

2016

Judicial Review of Net-Metering Agreements: Seeking to Avoid Capture in the Western District

Erika Dopuch

Follow this and additional works at: <https://scholarship.law.missouri.edu/jesl>



Part of the [Environmental Law Commons](#)

Recommended Citation

Erika Dopuch, *Judicial Review of Net-Metering Agreements: Seeking to Avoid Capture in the Western District*, 23 J. Envtl. & Sustainability L. 217 (2016)

Available at: <https://scholarship.law.missouri.edu/jesl/vol23/iss1/10>

This Note is brought to you for free and open access by the Law Journals at University of Missouri School of Law Scholarship Repository. It has been accepted for inclusion in Journal of Environmental and Sustainability Law by an authorized editor of University of Missouri School of Law Scholarship Repository. For more information, please contact bassettcw@missouri.edu.

THE JOURNAL OF ENVIRONMENTAL AND SUSTAINABILITY LAW

A Publication of the University of Missouri School of Law



Judicial Review of Net-Metering Agreements: Seeking to Avoid Capture in the Western District

Erika Dopuch

JUDICIAL REVIEW OF NET-METERING AGREEMENTS: SEEKING TO AVOID CAPTURE IN THE WESTERN DISTRICT

*Sharp v. Kan. City Power & Light Co.*¹

I. INTRODUCTION

Solar energy is the most abundant energy resource available on earth, and the demand for it is at an all-time high in the United States.² However, the cost of producing solar electricity is relatively high compared to the costs of producing electricity by burning coal or nuclear fission.³ To respond to the increased demand, federal and state governments have adopted programs to offset the higher costs of solar production.⁴ Net-metering agreements between utility companies and residents with solar panels allow those residents to receive credit on their utility bills for energy pushed back into the utility company's grid. Net-metering agreements are one way to keep costs down because residential

¹ *Sharp v. Kan. City Power & Light Co.*, 457 S.W.3d 823 (2015).

² Erin R. Pierce, *Top 6 Things You Didn't Know About Solar Energy*, U.S. DEP'T OF ENERGY (June 22, 2012), <http://energy.gov/articles/top-6-things-you-didnt-know-about-solar-energy>.

³ *E.g.*, Kevin Karges, Note, *Net Metering: Do Non-Solar Homeowners and Utility Companies Have a Legitimate Gripe?*, 3 ARIZ. J. ENVTL. L. & POL'Y 1017 (2014).

⁴ *Id.*

solar energy requires minimal government oversight and public investment.⁵

However, said government oversight may cause problems because the government and its agencies should be acting impartially when regulating the utility industry and net-metering agreements. So, when disputes arise in courts, judges will closely examine each party's relationship with the agency and will want to avoid ruling favorably for a party which already has a close relationship with an agency. Sometimes government agencies develop too close of a relationship with an industry, causing the government agency to no longer work for public interest.⁶ Agency "capture" occurs when an agency prioritizes its regulated industry's interests over public interest.

As net metering is a relatively new practice, there is little case law on point to guide counsel and judges when disputes arise between consumers and a utility company. These types of net-metering disputes could potentially affect all utility consumers because higher costs for the utility companies will be passed on to its consumers. Therefore, when an

⁵ *Id.* at 1019.

⁶ *See generally* David Freeman Engstrom, *Corralling Capture*, 36 HARV. J.L. & PUB. POL'Y 31 (2013).

agency has the power to make a unilateral decision which would favor one party, the decision could problematically lead to agency capture and overreach unless proper safeguards like judicial review are implemented.

II. FACTS AND HOLDING

In 2008, the Missouri legislature passed the Renewable Energy Standard,⁷ a statutory scheme designed to promote renewable energy sources among consumers and producers.⁸ Section 393.1030.3, as part of the Solar Energy Rebate Program (“Rebate Program”), requires all electric utilities to “make available to its retail customers a solar rebate for new or expanded solar electric systems sited on customers’ premises.”⁹ The Renewable Energy Standard gives the Missouri Public Service Commission (“the Commission”) the authority to make any rules necessary to enforce the Renewable Energy Standard.¹⁰

Accordingly, the Commission enacted a regulation which requires electric utility companies to make a rebate available for consumers who own or lease solar-generated power equipment interconnected with the

⁷ MO. REV. STAT. § 393.1020 (Cum. Supp. 2013).

⁸ *Sharp*, 457 S.W.3d at 824.

⁹ MO. REV. STAT. § 393.1030.3 (Cum. Supp. 2013). Some electric utilities are exempt from this provision. Those exemptions are contained in § 393.1050.

¹⁰ § 393.1030.2.

utility’s system.¹¹ As part of the interconnection Rebate Program, the Commission also requires consumers and utilities to enter into an Interconnection Agreement and lay out the terms of the Agreement in a form.¹² The Commission’s Agreement form contains a dispute resolution provision.¹³

Pursuant to the Renewable Energy Standard and the Rebate Program, Kansas City Power & Light (“Utility Company”) advertised solar rebates on its website, soliciting its customers to participate.¹⁴ On its website, the Utility Company also listed approved installers of the solar-power systems, one of which was United States Solar.¹⁵ The Utility Company’s forms contained a Net-Metering Agreement, which mirrored

¹¹ MO. CODE REGS. ANN. tit. 4, § 240-20.100(4) (2016).

