

**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.)	

REPLY BRIEF OF MCFFC & COREY MALONE

Complainants, the Missouri Coalition or Fair Competition and Corey Malone, by and through counsel, offer the following reply brief addressing the issues raised in the principal briefs of the Commission’s Staff (Doc. No. 92) and Ameren (Doc. No. 93).

1. The Governing Law

The proposition that a tariff of this Commission can overrule a statute is frivolous. Section 386.756.8 RSMo., states, “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.” Complainants are not attacking the programs at issue. They are complaining about the way Ameren Missouri is operating the programs in violation of the Fair Competition Law. §§ 386.754-.764 RSMo. and 20 CSR 4240-20.017.

This Commission should not accept invitation to use one statute to decide that another one does not apply. “[C]ourts do not favor reaching a finding that a statute has been repealed by implication. State v. Carter, 614 S.W.3d 74, 79 (Mo. App. W.D. 2020). If, however, "by any fair interpretation both statutes . . . can stand, there is no repeal by implication and both should be given effect." Id. St. Louis-Jefferson Solid Waste Mgmt. Dist. v. Dept of Nat. Res., 678 S.W.3d 152 (Mo. App. W.D. 2023).

Complainants noted in their opening brief (Doc. No. 91, page 2) Ameren’s claim in its opening statement that the PAYS program was no longer at issue (Doc. No. 57 pp. 16-17) but observed that the modifications to the program were made only after the filing of the Complaint (Id. at 34). It is clearly possible to effect the tariffs and comply with the Fair Competition Law. See, e.g., State ex rel. Office of the Pub. Counsel v. Mo. Pub. Serv. Comm'n, 331 S.W.3d 677 (Mo. App. W.D. 2011) (statutes read together to avoid absurd result); Collins & Hermann, Inc. v. TM2 Const. Co., 263 S.W.3d 793, 798 (Mo. App. E.D. 2008) (statutes relating to the same subject matter are construed together as though constituting one act).

The proposition that § 386.756.8 RSMo. licenses Ameren Missouri to violate the Fair Competition Law should be firmly rejected.

2. Whether the Other Companies are Affiliates or Utility Contractors

The lack of direct evidence that the EEtility, Resource Innovations or Anton’s are affiliates or utility contractors under the Fair Competition Law because a) Staff did not ask and b) Ameren refused to provide the information to the Complainants in this

litigation. The breadth of Staff's inquiry into the relationship between Ameren and the "implementors" of the programs at issue is not clear. Mr. Kiesling testified that he did not make inquiry (Doc. No. 57, p. 43), and that although he concluded that the "implementors" were not contractors or affiliates (id.), he did not know if they had a contractual relationship with Ameren (id. p. 44), and although a contract was "potentially" involved, he never saw it. Id. p. 45. When Complainants made inquiry in this case for an explanation of the financial relationship between Ameren and its affiliates or contractors, Ameren refused to provide the documents. (Doc. Nos. 62& 63).

But there is no lack of circumstantial evidence that EEtility, Resource Innovations or Anton's are affiliates or utility contractors. Complainants may have the burden of proof in this case, but Ameren Missouri cannot prevail by refusing to provide the evidence that is in its exclusive control. State ex rel. Laclede Gas Co. v. Pub. Serv. Comm'n of Mo., 392 S.W.3d 24, 36 (Mo. App. W.D. 2013) (affirming Commission's summary decision after utility refused to produce documents).

3. Ameren's Hearsay Complaints

The touchstone of any evidentiary issue before an administrative agency is the Administrative Procedures law in Chapter 536, RSMo. Section 536.070(10) RSMo, which allows:

Any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of an act, transaction, occurrence or event, shall be admissible as evidence of the act, transaction, occurrence or event, if it shall appear that it was made in the regular course of any business, and that it was the regular course of such business to make such memorandum or record at

the time of such act, transaction, occurrence, or event or within a reasonable time thereafter. All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect the weight of such evidence, but such showing shall not affect its admissibility. The term "business" shall include business, profession, occupation and calling of every kind[.]

Notably, but for the technical hearsay objection, Ameren has not denied the veracity of the records at issue, including the Kuelker estimate (Doc. No. 58, Malone Testimony Ex. 4, Ex. CM1 pp. 5-9), its own statements on its web page (id. Ex. 5, CM1 p. 10), or the photographs that appear to be Ameren employees on Anton's website (id. Ex. 8, Ex. CM1 pp. 13-14).

4. Staff's Brief

Staff raised no legal issue that Complainants need address. Complainants' issue with Staff is its factual determination that never addressed the issues in the Fair Competition Law.

Conclusion

There is no doubt that Ameren has, under the guise of the Commission's energy efficiency tariffs, again attempted to enter into the HVAC business, contrary to the provisions of the Fair Competition Law. The Commission should make findings to that effect and refer the matter to the Attorney General's Office for enforcement and grant such other or further relief as may seem to the Commission just and necessary.

Respectfully submitted,

/s/ David F. Barrett

David F. Barrett
PO Box 104151
Jefferson City, MO 65110
Telephone: (573) 340-9119
dfbarrett@outlook.com

**ATTORNEY FOR THE MISSOURI
COALITION FOR FAIR COMPETITION
AND COREY MALONE**

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing was served on counsel for all parties of record in this matter via EFIS on August 30, 2024.

/s/ David F Barrett

David F. Barrett