

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

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

**STAFF’S POST-HEARING BRIEF**

**COMES NOW**, the Staff of the Missouri Public Service Commission (“Staff”), by and through counsel, and files its Post-Hearing Brief as follows:

**BACKGROUND**

On August 3, 2022, Complainants Corey Malone and the Missouri Coalition for Fair Competition (the “MCFFC”) filed a formal Complaint with the Missouri Public Service Commission (“PSC” or “Commission”) alleging that Respondent Union Electric Company d/b/a Ameren Missouri (“Ameren”) violated what it referred to as the “Fair Competition Law,”<sup>1</sup> by engaging in Heating, Ventilation and Air Conditioning (“HVAC”)<sup>2</sup> services. This law forbids utilities, like Ameren, from allowing their affiliate contractors to use its company’s name to engage in HVAC services in a manner which subsidizes the activities of the Company. In doing so, the Complainants allege that Ameren is using the affiliated contractor companies, in this case Anton’s Air Conditioning & Heating, through the Pay as You Save (PAYS) program and the Community Savers Low-Income programs

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<sup>1</sup> The parties have also referred to §§ 386.754 - 386.764, RSMo, as “the HVAC Law.”

<sup>2</sup> HVAC stands for “heating, ventilation, and air conditioning.”

within Ameren's Missouri Energy Efficiency Investment Act (MEEIA)-approved programs, to compete against his company, Air Comfort Service, and other small businesses, thereby taking an unfair advantage against them. They claim that Ameren, through these two MEEIA programs, is purposefully forbidding or somehow depriving Mr. Malone's HVAC company to fairly compete for inclusion into those programs.

Mr. Malone and MCFFC want the Commission to order the Staff to audit Ameren's books and records and make a finding that Ameren violated the provisions of §§ 386.754 through 386.764, RSMo, then refer the matter to the Attorney General's Office to take civil action against Ameren for civil penalties. The problem with that is that the Staff has already done an investigation by sending out data requests and reviewing Ameren's records, and submitted its report on April 12, 2023. It concluded that Ameren did not violate any statutes, rules, or regulations pertaining to those sections of the law or any of its filed and approved tariffs.

### **ISSUE**

The single issue in this case is whether Ameren engaged in HVAC services in a manner that violates § 386.756, RSMo?

Based on Staff's investigation and review of information and the evidence provided by the parties and presented at the hearing, the Complainants failed to show any violations by Ameren of any applicable statutes, Commission rules or regulations, or Commission-approved tariffs.

### **BURDEN OF PROOF**

Generally, the burden of proof "rests on the party asserting the affirmative of an issue," such as a violation of law or that a particular party has engaged in unjust or

unreasonable actions.<sup>3</sup> As such, Mr. Malone and MCFFC carry the initial burden of proof. There are two components of the burden of proof – the burden of producing evidence and the burden of persuasion:<sup>4</sup>

The burden of production is “a party’s duty to introduce enough evidence on an issue to have the issue decided by the fact-finder[.]” BLACK’S LAW DICTIONARY 223 (9th ed.2009). The burden of persuasion is defined as “[a] party’s duty to convince the fact-finder to view the facts in a way that favors that party.” *Id.*<sup>5</sup>

The burden of producing evidence is “simply the burden of making or meeting a prima facie case.”<sup>6</sup> The Complainants in this case failed to meet their burden.

## DISCUSSION

Section 386.756.4, RSMo, states:

a utility may not engage in or assist any affiliate or utility contractor in engaging in HVAC services in a manner which subsidizes the activities of such utility, affiliate or utility contractor to the extent of changing the rates or charges for the utility’s regulated services above or below the rates or charges that would be in effect if the utility were not engaged in or assisting any affiliate or utility contractor in engaging in such activities.

Subsection 9 of that statute states that if a utility violates any provision of that section, the utility is “guilty of a civil offense and may be subject to a civil penalty of up to [\$12,500] for each violation.” It further states that “the attorney general may enforce the provisions” of the statute.

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<sup>3</sup> See, *AG Processing, Inc. v. KCP & L Greater Missouri Operations Co.*, 385 S.W.3d 511, 514 (Mo. App. WD 2012)

<sup>4</sup> *Kinzenbaw v. Director of Revenue*, 62 S.W.3d 49, 54 (Mo. banc 2001).

<sup>5</sup> *White v. Director of Revenue*, 321 S.W.3d 298, 304-305 (Mo. banc 2010).

<sup>6</sup> *McCloskey v. Kopljar*, 46 S.W.2d 557, 563 (Mo. banc 1932)

Section 386.762, RSMo, on the other hand, only gives the PSC the authority to:

(1) Review, inspect and audit books, accounts and other records kept by a utility or affiliate for the sole purpose of ensuring compliance with sections 386.754 to 386.764 and make findings available to the commission; and

(2) Investigate the operations of a utility or affiliate and their relationship to each other for the sole purpose of ensuring compliance with sections 386.754 to 386.764.

The Commission cannot impose any type of penalty against the Company. Only the circuit court can do that, and only if the attorney general brings an action in circuit court alleging such a violation.<sup>7</sup>

The PSC has already done what the statute required it to do – review, investigate, and audit the Company’s practices, and determine if it complied with the provisions of “sections 386.754 to 386.764 and make findings available to the commission.”<sup>8</sup> Staff conducted an investigation of the issues involved in this case, submitted data requests, inquired into Ameren’s activities as it related to the use of and procurement of its HVAC contractors for the various programs at issue in this case, and submitted a Staff Report to the Commission.<sup>9</sup> As outlined in that Staff Report, Staff Witness Mark Kiesling affirmed that “the staff ultimately concluded that Ameren Missouri was not taking [sic] activities in violation of the HVAC law,” and that “Staff didn’t uncover any evidence that Ameren Missouri was selling or installing or maintaining or repairing or doing any other activities that are listed in the definition of HVAC services in connection with [the] two programs.”<sup>10</sup> Therefore, no other action remains for the Staff to take with regards to this case.

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<sup>7</sup> § 386.756.4, RSMo.

<sup>8</sup> § 386.762, RSMo.

<sup>9</sup> See, Staff Exhibit 200C (*Report of the Staff*); Tr. 40:1-3.

<sup>10</sup> Tr. 40:23-25; 41:1-4; 10-15.

“The statute limits the relief that can be granted to any combination of enumerated remedies.”<sup>11</sup> As such, the Commission can only grant the Complainants the relief conferred upon it by statute.<sup>12</sup> Since the Staff already took the steps outlined in § 386.762, RSMo, there is nothing left for the Commission to do in this case but find that no further action is needed and close the matter.

**WHEREFORE**, Staff submits this Post-Trial Brief for the Commission’s consideration and information.

Respectfully submitted,

**/s/ Carolyn H. Kerr**  
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### **CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing was served by electronic mail, or First Class United States Postal Mail, postage prepaid, on this 21<sup>st</sup> day of August, 2024, to all counsel of record.

**/s/ Carolyn H. Kerr**

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<sup>11</sup> *In re Area 16 Pub. Def. Off. III*, 609 S.W.3d 743, 758 (Mo. App. W.D. 2020).

<sup>12</sup> The PSC’s “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. *State ex rel. MoGas Pipeline, LLC v. Missouri Pub. Serv. Comm’n*, 366 S.W.3d 493, 496 (Mo. 2012).