¹² *Sharp*, 457 S.W.3d at 825. “If the electric utility so chooses, it may allow customers to apply electronically through the electric utility’s website. The interconnection agreement on the electric utility’s website shall substantially be the same as the interconnection agreement included herein.” *Id.* at 825 (citing MO. CODE REGS. ANN. tit. 4, § 240–20.065(9) (2016)).

¹³ *Id.* The language of the provision provides: “If any disagreements between the Customer . . . and [Utility] arise that cannot be resolved through normal negotiations between them, the disagreements may be brought to the [Commission] by either party, through an informal or formal complaint.” MO. CODE REGS. ANN. tit. 4, § 240-20.065 (D)(8) (2016).

¹⁴ *Sharp*, 457 S.W.3d at 825.

¹⁵ *Id.*

the language of Commission’s Agreement form, including a dispute resolution provision.¹⁶

Richard Sharp and five other consumers were participants in the rebate program, and all were so dissatisfied with the solar-power systems’ quality and performance that they brought a class action against the utility company, the installer, and two individual company owners.¹⁷ The Plaintiffs alleged breach of contract, negligence, fraud, and violation of the Missouri Merchandising Practices Act.¹⁸ The Utility Company filed a Motion to Dismiss or, Alternatively, Stay Proceedings and Compel Arbitration because the Agreement containing the dispute resolution provision was a valid and enforceable arbitration agreement.¹⁹ Plaintiffs filed a Supplemental Brief in Opposition alleging the installer had fraudulently induced the Plaintiffs into signing a blank iPad screen, and the signatures were later “copied and/or forged” onto the Net-Metering Agreement.²⁰ Plaintiffs claimed they never received any written

¹⁶ *Id.*

¹⁷ Appellants’ Brief at 1, Sharp v. Kan. City Power & Light Co., 457 S.W.3d 823 (2015) (No. 13BU-CV03671), 2014 WL 4659592 at *1.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

documents²¹ and “never . . . could have seen any agreement that Defendants now allege serve as the basis of Defendants’ present motions.”²² The trial court allowed the Plaintiffs to file a Second Amended Petition for Damages, but acknowledged that Missouri Courts tend to favor arbitration.²³

The trial court, the Circuit Court of Buchanan County, was ultimately not persuaded that the Plaintiffs agreed to the Net-Metering Agreement, including the dispute resolution provision, because “a person who claims never to have seen nor signed a contract [should not] be bound by the terms therein.”²⁴ The trial court thereby found that the consumers had not signed the contracts containing the dispute resolution provision.²⁵ Utility Company appealed the trial court’s decision, and the Court of Appeals for the Western District of Missouri held the dispute resolution

²¹ Brief for the Respondents at 4, *Sharp v. Kan. City Power & Light Co.*, 457 S.W.3d 823 (2015) (No. 13BU-CV03671), 2014 WL 5286452, at *4.

²² Appellants’ Brief, *supra* note 17, at 4.

²³ *Sharp v. KCE&L, LLC*, No. 13BU-VC03671, 2014 WL 5502554, at *1 (Mo. Cir. Ct. Mar. 27, 2014).

²⁴ *Id.* at *2.

²⁵ *Sharp v. Kan. City Power & Light Co.*, 457 S.W.3d 823, 829 (Mo. Ct. App. 2015).

provision was not an arbitration agreement, affirming the trial court's decision.²⁶

The appellate court held *de novo* that the trial court had properly denied Utility Company's motion to stay proceedings and compel arbitration.²⁷ In making this decision, the appellate court looked to three factors: (1) whether a valid arbitration agreement exists; (2) whether the dispute falls within the scope of the agreement; and (3) whether applicable contract principles subject the agreement to revocation.²⁸ When a dispute resolution provision is not specific as to the type of dispute resolution, then the fact finder may not necessarily hold the provision is an agreement to arbitrate. Although, the provision need not use the express term "arbitration"²⁹ for the fact finder to determine an arbitration agreement exists between the parties. However, without an agreement to arbitrate, a party cannot compel arbitration.³⁰

²⁶ *Id.* at 824, 828.

²⁷ *Id.* at 826.

²⁸ *Id.* (citing *Baier v. Darden Rests.*, 420 S.W.3d 733, 737 (Mo. Ct. App. 2014)).

²⁹ *Id.* at 827.

³⁰ *Id.* at 829-30.

III. LEGAL BACKGROUND

A. *The Commission's limited jurisdiction and the general preference for arbitration where parties have agreed to it*

This case is important because it falls within a relatively undeveloped area of Missouri law, specifically what role the Commission has in disputes arising from net-metering agreements between a utility company and a consumer. Net-metering agreements have been used increasingly between utility companies and consumers for renewable energy, and the Commission, not the Utility Company, drafted the terms for the Agreement between the parties.³¹

Disputes between consumers and utility companies are not new, but only courts can construe and enforce contracts. In 1957, the Kansas City Court of Appeals reiterated the Commission's limited jurisdiction in *Katz v. Kan. City Power & Light*.³² There, a consumer sued the Utility Company to recover a refund allegedly due under the terms of the contract between the two parties,³³ but the Utility Company wanted the issue

³¹ *Id.* at 825.

