

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

Delmar Gardens Enterprises, Inc.,	)	
Complainant,	)	
v.	)	File No. EC-2022-0163
	)	
Union Electric Company d/b/a Ameren Missouri,	)	
Respondent	)	

**AMEREN MISSOURI'S ANSWER, AFFIRMATIVE DEFENSES, AND  
MOTION TO DISMISS**

COMES NOW Union Electric Company d/b/a Ameren Missouri ("Ameren Missouri" or "the Company"), and for its Answer, Affirmative Defenses, and Motion to Dismiss states as follows:

**Background**

1. On January 6, 2022, Delmar Gardens Enterprises, Inc. ("Complainant") filed a complaint against the Company alleging the Company violated prior decisions made by the Commission and the Company has given inconsistent treatment to similarly situated entities. (Complaint at para. 7, p. 2). Complainant respectfully requests to opt-out of making Energy Efficiency Investment Charge ("EEIC") payments into the Ameren Missouri Biz Savers Program effective as of January 1, 2022. (*Id.*, para. 6).

2. The Missouri Public Service Commission ("Commission") issued an Order Giving Notice of Complaint and Directing Response ("Order"). In its Order, the Commission directed the Company to file its response no later than February 7, 2022.

**Answer**

3. The Complainant's allegations not specifically admitted in this Answer should be considered denied.

4. Ameren Missouri admits the allegations in paragraphs 1 through 4.

5. Ameren Missouri denies the amount at issue alleged in paragraph 5 and denies the allegations of fact set forth in paragraph 5.

6. In answer to paragraph 6, the Company denies that Complainant is entitled to the relief requested and denies the allegations of fact set forth in paragraph 6.

7. The Company denies the allegations in paragraph 7 and denies Commission Chief Deputy Counsel Curtis Stokes was acting on behalf of Ameren Missouri.

8. With respect to the allegations in paragraph 8, the Company admits it received the Complainant's application dated October 22, 2021 as shown in Complainant's Exhibit 2. The Company has no knowledge regarding the e-mail communication in Complainant's Exhibit 1. The Company denies the Complainant was not given a reason, explanation, or evidence as alleged. The Company provided the Complainant Staff's Memorandum dated November 24, 2021 by email on November 24, 2021. See Ameren Missouri Exhibit 1. Ameren Missouri either has no knowledge or denies the remainder of the allegations as stated in paragraph 8.

#### **Affirmative Defenses**

9. Complainant e-mailed the Staff of the Missouri Public Service Commission ("Staff") on October 29, 2021, requesting to opt-out of demand-side programs pursuant to Commission Rule 20 CSR 42-20.094(7)(A).<sup>1</sup> Ameren Missouri Exhibit 1. There is no factual dispute that the Complainant had a coincident demand of 2,500 kW or more in the 12 months previous to its request

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<sup>1</sup>Commission Rule 20 CSR 42-20.094(7)(A) provides in part: (7) Provisions for Customers to Opt-Out of Participation in Utility Demand-Side Programs. (A) Any customer meeting one (1) or more of the following criteria shall be eligible to opt-out of participation in utility-offered demand-side programs: 1. . . . 3. The customer has accounts within the service territory of the electric utility that have, in aggregate across its accounts, a coincident demand of two thousand five hundred (2,500) kW or more in the previous twelve (12) months, and the customer has a comprehensive demand-side or energy efficiency program and can demonstrate an achievement of savings at least equal to those expected from utility-provided demand-side programs. . .

and meets the coincident demand requirement of 20 CSR 4240-20.094(7)(A)3. As Staff indicated and as the Company explained to the Complainant, the Complainant participated in Ameren Missouri's demand-side program and received an incentive in the last three years. *See* Ameren Missouri Exhibit 2.

10. Commission Rule 20 CSR 4240-20.094(7)(L) specifically states:

A customer who participates in demand-side programs initiated after August 1, 2009, shall be required to participate in demand-side programs funding for a period of three (3) years following the last date when the customer received a demand-side incentive or a service. Participation shall be determined based on premise location regardless of the ownership of the premise.

11. Under the Commission Rule 20 CSR 4240-20.094(7)(L), Complainant is not eligible to opt-out of Ameren Missouri's demand-side program beginning in January 2022. The Company communicated to the Complainant that an energy efficiency incentive was paid to Complainant for one of its electric accounts. *See* Ameren Missouri Exhibit 2. Based on the Complainant's participation in 2021, the Complainant will be eligible to opt out of energy efficiency programs in three years. If the Complainant does not participate in the Company's energy efficiency programs in the next three years, then the Complainant can submit an opt-out application in 2024 and the Complainant will be eligible to opt-out of the Company's energy efficiency programs effective January 2025.

