BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

EARTH ISLAND INSTITUTE d/b/a RENEW MISSOURI, et al.,	)	
Complainants,	)	
vs.	)	**File No: EC-2013-0381**[1]
UNION ELECTRIC COMPANY d/b/a AMEREN MISSOURI,	)	
Respondent.	)	

AMEREN MISSOURI'S RESPONSE IN OPPOSITION TO COMPLAINANTS' MOTION FOR SUMMARY DETERMINATION

COMES NOW Union Electric Company d/b/a Ameren Missouri ("Ameren Missouri" or "Company") and pursuant to 4 CSR 240-2.117(1)(C), hereby files this response to Complainants' Motion for Summary Determination ("Complainants' Motion") and respectfully prays that the Commission deny Complainants' request for summary determination as prayed in Complainants' Motion.

Introduction

Summary determination is only proper when there are (a) no genuine issues of material fact **and** (b) the movant is entitled to judgment as a matter of law. *ITT Commercial Fin. Corp. v. Mid-Am. Marine Supply Corp.*, 854 S.W.2d 371, 377 (Mo. banc 1993).[2]

[1] This case, involving Complainants' complaint against Ameren Missouri, has been consolidated with similar complaints against other electric utilities filed in File Nos. EC-2013-0379, EC-2013-0380 and EC-2013-0382.

[2] As discussed in numerous Commission orders, including in the recent case styled *Unice Harris v. Southern Union Company d/b/a Missouri Gas Energy*, 2013 Mo. PSC LEXIS 257, [5] n.4 (effective Apr. 19, 2013) (adopted by the full Commission at 2013 Mo. PSC LEXIS 305), the *ITT* case applied Mo. R. Civ. P. 74.04, which as the Commission has noted "is sufficiently similar to the Commission's regulation to make cases interpreting the rule helpful in understanding the regulation." *Harris, supra.*.

Complainants bear the burden of establishing their entitlement to summary determination. *Id. at 378.* Complainants have failed to establish that there is no dispute about material facts or that they are entitled to judgment as a matter of law and, therefore, their request for summary determination must be denied. This is demonstrated because some of the "facts" claimed as material and about which the lack of a genuine dispute is claimed are in truth *legal* conclusions, the resolution of which may turn on the specific facts of this case that can only be developed through an evidentiary hearing. This means that even if there were no disputes about material facts, which there are – see below, Complainants have failed to establish their entitlement to judgment as a matter of law. Moreover, there are additional material facts, not listed by Complainants, in dispute that are relevant to the legal determinations Complainants say are at issue in this case. This too precludes granting summary determination.

Finally, even if the Commission were to believe that there was some technical failure to perform the precise calculation the rule required, the Commission possesses full authority to waive the rule's requirements to whatever extent it believes it is necessary and should do so in full resolution of the Complaint. Indeed, such a request was made in the Company's RES Compliance Plan filing and has yet to be ruled upon.[3] Insofar as the calculation performed by Ameren Missouri used a conservative, alternative methodology which set the cap at its lowest possible point – as the sworn rebuttal testimony of Ameren Missouri witness Matt Michel's demonstrates, there is simply no harm caused by any such alleged technical violation. As Complainants' witness P.J. Wilson himself admitted during his deposition, Ameren Missouri's RES compliance expenditures did not exceed the conservative result, so it would not have exceeded the more liberal calculation of the 1% cap.

[3] File No. EO-2012-0351, Response to Comments, June 15, 2012, p. 2.

> Q. Would you agree with me that the $26.1 million that's referenced here [Ameren Missouri's 2012 RES Compliance Plan for 2012-2014] on page 16 is less than 1 percent of the nonrenewable scenario that has additional nonrenewable generation and greenhouse gas costs include?
> A. I think that it's likely that that $26.1 million is a smaller number than the other scenario.[4]
>
> Q. Would you agree with me that the $26.1 million is likely to be less than the ten-year average of the company's revenue requirement plus ten-years of greenhouse gas and ten years of nonrenewable generation added, the 1 percent applied to that number?
> A. I would think that under normal circumstances that I'm aware of, that yes, that number would be a number greater than $26.1 million.[5]

There was and is no point in performing a different calculation now.

