Case No. SC96222

IN THE SUPREME COURT OF MISSOURI

UNION ELECTRIC COMPANY D/B/A AMEREN MISSOURI,

Appellant,

v.

MISSOURI PUBLIC SERVICE COMMISSION,

Respondent.

APPEAL FROM THE PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI
CASE NO. EC-2015-0315

SUBSTITUTE BRIEF OF APPELLANT UNION ELECTRIC COMPANY d/b/a AMEREN MISSOURI

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JURISDICTIONAL STATEMENT

The Staff of the Public Service Commission filed a complaint against Ameren, alleging that Ameren violated a Commission rule promulgated under the Missouri Energy Efficiency Investment Act. The Staff and Ameren filed cross-motions for summary determination. The Commission granted the Staff's motion and denied Ameren's. The Court of Appeals affirmed the Commission's decision. On April 4, 2017, this Court transferred the case in accordance with Rule 83.04. As a result, this Court has subject matter jurisdiction under Article V, § 10 of the Missouri Constitution.

STATEMENT OF FACTS

Background

Appellant Union Electric Company d/b/a Ameren Missouri ("Ameren") is an electrical corporation and public utility regulated by the Public Service Commission (the "Commission"). Since enactment of the Missouri Energy Efficiency Investment Act ("MEEIA"), § 393.1075 RSMo.,[1] electrical corporations like Ameren had the option of proposing demand-side programs, which are designed to give customers incentive to reduce their energy usage.[2] This case involves Ameren's first MEEIA plan, which provided for energy efficiency programs to be operated in 2013, 2014, and 2015. Under both the statute and the terms of the Commission-approved plan, Ameren is entitled to recover its costs of operating the programs, sums necessary to offset the revenues lost because of the programs, and a utility incentive.

[1] Statutory references are to the Revised Statutes of Missouri (2016). The MEEIA statute, as codified therein, is identical to the MEEIA statute in force at all times relevant to this appeal.

[2] The phrases "demand-side programs" and "energy efficiency programs" are used interchangeably in this Brief.

This appeal arose when the Commission's Staff filed a complaint[3] claiming that Ameren failed to adhere to one of the rules adopted by the Commission to implement the MEEIA.[4] Ameren and Staff filed cross-motions for summary determination.[5] The Commission ruled that Ameren had failed to follow the subject rule.[6] Ameren timely sought rehearing, as well as clarification.[7] The Commission denied Ameren's motion for rehearing, but granted its request for clarification.[8] Ameren timely appealed the Commission's decision to the Court of Appeals – Western District, which, by a vote of two to one, affirmed the Commission's Order on December 6, 2016. The Honorable

[3] L.F. 6, *Staff Complaint*. References to the Legal File (L.F.) are to the page numbers listed in the Index to Legal File submitted to the Court of Appeals and subsequently certified by the Court of Appeals to this Court.

[4] The MEEIA rules are codified as 4 CSR 240-3.163, -3.164, -20.093, and -20.094, and are included in the Appx. at pp. A4 to A18.

[5] L.F. 50, 86, Appx. pp. A23 to A42, A43 to A51. The Commission's summary determination rule is codified as 4 CSR 240-2.117(1).

[6] *Order Granting Staff's Motion for Summary Determination, and Denying Ameren Missouri's Motion for Summary Determination* (the "Order"), L.F. 210, Appx. pp. A52 to A60.

[7] L.F. 219, *Ameren Missouri's Application for Rehearing and Request for Clarification.*

[8] L.F. 250, *Order Regarding Requests for Rehearing and Clarification*.

Alok Ahuja dissented in a 24-page dissenting opinion. On April 4, 2017, this Court granted Ameren's application for transfer.

The MEEIA 1 Plan

Ameren filed the demand-side program plan at issue in this case on January 20, 2012 (the "MEEIA 1 Plan").[9] The MEEIA 1 Plan, as initially proposed by Ameren, is set forth in the *2013 – 2015 Energy Efficiency Plan* report (the "Report") submitted with Ameren's application for approval.[10] The MEEIA 1 Plan was not adopted exactly as filed, but instead was modified in some respects by the terms of the *Unanimous Stipulation and Agreement Resolving Ameren Missouri's MEEIA Filing* (the "Stipulation") dated July 5, 2012.[11] The Commission approved the modified MEEIA 1 Plan (the "Modified Plan") in an order dated August 1, 2012 (the "Stipulation Approval

[9] L.F. 50, *Ameren Missouri's Motion for Summary Disposition*, Statement of Undisputed Material Facts, at p. 1, ¶ 1, Appx. p. A23.

[10] *Id.*, p. 1, ¶ 2 (The pertinent portion of the Report, which without its appendices consists of 115 pages in total, is contained in the Appendix, Appx. pp. A61 to A88).

[11] *Id.*, pp. 1-2, ¶ 3 (The Stipulation is contained in the Appendix, Appx. pp. A89 to A123).

Order").[12] Staff, the complainant, is a signatory to the Stipulation and, like all signatories, was ordered to comply with it.[13]

The Demand-Side Investment Mechanism

The approved Modified Plan included a demand-side programs investment mechanism ("DSIM").[14] The DSIM is at the heart of the dispute in this case. The approved DSIM is outlined in Section 2 of the Report, with only the modifications provided for by ¶¶ 5, 6 and 7 of the Commission-approved Stipulation.[15] This means that to discern the terms of the DSIM, one must first review the terms of the Report and then determine if the Stipulation modified the Report's terms. If the Stipulation did not modify a provision governing the DSIM's operation as set out in the Report, the DSIM's operation is governed by the Report.

Under the Commission's MEEIA rules, a DSIM is defined as a mechanism to "encourage investments in demand-side programs."[16] The rules provide that a DSIM

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[12] *Id.*, p. 2, ¶ 4 (The Stipulation Approval Order is contained in the Appendix, Appx. pp. A124 to A128).

[13] Stipulation Approval Order, p. 5, ¶ 3, Appx. p. A128.

[14] *Ameren Missouri's Motion for Summary Disposition,* Statement of Undisputed Material Facts, p. 2, ¶ 7, Appx. p. A24.

[15] *Id.*, p. 2, ¶ 8 Appx. p. A24.

[16] The Commission's MEEIA rules are included in the Appendix, Appx. pp. A4 to A22. The definition of a DSIM appears at Appx. p. A4.

may include (among other things) the following components: (1) "program costs," such as rebate payments, incentives offered to lower the cost of energy efficiency measures (e.g., efficient light bulbs, air conditioners, etc.), and marketing costs to encourage participation; (2) recovery of revenues lost due to diminished sales caused by demand-side programs; and (3) a "utility incentive."[17] The third category – the utility incentive component – is the one that matters in this case.

Under the Commission's MEEIA rules, the utility incentive component of a DSIM is defined as

> the methodology approved by the commission in a utility's filing for demand-side program approval to allow the utility to receive a portion of annual net shared benefits achieved and documented through EM&V reports.[18]

According to this definition, when the Commission approved Ameren's DSIM, which included a utility-incentive component, the Commission approved the *methodology* by which Ameren would recover a portion of the net monetary benefits arising from the

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[17] 4 CSR 240-3.163(F), Appx. p. A4.

[18] 4 CSR 240-20.093(1)(EE), Appx. p. A11. As used in the rule, the acronym "EM&V" stands for evaluation, measurement and verification, which is an after-the-fact process used to "estimate and/or verify the estimated actual energy [megawatt-hours ("MWh")] and demand [megawatts ("MW")] savings, utility lost revenue, cost effectiveness, and other effects from demand-side programs." 4 CSR 240-20.093(1)(V), Appx. p. A11.

energy efficiency programs. As noted, that methodology was prescribed by the Report, and if it was modified at all, by ¶¶ 5, 6 and 7 of the Stipulation.

Since the utility-incentive component of a DSIM is the methodology by which the utility receives a portion of annual net shared benefits, the calculation of annual net shared benefits (referred to as "net shared benefits" or "NSBs") is an important issue in this case. The net shared benefits are the net monetary benefits of an energy efficiency program, and consist of the estimated avoided costs less the costs of running the energy efficiency programs.[19] To determine the net shared benefits, one must multiply the applicable per unit avoided cost estimates by the megawatt-hours of energy or megawatt of demand savings determined to have been caused by the energy efficiency programs, and then one must subtract from that product the program costs. This dispute centers on what estimates of avoided costs Ameren should have used to calculate the net monetary benefits from the Modified Plan. More particularly: What estimates of avoided costs should have been used to determine benefits attributable to energy efficiency measures installed starting October 1, 2014 (the fourth quarter of the second MEEIA 1 Plan program year)?[20]

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[19] 4 CSR 240-20.093(1)(C), Appx. p. A10.

[20] The complainant below, the Commission's Staff, had requested the relief it sought be applied to all energy efficiency measures installed in 2014. However, in granting Ameren's clarification motion (L.F. 219), the Commission ruled that the relief only applied to measures installed on or after October 1, 2014, since the updated avoided cost

Avoided Cost Estimates

When a company runs a successful energy efficiency program, it reduces demand for electricity into the future. The term "avoided costs" refers to costs the company will not incur – in the future – to generate, transmit, and distribute that no-longer-needed electricity. These may include not only the costs associated with generating, transmitting, and distributing electricity, but also the costs of complying with environmental regulations. [21] Suppose that by enticing customers to install a certain number of high efficiency furnaces, a company causes demand to fall by 10,000 MWh over the next 20 years. Somehow the company has to estimate what it would have cost, during those years, to produce and distribute the electricity when it would have been needed. These estimates are the avoided costs at issue in this appeal.