³² *Katz v. Kan. City Power & Light Co.*, 303 S.W.2d 672, 679 (1957) (citing *State ex rel, Kan. City Power & Light Co. v. Buzard*, 168 S.W.2d 1044, 1046 (Mo. 1943)).

³³ *Id.* at 680.

before the Commission, not the court.³⁴ The Commission only has powers statutes confer upon it³⁵ and cannot construe or enforce contracts.³⁶ Therefore, the circuit court properly had jurisdiction over the issues in the dispute, not the Commission.³⁷

In *Sharp*, the Utility Company cites to *AMF*³⁸ as persuasive authority for courts' strong preference for arbitration. In *AMF*, competitor manufacturers agreed to bring their disputes in the form of nonbinding arbitration.³⁹ A dispute arose, and the court found the dispute subject to the agreement for nonbinding arbitration and compelled arbitration.⁴⁰ In the case at bar, Utility Company lifts a sentence out of the *AMF* opinion in its reply brief: "If the parties have agreed to submit a dispute for a decision by a third party, they have agreed to arbitration."⁴¹ However, in context of

³⁴ *Id.* at 678.

³⁵ *Id.* at 679 (citing State *ex rel.* Kan. City Power & Light Co. v. Buzard, 168 S.W.2d 1044, 1046 (Mo. 1943)).

³⁶ *Id.* (citing State *ex rel.* Washington Univ. v. Pub. Serv. Comm'n, 272 S.W. 971, 972 (Mo. 1925)).

³⁷ *Id.* at 680.

³⁸ See generally *AMF Inc. v. Brunswick Corp.*, 621 F. Supp. 456 (E.D.N.Y. 1985).

³⁹ *Id.* at 458. The agreement provides: "Both parties agree to submit any controversy which they may have . . . to such advisory third party for the rendition of an advisory opinion. Such opinion shall not be binding upon the parties . . . The parties agree that the National Advertising Division of the Council of Better Business is agreeable to each as the advisory third party." *Id.* at 459.

⁴⁰ *Id.* at 463.

⁴¹ Appellants' Reply Brief at 15, *Sharp v. Kan. City Power & Light Co.*, 457 S.W.3d 823

the *AMF* opinion, this sentence is part of dicta discussing arbitration in general, not the manufacturers' dispute.⁴²

Further, *Wolsey* provides relevant background on the Federal Arbitration Act ("FAA").⁴³ The parties' contract contained a dispute resolution provision,⁴⁴ and the district court assumed the parties' dispute resolution provision referred to arbitration.⁴⁵ The Ninth Circuit found "no magic words such as 'arbitrate' or 'binding arbitration' or 'final dispute resolution' are needed to arbitrate."⁴⁶ "The FAA was designed to overrule the judiciary's longstanding refusal to enforce agreements to arbitrate," and "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration."⁴⁷ The court decided to compel arbitration.⁴⁸

(Mo. Ct. App. 2015) (WD 77444), 2014 WL 5911478, at *15 (citing *AMF Inc.*, 621 F. Supp. at 460).

⁴² *AMF Inc.*, 621 F. Supp. at 460.

⁴³ *Wolsey, Ltd. v. Foodmaker, Inc.*, 144 F.3d 1205 (9th Cir. 1998).

⁴⁴ *Id.* at 1209. The agreement language says that "all controversies, disputes or claims . . . shall be submitted for non-binding arbitration to . . . the American Arbitration Association on demand of either party." *Id.*

⁴⁵ *Id.* at 1213 n.3.

⁴⁶ *Id.* at 1208.

⁴⁷ *Id.* at 1209 (quoting *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219-20 (1985) and *Moses H. Cone Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1983)).

⁴⁸ *Wolsey Ltd.*, 144 F.3d at 1213.

More recently, the Supreme Court of Missouri ruled on compelling arbitration in *Triarch Industries, Inc. v. Crabtree*.⁴⁹ The policy favoring arbitration regards the parties' intent as evidenced by their agreement.⁵⁰ The ordinary meaning of the contract's terms expresses the parties' intent,⁵¹ and where the contract is not ambiguous, the court will determine the parties' intent from the four corners of the contract.⁵² So, "while courts look favorably upon clauses entitling a party to arbitration, this does not mean that a court will . . . read a right to arbitrate into a contract where the contract does not provide such a right."⁵³ Therefore, a party cannot be compelled to arbitrate unless that party has agreed to it in the contract.⁵⁴

B. *The Renewable Energy Standard*

In November 2008, Missouri voters approved the Renewable Energy Standard, a statutory scheme designed to encourage the use of

⁴⁹ See generally *Triarch Indus., Inc. v. Crabtree*, 158 S.W.3d 772 (Mo. 2005).

