

(of innuendo) to essentials,² from the facts averred and inferences therefrom to be drawn, the basis for the requested relief is that Ameren previously allowed Washington University to opt out of the program, that Delmar's case is not materially different from Washington University's case, and, therefore, in denying Delmar's request to opt out of the program Ameren has unduly given Washington University preferential treatment.

3. Section 386.390.1, RSMo provides that any corporation or person may make a complaint to the commission by petition "or complaint in writing, setting forth any act or thing done or omitted to be done by any corporation, person or public utility in violation, or claimed to be in violation, of any provision of law subject to the commission's authority, of any rule promulgated by the commission, of any utility tariff, or of any order or decision of the commission. . . ."

4. Section 393.140 (11), RSMo, RSMo, states:

No corporation shall charge, demand, collect or receive a greater or less or different compensation for any service rendered or to be rendered than the rates and charges applicable to such services as specified in its schedule filed and in effect at the time; nor shall any corporation refund or remit in any manner or by any device any portion of the rates or charges so specified, nor to extend to any person or corporation any form of contract or agreement, or any rule or regulation, or any privilege or facility, except such as are regularly and uniformly extended to all persons and corporations under like circumstances.

5. Section 393.140 (5), RSMo, states:

Whenever the commission shall be of the opinion, after a hearing had upon its own motion or upon complaint, that the rates or charges or the acts or regulations of any such persons or corporations are unjust, unreasonable, unjustly discriminatory or unduly preferential or in any wise in violation of any provision of law, the

² The Complaint alleges communications between Delmar's representative and Staff Counsel. None of these alleged communications nor any inference, speculation, surmise, or fantasy thereby suggested (or imagined) is material ("essential") to whether the complaint states a cause of action; and, accordingly, none need or will be here addressed. See Section 386.390.1, RSMo, which authorizes complaints against "any corporation, person or public utility." The Staff is not any of those things. A complaint against the Staff is not authorized and cannot be entertained.

commission shall determine and prescribe the just and reasonable rates and charges thereafter to be in force for the service to be furnished, notwithstanding that a higher rate or charge has heretofore been authorized by statute, and the just and reasonable acts or regulations to be done and observed. . . .”

Rule 20 CSR 4240-20.094 (7) sets forth the requirements and procedures related to customer opt-outs from electric utility demand-side programs. Subsection (7)(A) states which customers are eligible to opt-out. Subsection (7)(L) then qualifies the opt-out right of a customer who has received a demand-side incentive or service:

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.

7. Rule 20 CSR 4240-20.094 (11) states: “Variances. Upon request and for good cause shown, the commission may grant a variance from any provision of this rule.”

8. A motion to dismiss for failure to state a cause of action assumes that all of plaintiff’s averments are true and liberally grants the plaintiff all reasonable inferences therefrom. The question, then, is whether the facts averred and which may be reasonably inferred meet the elements of a recognized cause of action, or a cause that might be adopted in the case.³ Rule 20 CSR 4240-2.070 (7) states that “[t]he commission, on its own motion or on the motion of a party, may after notice dismiss a complaint for failure to state a claim on which relief may be granted. . . .” In ruling on a motion to dismiss, the Commission merely considers the adequacy of the complaint. It assumes that all averments in the complaint are true and liberally grants to the complainant all reasonable

³ *State ex rel. Union Elec. Co. v. Dolan*, 256 S.W.3d 77, 82 (Mo. Banc 2008), citing *Reynolds v. Diamond Foods & Poultry, Inc.*, 79 S.W.3d 907, 909 (Mo. Banc 2002).

inferences from those averments. The Commission does not weigh any facts alleged in the complaint to determine whether they are credible or persuasive. Further, “[c]omplaints or other pleas before the Commission are not tested by the rules applicable to pleadings in general, if a complaint or petition ‘fairly presents for determination some matter that falls within the jurisdiction of the Commission, it is sufficient.’” Section 386.390(1), RSMo (Supp. 2020), gives the Commission jurisdiction to hear complaints about “any act or thing done or omitted to be done by any corporation, person or public utility in violation, or claimed to be in violation, of any provision of law subject to the commission's authority, of any rule promulgated by the commission, of any utility tariff, or of any order or decision of the commission. . . .”⁴ In deciding whether a complaint “fairly presents for determination some matter,” the Commission should consider whether the complaint fairly apprises the Commission and the Respondent of the basis for the complaint, the relief sought, and the basis therefor.

9. Staff contends that the complaint fails to state a cause of action entitling Delmar to the relief actually requested. The complaint is devoid of any averments of facts or any basis for inferring facts which would entitle Delmar to opt out of the EEIC. It states no facts that would include Delmar in Rule 20 CSR 4240-20.094 (A)'s opt-out eligibility criteria. It states no facts that would exclude Delmar from subsection (7)(L)'s disqualification criteria. But dispositive: Not only does the complaint aver no ultimate facts which, if true, would entitle Delmar to opt out under 20 CSR 4240-20.094; the complaint does not even assert the conclusion that Delmar is entitled to an opt out under

⁴ Clearwater Enterprises, L.L.C., Complainant, No. GC-2021-0353, 2021 WL 2476634, at *1–2 (June 16, 2021)

the rule. For this reason, Delmar's complaint does not "fairly present for determination" anything for the Commission to consider under the opt-out rule at 20 CSR 4240-20.094.