12. The Complainant acknowledges that on January 12, 2021, an incentive application was submitted. Complainant Ex. 2 at p. 2. Ameren Missouri Exhibit 3 shows the remittance of the incentive to Delmar Gardens Enterprise as the account owner. Complainant represented to Staff that the incentive was paid to the tenant, but Ameren Missouri records show that incentive was paid to Delmar Gardens Enterprise. *Id.*, Ameren Missouri Exhibit 3. Consequently, under the Commission's

rules, the Complainant was not eligible to opt-out for January 2022 since an incentive was paid on February 3, 2021.<sup>2</sup> *See* Ameren Missouri Exhibit 3, page 3.

13. The Complainant claims the amount at issue in this case is over one million dollars for a period of ten years during the opt-out term. Complaint at paragraph 5, page 1. There is no amount in controversy. Under the Commission rules and the Company's tariffs, the Complainant is not eligible to opt-out and is obligated to remit Rider EEIC charges until such time the Complainant is eligible to opt-out. If the Complainant is eligible to opt-out in 2024, then Complainant will no longer be obligated to pay the Rider EEIC charges in 2025.

14. The Commission's rules do not allow a customer to "pay back" an incentive paid in 2021 in exchange for opting out the energy efficiency programs in 2022. Ameren Missouri communicated to the Complainant that the Company could not accept a repayment of the incentive in exchange for opting out of the energy efficiency programs the following year. Ameren Missouri explained to the Complainant that its request is inconsistent with the requirements of 20 CSR 240-20.094(7). Participation in demand-side program funding by participating customers is necessary to ensure that both participating and non-participating customers continue to benefit from cost-effective demand side investments. Complainant's request to opt-out of the 2022 energy efficiency programs should be denied since the request is contrary to the Commission's rules.

15. Additionally, the Complainant did not present any facts to support its allegation it is being treated any differently than similarly situated customers. The Complainant's allegation is speculative. While Complainant claims that its request is similar to a previous customer's request, the Complainant's reliance on another customers opt-out request is improper and irrelevant to this case.

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<sup>2</sup> Date of the incentive check as shown in Ameren Missouri Exhibit 3.

16. Although the Complainant's reference to another customer is not relevant to the Complainant's case, the prior customer referenced in the Complainant's complaint was not similarly situated as the Complainant. Although the Complainant verbally notified the Company in late 2020 it was thinking of opting out of the energy efficiency programs, the Complainant did not notify or follow-up with the Company until August 2021. On August 11, 2021, the Complainant sent an email requesting information to determine whether it was eligible to opt-out of the energy efficiency programs. Ameren Missouri Exhibit 2. In response to the Complainant's request for information, the Company told the Complainant it did not include an account on its list. The account the Complainant omitted had an incentive that was paid to the Complainant in February 2021 for a project associated with the account in February 2021.

17. In regard to how the Company treated the other customer compared to the Complainant, the facts are distinguishable and therefore not relevant to this case. Ameren Missouri did not provide the details of another customer's case to the Complainant since the Company does not publicly disclose customer account information. In order to be transparent in this case, Ameren Missouri provides the following confidential information regarding the other customer's opt-out request in Ameren Missouri Exhibit 4. On page 1 of the exhibit, a timeline of the opt-out process for the two customers is shown. On pages 2 and 3 of the exhibit, a detailed outline of the distinguishing facts is presented. The Complainant's case is distinguishable as shown in Ameren Missouri Exhibit 4 and summarized on page 4 of the exhibit. Consequently, the approach the Company took with the other customer and Complainant allows both participating and non-participating customers continue to benefit from cost-effective demand-side investments.

18. The record in this case indicates the Complainant worked with the BizSavers program to receive an incentive in support of its energy efficiency project starting July 20, 2020. Ameren

Missouri Exhibit 3, page 1. Now the Complainant is requesting to void ("pay back") its incentive payment when it submitted its opt-out request. The Complainant's Exhibit 2 shows the Complainant complains it did not authorize the project, but the Company remitted the incentive to the Complainant since the Complainant was the account holder with the check made directly to the Complainant. Ameren Missouri Exhibit 3, page 3. The Complainant incorrectly assumes that if the incentive was remitted back to the Company, the requirements of the Commission's rules are met. The timing of the request and remittance is an attempt to circumvent CSR 240-20.094(7)(L). The Commission should dismiss the complaint since the Complainant does not meet the requirements under the rules.