⁵⁰ *Id.* at 776 (quoting *Keymer v. Mgmt. Recruiters Int'l, Inc.* 169 F.3d 501, 505 (8th Cir. 1999)).

⁵¹ *Id.*

⁵² *Id.* at 777 n.7 (citing *Eisenberg v. Redd*, 38 S.W.3d 409, 411 (Mo. banc 2001)).

⁵³ *Id.* at 777 (citing *AJM Packaging Corp. v. Crossland Const. Co., Inc.*, 962 S.W.2d 906, 911 (Mo. Ct. App. 1998)).

⁵⁴ *E.g.*, *Kan. City Urology v. United Healthcare Serv.*, 261 S.W.3d 7, 11 (Mo. Ct. App. 2008).

renewable energy sources.⁵⁵ The scheme requires investor-owned utilities to offer rebates to encourage the use of renewable energy by meeting fifteen percent of the company's annual retail sales by 2021.⁵⁶ In June 2014, the rebates would decrease annually until they cease on June 30, 2020.⁵⁷ The rebate decrease incentivizes consumers to implement renewable energy technology sooner rather than later.⁵⁸ The statute gives the Commission authority to enforce the statutes,⁵⁹ and the Commission drafted the interconnection net-metering Agreement at issue in *Sharp*.⁶⁰ Utility companies must use interconnection agreements "substantially the same" as the interconnection agreement the Commission drafted.⁶¹

Net-metering agreements, like the Agreement between the Utility Company and the consumers, are used widely as part of renewable energy efforts.⁶² Net-metering agreements encourage solar installations because

⁵⁵ *Renewable Energy Standard*, N.C. CLEAN ENERGY TECHNOLOGY STANDARD (last visited Nov. 21, 2016), <http://programs.dsireusa.org/system/program/detail/2622>.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ MO. REV. STAT. § 393.1020 (Cum. Supp. 2013).

⁶⁰ *Sharp v. Kan. City Power & Light Co.*, 457 S.W.3d 823, 825 (Mo. Ct. App. 2015).

⁶¹ MO. CODE REGS. tit. 4, § 240-20.065(9)(A) (2015).

⁶² Specifically, forty-three states use net-metering agreements for solar energy transactions between consumers and utility companies. *E.g.* Kayci G. Hines, *Solar Shift: An Analysis of the Federal Income Tax Issues Associated with the Residential Value of Solar Tariff*, 5 ARIZ. J. ENVTL. L. & POL'Y 388, 390 (2015).

households with solar panels can spin their electric meters backwards if they generate enough energy to push power back into the utility company's energy grid.⁶³ If the home produces enough energy to send power to the grid, the utility company purchases the electricity for a credit on the consumer's monthly bill,⁶⁴ banking credit for the consumers.⁶⁵ Despite these benefits, solar panel systems are expensive, and their continued viability may depend on government-mandated incentives and rebates.⁶⁶

C. *Contractual disputes before the Commission and in Missouri, generally*

Later, the Commission itself determined it could not interpret a contractual dispute between a utility company and a consumer in *Shawnee Bend Dev. Co. v. Lake Region Water & Sewer Co.*⁶⁷ The parties' contract contained a conditional provision for arbitration, but the Commission

⁶³ Kevin Karges, *Net Metering: Do Non-Solar Homeowners and Utility Companies Have a Legitimate Gripe?*, 3 ARIZ. J. ENVTL. L. & POL'Y 1017, 1018 (2014).

⁶⁴ *Id.*

⁶⁵ Alexander D. White, *Compromise in Colorado: Solar Net Metering and the Case for "Renewable Avoided Cost"*, 86 U. COLO. L. REV. 1095, 1096 (2015).

⁶⁶ *Id.* at 1098-99.

⁶⁷ *Shawnee Bend Dev. Co. v. Lake Region Water & Sewer Co.*, No. 2009 WL 762536, at *1-2 (Mo. P.S.C. 2009).

could not determine whether that condition had been met.⁶⁸ The Commission cannot interpret contracts, including whether the contractual condition had been met.⁶⁹ The Commission only has authority to arbitrate when both parties have agreed in writing to submit the particular dispute to arbitration before it.⁷⁰

In *Sharp*, the Utility Company cites to *MFA, Inc. v. HLW Builders, Inc.*,⁷¹ which discusses mandatory arbitration and permissive arbitration.⁷² However, the *MFA* opinion relies on a case which states deliberately using the word “may” instead of “shall” shows “the parties’ intent to make arbitration permissive” and discretionary.⁷³ The *MFA* opinion relies on *Maloney-Rafaie*,⁷⁴ even though the language of the *MFA* agreement is

⁶⁸ *Id.*

⁶⁹ *Id.* at *2.

⁷⁰ *Id.* at *1.

⁷¹ Appellant’s Brief, *supra* note 17, at 9, 26; *see also* *MFA, Inc. v. HLW Builders, Inc.*, 303 S.W.3d 620, 620 (Mo. Ct. App. 2010).

