

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

In the Matter of the Application of Union)
Electric Company d/b/a Ameren Missouri) File No. ET-2021-0082
for Approval of its Surge Protection Program.)

AMEREN MISSOURI’S RESPONSE TO STAFF MOTION FOR DETERMINATION

COMES NOW Union Electric Company d/b/a Ameren Missouri ("Ameren Missouri" or "Company"), and for its response to the Staff “Motion for Determination” (“Motion”) filed in this docket on November 23, 2020, states as follows:

1. While only partially denominated as such, Staff’s Motion is functionally, if not literally either, a motion for determination on the pleadings or a motion for summary determination. Put another way, Staff is asking the Commission to rule as a matter of law, based on the flawed assumption that there are no facts in dispute and indeed without an evidentiary record necessary to develop facts to which the law must be applied, that Staff’s legal *arguments* and factual *allegations* are, at this early stage of this case, beyond dispute. But at this point in the case that is all they are: untested arguments and allegations.

2. As Staff has recognized, a motion for determination on the pleadings¹ is “essentially indistinguishable from a motion to dismiss for failure to state a claim.”² As such, the facts alleged to be true by the Company (reflected in its Application and pre-filed testimony) must be accepted as true at this stage of the case.³ Moreover, those facts must be given the benefit of all

¹ Staff’s Recommendation is a pleading because it seeks a specific action or remedy. 20 CSR 4240-2.010(12) (Staff’s Recommendation: “Staff prays that the Commission will reject Ameren Missouri’s *Application* and its revised tariff sheet . . .”). *Staff v. KCP&L Greater Missouri Operations Co. et. al.*, File No. EC-2009-0430.

² *Staff’s Suggestions in Opposition to Respondents’ Motion for Determination on the Pleadings*, File No. EC-2009-0430.

³ See, e.g., *Nazeri v. Missouri Valley College*, 860 S.W.2d 303, 306 (Mo. banc 1993).

reasonable inferences in the Company's favor, and the case should not be dismissed (which is essentially what Staff is asking the Commission to do without a hearing or any development of an evidentiary record) unless the Company's filing shows no set of facts that would entitle it to the relief it seeks.⁴

3. A determination on the pleadings is improper if granting it would be contrary to law or contrary to the public interest. 20 CSR 4240-2.117(2). Granting the determination Staff seeks (rejection/dismissal of the case) would be contrary to law because it would require the Commission to assume the facts alleged by the Company are not true, when under the law the Commission must assume just the opposite. And granting the determination the Staff seeks would also be contrary to the public interest because clearly the parties do not agree on the facts, as discussed in greater detail below.⁵

4. Just as KCP&L Greater Missouri Operations Company was not entitled⁶ to have its case determined simply because it claimed that there was only one legal question before the Commission that it claimed should be answered in its favor, neither is Staff entitled to short-circuit the process of developing an evidentiary record and conducting a hearing simply because Staff has made a legal argument, has alleged the existence of certain facts, and has thereby claimed that its position should prevail.

5. Not only has Staff's legal claim not been fully vetted, briefed, or argued based upon the application of a fully developed evidentiary record to the law, but a review of Staff's

⁴ *Id.* The relief sought is of course approval of the proposed program, including the program tariff.

⁵ See, e.g., *Order Denying Motion for Determination on the Pleadings and Setting Prehearing Conference*, File No. EC-2006-0451, 2006 Mo. PSC LEXIS 1110 (Ruling that were the facts are in dispute it would be contrary to the public interest to grant a determination on the pleadings).

⁶ In the case cited in footnote 2 above where it was the Staff opposing a determination on the pleadings.

Recommendation makes it clear that there are significant disputes about the pertinent facts. The most noteworthy of the facts in dispute surrounds Staff's (inaccurate in the Company's view) claims about what Staff refers to as "Insufficiencies in Non-Participating Ratepayer Analysis."⁷ The Memorandum claims the Company's analysis is "unreliable" and relies on "questionable ratemaking assumptions." The Staff provides no facts demonstrating why it claims a lack of reliability of questions the assumptions. Regardless, both such claims are clearly factual allegations to which the Company has had no proper opportunity to respond. This is precisely why a procedural schedule needs to be developed so testimony can be filed and a complete evidentiary record developed to test the parties' – the Staff's and the Company's -- factual claims.⁸ Staff also presents a graph at page 6 of its Memorandum that is flatly wrong because it multiplies a series of *annual* value that underlie the analysis presented in the Company's direct testimony, and accumulates those annual values on a month-by-month basis resulting in a chart that is essentially misstated by a factor of 12. Certainly, the Company's surrebuttal testimony (if Staff were to persist in making this mistake when it files rebuttal testimony pursuant to the procedural schedule that ought to be put in place in this case), would fully address this significant mistake.⁹

6. Staff's Recommendation could also be viewed as a motion for summary determination under 20 CSR 4240-2.117(1). However, if viewed through that lens the motion is clearly inadequate. For example, Staff has failed to "state with particularity in separately numbered paragraphs each material fact as to which the movant claims there is no genuine issue." Staff has, at best, provided a narrative memorandum making certain allegations (see paragraph 5

⁷ Staff's Recommendation "Memorandum", p. 5.

⁸ *Id.*

⁹ For these reasons, granting a determination on the pleadings would also be improper because doing so would be contrary to the public interest in fully developing a proper record and vetting the factual and policy issues raised by the Company's Application).

above). If there are disputes about material facts (and there are), a determination simply cannot be made as a matter of law and certainly the Company would have been entitled, had such a motion been properly made, to respond in the manner and in the timeframe contemplated by 20 CSR 4240-2.117(1); it has had no such opportunity.¹⁰

7. The Company respectfully submits that it is quite clear that the only proper way to resolve this docket, now that the Staff has clearly indicated its opposition to the proposed program, is to develop a procedural schedule that will allow the proper development of the facts and, ultimately, allow for those facts to be further developed via an evidentiary hearing.

WHEREFORE, the Company respectfully requests that the Commission deny Staff's Motion for Determination and require the parties to file a proposed procedural schedule by December 15, 2020.

Respectfully submitted,

/s/ James B. Lowery

James B. Lowery, #40503
SMITH LEWIS, LLP
111 S. Ninth Street, Suite 200
P.O. Box 918
Columbia, MO 65205-0918
Telephone (573) 443-3141
Facsimile (573) 442-6686
lowery@smithlewis.com

Eric Kendall Banks
Missouri Bar No. 28655
Banks Law LLC
1824 Chouteau Avenue
St Louis, MO 63103
(314) 583-7075 (phone)
(302) 365-2789 (fax)
ericbanks@banksllc.com

¹⁰ See 2006 Mo. PSC LEXIS 1110, *supra* (Failure to properly denominate one's motion and otherwise comply with the summary determination rule deprives the other party of an opportunity to respond in the time and manner allowed by the rule).

Wendy K. Tatro, #60261
Director and Assistant General Counsel
Ameren Missouri
P.O. Box 66149
St. Louis, MO 63166-6149
(314) 554-3484 (phone)
(314) 554-4014 (fax)
AmerenMOService@ameren.com

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

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing was served on the Staff of the Commission and the Office of the Public Counsel via electronic mail (e-mail) on this 1st day of December, 2020.

/s/ James B. Lowery
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