But avoided costs are not actual costs. Rather, avoided costs are estimated based on long-term (over 20 or more years) forecasts about conditions that impact certain utility

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estimates the Staff (and now the Commission) claimed should be used did not exist before then. *See* L.F. 250, *Order Regarding Requests for Rehearing and Clarification.*

[21] The main categories of avoided costs are energy prices, capacity prices, and transmission and distribution costs, as well as environmental costs. *Ameren Missouri's Motion for Summary Disposition,* Statement of Undisputed Material Facts, p. 2, ¶ 10, p. 3, ¶ 12, Appx. pp. A24 to A25.

costs, including long-term future energy and capacity market conditions.[22] These estimates are based upon national and (sometimes) international market information for items such as gas, coal, electric energy and capacity, capital markets and economic drivers, most of which are beyond anyone's control.[23] Because the avoided cost estimates used in calculating net shared benefits are estimates of predicted prices and other costs over a long period that extends well beyond the three-year period during which the MEEIA 1 programs were operated, the net shared benefits arising from energy efficiency measures installed in the fourth quarter of 2014 are themselves estimated. In other words, the net monetary benefits of Ameren's three-year energy efficiency plan can only be estimated, regardless of whether one uses avoided cost estimates from 2012 or avoided cost estimates from 2014.

Long-term avoided cost estimates are used to determine net shared benefits because the energy savings resulting from energy efficiency programs are realized over time. For example, if a customer is induced by a rebate offered in an energy efficiency program to replace a furnace in 2014, one would expect the new, more efficient furnace to last far beyond the three-year program period, perhaps 20 years or more. The new furnace will save energy over that entire period. So when determining net shared benefits arising from a furnace installed in 2014, one cannot use the actual energy price in 2014

[22] *Id.*, p. 3, ¶ 14, p. 6, ¶ 31, p. 7, ¶¶ 33-34, p. 8, ¶¶ 35-36, Appx. pp. A25, A28, A29, and A30.

[23] *Id.*, p. 3, ¶ 12, Appx. p. A25.

and apply it to the MWh savings as if the energy price will never change over the life of the furnace. We know the costs are going to rise and fall: the best we can do is estimate them.

Estimates change over time. A prediction of energy prices and other factors over the next 20 years made as of the time of writing this brief will undoubtedly be different than a prediction of energy prices and other factors that was made five years ago, or one that is made five years in the future. Markets, the economy, and regulations are dynamic. The undisputed fact that these estimates change (up and down) over time is at the heart of the dispute on appeal here.

The crux of the dispute on appeal here is the Staff's claim that Ameren failed to comply with one of the Commission's MEEIA rules (4 CSR 240-20.093(1)(F)),[24] and that this failure resulted in net shared benefits calculated for the 2014 program year that were higher than the Staff claimed they should be. As discussed in more detail below, the Staff contended that avoided cost estimates that became available in October 2014 (20 months into the 36-month MEEIA 1 Plan's operation) and that were lower[25] (which

[24] Appx. pp. A10 to A11. The cited rule contains the definition of "avoided cost" in the MEEIA rules which, collectively, appear in two subchapters of Chapter 3 of Division 240 of Title 4 of the Code of State Regulations and two subchapters of Chapter 20 of Division 240 of Title 4. The same avoided cost definition also appears in 4 CSR 240-3.163(1)(C), Appx. p. A4.

[25] *Id.*, p. 8, ¶ 37, Appx. p. A30.

would result in a lower calculation of NSBs and a smaller utility incentive for Ameren) should have been used in determining NSBs for all of program year 2014. The Staff contended that these 2014 avoided cost estimates should displace the avoided cost estimates developed in 2011, which underpinned the MEEIA 1 Plan when it was filed in January 2012. Specifically, the Staff claimed that Ameren was required to use these lower avoided cost estimates in accordance with the Staff's interpretation of the definition of "avoided cost" in the MEEIA rules. Under the Commission's MEEIA rules, "avoided cost" is defined as

> the cost savings obtained by substituting demand-side programs for existing and new supply-side resources. Avoided costs include avoided utility costs resulting from demand-side programs' energy savings and demand savings associated with generation, transmission and distribution facilities including avoided probable environmental compliance costs. The utility shall use the same methodology used in its most recently-adopted preferred resource plan to calculate its avoided costs.[26]

The Staff alleged that Ameren failed to comply with the last sentence of that definition. The Staff argued that a utility can only use "the same methodology" if it uses the same inputs – the estimates of market energy prices, fuel costs, transmission costs, etc. – that the utility used to select its most recently adopted preferred resource plan.

[26] 4 CSR 240-20.093(1)(F), Appx. A10 to A11.

To the contrary, Ameren argues that one can apply the same methodology (according to Ameren, properly understood as referring to a procedure or process) to develop different inputs and still comply with the same methodology requirement. Ameren contends that it complied with the Commission's rule because, although the inputs changed over time, Ameren used the same methodology to calculate avoided cost estimates for its 2011 preferred resource plan, its 2012 energy efficiency plan, and its 2014 preferred resource plan.

The meaning of the phrase "same methodology used in its most recently-adopted preferred resource plan" matters because during the 2013–2015 timeframe, when the Modified Plan was in operation, Ameren operated under two different preferred resource plans: one was in place from 2011 through September 30, 2014, and the other was in place starting October 1, 2014.[27] The estimates of avoided energy, capacity, transmission, distribution, and environmental costs underlying the analyses that led to the two different preferred resource plans were different because estimates of such costs change, and because the preferred resource plans were adopted at different times. To understand the role a preferred resource plan plays in relation to a MEEIA energy efficiency program requires a basic understanding of the integrated resource planning rules adopted by the Commission.

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[27] *Ameren Missouri's Motion for Summary Disposition*, Statement of Undisputed Material Facts, p. 4, ¶¶ 19-21, Appx. p. A26; L.F. 6, *Staff Complaint*, pp. 4-5, ¶ 11 (pointing to the 2014 IRP and its preferred resource plan).

Under the Commission's integrated resource planning rules,[28] companies like Ameren are required to submit detailed plans known as "integrated resource plans" or "IRPs" every three years. These rules require utilities to develop and consider alternative plans for meeting their customers' demands over the next 20 years.[29] From these alternatives, utilities choose a preferred resource plan.[30] Ameren filed an IRP in 2011 and again on October 1, 2014. When it filed the MEEIA 1 Plan (in January 2012), a preferred resource plan arising from the 2011 IRP was in effect.[31] As required by the IRP rule, Ameren had developed avoided cost estimates that were used in the analyses that led to that preferred resource plan's adoption.

With the Commission's knowledge and approval, Ameren has updated avoided cost estimates that were used in an IRP before. Ameren updated the avoided cost estimates from its 2011 IRP before filing its proposed energy efficiency plan in 2012, and the data were available to the Commission before it approved the Modified Plan.[32] The

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[28] The IRP rules are codified at 4 CSR 240-22.010–22.080.

[29] 4 CSR 240-22.060(4), Appx. pp. A20 to A21.

[30] 4 CSR 240-22.060(4)(C), Appx. p. A21.

[31] *Ameren Missouri's Motion for Summary Disposition*, Statement of Undisputed Material Facts, pp. 4-5, ¶¶ 19- 25, Appx. pp. A26 to A27.

[32] *Id.*, p. 5, ¶ 26, Appx. p. A27. These avoided cost estimates impact the NSB estimates in the MEEIA 1 Plan and a number of other financial metrics that were used to support the MEEIA 1 Plan, as required by the MEEIA rules. This is evident since the financial

Commission's Staff, in testimony filed in the docket giving rise to this appeal, opined that the avoided cost estimates Ameren used to underlie the MEEIA I Plan (but which were different than those that underlie the 2011 IRP) at issue here were "reasonable."[33]

The first MEEIA 1 Plan program year (2013) was completed, and NSBs for that program year were calculated in early 2014 and reflected in the EM&V reports for program year 2013.[34] EM&V is a post hoc process whereby contractors look back to determine how many (and what mix of) energy efficiency measures were deployed because of the operation of an energy efficiency plan and, based on those measures' characteristics (e.g., which light bulb or furnace), how many MWhs of energy and MWs of demand those measures are estimated to save. The EM&V process itself does not determine avoided costs.[35] There is no controversy about the calculated NSBs for the 2013 program year.

The second program year (2014) commenced, and as noted, on October 1, 2014, Ameren filed its 2014 IRP, as required by the IRP rules, which reflected the selection of a new preferred resource plan. As also required by the IRP rules, avoided cost estimates

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metrics which must be calculated and filed under the MEEIA rules depend to varying degrees on the NSBs, and the NSBs depend in part on the avoided cost estimates.

[33] *Id.*,p. 5, ¶ 27, Appx. p. A27.

[34] *Ameren Missouri's Motion for Summary Disposition*, Statement of Undisputed Material Facts, p. 8, ¶¶ 38-41, Appx. p. A30.

[35] *Id.*, p. 9, ¶ 46, Appx. p. A 31.

were used in the 2014 IRP analyses, and those avoided cost estimates were developed using market and other data from a later timeframe than the data that had been used for the 2011 IRP or the 2012 MEEIA 1 Plan. Consequently, the avoided cost estimates in the 2014 IRP were different (lower) than they were in the 2011 IRP and were also different than the separate set of avoided costs used in the 2012 MEEIA 1 Plan calculations. Consequently, there are three sets of avoided cost estimates relevant to this case: those that underlie the 2011 IRP; those that underlie the 2012 MEEIA 1 Plan; and those that underlie the 2014 IRP. The estimates are different in each instance.