Regardless, as shown below, Complainants have failed in their burden to establish their entitlement to summary determination.

RESPONSE TO COMPLAINANTS' "FACTUAL" ALLEGATIONS

5. [6]"There is no genuine dispute that the Commission's rule 4 CSR 240-20.100(7) provides: "Each electricity utility shall file an annual RES compliance plan with the commission. The plan shall be filed no later than April 15 of each year." Rule 4 CSR 240-20.100(7)(B)1 further provides: "The RES compliance plan shall include, at a minimum-…F. A detailed explanation of the calculation of the RES retail impact limit calculated in accordance with section (5) of this rule. This explanation should include the pertinent information for the planning interval which is included in the RES compliance plan."

Response: The Company admits that Complainants have accurately quoted portions of the cited rules.

[4] Patrick J. Wilson Deposition, Case No. EC-2013-0379, July 16, 2013, p. 87, l. 3-10.
[5] Wilson depo, p. 88, l. 4-14.
[6] We number our paragraphs starting with paragraph 5 to correspond to Complainants' apparent recitation of material facts it claims are undisputed.

6. "There is no genuine dispute as to the fact that the Commission's rule 4 CSR 240-20.100(5) provides:

> (A) The retail rate impact…may not exceed one percent (1%) for prudent costs of renewable energy resources directly attributable to RES compliance…. (B) The RES retail rate impact shall be determined by subtracting the total retail revenue requirement incorporating an incremental non-renewable generation and purchased power portfolio from the total retail revenue requirement including an incremental RES-compliant generation and purchased power portfolio…The comparison of the rate impact of renewable and non-renewable energy resources shall be conducted only when the electric utility proposes to add incremental renewable energy resource generation directly attributable to RES compliance through the procurement or development of renewable energy resources."

Response: The Company admits that Complainants have accurately quoted portions of the cited rules.

7. "There is no genuine dispute that KCP&L's 2012-2014 RES Compliance Plan did not include a detailed explanation of the utility's section (5) calculation. Whether such omission constitutes a violation rule 4 CSR 240-20.100(7)(B)1.F. is a question of law addressed in Complainants' accompanying Memorandum in Support.

a. While KCP&L's March 4, 2013 Answer in case no. EC-2013-0381 denies Complainants' allegation that the omission of a detailed explanation of the section (5) calculation constitutes a violation of rule 4 CSR 240-20.100(7)(B)1.F,[7] KCP&L does not dispute the fact that it omitted the detailed explanation in its 2012-2014 RES Compliance Plan.

b. In his Rebuttal Testimony on behalf of KCP&L and GMO, Tim Rush concedes that KCP&L did not include a detailed explanation of its section (5) calculation in its 2012-2014 RES Compliance Plan. Mr. Rush's testimony claims that KCP&L was not required to perform or disclose the section (5) calculation, by virtue of the last sentence of rule 4 CSR

[7] "Answer," filed by KCP&L in File No. EC-2013-0379 on March 4, 2013, p. 3, ¶21.

240-20.100(5)(B).[8] Burton Crawford's Rebuttal Testimony on behalf of KCP&L and GMO makes a similar concession when it states that the section (5) calculation was not required by virtue of rule 4 CSR 240-20.100(5)(B).[9]

c. On p. 16 of its 2012-2014 RES Compliance Plan, KCP&L states:

"Since each Company Preferred Plan identified in the April 2012 IRP filing only contains renewable additions that improve each company's cost, no non-compliant plan is necessary to calculate rate impacts." By KCP&L's own admission, it did not include a detailed explanation of the section (5) calculation because it believed the full calculation was not necessary."

Response: This allegation is not directed to the Company and thus no response from the Company is required.

