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 REPLY BRIEF

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

INTRODUCTION

Complainants' brief makes clear that they are asking the Commission to apply a statute that they wished existed, instead of the statute that does exist. But the Commission cannot convict the Company violating a law that does not exist.

Complainants' brief also reflects exactly what the Company told the Commission in the Company's Initial Brief: a complete lack of competent and substantial evidence to back up the claims reflected in the Complaint. Consequently, the Complaint fails for lack of proof in any event.

Complainants' brief further misstates what little record Complainants have managed to develop, which the Company will address further below.

And finally, Complainants completely ignore that the entire Complaint fails as a matter of law, both because the energy efficiency programs are completely exempt from the HVAC Statute[1]

[1] Capitalized terms used herein have the meanings given them in the Company's Initial Brief.

by its express terms, and because the Complaint reflects an impermissible collateral attack on the Commission's orders approving the CS and PAYS Programs, and the Commission-approved tariffs that reflect those programs.

ARGUMENT

1. Response to the "Argument" Section of Complainants' Brief.

The Company takes no issue with the first paragraph of Complainant's Argument, save the last clause: "including referral … with a penalty…". See pages 10-11 of the Company's Initial Brief and Staff's Initial Brief, for a discussion as to why only a civil court, based on an action brought by the Missouri Attorney General, can take punitive actions under the HVAC statute, even if one assumed that a violation had occurred.

The remainder of Complainants' Argument (2nd paragraph page 4 of Complainants' brief) is wrong as a matter of law. Putting aside the total exemption from the HVAC statute of the subject energy efficiency programs, the first sentence is wrong as a matter of law because it is undisputed that Ameren Missouri does not itself engage in any of the activities that constitute an "HVAC Service," *as defined in Section 386.754(2)*. That definition, not Complainants' conclusory claims, controls whether an entity – the Company included – is engaging in HVAC services and there is not a shred of evidence that the Company is doing so. And the first sentence in Complainants' Argument is further wrong as matter of law because there is no proof at all that those who do engage in such activities (e.g., who install, sell, warrant, repair, etc., HVAC equipment) are (a) Ameren Missouri "affiliates," or (b) "utility contractors," *as defined by* the controlling statutory definitions of those terms in Section 386.754(3) and (4), respectively, definitions which Complainants also completely overlook or ignore.

And Complainants' entire Argument fails for another reason: subsection 8 of the HVAC Statute, which Complainants have also ignored, although the Company has raised it directly on

three separate occasions,[2] exempts these programs from the statute. Subsection 8 is clear: the HVAC statute does not prohibit Ameren Missouri from "providing [these energy efficiency programs] … pursuant to an existing tariff, rule or order of the public service commission." And it is undisputed that there are existing tariffs and orders approving the subject energy efficiency programs.[3] Although such an argument would be strained, perhaps Complainants would argue that such tariffs or orders must have existed in 1998 when the HVAC Statute was enacted. But such a reading would violate the most basic of statutory interpretation principles, that is, to give effect to the intention of the legislature using the plain and ordinary meaning of the language of the statute in question. *See, e.g.,* ***Chas. C. Meek Lumber Co v. Cantrell***, 813 S.W.2d 936, 938 (Mo. App. S.D. 1991).

The legislature included two exemptions in the HVAC statute, one in subsection 7 and one in subsection 8. The subsection 7 exemption demonstrates unequivocally that the legislature knew how to restrict an exemption to programs existing at the time the legislature adopted the HVAC Statute because subsection 7 provides, in no uncertain terms, that only HVAC services provided by a utility within a 5-year window of August 28, 1993, and August 28, 1998 (the effective date of the statute) are exempt under subsection 7.

But by its plain terms subsection 8 contains no such restriction. To the contrary, the only requirement for application of the subsection 8 exemption is that the tariff or program approval exist. If the tariff ceases to exist or the program approval expires – indeed absent further Commission approval program approval will expire and the tariff will cease to exist December 31, 2024 – then the exemption too would cease because there would be no existing tariff or program

[2] In the Company's Answer and Motion to Dismiss (EFIS Item No. 5), in the Company's Statement of Positions (EFIS Item No. 47), and in the Company's Opening Statement and responses to questions from the bench (Tr. p. 21, ll. 2-5).

[3] See Exhibits 101 – 116.

approval. But while the tariff/approval does exist, as here, the plain and ordinary language of the HVAC Statute exempts these programs from the statute's provisions. Such a reading of the HVAC statute is supported by basic principles of statutory interpretation, including the doctrine of *expressio unius est exclusio alterius*: "It is well settled, in interpreting a statute, that the legislature is presumed to have acted intentionally when it includes language in one section of a statute [subsection 7], but omits it from another [subsection 8]. ***State v. Meeks*****,** 427 S.W.3d 876, 878 (Mo. App. E.D. 2014). The specific expression of a limitation on the availability of the subsection 7 exemption (i.e., the exemption only applies if the program existed at or within 5 years prior to the HVAC statute) implies the lack of such a limit in the subsection 8 exemption.

That this is true is also reinforced by other plain language in the HVAC Statute, specifically, the first sentence of subsection 8: "[t]he provisions of this section shall not *be construed* to prohibit…" (emphasis added). The subject language is in the *future* tense [i.e., post August 28, 1998], indicating that the exemption operates prospectively, rather than at and before the past, that is, rather than at and before August 28, 1998. *Cf.* ***Chas. C Meek***, 813 S.W.2d at 938 (Determining legislative intent based in part on the tense used by the legislature, noting that the phrase "owner-occupied" (in the present tense) must refer to a home that is already in existence (else it could not be occupied).