After program year 2014, net shared benefits were calculated for that year using (consistent with Ameren's understanding of the MEEIA rules and the Modified Plan) the same avoided cost estimates that underlie the MEEIA 1 Plan calculations. These estimates were developed using the same methodology that had been used for the 2011 IRP and that was also used for the 2014 IRP. As noted, Ameren thought it was using the correct avoided cost estimates under the MEEIA rules and that the terms of the approved MEEIA 1 Plan (more specifically, the terms in the part of the Report that details the operation of the approved DSIM, including the utility incentive component of the DSIM) explicitly required the use of the same avoided cost estimates that had underpinned the MEEIA 1 Plan when filed. The plan required Ameren to use those same avoided cost estimates because the Modified Plan specifically provided that the avoided cost estimates that underlie the Modified Plan were not to be updated over the life of the DSIM; i.e., the Commission-approved Modified Plan affirmatively prohibited using updated avoided cost estimates and required the continued use of the avoided cost estimates that underlie

the 2012 MEEIA 1 Plan.[36] The Order on appeal specifically requires using updated avoided cost estimates.

The Report, especially Chapter 2 of the Report (entitled "Demand-Side Investment Mechanism"), details the terms and operation of the DSIM, including the terms of the utility incentive component.[37] The first five subsections of Chapter 2 (2.1 to 2.5) outline various terms of the DSIM, and subsection 2.6 provides how the DSIM is to be implemented as the program years move forward. It provides in pertinent part as follows:

> Table 2.12 shows the items associated with estimating net benefits and whether those items will be updated for purposes of assessing performance and benefits as part of the implementation process. Notice that several items will not be updated, so the focus remains on the cost of the programs and the number of measures implemented.[38]

Table 2.12 is reproduced in its entirety below:

[36] The DSIM is the means by which Ameren obtains cost recovery and receives the utility incentive component (which is a share of the net benefits) arising from program operation for all three program years, 2013 through 2015.

[37] *Id.*, p. 2, ¶ 8, Appx. p. A24.

[38] Report, p. 38, l. 6-10, Appx. p. A85.

Table 2.12 Description of Update Process[39]

Category	Update?	Description
Avoided Costs	✗	The avoided energy, capacity, and T&D values are deemed
Measure Attributes	✗	The TRM provides the deemed values or protocols for all measures
DSMore Software	✗	XLS Version 5.0.14, GCG Version 5.0.23
Number of Measures	✓	The number of measures will be measured as part of the evaluation process
Program Admin. Costs	✓	The direct program costs will be tracked
Measure Rebate Costs	✓	Measure rebates are included in the direct program costs
Net-to-Gross Factors	✗	The TRM provides the deemed values
Customer Opt-Out	✓	The final performance goals shall be adjusted based on final opt-out estimates
Discount Rate	✗	The discount rate shall remain 6.95%

Staff and the Commission concede that the Stipulation does not affect this portion of the proposed plan. In this regard, the Commission's Order states that "[S]ubsection 2.6 and Table 2.12 . . . do[] not allow for the use of updated avoided cost estimates."[40] The relevant portions of the Stipulation make clear that, for purposes of calculating the utility

[39] The red "✗s" and green "✓s" appear in the Report.

[40] *Order*, p. 5, ¶ 10, Appx. p. A56 (Discussing the utility incentive component of the DSIM and stating that it, "specifically subsection 2.6 and Table 2.12 . . . does not allow for the use of updated avoided cost estimates").

incentive component of the DSIM, only the actual MWh of energy savings and actual customer opt outs were to be tracked and then used in the calculations. The energy saving targets at which various incentive payouts would occur were set out in Appendix B to the Stipulation. The closer Ameren got to reaching them, the greater the percentage of the net monetary benefits it would be entitled to share and collect.[41]

The Modified Plan itself (as specified in the Report, which the Stipulation did not change in this respect) specifically provided that after the three-year plan was over, the DSMore model would be updated "with the evaluated number of measures implemented and the final program costs." And with that updated analysis, the final value for net benefits will be calculated and the sharing percentage applied."[42] A share of those net benefits (depending on Ameren's performance – see Appendix B to the Stipulation) would then be received by Ameren as its utility incentive.[43]

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[41] *Stipulation*, p. 4 (Appx. p. A92) and Stipulation Appendix B (Appx. pp. A122 to A123). Note that references to the "performance incentive" are synonymous with the "utility incentive component" of the DSIM.

[42] Report, p. 39, l. 21-23, Appx. p. A86.

[43] As the Report outlines, when the MEEIA 1 Plan was filed, based on assumptions about what energy and demand savings could be achieved and assuming Ameren's performance was at 100% of the targeted level of energy/demand savings, Ameren's share of net benefits relating to the *utility incentive component* of the DSIM would have been 4.8%, with the remaining 15.4% of net benefits initially assumed when the Plan was filed to be

Consequently, but for the Staff's (and now the Commission's) interpretation of the last sentence within the definition of "avoided cost" in the rule relied upon by the Staff, there would have been no complaint and no order sustaining it. However, the Staff argues (and the Commission agreed) the terms of the approved MEEIA 1 Plan that prohibit using updated avoided cost estimates are contrary to the MEEIA rule's "avoided cost" definition. Therefore, they say, absent a variance from the rule, the MEEIA 1 Plan's terms must yield to the rule's definition. The Commission's decision on appeal here notes that, while several other variances needed to conform the MEEIA 1 Plan to the MEEIA rules were requested and granted, no variance of the definition of "avoided cost" was granted. The Commission says this means that the rule supersedes the Stipulation.[44]

Ameren's position is that if the Order's interpretation of "methodology" were correct, it would necessarily mean the Commission approved (and affirmatively ordered the parties to comply with) a MEEIA 1 Plan that was unlawful in two respects. First, the plan would have to be unlawful under such a scenario since the avoided cost estimates (inputs) that underlie that plan were not the same as the avoided cost estimates that underlie the then-most-recent (2011) IRP, but under the interpretation of the "avoided cost" definition in the Order, they had to be. Second, if the "same methodology"

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received by Ameren to offset the throughput disincentive, which was a means to address the lost revenues Ameren would experience due to the operation of the energy efficiency programs. Report, p. 29, Appx. p. A76.

[44] Order, p. 5, ¶ 10, Appx. p. A56.

requirement means that Ameren must update its avoided cost estimates each time it adopts a new preferred resource plan, then by approving a plan that fixed avoided cost estimates for three years, the Commission approved a plan that failed to comply with its own rule since the plan prohibited any such update. Ameren argues that all of this can be avoided by giving effect to the plain meaning of the term "methodology."

Ameren further argues that since no one interpreted the subject definition then as the Commission has interpreted it now, Ameren had no reason to seek a variance. Ameren argues that the plain meaning of the term "methodology," as used in the definition relied upon by the Staff (and the Commission), and as used elsewhere in the MEEIA rules, does not require Ameren to use avoided cost estimates that are updated during the three-year period of the MEEIA 1 Plan program. Instead, Ameren's position is that the term "methodology" means Ameren was required to follow the same process or procedure (because that is what a "methodology" is) to develop avoided cost estimates for its MEEIA plan as it used to determine avoided cost estimates for the IRP. Put another way, it is Ameren's position that a utility can't use Methodology A to develop avoided cost estimates that are used to develop its 20-year preferred resource plan, and then use Methodology B to develop avoided cost estimates for its MEEIA plans. However, Ameren contends that this does not mean that later in time estimates of avoided costs from a new preferred resource plan that is developed in the middle of the operation of the MEEIA plan supplant the avoided cost estimates that underlie the MEEIA plan, received by, stipulated to, and approved by the Commission.

A key issue on appeal here therefore comes down to what the term "methodology" means in the MEEIA rules. The Staff argued (and the Commission adopted the argument) that, as used in the rules, the term "methodology" "necessarily encompasses the formula, the inputs, and the results of the calculation."[45] Adopting the Staff's argument, the Commission found that in "the context of this rule, methodology includes both the formula by which avoided costs are calculated and the inputs used in that formula."[46]

Ameren's position is that the plain meaning of the term "methodology" controls, and that the plain meaning of that term is "a particular procedure or set of procedures."[47] The procedure Ameren followed to arrive at avoided cost estimates is undisputed, and is reflected in undisputed material fact number 31, which was admitted by all parties to be true.[48] Ameren disagrees that inputs are a necessary part of a procedure or set of procedures. In other words, a person may run the same procedure (that is, use the same methodology) using different inputs (e.g., a mulcher performs the same process regardless of the type of tree (the input) that goes in). Ameren contends the

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[45] L.F. 114, *Staff's Response to Ameren Missouri's Motion for Summary Determination,* p. 9.

[46] Order, p. 5, ¶ 11, Appx. p. A56.

[47] *Webster's New World College Dictionary* (4th ed.).

[48] *Ameren Missouri's Motion for Summary Disposition,* Statement of Undisputed Material Facts, pp. 6-7, ¶ 31, Appx. pp. A28 to A29.

Commission's Order reflects more than a mere interpretation of the term "methodology"; that the Commission has in fact adopted a wholesale revision of a key term in its rule. As re-written, Ameren contends the rule would read as follows:

> Avoided cost or avoided utility cost means the cost savings obtained by substituting demand-side programs for existing and new supply-side resources. Avoided costs include avoided utility costs resulting from demand-side programs' energy savings and demand savings associated with generation, transmission and distribution facilities including avoided probable environmental costs. The utility shall use the same ~~methodology~~ **inputs** used in its most recently-adopted preferred resource plan to calculate its avoided costs.

If the Commission-adopted meaning of the term "methodology" is upheld, then the calculated NSBs for the last quarter of program year 2014 would be lower, which would lower Ameren's utility incentive under its DSIM, which in turn would lower the energy efficiency charges paid by customers.[49]

Other Pertinent Facts

In addressing the result of its Order, the Commission made several findings that are pertinent to the issue on appeal. First, the Commission found that its "interpretation

[49] While the 2015 program year is not literally "at issue" in this case, the practical effect of the Commission's decision here, if upheld, will be to substantially lower Ameren's utility incentive for 2015 as well.