8. "There is no genuine dispute that GMO's 2012-2014 RES Compliance Plan did not include a detailed explanation of the utility's section (5) calculation. Whether such omission constitutes a violation of rule 4 CSR 240-20.100(7)(B)1.F. is a question of law addressed in Complainants' accompanying Memorandum in Support.

a. While GMO's March 4, 2013 Answer in case no. EC-2013-0380 denies Complainants' allegation that the omission of a detailed explanation of the section (5) calculation constitutes a violation of rule 4 CSR 240-20.100(7)(B)1.F.,[10] GMO does not dispute the fact that it omitted the detailed explanation in its 2012-2014 RES Compliance Plan.

b. As mentioned above, the Rebuttal Testimony of both Tim Rush and Burton Crawford concedes that the section (5) calculation was not performed and the detailed explanation was not included in the Plan.

[8] "Rebuttal Testimony of Tim Rush," filed on behalf of KCP&L and GMO on August 9, 2013, p. 8, line 1-2; p. 10, lines 5-6.
[9] "Rebuttal Testimony of Burton L. Crawford," filed on behalf of KCP&L and GMO on August 9, 2013, p. 3, lines 14-15.
[10] "Answer," filed by GMO in File No. EC-2013-0380 on March 4, 2013, p. 3, ¶21.

c. On p. 16 of its 2012-2014 RES Compliance Plan, GMO states: "Since each Company Preferred Plan identified in the April 2012 IRP filing only contains renewable additions that improve each company's cost, no non-compliant plan is necessary to calculate rate impact." By GMO's own admission, it did not include a detailed explanation of the section (5) calculation because it believed the full calculation was not necessary."

Response: This allegation is not directed to the Company and thus no response from the Company is required.

9. "There is no genuine dispute that Ameren Missouri's 2012-2014 RES Compliance Plan did not include a detailed explanation of the utility's section (5) calculation. Whether such omission constitutes a violation of rule 4 CSR 240-20.100(7)(B)1.F. is a question of law addressed in Complainants' accompanying Memorandum in Support.

a. While Ameren Missouri's March 4, 2013 Answer in case no. EC-2013-0381 denies Complainants' allegation that the omission of a detailed explanation of the section 5 calculation constitutes a violation of rule 4 CSR 240-20.100(7)(B)1.F,[11] Ameren Missouri does not dispute the fact that it omitted the detailed explanation in its 2012-2014 RES Compliance Plan.

b. On pg. 6 of his Rebuttal Testimony on behalf of Ameren Missouri, Matt Michels concedes that Ameren Missouri didn't make use of its IRP model in order to include a detailed calculation of the 1% retail rate impact limitation in its 2012 RES compliance filing.[12] [13] Mr. Michels explains that the section (5) calculation wasn't included because the Commission's rules were the subject of litigation at the time, and thus Ameren Missouri used an

[11] "Answer," filed by Ameren Missouri in File No. EC-2013-0381 on March 4, 2013, p. 3, ¶24.
[12] "Rebuttal Testimony of Matt Michels," filed on behalf of Ameren Missouri in File No. EC-2013-0379, et al. on August 9, 2013, p. 6, lines 1-11.
[13] Id. at p. 4, lines 3-10 (Mr. Michels explains that its 2011 IRP filing included an Excel spreadsheet model, developed to perform the section 5 calculation).

alternative method for calculating the 1% retail rate impact limitation.[14]

c. By Ameren Missouri's own admission, it is this alternative method that is explained on p. 16 of its 2012-2014 RES Compliance Plan:

> As established in Case No. ER 2011-0028, the total annual base rate revenue requirement for Ameren Missouri is $2.61 billion. The application of a 1% rate increase would equate to a rate impact of $26.1 million.
>
> As demonstrated in Table 3, the costs affecting the annual rate impact are well below $26.1 million."

Response: This is not a factual allegation and thus no response is required. To the contrary, it is a conclusion of law (Complainants' argument regarding what is required by 4 CSR 240-20.100(7)(B)1.F, including what is the legal interpretation of "detailed explanation"). ***See e.g., Universal Underwriters Ins. Co. v. Dean Johnson Ford,*** **905 S.W.2d 529, 532–33 (Mo. App. W.D. 1995) (A non-movant for summary judgment is not required to controvert alleged undisputed facts when the allegations are not facts, but rather, are legal conclusions. With respect to the allegations in subparagraphs a, b and c of paragraph 9, Ameren Missouri disputes that it omitted a detailed explanation.** ***See*** **Affidavit of Matt Michels attached hereto and incorporated herein by this reference.**