⁷² *MFA, Inc.*, 303 S.W.3d at 623-24.

⁷³ *DiCesare-Bentley v. City of New London*, 1990 WL 283866, at *1 (Conn. Super. Ct. Aug. 3, 1990).

⁷⁴ *Maloney-Rafaie v. Bridge at Sch., Inc.*, 958 A.2d 871, 884 (Del. Ch. 2008). In *Maloney-Rafaie*, an arbitration clause in an employment agreement contained the language: “Any controversy, claim or dispute arising from or relating to this Agreement . . . upon mutual agreement of the parties, **shall** be resolved in accordance with the National Rules for the Resolution of Employment Disputes of the American Arbitration Association . . .” *Id.* at 883 (emphasis added).

“may” and the language of the *Maloney* agreement is “shall.”⁷⁵ In *Sharp*, the Utility Company argued that the word “may” in the contract “grants one side a right to pursue arbitration if it wished[,] and mandatory arbitration is required when one side so requests.”⁷⁶ Essentially, the Utility Company argued that the optional remedy turns into a compulsory procedure once one party decides to ask for the remedy of arbitration.⁷⁷ However, it is incorrect and illogical to require a party who agreed to a provision containing the words “may be brought” to mandatory arbitration because the provision could have said “shall be brought” and does not.⁷⁸

Further, arbitration contracts must be proven.⁷⁹ The party asserting the existence of a valid and enforceable arbitration contract bears the burden of proving that proposition.⁸⁰ Elements of a valid contract are offer, acceptance, and bargained for consideration. All three elements

⁷⁵ Wes Dagestad, *Student Contribution: Kansas City Power & Light Co. v. Sharp – iPad Signatures Leave Courts Reconstructing the Mona Lisa on an “Etch-A-Sketch”*, PROF. ROYCE DE ROHAN BARONDES: CASUAL OBSERVATIONS ON THE LAW OF CONTRACTS & BUSINESS ENTITIES, (Mar. 4, 2015) http://missouri-k.com/?page_id=818.

⁷⁶ Appellants’ Brief, *supra* note 17, at *26 (citing *Maloney-Refaie*, 958 A.2d at 884).

⁷⁷ *Id.*

⁷⁸ Dagestad, *supra* note 75.

⁷⁹ *Baier v. Darden Rest.*, 420 S.W.3d 733, 737-38 (Mo. Ct. App. 2014) (citing *Collins v. Swope*, 605 S.W.2d 538, 540 (Mo. Ct. App. 1980)).

⁸⁰ *Id.* at 737.

must be proven to establish an arbitration contract.⁸¹ Additionally, mutual assent must occur at the time of the contract, not later.⁸² In *Baier*, the Court of Appeals for the Western District of Missouri found a former employee was not bound to arbitrate her dispute with her former employer.⁸³ Without the employer's signature on certain portions of the contract, the defendants failed to establish a valid arbitration contract.⁸⁴ Without a signature, the party claiming a contract was formed must present other evidence to establish assent to abide by the agreement's terms.⁸⁵

Lastly, the circuit court used the reasoning in *Baier* to solidify that offer and acceptance require a meeting of the minds and assenting to the

⁸¹ *Id.* at 737-38 (citing *Johnson v. McDonnell Douglas Corp.*, 745 S.W.2d 661, 662 (Mo. banc 1988)).

⁸² *Id.* at 738 (citing *Kunzie v. Jack-In-The-Box, Inc.*, 330 S.W.3d 476, 483 (Mo. Ct. App. 2010)).

⁸³ *Id.* at 733.

⁸⁴ *Id.* at 741. The Missouri Court of Appeals for the Western District affirmed the trial court's finding that the employer and employee did not mutually assent to the terms of the dispute resolution agreement, therefore the employer failed to establish the existence of a valid arbitration agreement. *Id.* at 738. There were two signature lines on the form—one for the employer and one for the employee. *Id.* at 735. Since the employer drafted the contract, the trial court determined that the employer intended both the employee and employer's management to sign or initial each line. *Id.* at 739. The employer's signature line was actually left blank. *Id.* at 735. An absence of an offeror's signature presents a fact question requiring the trial court to determine the offeror's intent. *Id.* at 739. Thus, the employer could not compel arbitration. *Id.*

⁸⁵ *Id.* at 739.

same thing in the same sense at the same time.⁸⁶ The case was tried without a jury, and Judge Judah was unpersuaded by the argument that a person who claims never to have seen nor signed a contract is required to be bound by its terms.⁸⁷ The consumers could not have agreed to arbitrate disputes with Utility Company if they had not seen the contract's terms when they signed the iPad.⁸⁸ Utility Company argued on appeal the preference for arbitration and applicable contract principles require the consumers be compelled to arbitration.⁸⁹

IV. INSTANT DECISION

After the trial court denied the Utility Company's motion to compel arbitration, the Utility Company argued on appeal the trial "court erred because the consumers' complaints were within the scope of the . . . valid and enforceable dispute resolution provision," and the provision embodied an agreement to arbitrate before the Commission.⁹⁰ The court held the trial court properly denied the Utility Company's motion because

⁸⁶ *Sharp v. KCE&L, LLC*, 2014 WL 5502554, at *2 (Mo. Cir. Ct. 2014).