[of the term "methodology" in the rule the Staff cites] is consistent with the goal of the MEEIA statute, which is to encourage the electric utility to implement energy saving measures by protecting the utility's financial interests while also protecting customers."[50] This goal does not appear in the statute. The statute provides as follows:

> The commission shall permit electric corporations to implement commission-approved demand-side programs proposed pursuant to this section with *a goal of achieving all cost-effective demand-side savings . . ..*[51]

The statute also requires the Commission to take certain steps to support the state policy reflected therein,[52] including to ensure that "utility financial incentives are aligned with helping customers user energy more efficiently . . ." and to provide "timely earnings opportunities associated with cost-effective measurable and verifiable efficiency savings."[53]

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[50] Order, p. 5, ¶ 11, Appx. p. A56.

[51] Section 393.1075.4, Appx. p. A2. In this context, "savings" take the form of reductions in energy (MWh) usage or demand (MW). (emphasis added)

[52] "[I]t shall be the policy of the state to value demand-side investments equal to traditional investments in supply and delivery infrastructure . . .." § 393.1075.3(2), RSMo., Appx. p. A1

[53] § 393.1075.3(2) and (3), RSMo., Appx. A1

Another pertinent finding reflected in the Order (this finding is focused on dollars of savings instead of the efficiency savings (i.e., energy (MWh) or demand (MW) savings) addressed in the just-cited statutory provisions) was that in order to accomplish "that purpose,[54] the company's performance incentive [its share of NSBs] must be connected to how much money ratepayers actually saved as a result of the company's MEEIA program."[55] The Commission did not find that the 2014 IRP estimates were or would ultimately reflect a more accurate measure of the costs avoided (and thus the actual benefits shared between customers and Ameren from the energy efficiency programs) over the long lives of the energy efficiency measures installed in 2014.

The Commission also made certain findings about future earnings opportunities on utility supply-side investments, stating that they depend on "the dynamic character of the energy marketplace."[56] The parties agreed that energy and capacity costs were outside or almost completely outside Ameren's control.[57]

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[54] The "purpose" to which the Commission was referring was the just-discussed "goal" it had identified: "to encourage the electric utility to implement energy saving measures by protecting the utility's financial interests while also protecting consumers." Order, p. 5, ¶11, Appx. p. A56.

[55] Order, p. 5 ¶ 11, Appx. p. A56.

[56] Order, p. 7, Appx. p. A58.

[57] *Ameren Missouri's Motion for Summary Disposition,* Statement of Undisputed Material Facts, p. 3, ¶ 12, p. 8, ¶¶ 39, 43, Appx. p. A25, A30.

There are additional facts relevant to the issues on appeal here, all of which are undisputed, about which the Commission did not make any findings. When the MEEIA 1 Plan was prepared and filed, it contained the results of cost-effectiveness tests (notably, a test called the "Total Resource Cost" or "TRC" test), as required by the Commission's MEEIA rules. TRC results heavily depend on the avoided cost estimates used in the TRC calculation.[58] The MEEIA rules also required the MEEIA 1 Plan filing to include a comparison of Ameren's expected revenue requirement with the proposed DSIM in place (i.e., if the MEEIA programs were operating and customers were paying for them), and its expected revenue requirement without the DSIM in place, which allows the Commission to evaluate the expected impact on customers from implementing the proposed MEEIA plan.[59] Those revenue requirement comparisons depended on the NSBs calculated at the plan's inception and reflected in the Report, and those NSBs depended on the avoided cost estimates that were used – those from the 2011 IRP's preferred resource plan.[60] In determining that the MEEIA 1 Plan (as filed, with the modifications reflected in the Stipulation) should be approved and implemented, the

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[58] *Id.*, pp. 9-10, ¶¶ 50, 51 and 54, Appx. pp. A31 to A32. 4 CSR 240-3.164(2)(B)(1), Appx. p. A8, requires cost-effectiveness calculations (TRC results) to be submitted with a request to approve a MEEIA plan.

[59] *Ameren Missouri's Motion for Summary Disposition*, Statement of Undisputed Material Facts, p. 10, ¶ 52, Appx. p. A32.

[60] *Id.*, p. 10, ¶ 53, Appx. p. A32.

Commission relied on the cost-effectiveness tests results contained in the filing and on the revenue requirement impacts also contained in the filing.

POINTS RELIED ON

I. The Commission erred in granting summary determination in favor of the Staff on Staff's complaint because the Commission's order was unreasonable in that, by requiring Ameren to update estimates of future avoided costs, the Commission disregarded the binding terms of the Commission-approved demand-side investment mechanism outlined in the energy efficiency plan that it approved.

Farrow v. St. Francis Med. Ctr., 407 S.W.3d 579 (Mo. 2013)

State ex rel. Pub. Counsel v. Pub. Serv. Comm'n, 289 S.W.3d 240 (Mo. App. W.D. 2009)

Bowman v. McDonald's Corp., 916 S.W.2d 270 (Mo. App. W.D. 1995)

4 CSR 240-20.093(1)(F)

4 CSR 240-20.093(2)(J)

II. The Commission erred in granting summary determination in favor of the Staff on the Staff's complaint because the Commission's order was unreasonable in that, by disregarding the plain meaning of the term "methodology" and interpreting it in conflict with the same term in another provision of the MEEIA rules, the Commission erroneously interpreted the same methodology requirement as a matter of law.[61]

Mercy Hosp. E. Communities v. Mo. Health Facilities Review Comm., 362 S.W.3d 415 (Mo. 2012)

Atmos Energy Corp. v. Pub. Serv. Comm'n, 103 S.W.3d 753 (Mo. 2003)

Spudich v. Dir. of Revenue, 745 S.W.2d 677 (Mo. 1988)

4 CSR 240-20.093(1)(F)

4 CSR 240-20.093(1)(EE)

4 CSR 240-20.093(1)(J)

[61] While it is true that the Commission had the statutory authority to decide this case and to apply its rule as it did so, rendering its *Order* "lawful" under the applicable standard of review, the meaning of a term in an administrative rule is a question of law subject to this Court's *de novo* review.

III. The Commission erred in granting summary determination in favor of the Staff on the Staff's complaint because its Order is unreasonable in that its reliance on rationales and justifications that only ostensibly support the decision is arbitrary and capricious, does not make sense, and amounts to an abuse of discretion.

State ex rel. Pub. Counsel v. Pub. Serv. Comm'n, 289 S.W.3d 240 (Mo. App. W.D. 2009).

Bowman v. McDonald's Corp., 916 S.W.2d 270 (Mo. App. W.D. 1995)

City of Lake Lotawana v. Public Service Commission, 732 S.W.2d 191 (Mo. App. W.D. 1987)

4 CSR 240-3.163(2)(D)

4 CSR 240-3.164(2)(B)

4 CSR 240-20.094(3)(A)

STANDARD OF REVIEW

This appeal is of the Commission's grant of summary determination in favor of the Commission's Staff, under Commission rule 4 CSR 240-2.117(1), and from the Commission's denial of Ameren's cross-motion for summary determination, filed under the same rule.[62]

Because this appeal is from an order or decision of the Commission, the standard of review is whether the decision is "lawful" and "reasonable." ***State ex rel. Associated Natural Gas Co. v. Pub. Serv. Comm'n***, 954 S.W.2d 520, 528 (Mo. App. W.D. 1997). If this Court determines that the Commission's decision is unlawful or unreasonable, it must reverse it or set it aside. ***State ex rel. GTE North, Inc. v. Pub. Serv. Comm'n***, 835 S.W.2d 356, 361-62 (Mo. App. W.D. 1992).

In determining whether a Commission order is lawful, the courts "exercise . . . unrestricted, independent judgment and must correct erroneous interpretations of the law." ***Associated Natural Gas***, 954 S.W.2d at 528. A Commission decision is lawful if the Commission had statutory authority to do what it did. ***State ex rel. Union Elec. Co. v. Pub. Serv. Comm'n***, 399 S.W.3d 467, 476 (Mo. App. W.D. 2013).

Although a Commission decision may be lawful in the sense that the Commission possessed the statutory power to decide a specific matter (e.g., a complaint arising under the MEEIA), questions of law, such as the proper interpretation of an administrative rule,

[62] While the Commission's summary determination rule lacks the details of Mo. R. Civ. P. 74.04, its basic operation is the same.

under well-established principles of construction, are to be reviewed by this Court *de novo*. While such review occurs under the "reasonableness prong," the review is nonetheless without deference to the Commission. ***Teague v. Mo. Gaming Comm'n***, 127 S.W.3d 679, 685 (Mo. App. W.D. 2013) (Rules are to be interpreted like statutes); ***Conseco Fin. Servicing Corp. v. Mo. Dep't of Revenue***, 98 S.W.3d 540, 542 (Mo. 2003) (Statutory interpretation is a question of law to be reviewed *de novo*); ***State ex rel. Office of Pub. Counsel v. Pub. Serv. Comm'n***, 301 S.W.3d 556, 566 (Mo. App. W.D. 2009) (No deference is owed to the agency when its interpretation is inconsistent with the term's plain meaning).