10. "There is no genuine dispute that Empire's 2012-2014 RES Compliance Plan did not include a detailed explanation of the utility's section (5) calculation. Whether such omission constitutes a violation of rule 4 CSR 240-20.100(7)(B)1.F. is a question of law addressed in Complainants accompanying Memorandum in Support.

a. While Empire's March 4, 2013 Answer in case no. EC-2013-0382 denies Complainants' allegation that the omission of a detailed explanation of the section (5)

[14] Id. at p. 6, lines 12-19.

calculation constitutes a violation of rule 4 CSR 240-20.100(7)(B)1.F.,[15] Empire does not dispute the fact that it omitted the detailed explanation in its 2012-2014 RES Compliance Plan.

b. On p. 6 of his Rebuttal Testimony on behalf of Empire, Timothy Wilson concedes that Empire omitted a detailed explanation of its section (5) calculation from its 2012-2014 RES Compliance Plan.[16] Mr. Wilson reasons that such explanation wasn't required because Empire was exempt by 4 CSR 240-20.100(5)(B) from making "a detailed retail rate impact calculation and from including that calculation as part of its RES Compliance Plan filing."[17] Furthermore, Mr. Wilson's testimony described Empire's short explanation in its 2012-2014 RES Compliance Plan (at p. 7) as a "somewhat rough estimate of the one percent retail rate cap."[18]

Response: This allegation is not directed to the Company and thus no response from the Company is required.

11. "There is no genuine dispute that the Staff Reports, filed on May 31st, 2012, observed that all four utilities' compliance plans were "not at the level of detail contemplated by the rule"[19] with respect to the requirement in rule 4 CSR 240-20.100(7)(B)1.F. Staff observed: "the rule requires a calculation to net the least-cost of renewable generation for RES compliance with the cost to provide an equivalent amount of generation from nonrenewable resources."[20] Whether this lack of sufficient detail constitutes a violation rule 4 CSR 240-20.100(7)(B)1.F is a legal issue, and thus is not addressed here."

Response: The Company admits that Complainants accurately quote the Staff Report in

[15] "Answer," filed by Empire in File No. EC-2013-0382 on March 4, 2013, p. 3, ¶20.
[16] "Rebuttal Testimony of Timothy N. Wilson," filed on behalf of Empire on August 9, 2013, p. 6, lines 1-2.
[17] Id.
[18] "Rebuttal Testimony of Timothy N. Wilson," filed on behalf of Empire on August 9, 2013, p. 6, lines 11-14.
[19] "Staff Report on Company's RES Compliance Plan," filed on May 31, 2012 in File Nos. EO-2012-0336 (p.2,¶6), EO-2012-0348 (p.2, ¶7), EO-2012-0349 (p. 2, ¶7), EO-2012-0351 (p. 2, ¶7).
[20] Id.

the Company's RES compliance plan docket for 2012, but state that the Staff's *opinion* is not dispositive and does not establish the absence of a dispute. It is the Commission that must decide the meaning of "detailed explanation" when applied to a given set of facts, and those facts have not yet been developed because there has been no evidentiary hearing and that there are other material facts which remain disputed (as outlined below), demonstrating the need for an evidentiary hearing and the impropriety of granting summary determination.

12. "There is no genuine dispute that the Staff Reports recommend that the Commission grant all four IOUs a variance from rule 4 CSR 240-20.100(7)(B)1.F, although no utility requested such a variance concurrent with its compliance plan.[21] Staff reasoned that: "[s]ince the Compan[ies'] costs for these compliance period are significantly below the one percent (1%) retail rate impact limit, performing the detailed netting calculation would literally serve no purpose."[22]

Response: Admitted, although a variance request was made by Ameren Missouri in its *Response to Comments*, filed in the same docket.

13. "There is no dispute that the Commission has not granted any utility a variance from rule 4 CSR 240-20.100(7)(B)1.F, despite multiple requests."