10. Nor does the complaint assert even a bare conclusion that Delmar is seeking a waiver under Rule 20 CSR 4240-20.094(11) allowing a party to present evidence of good cause for a variance from the opt-out requirements under 20 CSR 4240-20.094. Delmar's complaint does not mention the good cause waiver provision, does not seek waiver of the opt-out rule requirements for good cause or otherwise, and does not state any facts that would support the Commission's sua sponte finding of good cause to waive the opt-out rule requirements. Delmar's complaint does not fairly present for determination anything for the Commission to consider under the good cause waiver provision at 20 CSR 4240-20.094.

11. Turning from what the complaint does not do to what it tries to do: Assuming all the complaint's (material) averments to be true and liberally granting Delmar all reasonable inferences and assuming the facts so inferred to be true, Delmar's sole stated basis for an opt-out actually amounts to an argumentative hypothetical as follows: (a) Assume for argument's sake that Ameren allowed Washington University to opt out of the program even though Washington University was not eligible to opt out;⁵ (b) assume for argument's sake that Delmar is also not entitled to opt out of the program;⁶ (c) in denying Delmar's request to opt out when it is not entitled to opt out, Ameren has violated the Section 393.140 (11), RSMo undue preference prohibitions; and (d) therefore, Delmar should be allowed to opt out.

⁵ The complaint invites this inference on the basis of averments that Ameren has refused to show that Washington University situation was different from Delmar's.

⁶ It is apparent Delmar is inviting this assumption because its complaint makes no effort to allege that it is opt-out eligible

Staff contends that if the Commission assumes the first three propositions to be true, then ipso facto, contrary to Delmar's conclusion, the Commission is completely foreclosed from granting Delmar an opt out. Delmar's claim is based on the premise that even though it may not be entitled to opt out, it should be allowed to do so because someone else similarly situated was allowed to do so. Neither the law, sound policy nor logic allows the Commission to let an ineligible person opt out where the express reason is that he is ineligible and, therefore, similarly situated to someone else. One may as well find that a guilty bank robber must be acquitted today (and all others tomorrow) because one was mistakenly acquitted yesterday. Question: Will the Commission issue an order favorable to Delmar which thereafter requires Ameren to allow all ineligible customers to opt out? In conclusion, the complaint manifestly fails to state just cause for waiving the Commission's rules concerning opt outs.

12. On the other hand, although the Commission is simply without power to grant Delmar the relief it really wants here—an opt out--on the basis of its argument's assumptions, the Commission does still have the power to grant other relief, i.e., the power to "prescribe just and reasonable acts" to Ameren if it determines after a hearing on a complaint that Ameren is allowing ineligible customers to opt out without just cause.⁷ The question presented is, again, whether the complaint states ultimate facts which, if true, mean that Ameren has done so.

13. It does not. Having determined that the complaint does not state a cause of action for the opt-out relief which Delmar requests, may the Commission then entertain one of the same hypotheses, i.e., the hypothesis that Washington University was not

⁷ Section 393.140 (5), RSMo.

eligible for an opt out, to determine whether the complaint states ultimate facts sufficient to find that Ameren violated a statute, rule, or tariff by allowing an opt out to a non-eligible customer? Again: Pure logic says no. That kind of reasoning fits the classic definition of “bootstrapping,” a/k/a “begging the question.” One begs the question when one “assumes as true the very premise [one is] required to demonstrate [. . .], thereby employing the logical fallacy of begging the question.”⁸ The complaint does not actually state that Washington University was ineligible for an opt out. It assumes it. The question before the Commission is whether the complaint *states* a cause of action. One cannot *assume* it states a cause of action as a basis for concluding it *does state* a cause of action. In summary, Delmar’s complaint does not fairly present for determination anything for the Commission to consider under 393.140(5) because Delmar’s complaint cannot support a viable inference that Ameren granted another customer an undue preference by granting an opt-out from the EEIC when the customer was not qualified to opt out. Even if Delmar’s complaint could support such an inference, it would still not fairly present for determination anything for the Commission to consider, because the remedy for such an undue preference would not be to grant Delmar’s requested relief of allowing an equally unqualified customer to opt out of the EEIC.

14. In conclusion, the complaint does not state facts directly or by inference which, if true, qualify Delmar for an opt out. The complaint does not state facts directly or by inference which constitute good cause to grant a variance from the provisions 20 CSR 4240-20.094. The complaint does not state facts directly or by inference which,

⁸ *USAA General Indemnity Company v. Prater*, 612 S.W.3d 215, 219 (Mo. App. S.D. 2020).

if true, establish that Ameren violated the law or any alleged violation that would support granting Delmar an opt-out from the EEIC.

WHEREFORE, the Staff recommends the Commission grant Ameren's Motion for Summary Determination.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

The undersigned by his signature below certifies that the foregoing pleading was served upon all counsel of record on this 11th day of March, 2022, by electronic filing in EFIS, electronic mail, hand-delivery, or U.S. postage prepaid.

/s/ Paul T. Graham