### **Motion to Dismiss**

19. In its Complaint, the Complainant did not establish that it is eligible to opt-out of energy efficiency programs under the Commission's rules. The Complainant acknowledges an incentive application was submitted and an incentive was received. Complainant Ex. 2 at p. 2. Under the rules, the Complainant must not receive an incentive for 36 months to be eligible to opt-out of energy efficiency programs. Instead of waiting the 36 months required under the rules, the Complainant requested to pay back the incentive in the year it was received so that its request to opt-out would be granted the following year. The Complainant, however, fails to cite any Commission rules that allow such a "payback" option. Consequently, under the Commission's rules, the Complainant was not eligible to opt-out of energy efficiency programs in January 2022 since an incentive was paid on or about February 3, 2021. *See* Ameren Missouri Exhibit 3, page 3.

20. Consequently, the Commission cannot grant the relief request by the Complainant and it is proper for the Commission to grant a motion to dismiss. *City of O'Fallon v. Union Electric Co.*, 2015 Mo. App. Lexis 454, \*11, \*16 (April 28, 2015) ("the Commission's powers are limited to those conferred by statute either expressly or by clear implication as necessary to carry out the powers

specifically granted” and where the complainant could provide, “no statutory authority for the Commission to grant the requested relief[,]” the complaint was properly dismissed).

21. Section 396.390.1 provides that the Commission shall hear complaints regarding “a violation, of any provision of law, or of any rule or order or decision of the commission.” In this case, the Complainant has not established that Ameren Missouri violated any "rule or order or decision of the Commission." Rather, the Complainant is requesting the Commission allow the Complainant to circumvent CSR 4240-20.094(7)(L) and allow the Complainant to pay back an incentive paid in 2021 to receive the benefit of opting out for 2021.

22. The Commission has consistently applied the standard for consideration of a motion to dismiss established by Missouri’s courts as follows:

A motion to dismiss for failure to state a cause of action is solely a test of the adequacy of the plaintiff’s petition. It assumes that all of plaintiff’s averments are true, and liberally grants to plaintiff all reasonable inferences therefrom. No attempt is made to weigh any facts alleged as to whether they are credible or persuasive. Instead, the petition is reviewed in an almost academic manner to determine if the facts alleged meet the elements of a recognized cause of action, or of a cause that might be adopted in that case.

*Nazeri v. Missouri Valley College*, 860 S.W.2d 303, 306 (Mo. 1993) *citing Sullivan v. Carlisle*, 851 S.W.2d 510, 512 (Mo. banc 1993).

The Commission must assume all the of the Complainant's assertions are true. In this case, the Complainant recognizes it did not meet the Commission's requirements under its rules. The Commission must infer that the Complainant has no personal knowledge of the circumstances of the facts regarding another customer's opt-out requests. Regardless of the circumstances surrounding another customer, the Commission must weigh this motion to dismiss on the adequacy of the Complainant's petition and the Complainant has not established it qualifies to opt-out under the Commission's rules.

23. The Complainant acknowledges it received an incentive in 2021. While the Complainant alleges there is a precedent for allowing incentives to be remitted back in exchange for allowing an opt-out, the Complainant does not explain how that precedent applies in this case and the Complainant cannot establish that its request is similar to a previous request. Consequently, the Commission cannot grant the relief requested by the Complainant, even assuming the opt-out process for another customer is relevant in this case. Therefore, the Company respectfully states that the complaint does not state claims upon relief can be granted and requests that the Commission dismiss the complaint.

**WHEREFORE**, for the foregoing reasons, the Company respectfully requests that the Commission enter an order dismissing Complainant's request to opt-out of energy efficiency programs in 2022.

Respectfully submitted,

*/s/ Jennifer Moore*

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**ATTORNEYS FOR UNION ELECTRIC  
COMPANY D/B/A AMEREN MISSOURI**



**CERTIFICATE OF SERVICE**

I hereby certify that copies of the foregoing have been emailed to the parties of record on this 7<sup>th</sup> day of February, 2022:

*/s/ Jennifer Moore*  
Jennifer S. Moore