

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

DELMAR GARDENS ENTERPRISES, INC.,)	
)	
Complainant,)	
)	Case No.: EC-2022-0163
v.)	
)	
UNION ELECTRIC COMPANY d/b/a)	
AMEREN MISSOURI,)	
)	
Respondent.)	

RESPONSE TO RESPONDENT’S MOTION TO DISMISS

COMES NOW Delmar Gardens Enterprises, Inc. (“Delmar Gardens”), by and through undersigned counsel, and for its Response to Respondent Union Electric Company d/b/a Ameren Missouri’s (“Ameren”) Motion to Dismiss states as follows:

1. On January 6, 2022, Delmar Gardens filed its Formal Complaint with the Missouri Public Service Commission (the “MPSC” or the “Commission”) requesting that Ameren allow Delmar Gardens to opt-out of making Energy Efficiency Investment Charge (“EEIC”) payments to Ameren’s Biz Savers Program.

2. Delmar Gardens presented its Complaint following the form created by the MPSC. Any alleged deficiencies in the information in Delmar Gardens’ Complaint and request to opt-out were done by following the “Formal Complaint” form provided by the MPSC.

3. Pursuant to Missouri CSR 4240-20.094, A customer that received a demand-side incentive or service for three (3) years following the last date when a customer receives that incentive must make payments to Ameren’s Biz-Savers Program. After three years without receiving an incentive has expired, the customer may then opt out.

4. On or around 2016, Washington University in St. Louis (“Washington University”) violated CSR 4240-20.094 by opting out of the Biz Savers Program despite

Washington University receiving an incentive prior to the expiration of the three-year waiting period.

5. Ameren created precedent in that instance as an alternative means of opting out under CSR 4240-20.094 by permitting Washington University to opt-out of the Biz Savers Program by repaying the incentive received.

6. Specifically, Washington University received an incentive due to “administrative error” on the part of Ameren. Upon request from Washington University, Ameren permitted the repayment of the incentive in full. After repayment was made, Washington University’s status under the thirty-six (36) month waiting period was allowed to resume as if no incentive was received. This issue and repayment were never brought before the Commission and was, presumably, handled privately between Ameren and Washington University.

7. Delmar Gardens was attempting to opt-out of the Biz Savers Program and had not been receiving incentives from Ameren. This was decision was consciously made by the officers of Delmar Gardens. At no point did Delmar Gardens authorize any of its property managers, employees, or agents to apply for or receive incentives on Delmar Gardens’ behalf.

8. On or about February 3, 2021, the manager of a building owned by Delmar Gardens, but openly operated by Cushman Wakefield applied for an incentive on Delmar Garden’s behalf for roughly \$580. Ameren should have been aware that Jennifer Bauer, the Cushman Wakefield employee, was not employed by or an agent of Delmar Gardens. Specifically, Ms. Bauer signed the application using her Cushman Wakefield email address.

9. Where a principal “holds out” as possessing authority and reasonably inducing others that the authority exists, apparent authority exists even when none has been granted. *Hamilton Hauling, Inc. v. GAF Corp.*, 719 S.W.2d 841 (Mo. Ct. App. W.D. 1986). However,

where there is a clear disconnect between the principal and the third party, no apparent authority exists.

10. Here, although Ms. Bauer requested the incentive under Delmar Gardens as the building's owner, she still signed the application using her Cushman Wakefield email address. Ameren should have been aware that an individual that was not employed by or an officer of Delmar Gardens does not have the authority to apply for a demand-side incentive. Thus, Ameren violated CSR 4240-20.094 by issuing the incentive to an individual without authority.

11. Delmar Gardens has properly alleged a claim against Ameren when it failed to permit Delmar Gardens to use the same exception to CSR 4240-20.094 as Washington University. Communications and correspondence with Ameren have led to it claiming that the situations were "different." However, at no time has Ameren provided specific evidence or explanation that that Ameren's "administrative error" here is different in Washington University's case.

12. As a result of Ameren's mistaken issuance of the incentive to Delmar Gardens, the same "administrative error" and repayment for the incentive should have been available here. Ameren wrongfully issued a demand-side incentive to Delmar Gardens and wrongfully denied Delmar Gardens its request to pay back the incentive to Ameren under the precedent set with Washington University.

13. Delmar Gardens has adequately alleged that as a result of Ameren's wrongful denial of Delmar Garden's request to repay its erroneously issued incentive and opt-out of the Biz Savers Program, Delmar Gardens has been damaged. Further, forcing Delmar Gardens to remain in the Program for an additional three (3) years would cause Delmar Gardens to pay over \$1,000,000 in EEIC payments.

14. Because Complainant Delmar Gardens properly asserted its claim that Respondent Ameren violated CSR 4240-20.094, the Commission should not dismiss Complainant's Complaint.

WHEREFORE, Complainant respectfully requests that the Missouri Public Service Commission denies Respondent's Motion to Dismiss and grant Complainant's request to opt-out of energy efficiency programs in 2022.

Respectfully submitted,

McCARTHY, LEONARD & KAEMMERER, L.C

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