Aside from deciding such legal questions when reviewing a Commission order, in deciding whether a Commission order is otherwise "reasonable," the courts must "determine . . . whether the [Commission's] decision was supported by substantial and competent evidence on the whole record, whether the decision was arbitrary, capricious or unreasonable, or whether the [Commission] abused its discretion." ***Id.*** at 528. "[W]hen an agency's order 'indicates that the agency completely failed 'to consider an important aspect or factor of the issue before it,' [the reviewing court] may find that the agency acted arbitrarily and capriciously." ***State ex rel. Pub. Counsel v. Pub. Serv. Comm'n***, 289 S.W.3d 240, 250 (Mo. App. W.D. 2009) (quoting ***State ex rel. GS Techs. Operating Co. v. Public Service Comm'n***, 116 S.W.3d 680, 692 (Mo. App. W.D. 2003) (quoting ***Barry Serv. Agency Co. v. Manning***, 891 S.W.2d 882, 892 (Mo. App. W.D. 1995))). An abuse of discretion occurs when the decision is clearly against the logic of the circumstances then before the agency and is so arbitrary and unreasonable as to shock

the sense of justice and indicate a lack of careful consideration; i.e., an untenable act that defies reason and works as injustice. ***Bowman v. McDonald's Corp.***, 916 S.W.2d 270, 276 (Mo. App. W.D. 1995) (citing ***Egelhoff v. Holt***, 875 S.W.2d 543, 549-50 (Mo. 1994) and ***McClure v. Wingo***, 886 S.W.2d 141, 142 (Mo. App. S.D. 1994)).

The unreasonableness prong of the standard of review is also captured by the opinion in ***City of Lake Lotawana v. Public Service Commission***, 732 S.W.2d 191, 195 (Mo. App. W.D. 1987), where it was observed that "if judicial review is to have any meaning, it is a minimum requirement that the evidence, along with the explanation therefor by the witnesses and by the Commission itself, make sense to the reviewing court. We may not approve an order on faith in the Commission's expertise."

As noted, this is an appeal from a summary determination order under a Commission rule that is materially the same as Rule 74.04. While research reveals no cases addressing the issue, logically an appellate court should "review the record in the light most favorable to the party against whom judgment was entered." *Id*. As also noted, the Commission's Order in this case also denied Ameren's cross-motion for summary determination. While it is generally true that the denial of a motion for summary judgment would not be subject to appellate review, there are limited circumstances where the denial is subject to appellate review:

> An appellate court's review of summary judgment is essentially *de novo*, "as the appropriateness of a summary judgment is an issue of law." *Pennington v. Solovic*, 870 S.W.2d 440, 440 (Mo. App. 1993). Inherent in the grant of summary judgment is the determination that there are no

> genuine issues of material fact. When reviewing a summary judgment, the appellate court may accept that there are no genuine issues of material fact, but find instead that there was an erroneous application of law. If a cross-motion has been filed by the opposing party, the correct application of law may dictate that the cross-motion for summary judgment be sustained. In effect, the reviewing court would be considering whether the trial court's denial of summary judgment to the respondent on the respondent's cross-motion was erroneous.

Swartz v. Swartz, 887 S.W.2d 644, 651 (Mo. App. W.D. 1994).

Applying that principle to the Commission's similar summary determination rule, the limited circumstance where this Court should review the denial of Ameren's summary determination motion is present here, meaning a finding that the Commission erred in granting summary determination for the Staff should be accompanied by a finding that the Commission erred in not granting summary determination for Ameren.

SUMMARY OF ARGUMENT

Summary determination should not have been granted in favor of the Staff on its complaint and should have instead been granted in Ameren's favor. Under the applicable standard of review, it is unreasonable to require Ameren to use updated avoided cost estimates given that the utility incentive component of the DSIM that was agreed upon by the parties and approved by the Commission expressly prohibits it from doing so. Under the Commission's rule that binds both the Commission and Ameren to that utility incentive component for the life of the DSIM of which it is a part, the Commission cannot disregard it. There is no question the Commission, by its Order, has disregarded the utility incentive component of the DSIM it approved. There is similarly no question that if the Commission's Order were correct, then the Commission completely disregarded its own rules in 2012 when it approved the Modified Plan which did not use the avoided cost estimates from Ameren's then most recent IRP, as the Commission (per the Order) now claims it must. The foregoing means that under the Order, the Commission approved a Modified Plan that at the moment of its approval was unlawful in two respects. This makes no sense.

The Order also rests on a flawed interpretation of the term "methodology" in the Commission's MEEIA rules' definition of "avoided cost" that completely disregards the plain and ordinary meaning of that term. While review of this case is under the "reasonableness prong" of the standard of review (it is true the Commission had statutory authority to decide the underlying complaint), review of the Commission's interpretation of an administrative rule is a question of law reviewed by this Court *do novo*. A

"methodology" does not "include the inputs," as the Commission erroneously concluded. Moreover, to interpret "methodology" in the avoided cost definition of the rule as the Commission interpreted it unnecessarily creates a conflict with another provision of the MEEIA rules. Indeed, if "methodology" means what the Commission now claims, then an update of the avoided costs would be prohibited because those costs, as inputs, would have been locked down for the entire period during which the Modified Plan was in place.

The Order is also unreasonable because it rests on rationales and justifications that only ostensibly support it, but which in fact are totally lacking in support in the record or through the application of common sense. Updated avoided cost estimates cannot be "connected to" unknown "actual savings," as the Commission claims; indeed the record provides no support for such a claim and in fact rebuts its validity. The Order logically impedes the goal of MEEIA that is expressed in the MEEIA statute because it changes the rules of the game in the middle of it, which will logically discourage the pursuit of MEEIA programs, in contravention of the statute's goal. The Order does this by turning a utility incentive component that was designed to be tied to how well the utility ran the energy efficiency programs into an energy price lottery, even though the utility has no control over such prices. This makes no sense. Similarly, the Order rests on the flawed proposition that changes in energy prices drive the level of utility earnings on supply-side investments. That premise is false as well.

Finally, the Order is unreasonable because it makes no sense for the Commission to decide whether a MEEIA plan should proceed in the first place based on the avoided cost estimates that underlie it, but to then disregard those estimates as the plan proceeds.

ARGUMENT

I. The Commission erred in granting summary determination in favor of the Staff on Staff's complaint because the Commission's order was unreasonable in that, by requiring Ameren to update estimates of future avoided costs, the Commission disregarded the binding terms of the Commission-approved demand-side investment mechanism outlined in the energy efficiency plan that it approved.

A. The Commission-approved DSIM provides that, for purposes of calculating net shared benefits, estimates of future avoided costs were *not* to be updated and instead *must remain fixed*.

The Modified Plan unambiguously provided that avoided cost estimates would not be updated during the three-year life of the plan. To sustain the Commission's Order, this Court would have to conclude the Commission was entitled to disregard the terms of the plan it approved.

Relying on the plan and the rules as everyone interpreted them, Ameren spent nearly $150 million[63] on energy efficiency programs.[64] Ameren expected that its DSIM would cover the program costs and lost revenues. It also reasonably believed that it would receive rate revenues through the DSIM in payment of the agreed upon sums due

[63] Stipulation, p. 2, ¶ 5.a, Appx. p. A90. (The program's budget was approximately $49.1 million annually for three years).

[64] The assurance was of course conditioned on Ameren prudently operating the programs.

under the utility incentive component on the terms approved by the Commission. There is no dispute: the Commission's Order disregards the approved DSIM, and specifically the utility incentive component of the DSIM. The Commission's Order acknowledges as much by stating that the terms of the DSIM do "not allow for the use of updated avoided cost estimates,"[65] yet by granting summary determination in the Staff's favor, the Commission has in fact ordered the use of updated avoided cost estimates.

The Commission had to acknowledge that its Order is at odds with the utility incentive component of the DSIM *it approved* because the DSIM is outlined in detail in the Report, and the Report itself sets out the terms, conditions and operation of the approved MEEIA 1 Plan, except to the extent that the Stipulation modifies the Report.[66]

The terms of the Report most pertinent to the DSIM and the issue on appeal here are contained in Section 2.6, which provides in pertinent part as follows:

> Table 2.12 shows the items associated with estimating net benefits and whether those items will be updated for purposes of assessing performance and benefits as part of the implementation process. Notice that *several items will not be updated*, so the focus remains on the cost of the programs and the number of measures implemented.[67]

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[65] Order, p. 5, ¶ 10, Appx. p. A56.

[66] The Commission's Order does not claim that the Stipulation modified the DSIM respecting its terms at issue in this appeal, and as noted, in fact acknowledges it did not.

[67] Report, p. 38, l. 6-10, Appx. p. A85 (emphasis added).

Table 2.12 is reproduced in its entirety below:

Table 2.12 Description of Update Process[68]

Category	Update?	Description
Avoided Costs	✗	The avoided energy, capacity, and T&D values are deemed
Measure Attributes	✗	The TRM provides the deemed values or protocols for all measures
DSMore Software	✗	XLS Version 5.0.14, GCG Version 5.0.23
Number of Measures	✓	The number of measures will be measured as part of the evaluation process
Program Admin. Costs	✓	The direct program costs will be tracked
Measure Rebate Costs	✓	Measure rebates are included in the direct program costs
Net-to-Gross Factors	✗	The TRM provides the deemed values
Customer Opt-Out	✓	The final performance goals shall be adjusted based on final opt-out estimates
Discount Rate	✗	The discount rate shall remain 6.95%

Subsection 2.6 and the above table could not be clearer. Some items (those with a green checkmark) are to be updated "for purposes of assessing performance [the utility incentive component] and benefits." Other items (those with a red "X") are not to be updated. Avoided cost estimates are an item that is *not* to be updated – period. As subsection 2.6 also provides, the focus (of determining the utility incentive and net benefits) is on "the cost of the programs and the number of measures implemented."

[68] The red "✗s" and green "✓s" appear in the Report.

Those two items were to be updated to determine the utility incentive; avoided cost estimates, which have no impact on either of those items, were not.[69]

B. The Commission's own rule binds both the Commission and Ameren to the utility incentive component of the DSIM the Commission approved.