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Sharp*, 457 S.W.3d at 825-26.

⁹⁰ *Id.* at 826.

the dispute resolution provision was not an agreement to arbitrate disputes.⁹¹

Three factors should be considered when determining whether to grant a motion to compel arbitration: “(1) whether a valid arbitration agreement exists; (2) whether the dispute falls within the scope of the agreement; and (3) whether applicable contract principles subject the agreement to revocation.”⁹² Although the trial court never resolved the first factor, whether the dispute resolution provision constituted an arbitration agreement, appellate courts do not need to agree with the trial court’s reasoning in order to affirm.⁹³

Even though courts look favorably upon enforcing agreements to arbitrate disputes, the instant court held courts do not have to find and enforce an arbitration agreement if the parties have not agreed to it in their contract.⁹⁴ Therefore, the Utility Company bore the burden of proving a valid and enforceable contract to arbitrate disputes existed.⁹⁵ The Utility

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.* at 827 n.5. Appellate “courts are ‘concerned primarily with reaching a correct result, and thus . . . do not need to agree with the reasoning of the trial court in order to affirm.’” *Id.* (quoting *McDermott v. Carnahan*, 934 S.W.2d 285, 287 (Mo. banc 1996)).

⁹⁴ *Id.* at 827-28.

⁹⁵ *Id.*

Company argued arbitration agreements do not specifically need to use the word “arbitrate” to come within the FAA’s coverage.⁹⁶ The instant court agreed with the Utility Company but narrowed the Utility Company’s argument, holding not every dispute resolution provision constitutes an agreement to arbitrate.⁹⁷ In other words, only some dispute resolution provisions are arbitration agreements. Furthermore, the court declined to accept the Utility Company’s argument that all dispute resolution provisions constitute arbitration agreements.⁹⁸ The dispute resolution provision in *Sharp* is an example of a dispute resolution provision that is not an arbitration agreement.⁹⁹ Nevertheless, the court agreed all arbitration agreements constitute dispute resolution provisions.¹⁰⁰

Dispute resolution includes negotiation, mediation, litigation, and arbitration.¹⁰¹ The parties’ dispute resolution provision “provides for ‘dispute resolution’ in the form of either ‘an informal or formal complaint’” to be brought to the Commission.¹⁰² The provision identifies

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.* at 827-28.

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 827.

¹⁰¹ *Id.* at 828.

¹⁰² *Id.*

the regulation¹⁰³ governing the complaint filing procedure.¹⁰⁴ The court declined to accept the Utility Company's argument that the reference to the regulation was a procedural mechanism for the parties to commence arbitration.¹⁰⁵ The formal and informal complaint process did not constitute arbitration.¹⁰⁶ Even if the court accepted the Utility Company's argument, the Utility Company still did not demonstrate the necessary prerequisites to invoke the Commission's authority under the dispute resolution provision because the Utility Company failed to file a formal or informal complaint.¹⁰⁷

Of course, the court notes the consumers would have been the ones filing a complaint in front of the Commission, not the Utility Company.¹⁰⁸ This reasoning solidifies the court's determination that the dispute resolution provision was never intended to be an arbitration agreement.¹⁰⁹ If the Commission had intended the dispute resolution provision to be an

¹⁰³ MO. CODE REGS. ANN., tit. 4 § 240-2.070(1) (2016) (providing "any person or public utility who feels aggrieved by an alleged violation of any tariff, statute, rule, order, or decision within the commission's jurisdiction may file a complaint").

¹⁰⁴ *Sharp*, 457 S.W.3d at 828.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 830 n.6.

¹⁰⁹ *Id.*

arbitration agreement, the Utility Company would not need to file a complaint in front of the Commission and move to compel arbitration because usually a party will do one or the other but not both.¹¹⁰

Additionally, the Commission drafted the dispute resolution provision, and “the provision contains no reference whatsoever to . . . the sole authority”¹¹¹ allowing the Commission to act as arbitrators.¹¹² The court’s finding suggests the Commission did not intend the dispute resolution provision to include arbitration for controversies arising out of net-metering agreements.¹¹³ Further, the court cannot see how a non-party to a contract could “ever bind parties to mandatory arbitration.”¹¹⁴

In addition, statutory prerequisites must be fulfilled before the Commission can exercise its limited jurisdiction.¹¹⁵ The Commission’s authority to act as arbitrators is limited to controversies between public utilities or between public utilities and persons, only where “all the parties

¹¹⁰ *Id.*

¹¹¹ *E.g.*, MO. REV. STAT. § 386.230 (Cum. Supp. 2013) (providing “Whenever any public utility has a controversy with another public utility or person and all the parties . . . agree in writing to submit such controversy to the [C]ommission as arbitrators, the [C]ommission shall act as . . . arbitrators . . . and . . . hear such controversy, and their award shall be final”).

¹¹² *Sharp*, 457 S.W.3d at 828.

