BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

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

AMEREN MISSOURI'S INITIAL POST-HEARING BRIEF

COMES NOW Union Electric Company d/b/a Ameren Missouri ("Company" or "Ameren Missouri"), and for its Initial Post-Hearing Brief, states as follows:

INTRODUCTION

The material facts in this case are undisputed. The central question in this case is as follows: have Complainants[1] met their burden to establish by record evidence that Ameren Missouri has violated Section 386.756, RSMo (Cum. Supp. 2024)?[2] The answer to that question is "no," both as a matter of law and as a matter of fact.

Complainants' case fails as a matter of law because the Commission-approved and regulated energy efficiency programs which Complainants claim violate the HVAC Statute are completely exempt from the restrictions contained in the HVAC Statute by its terms, specifically, pursuant to Subsection 8. That this is true is established by the express terms of subsection 8, which provide in pertinent part that "[t]he provisions of this section shall not be construed to prohibit a

[1] Missouri Coalition for Fair Competition ("MCFFC") and Corey Malone.
[2] This Brief will refer to Section 386.756 as the "HVAC Statute," but for clarity, there are other statutory provisions relating to it (e.g., the definitions in Section 386.754) that are pertinent to the issues in this case.

utility from . . . providing a program pursuant to an existing tariff, rule or order of the public service commission." And that is precisely what Ameren Missouri is doing, that is, even if Ameren Missouri were otherwise "engaging in HVAC services" (the evidence indicates it is not) the prohibition in the HVAC statute of doing so, along with other restrictions in the statute, simply do not apply to any provision of HVAC services that occurs under the existing, tariffed, and Commission-approved energy efficiency programs at issue in this case.

Moreover, even if the subsection 8 exemption did not exist, to carry their burden to prove that Ameren Missouri has violated the HVAC statute, Complainants would have to establish that Ameren Missouri has fun afoul of either subsections 1, 2, 3, or 4 of the HVAC Statute. Complainants have completely failed in their burden to do so. Why?

Because (a) there is no evidence that Ameren Missouri has or is engaged in any of the activities that constitute an "HVAC Service," as defined in Section 386.754(2) – thus Ameren Missouri did not violate subsection 1 of the HVAC Statute; and (b) there is no evidence that any entity that does provide HVAC services, that is, the HVAC contractors (e.g., Anton's and the other contractors engaged by the third-party program implementers) who perform the installations, are either an Ameren Missouri "affiliate" or "utility contractor," as those terms are defined in Section 386.754(2) and (4), respectively – thus Ameren Missouri did not violate subsections 2, 3 or 4 of the HVAC Statute, because none of the restrictions in those subsections apply if the entity at issue is not an Ameren Missouri "affiliate" or a "utility contractor," as those terms are defined in Section 386.754.

FACTS

Complainants initially claimed violations of the HVAC Statute arising from both the Company's single-family low-income program (a/k/a, the Community Savers single-family program (the "CS Program")) and the Company's Pays-as-You-Save program (the "PAYS

Program").[3] According to Complainant Malone (who is also the President of Complainant MCFFC), Complainants are no longer contending that the PAYS program violates the HVAC statute.[4] Regardless, both programs are reflected in existing, in effect Commission-approved tariffs each of which were approved by Commission orders, all as part of the Commission's approval of Phase 3 of the Company's MEEIA[5] programs. Specifically, the CS Program was first approved in December 2018,[6] while the PAYs Program was first approved in August 2020.[7] The Commission's approval of both programs has been extended to December 31, 2024.[8] The Commission regulates the services provided by these programs pursuant to the MEEIA statute and the Commission's MEEIA regulations (20 CSR 4240-20.017).

Under the CS Program, contractors engaged by the CS program implementor, a third-party company called Resource Innovations, visit the homes of eligible low-income customers to assess whether and to what extent energy efficiency measures (e.g., a more efficient air conditioner, insulation) could save the customer money.[9] Resource Innovations was engaged by another third-party company, Franklin Energy, with whom Ameren Missouri contracted to act as the administrator for the MEEIA programs.[10] Based on the assessment, contractors engaged by Resource Innovations install the measures which are paid for by Commission-approved energy efficiency funding provided by the Company, with such costs ultimately included in the separate

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[3] Ex. 1 (Malone Direct), p. 4, l. 15 (referencing the CS Program); p. 5, ll. 16-19 (referencing the PAYS Program); Ex. 2 (Malone "Reply" (Surrebuttal) Testimony), pp. 2-3 (claiming the "income eligible" program (i.e., the CS Program) violated the HVAC statute.
[4] Tr., p. 32, l. 22 to p. 33, 8.
[5] Missouri Energy Efficiency Investment Act, Sections 393.1075.
[6] See Exs. 101 – 103.
[7] See Exs. 106 – 108.
[8] See Exs. 13 – 15.
[9] Ex. 100 (Harmon Rebuttal), p. 5, ll. 9 – 17 (Explaining that the CS Program Implementor, Resource Innovations, performs the visit to the home/assessment).
[10] *Id. (*Explaining that Franklin Energy, who is under contract with Ameren Missouri, engaged (i.e., contracts with) Resource Innovations to act as implementor).