To sustain the Commission's Order, this Court would have to conclude the Commission was entitled to disregard the terms of the utility incentive component of the DSIM it approved since all agree that under the terms of that approved utility incentive component, the avoided cost estimates *cannot* be updated.

The Commission cannot, however, disregard the utility-incentive component of the DSIM it approved because, under its own rules, it and Ameren are bound by it. Specifically, 4 CSR 240-20.093(2)(J) provides as follows:

> If the commission approves [a] utility incentive component of a DSIM, such utility incentive component shall be binding on the commission for the entire term of the DSIM, and such DSIM shall be binding on the electric utility for the entire term of the DSIM, unless otherwise ordered or conditioned by the commission when approved.[70]

Rules duly promulgated by an administrative agency, such as the Commission, have the force and effect of law and are binding on the agency. ***Farrow v. St. Francis***

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[69] *Ameren Missouri's Motion for Summary Disposition*, Statement of Undisputed Material Facts, p. 9, ¶¶ 46-47, Appx. p. A31.

[70] There was no such order or condition when the DSIM was approved.

Med. Ctr., 407 S.W.3d 579, 588 (Mo. 2013). The rule says that the Commission (like Ameren) is bound. Yet the Commission's Order granting Staff's motion for summary determination on Staff's complaint, if upheld, would mean the Commission is not bound and thus is failing to follow its own rule.

So how does the Commission attempt to square its Order with the above-cited rule? The Commission says that one sentence in the definition of "avoided cost" requires a different result. This sentence requires a utility to use "the same methodology used in its most recently-adopted preferred resource plan"[71] to determine avoided costs. The Commission claims this sentence requires the utility to update avoided cost estimates in the middle of a MEEIA plan even though a Commission-approved DSIM *prohibits* any such update. Since Ameren developed later-in-time avoided cost estimates that underlie the preferred resource plan selected as part of its 2014 IRP filing (filed October 1, 2014), the Commission concluded those 2014 avoided cost estimates must be used with respect to energy efficiency measures installed on or after October 1, 2014. Essentially, the Commission concluded that the "same methodology" sentence (quoted above from 4 CSR 240-20.093(1)(F)) trumps both the terms of the Commission-approved DSIM and the rule providing that the utility incentive component of DSIMs are binding on the Commission and the utility. See 4 CSR 240-20.093(2)(J). On that basis, the Commission concluded that the only way for Ameren to have avoided that result would

[71] 4 CSR 240-20.093(1)(F), Appx. pp. A10 to A11.

have been to obtain a variance from the application of the avoided cost definition in the rule.[72]

C. Ameren didn't need a variance from a rule, as evidenced by the actions of the parties including the Commission's Staff and ultimately the Commission itself, which demonstrate that the rule at issue in fact meant, and means, something totally different than they claim now.

The Commission's current interpretation seems result oriented: if Ameren has to substitute lower avoided cost estimates for the avoided cost estimates that under the Modified Plan were fixed, then ratepayers will owe Ameren less money. This is extraordinarily unfair: What if avoided cost estimates had skyrocketed and Ameren took the position that it was not bound by the utility incentive component of the DSIM it agreed to and thus claimed that it was entitled to more? More importantly, the Commission's result does not make any sense in light of the law, the regulations, or the Modified Plan's terms.

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[72] Order, p. 5, ¶ 10, Appx. p. A56 ("Subsection 4 CSR 240-20.093(1)(F) is not one of the rules from which a variance is provided. Therefore, Ameren Missouri's approved demand-side program remains subject to the requirements of that regulation, and Ameren Missouri is required to 'use the same methodology used in its most recently adopted preferred resource plan to calculate its avoided costs.'"). The logic of the Commission's Order is not that the DSIM definition demands the result reached, but rather, that the definition of "avoided cost" in (1)(F) does.

If the "avoided cost" definition means what the Commission *now* says it means, then why was the avoided cost definition in the rule not among the lengthy list of rules with which the Stipulation was inconsistent, and for which the parties to the Stipulation therefore agreed a variance was needed in order for the Modified Plan to be lawfully adopted?[73] If that definition means what the Commission *now* says it means, why did the Commission approve the MEEIA 1 Plan in the first place since that Plan used avoided cost estimates that were *different* than the estimates underlying the then most recent IRP even though the Commission now says its rule required that they be the same? If that definition means what the Commission *now* says it means, why did the Commission approve a DSIM containing a utility incentive component that was at odds with the Commission's own rules; that is, a utility incentive component that, unlike the rule – as now interpreted – expressly prohibited use of update avoided cost estimates?

The answer to all these questions is obvious: In 2012 there was no need to list the avoided cost definition provision of the rules in the list of required variances because a variance was not needed. This is because the approved Plan was *not inconsistent* with the

[73] Stipulation pp. 24-25, ¶ 23, Appx. pp. A112 to A113. The entire purpose of the long list of variances listed in the Stipulation was to make the Modified Plan consistent with the MEEIA rules since as agreed upon (and ultimately approved) it was inconsistent with numerous provisions of those rules unless a variance from those rules was granted. That the "avoided cost" definition is not on the list is strong evidence that the Modified Plan was and is consistent with the avoided cost definition in the rules, as it was promulgated.

avoided cost definition in the rules since the same methodology was used to develop avoided cost estimates for the 2011 IRP, and for the MEEIA 1 Plan itself.[74]

When one steps back for a moment, the Commission's interpretation simply does not make sense and is patently unjust. It makes no sense because (if upheld) it creates a situation in which the Commission approved an unlawful MEEIA plan in two respects, including (1) by approving what, under the Order, would be an unlawful plan since it is undisputed that the avoided cost estimates that underlie the approved plan are not the same as those that underlie the 2011 IRP; and (2) by approving a utility incentive component of the DSIM that prohibited updating avoided cost estimates in the face of a definition in its rule that the Commission now says required that they be updated. It is patently unjust because it creates a situation where a utility, that did not have to propose a MEEIA plan in the first place, proposed a plan, transparently outlined the DSIM for which it sought approval,[75] achieved agreement among the parties to approval of that DSIM, and, finally, obtained Commission approval of that DSIM, but is now told that the agreement of all the parties, and the approval it was given, are meaningless now that the time has come to pay the utility incentive.

[74] A point discussed in the argument on Point Relied On II, below.

[75] One where the avoided cost estimates were to remain fixed throughout the three-year cycle of the Plan.

II. The Commission erred in granting summary determination in favor of the Staff on the Staff's complaint because the Commission's order was unreasonable in that, by disregarding the plain meaning of the term "methodology" and interpreting it in conflict with the same term in another provision of the MEEIA rules, the Commission erroneously interpreted the same methodology requirement in the rule as a matter of law.

The crux of the Commission's defense of what it has done here rests on its novel legal interpretation[76] of the term "methodology" in the avoided cost definition in its rule. On questions of law, this Court does not defer to the Commission. ***State ex rel. Atmos Energy Corp. v. Pub. Serv. Comm'n***, 103 S.W.3d 753, 759 (Mo. 2003). Instead this Court decides questions of law *de novo*. ***Id.***; ***Stone v. Dep't Health & Senior Servs.***, 350 S.W.3d 14, 20 (Mo. 2011). And as this Court has said, "[r]egulations are interpreted according to the same rules as statutes." ***Stiers v. Dir. of Revenue***, 477 S.W.3d 611, 614 (Mo. 2016). As outlined below, the Commission's interpretation is wrong, and this Court should therefore reverse the Commission's decision.

[76] While it is true that the Commission had the statutory authority to decide this case and to apply its rule as it did so, rendering its *Order* "lawful" under the applicable standard of review, the meaning of a term in an administrative rule is a question of law subject to this Court's *de novo* review.

A. The plain and ordinary meaning of "methodology" does not support the Commission's interpretation of that term.

The term "methodology" must be interpreted according to its plain meaning. *See, e.g.*, ***Spudich v. Dir. of Revenue***, 745 S.W.2d 677, 680 (Mo. 1988). When the General Assembly does not define a term, Missouri courts apply the plain and ordinary meaning as derived from the dictionary. ***Id.***

According to Webster's, a "methodology" is "a particular procedure or set of procedures."[77] It is the "how one goes about" achieving something or arriving at an outcome or a result. In this context, the procedure is supposed to determine the avoided cost estimates to be used in making the calculations called for by the DSIM. As the undisputed facts cited above demonstrate, these are estimates of items like the forecasted cost of a MWh of energy over the next 20 years, or the cost of a MW of generating capacity over the next 20 years, or the cost of building a mile of transmission line over the next 20 years.

The Order completely disregards – indeed, it *fails to even acknowledge* – this plain meaning definition of the term "methodology."[78] Instead, the Commission applies a

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[77] *Webster's New World College Dictionary* (4th ed.). *Webster's* also tells us that a "methodology" is a "system of methods." *Webster's* further tells us that a "method," from which the word "methodology" is derived, is a "procedure, process."

[78] The Commission doesn't acknowledge the plain meaning of the term or explain or analyze in any way how it can conclude that a term that means one thing (a process, a

definition under which "methodology" "includes both the formula by which avoided costs are to be calculated, and the inputs used in that formula."[79] Nothing in the plain meaning of "methodology" supports this novel interpretation, which in effect re-writes the rule that is actually on the books to a rule that would read as follows:

> Avoided cost or avoided utility cost means the cost savings obtained by substituting demand-side programs for existing and new supply-side resources. Avoided costs include avoided utility costs resulting from demand-side programs' energy savings and demand savings associated with generation, transmission and distribution facilities including avoided probable environmental costs. The utility shall use the same ~~methodology~~ **inputs** used in its most recently-adopted preferred resource plan to calculate its avoided costs.