¹¹³ *Id.*

¹¹⁴ *Id.* at 830 n.8.

¹¹⁵ *Id.* at 828-29.

. . . agree in writing to submit such controversy to the [C]ommission as arbitrators.”¹¹⁶ Here, the statutory prerequisites for the Commission to act as arbitrators were not met.¹¹⁷ The consumers did not agree in writing to submit the controversy to the Commission, and the consumers were very opposed to arbitration before the Commission.¹¹⁸ Further, the statutory language “in writing” has been interpreted to mean a post-dispute agreement in writing.¹¹⁹

Because the consumers strongly opposed arbitration and the trial court found the consumers did not sign the contracts containing the dispute resolution provision, the Utility Company failed to show the parties agreed in writing to submit the controversy to the Commission as arbitrators.¹²⁰ Therefore, the Utility Company failed to invoke the Commission’s arbitration authority under § 386.230.¹²¹ Thus, the Utility Company failed to demonstrate a valid and enforceable contract to

¹¹⁶ MO. REV. STAT. § 386.230 (Cum. Supp. 2013).

¹¹⁷ *Sharp*, 457 S.W.3d at 829.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

arbitrate.¹²² Lastly, the court affirmed the trial court's overruling of the Utility Company's motion to stay proceedings and compel arbitration.¹²³

V. COMMENT

Agency capture is the process by which policy is directed away from public interest and toward a regulated industry's interests.¹²⁴ Here, capture would potentially occur if the Commission were to become directed more toward the utility industry's interests than public interest. Capture is a structural problem which occurs sometimes, allowing some industry interests to systematically win out over others.¹²⁵ In *Sharp*, it is not apparent the utility industry's interests systematically won out over public interest, and the Commission itself may have even determined it could not construe the contract, as the Commission did in *Shawnee*.

However, influencing policy is not identical to capturing a regulatory agency.¹²⁶ Of course, capture is often context-dependent, but capture may be weak or strong. Strong capture is the idea that interest groups' solicitations are so pervasive and socially costly that no regulation

¹²² *Id.* at 830.

¹²³ *Id.*

¹²⁴ Engstrom, *supra* note 6, at 31.

¹²⁵ *Id.* at 32.

¹²⁶ Bradford C. Mank, *Superfund Contractors and Agency Capture*, 2 N.Y.U. ENVTL. L.J. 34, 49 (1993).

at all might be better.¹²⁷ Therefore, in some instances, it might be better to get rid of entire departments or agencies if public interest is not being served.¹²⁸ Strong capture is not a problem which arises between the Commission and the utility industry. Weak capture is when regulation discarded in the administrative process is less publically interested than it should be but is still on balance for enhancing social welfare.¹²⁹ However, sometimes it might be better to change agency design to tweak institutional structure.¹³⁰ Perhaps it would be better to modify the Commission's authority to interpret net-metering disputes because those contracts are highly technical, and the Commission has specialized knowledge relevant to utilities that judges do not.

As mentioned, context matters.¹³¹ Agency rulemaking is far more insulated from capture than other types of administrative action.¹³² Here, the Commission made the rule that the form the Utility Company used in its rebate program had to be “substantially the same” as the Commission’s

¹²⁷ Engstrom, *supra* note 6, at 33.

¹²⁸ *Id.* at 34.

¹²⁹ *Id.* at 33.

¹³⁰ *Id.* at 34.

¹³¹ *E.g., id.* at 33.

¹³² *Id.*

form.¹³³ The Commission’s rule is not patently unfair to either party, and may actually serve public interest because sometimes arbitrators make a pattern of treating one side more favorably. So, if the Utility Company were allowed to draft its own form, the Utility Company may have drafted a form for mandatory arbitration with an arbitrator of its choosing. If the Commission’s rule allowed that hypothetical situation to take place, then its rule would not be serving public interest.

Administrative systems are designed so capture does not occur. “Although public interest groups generally have less influence with an agency than industrial groups do . . . today it is rare to find an agency serving only a regulated industry’s interests.”¹³⁴ Professor Engstrom, an Associate Professor at Stanford Law School who specializes in topics in administrative law,¹³⁵ thinks capture is not as worrisome as micro-levels of agency decision-making.¹³⁶

Nevertheless, if capture is a concern, one option is to cut agencies out of the process entirely by having legislature write more detailed

¹³³ MO. CODE REGS. ANN. tit. 4 § 240-20.065(9) (2016).

¹³⁴ Mank, *supra* note 126, at 51.

¹³⁵ Engstrom, *supra* note 6, at 31 n.a.1.

¹³⁶ Engstrom, *supra* note 6, at 36.

laws.¹³⁷ Of course, there are downsides to this because the Commission is supposed to have specialized knowledge that the legislature would not have.¹³⁸ Additionally, there is an argument to be made that legislative subcommittees are just as susceptible to political influence as administrative agencies and would be just as likely to reflect public interest.¹³⁹ Another alternative would be to give courts broad interpretive law-making authority.¹⁴⁰

Judicial review can be an important part of the administrative system.¹⁴¹ Courts should be wary of players that may or appear to be developing a close relationship, especially when one of those players is part of the government.¹⁴² In *Sharp*, it is noteworthy the appellate court has different reasoning for the decision at bar because the court could have decided this case exclusively with contract principals, and it hints at some broader policy reasons than the trial court did.¹⁴³ Courts, including the

¹³⁷ *Id.* at 37.