line-item charge on Ameren Missouri customer bills pursuant to Rider EEIC.[11] There is no contract between Ameren Missouri and Resource Innovations or between Ameren Missouri and the Resource Innovations-chosen contractors who perform the assessments and installations.[12] These entities are also not controlled by Ameren Missouri.[13]

Under the PAYS program, which is not limited to low-income customers, EEtility is the implementor.[14] EEtility visits the homes of eligible customers who apply to the PAYS Program to assess whether and to what extent energy efficiency measures (e.g., a more efficient air conditioner, insulation) could save the customer money.[15] EEtility then provides the customer a report and if the customer chooses,[16] contractors engaged by EEtility install the measures.[17] The measures are initially paid for with Commission-approved funds advanced by Ameren Missouri but which are ultimately paid for by the participating customers themselves, with interest at a Commission-approved rate (3%) via a separate charge on the customers' bills.[18] There is no contract between Ameren Missouri and EEtility or EEtility's chosen contractors.[19] There is also no evidence whatsoever that any of these entities are owned by, controlled by or under common control with Ameren Missouri, meaning they are not Ameren Missouri affiliates.[20]

There is no evidence of record that rebuts these basic facts.

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[11] See Ex. 102 (the CS Program Tariff). See also Ex. 104 (also the CS Program Tariff, but with changes to include additional single-family dwellings in the CS Program).
[12] Tr. P. 41, l. 24 to p. 42, l. 3.
[13] Tr. p. 43, ll. 15 - 24.
[14] Ex. 100 (Harmon Rebuttal), p. 12, ll.12-13.
[15] *Id.* p. 11, l. 16 to p. 12, l. 9; p. 12, l. 19 to p. 13, l. 16.
[16] Id.
[17] *Id.*, p. 10, ll. 1-2.
[18] Ex. 107 (Initial PAYS Program tariff), Ex. 108 (order approving the PAYS Program), Exs. 111 and 112 (Tariff change to set the interest rate to 3% and the Commission's approval of the same, respectively).
[19] Tr. p. 41. l 25 to p. 43, l. 3.
[20] Tr. p. 43, ll. 15 - 24.

ARGUMENT

1. The Governing Law.

Complainants alone bear the burden of sustaining the Complaint. *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.")).[21] This means that absent creating a record consisting of competent and substantial evidence that if true and believed by the Commission would sustain the Complaint, the Complaint fails as a matter of law. Ameren Missouri need not disprove a single allegation. To the contrary, Complainants must prove them and must prove allegations that, if true and believed by the Commission, would constitute a violation of the HVAC statute.[22]

Nor can litigants, via a complaint or otherwise, attack the Commission orders that approved the MEEIA programs at issue, including Ameren Missouri's offering of them. Such attacks are barred because absent those orders being found unlawful or unreasonable pursuant to the exclusive judicial review provisions of Sections 386.500, .510, the Commission's orders approving the subject tariffs and programs have the force of law and are "prima facie lawful and reasonable until

[21] *See also* Section 386.764, which makes clear Complainants bear the burden in this case as all complainants do in complaint cases.
[22] There are many "facts" set forth in and claimed to exist by Complainants in their pre-filed testimony that even if true, do not establish a violation of the HVAC statute. The Company is ignoring these allegations for purposes of its Initial Brief.

found otherwise in a suit brought for that purpose pursuant to the provisions of [Chapter 386]." *See, e.g., State ex rel. Pub. Counsel v. Pub. Serv. Comm'n*, 210 S.W.3d 344, 350 (Mo. App. W.D. 2006) ("'the legislature intended the orders of the Commission to remain in force and be *prima facie* lawful until found otherwise by the ultimate ruling of a court at the conclusion of the appeal process'", quoting *State ex rel. GTE North, Inc. v. Pub. Serv. Comm'n,* 835 S.W.2d 356, 367 (Mo. App. W.D. 1992)).