Response: The Company admits the Commission has not yet granted a variance and states the Commission retains the authority to do so at any time. The Company further states that it has had a related variance request pending before the Commission since 2012.[23]

14. "There is no genuine dispute that the Commission has not determined that any utility has reached the 1% retail rate impact limit or performed the section (5) calculation

[21] "Staff Report on Company's RES Compliance Plan," filed on May 31, 2012 in File Nos. EO-2012-0336 (p. 2, ¶8), EO-2012-0348 (p. 2, ¶9), EO-2012-0349 (p. 2, ¶9), EO-2012-0351 (p. 2, ¶9).
[22] Id.
[23] File No. EO-2012-0351, Response to Comments, June 15, 2012, p. 2.

correctly."

Response: The Company admits that the Commission has not made such determinations, and states that under the Commission's RES rules, such determinations are not contemplated, rendering the allegations of paragraph 14 irrelevant.

15. "There is no dispute that Ameren Missouri, KCP&L and GMO are claiming that expenditures in the form of solar rebates are directly attributable to RES compliance. Furthermore, there is no dispute that utility expenditures in the form of solar rebates result in the development of renewable energy resources."

Response: The Company admits that solar rebate expenditures are a RES compliance cost. The Company further states that the allegation in the last sentence of paragraph 15 is not a factual allegation, but rather, states a legal conclusion to which no response is required.

16. "There is no dispute that GMO filed a Motion to Approve Tariff to Suspend Payment of Solar Rebates on July 5, 2013 in case no. EO-2013-0505. That filing has since been moved to case no. ET-2014-0026."

Response: This allegation is not directed to the Company and thus no response from the Company is required. The Company also states that the allegations in this paragraph are irrelevant to the Complaint filed against it.

ADDITIONAL DISPUTED MATERIAL FACTS

1. Complainants' pre-filed testimony and Legal Memorandum submitted with Complainants' Motion indicates that business planning for renewable developers is relevant to resolving the allegations of the Complaint and indeed relevant to what the subject statutes and regulations mean (because, they say, it is one of the purposes of the statute and regulations). Consequently, the need for or usefulness of both a calculation of the one percent rate impact limit and a detailed explanation in relation to that business planning is a material fact injected

into this case by Complainants' claims about which there is a genuine dispute.[24] Specifically, there is a genuine dispute about the material fact of whether the calculation and detailed explanation Ameren Missouri submitted were inadequate to allow companies to "run their businesses." The Company disputes that there was any such inadequacy. *See* Affidavit of Mr. Wright, paras. 6 and 7, attached hereto and incorporated herein by this reference. That dispute precludes summary determination.

2. For similar reasons, whether renewable businesses need a "high level of assurance that utilities are correctly calculating"[25] the one percent limitation is a material fact about which there is a genuine dispute. Specifically, there is a genuine dispute about the material fact of whether a "high level" of assurance is needed and of what constitutes such a level. *See* Affidavit of Mr. Wright, para. 8. That dispute precludes summary determination.

3. Similarly, Complainants also claim that the survival of an "entire industry is threatened" by Ameren Missouri's alleged failure to have complied with the Commission's one percent calculation rule. Complainants' Legal Memorandum p. 7. This too is a material fact about which there is a genuine dispute. Specifically, there is a genuine dispute about whether anything having to do with the one percent calculation or a detailed explanation thereof has threatened the survival of an "entire industry." *See* Affidavit of Mr. Wright, para.9. That dispute precludes summary determination.

WHEREFORE, Respondent Ameren Missouri requests that the Commission deny Complainants' request for summary determination.

[24] Complainants' Legal Memorandum p. 3. The Company does not agree with the purpose of the one percent calculation claimed by Complainants, but having injected that purpose into the case, facts related to it are material and genuinely in dispute.
[25] Complainants' Legal Memorandum p. 4.

Respectfully Submitted,

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

Dated: September 6, 2013

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Response was served on counsel of record for all of the parties of record to this case via electronic mail (e-mail) or via certified and regular mail on this 6th day of September, 2013.