¹³⁸ *See generally id.* at 38.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *See generally* Engstrom, *supra* note 6, at 38.

¹⁴² *See generally id.*

¹⁴³ *Compare Sharp*, 457 S.W.3d 823 (analyzes the Commission's jurisdiction and the Commission's statutory authority), *with Sharp*, 2014 WL 5502554 (is concerned with presentation of the agreement's terms).

Court of Appeals for the Western District of Missouri, are usually careful to avoid having agencies decide anything outside of those agencies' limited specialized knowledge. Courts have an interest in limiting agencies to the powers statutes confer upon them, so courts will try to infer legislative intent when determining what powers agencies have. Based on judicial interpretation, Missouri legislature only intended the Commission have a fairly limited scope of power.¹⁴⁴

Agencies are scrutinized closely because of skepticism related to capture, and Professor Engstrom says capture may be a “self-fulfilling prophecy.”¹⁴⁵ So, here the problem might not be with the Commission itself, but with the idea that agencies like the Commission are susceptible to outside influence.¹⁴⁶ Of course, the judiciary has an interest in determining the statute's meaning, and precedent dictates the Commission cannot construe contracts, although it can sometimes act as an arbitrator.¹⁴⁷

¹⁴⁴ See generally *Sharp*, 457 S.W.3d at 828-29.

¹⁴⁵ Engstrom, *supra* note 6, at 39.

¹⁴⁶ See generally Engstrom, *supra* note 6, at 39.

¹⁴⁷ See *Shawnee Bend Dev. Co. v. Lake Region Water & Sewer Co.*, No. 2009 WL 762536, at *1-2 (Mo. P.S.C. 2009).

Sharp reaffirms the Commission has limited authority, and the Commission does not have the power to interpret contracts.¹⁴⁸ The Commission's rule the agreement had to be "substantially the same" as the Commission's form seems fair because contract drafters are the "masters" of the deal, and it would be unfair to give that benefit to one party. However, in this context, the Commission probably has more specialized knowledge of utility systems and net metering than most judges do. The decision in *Sharp* means future disputes about net-metering agreements could go either way, depending on how that particular judge construes the contract.

Nevertheless, here it is difficult to trace the source of the Agreement's unclarity. Should the Commission have chosen different terms for its form agreement, or should the legislature have written a more specific statute? Litigation is more expensive than dispute resolution,¹⁴⁹ so this oversight will impact any parties to future net-metering disputes because they too will not be able to arbitrate before the Commission. Of course, in net-metering agreement disputes, one party will certainly be a

¹⁴⁸ *Sharp*, 457 S.W.3d at 828-29.

¹⁴⁹ *AMF Inc. v. Brunswick Corp.*, 621 F. Supp. 456, 462 (E.D.N.Y. 1985).

utility company, which means utility companies will have to litigate net-metering disputes in the future. Here, the legal framework did not leave room for any other decision unless the appellate court were to carve out an exception for net-metering form agreements, but that decision might increase fears of agency capture. However, the appellate court's broader reasoning than the trial court's reasoning may have been unnecessary.

Any future disputes over net-metering agreements in the Western District, and likely even other parts of Missouri, must therefore encounter litigation costs, which could add up to hundreds of thousands or even millions of dollars.¹⁵⁰ Litigation costs for class actions may be so high as to induce settlement by the defendant.¹⁵¹ When defendant corporations have high costs, usually the shareholders incur those costs,¹⁵² which is why some shareholders prefer mandatory arbitration to litigation.¹⁵³ So, the Missouri Court of Appeals of the Western District's decision in *Sharp* will affect Kansas City Power & Light shareholders and other shareholders of Missouri utility companies as well in the future.

¹⁵⁰ Claudia H. Allen, *Bylaws Mandating Arbitration of Stockholder Disputes?*, 39 DEL. J. CORP. L. 751, 767 n.90 (2015).

¹⁵¹ *Id.* at 796-97.

¹⁵² *Id.* at 812.

¹⁵³ *Id.* at 794.

VI. CONCLUSION

If the *Sharp* decision is to be predictive of future disputes arising out of net-metering agreements between a utility company and its consumer, courts will be very careful to limit agency power to what is conferred to the agency in the statute. Additionally, courts will be very careful in construing the parties' intent as expressed in the parties' net-metering agreement contract. When parties must litigate their disputes, they almost certainly incur higher costs compared to alternative dispute resolution. Higher costs for utility companies because of litigation arising out of net-metering agreements could mean additional costs will be passed on to the company's shareholders. Perhaps utility companies will eventually lobby their interests against net-metering agreements, although it is difficult to say if the Commission would ever replace net-metering agreements with something else.

ERIKA DOPUCH

