas Co.*, 227 S.W.2d 666, 668 (Mo. 1950) ("'The Public Service Commission is an administrative body only, and not a court, and hence the commission has no power to exercise or perform a judicial function,

or to promulgate an order requiring a pecuniary reparation or refund." State ex rel. Laundry, Inc., v. Public Service Commission, 327 Mo. 93, 34 S.W.2d 37, 46; May Dept. Stores Co. v. Union Electric Light & Power Co., 341 Mo. 299, 107 S.W.2d 41, 57; State ex rel. Rutledge v. Public Service Commission, 316 Mo. 233, 289 S.W. 785, 787."). Such a judgment could only be made by a court via a proceeding brought by the Missouri Attorney General. *See* subsection 9 of Section 365.754. And while theoretically the Commission could authorize its General Counsel to ask a circuit court to impose fines under Section 386.600, as it could do in complaint cases generally, taking such an action is exceedingly rare and would be especially inappropriate here given that the *Commission itself* approved the programs at issue, which Complainants claim violate the statute.

Conclusion

As the Company will discuss further in its post-hearing briefing, the Complaint fails as a matter of law and the Commission should rule as such after completion of the evidentiary hearing and briefing. Regardless, Complainants cannot meet their burden of proof.

/s/ James B. Lowery
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ATTORNEYS FOR UNION ELECTRIC COMPANY d/b/a AMEREN MISSOURI

Dated: July 9, 2024

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing document was served on all parties of record via electronic mail (e-mail) on this 9th day of July, 2024.

/s/James B. Lowery
James B. Lowery