But in order for Complainants to obtain the relief they seek, the lawful and effective orders of the Commission approving Ameren Missouri's offering of the programs at issue would have to have overturned *by the courts*, and the *only means of doing so* would have been via the timely filing of an application for rehearing under Section 386.500 followed by a timely and successful appeal under Section 386.510. The time for such judicial review of these orders has long passed, and the operative orders are thus immune from collateral attack in this or any other case. See also Section 386.550, RSMo., which provides that "[i]n all collateral actions or proceedings the orders and decisions of the commission which have become final shall be conclusive." Under the PSC Law, Commission orders on matters properly within its jurisdiction (e.g., approval of MEEIA programs) are not subject to collateral attack by anyone – whether or not a party to the underlying case giving rise to the orders. *State ex rel. Harline v. Pub. Serv. Comm'n*, 343 S.W.2d 177, 184 (Mo. App. W.D. 1960) (Section 386.550 bars review of issues decided in a prior case that was withing the Commission's jurisdiction; clearly approving MEEIA programs is such a case). See also *State ex Licata v. Pub. Serv. Comm'n,* 829 S.W.2d 515, 518-19 (Mo. App. W.D. 1992) (A later challenge to a utility tariff (here, the tariffs approving the programs at issue) constitutes an impermissible collateral attack)..

The HVAC statute contains four restrictions, as follows:

- Subsection 1 precludes utilities from themselves engaging in HVAC services,

unless the statute provides otherwise; as noted earlier, it does so provide otherwise:

> 8. 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).

Note that subsection 8 does not just exempt such programs from the restriction of subsection 1 but it exempts such programs from HVAC statute entirely.

- Under subsection 2, if a utility "affiliate" or "utility contractor"[23] engages in HVAC services it can't use the utility's assets to do so;
- Under subsection 3, if a utility "affiliate" or "utility contractor" [24] uses the utility's name to engage in HVAC services, it must provide a disclaimer stating "the services are not regulated by the public service commission"; and
- Under subsection 4, if a utility "affiliate" or "utility contractor"[25] engages in HVAC services, the utility can't assist them by providing a subsidy from ratepayers.

2. The Complaint's Allegations.

As discussed below, the Complainants claim the Company's offering of these energy efficiency programs violate the law in five different ways. The record evidence in this case does not support any of those claims.

Complaint ¶ 7 – Alleges "upon information and belief"[26] that Ameren Missouri is engaged in HVAC Services.[27]

There is no evidence whatsoever that Ameren Missouri is warranting, selling …. installing

[23] As defined in Section 385.754, which defines certain terms used in Section 386.754 to 386.764.
[24] As defined in Section 385.754.
[25] As defined in Section 385.754.
[26] Which proves nothing.
[27] Claim arises under Subsection 1 of the HVAC Statute.

... maintaining or repairing … heating, ventilating and air conditioning equipment." Section 386.754(2).[28] None of the pre-filed testimony of Complainants' witnesses provide any such evidence, no testimony at hearing provides any such evidence, no exhibit in this case provides any such evidence. Consequently, Complainants have failed to prove the allegations in Complaint ¶ 7.

Complaint ¶ 8 – Alleges "upon information and belief" that Ameren Missouri is using its vehicles, service, tools, etc. to engage in HVAC services.[29]

There is similarly no evidence of record to sustain this claim, nor is there any evidence of record that Ameren Missouri is allowing an Ameren Missouri affiliate or a utility contractor to do so.[30] None of the pre-filed testimony of Complainants' witnesses provide any such evidence, no testimony at hearing provides any such evidence, no exhibit in this case provides any such evidence. Complainants have failed to prove the allegations in Complaint ¶ 8.

Complaint ¶ 9 – Alleges "upon information and belief" the Company's Name was Used Without Providing the Statutory Disclaimer.[31]

To trigger the disclaimer requirement of subsection 3, the following conditions must exist: (1) either a utility affiliate or utility contractor must use the name, and (2) the utility affiliate or utility contractor must be engaging in HVAC services using the name. The evidence is undisputed that Resource Innovations and EEtility, the respective program implementers under contract with Franklin Energy, use or allow contractors they engage to deliver measures under the programs to use Ameren Missouri's name or logo as part of their participation in delivering the MEEIA

[28] Tr., p. 41, ll. 10-15 (no evidence Ameren Missouri is doing any of the activities the statute defines to be an HVAC service); Ex. 100 (Harmon Rebuttal), p. 6, ll. 3-4 (Resource Innovcations does not do the installs; contractors are hired to install the measures in the CS Program); p. 10, l. 10 to p. 11, l. 4 (Discussing that contractors selected by EEtility do the installs for the PAYS Program)
[29] Claim arises under Subsection 2 of the HVAC Statute.
[30] As discussed below, there is no evidence that any of the contractors who do engage in HVAC services are an affiliate of Ameren Missouri, or are doing so under a contract with Ameren Missouri (and thus they are not "utility contractors").
[31] Claim arises under Subsection 3 of the HVAC Statute.

programs at issue. There is no evidence that either Resource Innovations or EEtility are owned by, controlled by or under common control with Ameren Missouri; i.e., they are not Ameren Missouri affiliates under Section 393.754(1). Indeed, there is affirmative evidence is contrary.[32] There is no evidence that any contractor engaged by Resource Innovations or EEtility is owned by, controlled by or under common control with Ameren Missouri. Similarly, there is no evidence that Ameren Missouri has a contract with either Resource Innovations or EEtility or has a contract with any of the contractors Resource Innovations or EEtility have engaged; i.e., these contractors are not utility contractors under the HVAC statute. Thus, conditions (1) and (2) do not exist and since they do not exist, no disclaimer is required by Subsection 3.[33] Complainants have failed to prove the allegations in Complaint ¶ 9.