Put another way, if the rule means what the Order claims it means, the term "methodology" need not have been included in the rule at all; the Commission should just have said, "use the same inputs."

Aside from the fact that a "procedure or set of procedures" has nothing to do with the inputs used *in* the procedure, when one considers the meaning of "inputs" together

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procedure, the "how to" do something) in fact somehow means something totally different ("includes the inputs"). It is true that its Staff argued as much, but that argument does not make it so.

[79] Order, p. 5, ¶ 11, Appx. p. A56.

with the meaning of "methodology," it becomes clear that they are not at all the same, and that an input is not part of the methodology itself. The most pertinent portion of the definition of "input" is that an input is "information fed into a data processing system or computer."[80] Avoided cost estimates are, without question, data fed into a computer when various calculations are made, and Ameren agrees that the avoided cost estimates are inputs. Specifically, those estimates are fed into the DSMore program used by the Company to perform MEEIA-related calculations.[81]

However, to repeat: A "methodology" (which is "a particular procedure or set of procedures") and an "input" (which is "information fed into a data processing system or computer") are not the same at all. Another part of the definition of "input" is "the act of putting in" and "what is put in."[82] But putting data into a computer does not make the *input* the *methodology*. To the contrary, a computer program takes inputs and does something with them, processes them using the instructions in the computer's code (i.e., applies the code's methodology).

Reference to a thesaurus reinforces the fact that a "methodology" does not include the inputs. Synonyms for "methodology" include "procedure, program,

[80] *Merriam Webster's Collegiate Dictionary* (10th ed.).

[81] *Ameren Missouri's Motion for Summary Disposition*, Statement of Undisputed Facts, p. 4, ¶ 18, Appx. p. A26.

[82] *Merriam Webster's Collegiate Dictionary* (10th ed.).

approach, how, manner, recipe, technique and way."[83] Several of the synonyms for "method" are quite similar: "approach, fashion, how, manner, methodology, and recipe"[84] and "procedure" and "process."[85] But none of those terms come close to describing an "input." "Methodology" and "input" are not synonymous. Yet the Commission's interpretation substitutes a word not appearing in the rule – "input," for the word the Commission used – "methodology." This falsely makes the two terms synonyms for one another when, in fact, they are not.[86]

Flouting the established usage of the word "methodology," the Commission decided that avoided cost estimates are inputs, and that a utility can't use the same inputs it used when it filed its MEEIA 1 Plan – even if those inputs were developed using the same methodology that was used to develop the inputs as of the time it filed the Plan – but must instead use new inputs each time a new IRP comes along. Talk about a

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[83] *Merriam Webster's Online Thesaurus.*

[84] *Id.*

[85] *Oxford Dictionaries*, Oxford University Press.

[86] The Commission indicates that not only are the inputs part of the "methodology," but so too is the "formula." The reference to a formula adds nothing. "Formula" is a synonym for "method." *Oxford Dictionaries*, Oxford University Press. In any event, the dispute here centers on the inputs (the avoided cost estimates). Just as "methodology" and an "input" are not the same, neither are a "formula" and an "input."

"formula" and even a "methodology" is essentially irrelevant under the Order because, as interpreted, the rule has been rewritten to provide that the utility "must use the same inputs…." As rewritten, there is no need to have talked about methodologies or formulas at all because those have nothing to do with it. However, as *actually codified,* the rule does require the use of the "same methodology," not the "same inputs."

The Commission cannot re-write its rule to require that the same inputs be used because the rule simply does not so provide. Instead, the Commission is bound *by the rule it wrote and adopted* as a matter of law. *See* ***Farrow***, 407 S.W.3d at 588. As written, what the rule means is that when the utility develops avoided cost estimates to use in relation to its MEEIA plan, it must use the methodology (the same procedure or set of procedures) that it last used when it developed avoided cost estimates that underlie its then most recent preferred resource plan. In other words, the utility cannot use one process for calculating the avoided cost estimates for its preferred resource plan, and then use another methodology for estimating avoided costs for its MEEIA plan.

This makes perfect sense. When a utility commits to energy efficiency programs, what it is really doing is deploying one kind of resource (a demand-side resource) to meet customer load as opposed to deploying another kind of resource (e.g., a supply-side resource (a generating plant)) to meet the same load. It makes sense to require the same methodology to be used to develop avoided cost estimates in an IRP, which is at its heart an evaluation of different resource deployment options, and in a MEEIA plan, which involves deployment of one kind of resource. In this case, Ameren *did use* the same process to develop avoided cost estimates for its MEEIA 1 Plan as it had used to

develop the avoided cost estimates that underlie its most recent preferred plan (i.e., as of the time the MEEIA 1 Plan was prepared – its 2011 IRP and the preferred plan reflected therein).[87] That's what the rule required, and that's what Ameren did. Only by the Commission's re-write of its rule could it sustain the Complaint. It erred when it did so as a matter of law.

Further evidence that this is what the rule requires, that the rule means what it says ("use the same *methodology*"), is the fact that when Ameren made its MEEIA 1 Plan filing and calculated NSB projections and revenue-requirement projections and included them in the filing as the MEEIA rules require, Ameren did *not* use the same avoided cost estimates (i.e., did *not* use the same *inputs*) as it had used for the preferred resource plan in place at the time.[88] As noted, Ameren *did* use the same methodology to develop the avoided cost estimates that underlie the preferred resource plan from 2011 and that underlie the MEEIA 1 Plan filing.

The foregoing facts demonstrate that the "same methodology" language in the rules' definition of "avoided costs" means exactly what it says, and was not interpreted by the Commission when it approved the MEEIA 1 Plan as "including inputs" that underlie the preferred plan (avoided cost estimates from the preferred plan). Instead,

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[87] *Ameren Missouri's Motion for Summary Disposition*, Statement of Undisputed Material Facts, pp. 6-7, ¶¶ 30-32, Appx. pp. A28 to A29.

[88] *Ameren Missouri's Motion for Summary Disposition*, Statement of Undisputed Material Facts, p. 5, ¶¶ 26-27, Appx. A27.

the Commission applied the rule exactly as written – and exactly as Ameren says it must be applied in this case.

B. Aside from failing to properly interpret the term "methodology" as a matter of law, the Commission's misinterpretation of that term is unreasonable because it means that the Modified Plan was unlawful in failing to use the avoided costs that underlie the 2011 IRP, and because it creates a direct conflict with another provision within the MEEIA rules: the rules' definition of the "utility incentive component."

1. The interpretation is unreasonable because it means that the Commission would have disregarded two of its own rules when it approved the MEEIA 1 Plan.

As discussed in the argument on Point Relied On I, if this Court were to affirm the Commission's current interpretation, it would necessarily mean that the Commission committed two glaring legal errors by approving Ameren's plan in 2012: first, by failing to require that the plan be based on the avoided cost estimates that underlie Ameren's 2011 IRP; and second, by approving a utility incentive component in the DSIM that required that avoided cost estimates would remain fixed in the face of a rule the Commission now says requires that they not remain fixed. A Commission decision is unreasonable if it does not make sense to the reviewing Court. ***Lake Lotawana***, 732 S.W.2d at 195. An Order that, if upheld, means the Commission disregarded two of its own rules should not make sense to this Court. An arbitrary and capricious decision is unreasonable, and a decision that reflects a failure to consider an important factor or

aspect of the case is arbitrary and capricious. ***Public Counsel***, 289 S.W.3d 240 at 251. When it issued the Order on appeal here, the Commission failed to consider a very important aspect of this case; that is, the issuance of its Order would mean that what it decided three years earlier was wrong as a matter of law.[89]

2. The Commission's new interpretation creates a direct conflict with another provision of the MEEIA rules.

Aside from the other problems discussed earlier is an additional, significant problem created by the Order; that is, the Commission's interpretation of "methodology" has now put 4 CSR 240-20.093(1)(F), where avoided costs are defined, directly in conflict with 4 CSR 240-20.093(1)(EE), which defines the utility incentive component of a DSIM. Why is there a conflict? Because the Commission has now, for purposes of this case, decided that "methodology" in its MEEIA rules includes the "inputs." And, based on that conclusion, the Commission in turn decided that "most recently adopted" means the preferred resource plan that was in place not when the MEEIA plan was filed, but at later points in time while the energy efficiency programs are in operation.

That interpretation simply cannot be squared with the use of the very same term – "methodology" – in 4 CSR 240-20.093(1)(EE). This rule defines "utility incentive component" as "the *methodology* approved by the commission in a utility's filing for demand-side program approval [i.e., its initial MEEIA plan filing] to allow the utility to

[89] The Commission indeed completely ignores this undeniable fact.

receive a portion of annual net shared benefits achieved and documented through EM&V reports" (emphasis added).

Clearly, if a "methodology" "includes the inputs," then the avoided cost estimates (i.e., those inputs) used in the utility incentive component of Ameren's DSIM were *locked down* at the time the DSIM was approved in 2012. They had to be, because the only other avoided cost estimates at issue in this case, from 2014, *did not yet exist*, meaning they could not possibly have been "included" in the "methodology approved by the commission"[90] in 2012. In other words, if a "methodology" includes the "inputs" (avoided cost estimates) – as the Commission says– then the Commission approved the inputs that underlie the MEEIA 1 Plan *at the time the MEEIA 1 Plan was approved in 2012* when it approved the methodology that *is* the utility incentive component itself. This then brings us back to 4 CSR 240-20.093(2)(J), which as discussed earlier expressly says that the DSIM that was approved (including the utility incentive component, which itself is a methodology) is binding on the Commission for its entire term. Consequently, the methodology, including those inputs that the Commission now says are part of it, bind the Commission and Ameren for the entire term.