2. <u>Response to Complainants "Evidence Supporting the Complaint."</u>

As a preliminary matter, Complainants' citations are so vague and indefinite at times that it is difficult to discern what "evidence" Complainants claim supports a given allegation of fact. For example, in the second paragraph on page 2 of Complainants' brief, Complainants cite five pages (5-9) of Mr. Malone's direct testimony[4] (Exhibit No. 1, EFIS Item No. 58), apparently

[4] One of which is his affidavit; there are only three other substantive pages of his testimony.

(although this is not clear) intending to point to the PAYS program report prepared by EEtility and provided to customers who request a PAYS evaluation. And after making this vague reference to some unidentified testimony (much of which is hearsay, as discussed in the Company's Initial Brief), Complainants then cite to Exhibit No. 100, EFIS Item No. 67 (Ms. Harmon's Rebuttal Testimony), claiming apparently that she agreed at page 11, ll. 3-9, that "the document" is consistent with PAYS program materials given to Ameren Missouri customers. Yet the cited testimony from Ms. Harmon has absolutely nothing to do with a PAYS Report or other information *given to customers*. Instead, that testimony addresses *requirements for contractors* (like Mr. Malone's company) to be an approved PAYS contractor. As perhaps an aside, Complainants admit that Mr. Malone's company and MCFFC members could participate as a PAYS contractor but have chosen not to.[5]

Another confusing (and even if unintentionally so, misleading) citation to the record is reflected in the last sentence on page 2 (that carries over to page 3) of Complainants' brief, which cites to testimony at the evidentiary hearing from Ms. Harmon where she was explaining why the Ameren Missouri name (along with a contractor badge) is an important consumer protection measure. This citation follows complaints expressed in Complainants' brief about the operation of the PAYS program. But in the testimony cited by Complainants, Ms. Harmon was not addressing PAYS at all. Instead, she was discussing the CS Program, where customers do not pay for any of the measures that are installed, i.e., they get "free stuff." See Tr. p. 49, l. 9 to p. 60, l. 6 (making clear that Mr. Harmon was discussing the single-family income eligible (i.e., CS Program)). Complainants' hyper-focus on shirts and logos is irrelevant in any event. The disclaimer provision, subsection 3 of the HVAC statute, does not apply unless the name is being used by an "affiliate"

[5] Tr. p. 29, ll. 8 – 11 (Mr. Malone confirming, in response to a question from the Chair, that "nothing would prohibit you from becoming a [PAYS] contractor").

or "utility contractor," as defined by Section 386.754. As discussed elsewhere, no entity involved in these programs meets those definitions. And it makes no sense in any event that a violation of a disclaimer provision could have occurred, because the required disclaimer, when it is required, is to tell customers that the program's services that are being provided are "not regulated" by the Commission. But here, they *are* regulated by the Commission since the programs themselves are regulated.

Another only partially accurate allegation is found in the last paragraph on page 3 (carrying over to page 4) where Complainants selectively cite to part of Mr. Kiesling's hearing testimony and claim that they asked for information in discovery from the Company that the record demonstrates they in fact did not ask for. Specifically, Complainants rely on testimony from Mr. Kiesling at page 43 of the hearing transcript claiming that Mr. Kiesling testified that he did not make inquiry into whether EEtility or Resource Innovations were contractors or affiliates of Ameren Missouri. While Mr. Kiesling answered in the negative *as to the contractor question* (page 43, line. 18) he testified in the affirmative a*s to the affiliate question* (page 43, line 21). Complainants left out half the story. And Complainants did so again when they cited (on page 4 of their brief) a data request (Exhibit 5) and the Company's partial objection to it (Exhibit 6) and claimed Ameren Missouri didn't provide a response. That too, at best, is only part of the story.

It's only part of the story because first, by its express terms, the data request in question (Exhibit 5) did not ask for any information about Resource Innovations or the CS Program; it only focused on PAYS, where EEtility is the implementor. Second, the only agreements the data request asked for were agreements with HVAC contractors (like Anton's); it did not ask for agreements even with EEtility. Third, if Complainants believed that they had made a legitimate discovery request and that the objection was not well taken, Complainants could and should have availed themselves of the ability to ask the Commission to compel a response; they took no steps at all to

do so. Moreover, Complainants can't claim they didn't have time to do so – they filed the Complaint in August 2022 – they had nearly two years to conduct discovery yet waited until nearly the eve of the evidentiary hearings to, apparently, try to adduce evidence to meet *their* burden of proof.

More fundamentally, what Mr. Kiesling did or did not know, or what Complainants did or did not ask about in discovery, does not discharge *Complainants*' burden of proof to establish by competent and substantial record evidence that any of these entities are affiliates or utility contractors, within the meaning of the statutory definitions. Complainants cite no evidence to establish those essential facts, nor can they, because there is no such evidence, as discussed on pages 8 to 9 of the Company's Initial Brief.

One last "factual" allegation bears a response. Complainants claim that it is "preposterous" that the Company is not itself or that its affiliates or utility contractors are not "engaging in HVAC services." Not true under the express terms of the HVAC Statute. Indeed, it is that statute that controls what is and what is not an HVAC service, and that controls who is and who is not an "affiliate" or "utility contractor." In Mr. Malone's mind, in the collective minds of the MCFFC members, they may think, believe, or wish that the statute as written matched what they want it to provide for, but the simple reality for them is that it does not.

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 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.

/s/ James B. Lowery

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

Dated: August 30, 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 30th day of August, 2024.

/s/James B. Lowery
James B. Lowery