Complaint ¶ 10 – Alleges "upon information and belief" that the Company is Assisting an Affiliate or Utility Contractor in Engaging in HVAC Services.[34]

Subsection 4 only applies if the utility is assisting a utility affiliate or a utility contractor. As just discussed, there is no evidence whatsoever that Resource Innovations or EEtility or any of the contractors those two third-party entities engaged are Ameren Missouri affiliates or utility contractors within the meaning of the HVAC statute. As such, Ameren Missouri cannot have violated subsection 4. Complainants have failed to prove the allegations in Complaint ¶ 10.

Complaint ¶ 11 – Alleges "upon information and belief" the facts alleged in ¶¶ 7 – 10 violate the Commission's MEEIA rules.

The allegation fails as a matter of law. The Commission's MEEIA rules do nothing more

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[32] Tr. p. 43, ll. 19-24. It is not, however, the Company's burden to disprove a single allegation made by Complainants that is necessary for Complainants to sustain their Complaint. If Complainants adduced no such evidence, the facts upon which Complainants claim rest do not exist as a matter of law.

[33] Such a disclaimer would also make no sense in this context given that the services provided under the programs at issue are regulated by the Commission.

[34] Claim arises under Subsection 4 of the HVAC Statute.

than codify the statutory terms and, indeed, by statute that is all they can do. Section 386.760.1 (such rules can neither be inconsistent with nor add to the HVAC statute's terms). Since as discussed above Complaint ¶¶ 7 – 10 fail, so too must Complaint ¶ 11.

3. The Proper Disposition of this Case.

For the reasons discussed above, the Commission should issue its Report and Order denying the Complaint because it fails as a matter of law. It fails as a matter of law because the offering of these energy efficiency programs are exempt from the HVAC statute and regardless, the entire Complaint is an impermissible collateral attack on the Commission-approved tariffs and the orders that approved them and is thus barred as a matter of law. On the latter point, that Complainants are engaged in an impermissible collateral attack is evidenced, among other things, by a portion of the relief Complainants seek in this case, that is, the request that this Commission order the Company to "cease and desist its violation."[35] In practical terms, such a request means that the Complainants are asking the Company to order the Company to stop offering the subject, Commission-approved energy efficiency programs in direct contradiction of the Commission's orders that approved them.

As far as Complainant's further request for relief, that is, that the Commission impose penalties of $12,500 for each violation, the Commission has no power whatsoever to adjudge a utility guilty of a civil offense or to impose penalties based thereon. *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,

[35] Complaint, ¶ 12.b.

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 for violations of a statute involving the Commission 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 authorized the Company to offer the programs at issue*.

Finally, the Commission should be mindful of the fact that its decision must rest of competent and substantial evidence of record. Much of Complainants' case is rank hearsay, which is not substantial and competent evidence.[36] *State ex. rel. Simmons*, 299 S.W.2d 540, 545 (Mo. App. St. L. 1957) ("[h]earsay evidence and conclusions based upon hearsay do not satisfy the 'competent and substantial evidence upon the whole record' requirement essential to validity of a final decision."); *See also Speer v. City of Joplin*, 839 S.W.2d 359, 360 (Mo. App. S.D. 1992) ("Although technical rules of evidence are not controlling in administrative hearings, fundamental rules of evidence apply [citation omitted]. Hearsay evidence and conclusions based upon hearsay do not qualify as "competent and substantial evidence upon the whole record" essential [under the Missouri Constitution] to the validity of a final decision of an administrative body….").

CONCLUSION

The Complaint fails as a matter of law both because the subject programs are exempt and because the Complaint is barred because it is an impermissible collateral attack on the approved

[36] See Ameren Missouri's May 20, 2024, Motion to Strike. MCFFC witnesses Sir and Keevin both readily admit that they base much of their testimony on hearsay. Tr., p. 25, l. 19 to p. 26, l. 3; p. 26, ll. 4-13. A review of witness Malone's testimony reveals that much of what he says is also entirely and impermissibly based on hearsay.

tariffs and related orders. The Complaint fails as a matter of fact, as a matter of evidence, because the material facts in this case simply do not establish a violation of the HVAC statute.

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

Dated: August 21, 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 21st day of August, 2024.

/s/James B. Lowery
James B. Lowery