/s/ Wendy K. Tatro
Wendy K. Tatro

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EARTH ISLAND INSTITUTE d/b/a RENEW MISSOURI, et al.,	)	
Complainants,	)	
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UNION ELECTRIC COMPANY d/b/a AMEREN MISSOURI,	)	
Respondent.	)	

STATE OF MISSOURI)
)
CITY OF ST. LOUIS)

AFFIDAVIT

The undersigned, being duly sworn upon his oath, states as follows:

1. My name is Matt Michels.

2. I am over the age of 18 years, and make this affidavit based upon my personal knowledge.

3. I have an electrical engineering degree from the University of Illinois-Urbana-Champaign, and have been employed in the utility industry for over 20 years, including extensive experience in financial and other corporate modeling and analyses.

4. I am employed by Ameren Service Company as Corporate Analysis Manager and in that capacity provide services to Union Electric Company d/b/a Ameren Missouri.

[1] This case, involving Complainants' complaint against Ameren Missouri, has been consolidated with similar complaints filed in Case Nos. EC-2013-0379, EC-2013-0380 and EC-2013-0382.

5. The Company performed a calculation of the retail rate impact of its 2012 to 2014 RES Compliance Plan that conservatively set the cap at its lowest possible level (providing the least possible "headroom" for RES compliance expenditures, to the extent needed to meet the RES portfolio requirements.) Included with the calculation was all of the detail and explanation that was necessary to replicate and understand it. The explanation and part of the details (e.g., the revenue requirement used) is found at page 16 of the Compliance Plan (quoted by Complainants in paragraph 9.c of Complainants' Motion for Summary Determination) and additional details are contained in Table 3 in the Compliance Plan. There is no further "detailed explanation" needed or that could be provided.

Further affiant sayeth not.

Matt Michels
Corporate Analysis Manager

On this 30th day of August, 2013, before me personally appeared Matt Michels, known to be the person who, upon his oath, signed the foregoing Affidavit in my presence in the county and state aforesaid.

Julie Donohue - Notary Public
Notary Seal, State of
Missouri - St. Louis County
Commission #13753418
My Commission Expires 1/15/2017

Julie Donohue
Notary Public

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UNION ELECTRIC COMPANY d/b/a AMEREN MISSOURI,	)	
Respondent.	)	

STATE OF MISSOURI)
)
CITY OF ST. LOUIS)

AFFIDAVIT

The undersigned, being duly sworn upon his oath, states as follows:

1. My name is Richard Wright.

2. I am over the age of 18 years, and make this affidavit based upon my personal knowledge.

3. I have a Bachelor of Science in Mechanical Engineering and Masters of Business Administration.

4. I am employed by Union Electric Company d/b/a Ameren Missouri ("Ameren Missouri" or "Company") as Managing Supervisor, Renewable Energy.

5. I and employees under my supervision have been dealing with many different solar system installers for the past several years, including at the time of and

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since the submission of the Company's 2012 RES Compliance Plan and the calculation of the one percent rate limitation addressed therein.

6. To my knowledge no solar system installer, aside from Mr. Vaughn Prost in his pre-filed testimony in this case, has made any claim that they cannot "run their businesses," either in general or in any way related to the one-percent calculation.

7. In fact, both comments made by the installers and my personal observations indicate that the solar installation business has been and continues to be quite robust and growing rapidly, in direct contradiction of Mr. Prost's assertions.

8. To my knowledge, no solar installer has claimed that a "high level" of assurance relating to the one percent cap or its calculation is needed to run their business or to otherwise run a successful solar installation business.

9. Despite substantial interaction with businesses and individuals operating in the renewables industry, I have not been told by representatives of such businesses or such individuals that their industry's survival is threatened, and certainly have not been told that it is threatened by any claimed deficiency in Ameren Missouri's calculation of the one percent rate limitation. I have also made no observations that the industry is threatened in general, or related to any claimed deficiency in Ameren Missouri's calculation of the one percent rate limitation.

Further affiant sayeth not.

On this 6th day of September, 2013, before me personally appeared Richard Wright, known to be the person who, upon his oath, signed the foregoing Affidavit in my presence in the county and state aforesaid.

Julie Donohue
Notary Public

Julie Donohue - Notary Public
Notary Seal, State of
Missouri - St. Louis County
Commission #13753418
My Commission Expires 1/15/2017