And just as interpreting "methodology" as including "inputs" meant that the definition of avoided costs in 4 CSR 240-20.093(1)(F) need not have spoken of a "methodology" at all, so too does it mean that 4 CSR 240-20.093(1)(EE) also need not have spoken of a "methodology." Instead, the latter definition of the "utility incentive

[90] 4 CSR 240-20.093(1)(EE) (emphasis added), Appx. p. A11.

component" need only have read as follows (with original language struck through and new language in bold and underlined):

> the ~~methodology~~ **inputs** approved by the commission in a utility's filing for demand-side program approval to allow the utility to receive a portion of annual net shared benefits achieved and documented through EM&V reports.

The conundrum created by the Commission's interpretation of "methodology" as including the inputs can be completely avoided by following the law and interpreting "methodology" according to its plain meaning, as can the unlawfulness of the original approval of the MEEIA 1 Plan. Then, so long as Ameren followed the same process to develop avoided cost estimates for its MEEIA filing as it followed in developing those estimates for its 2011 preferred resource plan (and it did as everyone admits), Ameren will have complied with the rule as written, and so will have the Commission. Moreover, applying "methodology" according to its plain meaning eliminates both the conflict between the rules and the Modified Plan and between different provisions of the rules, that the Order in this case creates.

When possible, courts are to harmonize two rules that appear to be in conflict with each other. *See, e.g.*, ***Mercy Hosp. E. Communities v. Mo. Health Facilities Review Comm.***, 362 S.W.3d 415, 419–20 (Mo. 2012); ***Flarsheim v. Twenty Five Thirty Two Broadway Corp.***, 432 S.W.2d 245, 251 (Mo. 1968) ("The courts must reconcile and harmonize statutes that appear to be in conflict if it is reasonably possible to do so."). It is not only "reasonably possible" to harmonize the inconsistency between 4 CSR 240-

20.093(1)(F) and 20.093(1)(EE) that only appears when the Commission's new definition of methodology is used, but indeed it is easy to do so. All that must be done is to apply "methodology" according to its plain and ordinary meaning. By doing so, there simply is no conflict.

III. The Commission erred in granting summary determination in favor of the Staff on the Staff's complaint because its Order is unreasonable, in that its reliance on rationales and justifications that only ostensibly support the decision is arbitrary and capricious, does not make sense, and amounts to an abuse of abuse of discretion.

A. The Commission's new interpretation of the term "methodology" frustrates the stated policies and goals of MEEIA.

1. The Commission's claim that the utility incentive component is connected with "actual savings" is completely unsupported by the record.

As direct support for its total disregard of the utility incentive component it approved, and for its (incorrect) legal conclusion about what "methodology" means (discussed in the arguments on Points Relied On I and II *supra*), the Commission stated as follows:

> That interpretation [of methodology] is consistent with the goal of the MEEIA statute, which is to encourage the electric utility to implement energy saving measures by protecting the utility's financial interests while also protecting consumers. To accomplish that purpose, the company's performance incentive must be connected to how much

money ratepayers *actually saved* as a result of the company's MEEIA program.[91]

The undisputed facts are that when the avoided cost estimates used in the 2014 IRP were developed, the only thing anyone "knew" that they didn't know when the avoided cost estimates used for the MEEIA plan were developed late in 2011 before the Plan was filed in early 2012, was what the level of certain costs turned out to be in 2012, 2013, and perhaps for part of 2014 before the 2014 IRP avoided cost estimates were developed. Moreover, even at the point in time when newer avoided cost estimates were developed for use in the 2014 IRP, no one knew (nor do they know now) what dollars Ameren will ultimately save (i.e., avoid spending) over the upcoming 20-year period during which energy efficiency measures installed in 2014 will continue to "live." Put another way, even now we do not know what the net monetary benefits are or will be. The reality is that whatever avoided cost estimates are used at whatever point in time they are used will not produce a determination of "actual [dollar] savings" from the energy efficiency programs

[91] Order, p. 5, ¶ 11, Appx. p. A56 (emphasis added). Notably, this "goal" of MEEIA as identified by the Commission doesn't appear anywhere in the MEEIA statute. Addressed below is the goal that does appear in the statute.

because those estimates are based on future, long-term forecasts and not on observations of actual savings.[92]

It follows then that it is simply not true that ignoring the plain meaning of "methodology" somehow lets the Commission "connect" the utility incentive Ameren will earn to the amount of money customers will "actually save" from the energy efficiency programs. The "connection" the Commission seeks is a myth. No one will ever know exactly what was "actually saved," and they certainly won't even have a close estimate of any "actual savings" when the utility incentive component is being determined.[93] The Commission's conclusion to the contrary indicates that the Commission either didn't

[92] These actual savings will ultimately manifest themselves in overall net benefits from the programs, which cannot be determined until after the energy efficiency measures lives end many years from now.

[93] Under the Plan, as modified by the Stipulation, the utility incentive component (performance incentive) is finally determined after the three-year plan ends, which occurred at the end of 2015. Stipulation, p. 4, Appx. p. A92 ("After the conclusion of the three-year Plan period..." the incentive will be determined); p. 7, Appx. p. A95 (Providing for the use of a rider (i.e., a rate adjustment mechanism that adjusts rates for MEEIA-related charges, including for the performance incentive, between rate cases)). Given the long lives of energy efficiency measures, actual dollar savings (and net benefits) will not be known until many years (if not decades) after the performance incentive has been collected through the rider.

consider that the statement it was making was *simply not true*, or that the Commission fundamentally misunderstands the nature of the avoided cost estimates that are at issue.

The failure to understand or consider such a key fact that goes to the heart of the issue in this case – avoided cost estimates – demonstrates arbitrary and capricious decision making. It also constitutes an abuse of discretion because it led the Commission to reach the unjust result while also reflecting a lack of careful consideration about the total lack of support for the decision the Commission was making. Moreover, the claim that the Commission's order ensures that there is a "connection" between the utility incentive and "actual savings" doesn't make any sense and is plainly not true.

2. By exposing the utility incentive component to market forces the utility cannot control, the Commission's Order unwittingly impedes MEEIA's goal.

In addition to attempting to find a rationale to support its decision based upon a "connection" to "actual savings," the Commission also attempted to articulate a rationale in the form of its creation of a claimed "goal" of MEEIA. Specifically, the Order claims that "the goal of the MEEIA statute . . . is to encourage the electric utility to implement energy saving measures by protecting the utility's financial interests while also protecting customers." But the text of the law does not support the Commission's statement. To the contrary, the only goal expressed in the statute is as follows:

> The commission shall permit electric corporations to implement commission-approved demand-side programs proposed pursuant to

> this section with *a goal of achieving all cost-effective demand-side savings . . ..*[94]

The Commission's action to impose avoided cost estimates developed in 2014 instead of those that underlie the 3-year MEEIA plan that was approved does not aid in promoting the *actual* goal of MEEIA, but logically *impedes* that goal. Indeed, the Commission's Order is devoid of *any* findings that would support its theory that its decision supports either the goal it claims exists under MEEIA, or even the goal the General Assembly included in the statute. The Order logically impedes MEEIA's statutory goal because if the Commission can change the rules of the game in the middle of it (by changing avoided cost estimates in the middle of the operation of the MEEIA plan at issue), and can do so even though it *approved a DSIM that says those terms won't be changed*, it is subjecting the utility to a risk of having its utility incentive cut because of factors the utility cannot control. And it is exposing the utility – which did not have to pursue a MEEIA plan at all – to such risk after the utility has committed itself to spend tens of millions of dollars on energy efficiency while deferring or eliminating investments on which the utility otherwise could have earned. The ability to change the rules of the game in the middle therefore logically *discourages* pursuit of MEEIA plans.

Changing the rules in the middle of the game is particularly egregious when one considers the undisputed fact that the utility can't control key factors that determine what avoided cost estimates will be at various points in time; notably, utilities cannot control

[94] Section 393.1075.4 (emphasis added), Appx. A2.

the national and international energy and capacity markets that will drive the avoided cost estimates for those items.[95]

If the rule at issue means that every time avoided cost estimates are updated during the operation of a MEEIA plan, the avoided cost estimates that underlie the MEEIA plan, as filed, are to be disregarded and replaced with different estimates, then the utility incentive component of the DSIM (which by its terms turns on Ameren's performance in reaching certain levels of megawatt-hour savings) has at least in part been turned into an "energy and capacity cost lottery," a crapshoot, a game of chance. If the market price of power – over which the utility has no control – falls, as it did between 2011 and 2014,[96] then under the Commission's interpretation, the utility would receive far less under the utility incentive component even if its performance in achieving MWh savings from the energy efficiency programs was strong. Even if the utility excelled at controlling program costs and deploying measures that saved a lot of energy[97] – even more than the energy savings targets to which the utility incentive is tied – simply because of the

[95] *Ameren Missouri's Motion for Summary Disposition*, Statement of Undisputed Material Facts, p. 3, ¶ 12, Appx. p. A25.

[96] *Id.*, p. 8, ¶ 37, Appx. p. A30.

[97] It is these items over which the utility can exercise a measure of control; it is here where the utility can "perform."

operation of national power markets, the utility would earn a far smaller incentive. Under those circumstances, the utility loses the lottery; customers win it.[98]

The converse is just as true. Had the avoided cost estimates happened to spike when the 2014 IRP was being prepared as compared to the time when the MEEIA 1 Plan was prepared, the Company could have won the lottery because those much higher avoided cost estimates, which the Commission's decision says must be used, would have increased the estimated net benefits and thus the Company's performance incentive reward would increase as well; i.e., the lottery ticket would have paid off.

That result makes no sense, yet it is the result the Order logically dictates. It makes no sense for the utility incentive component (also called a performance incentive) to be a lottery in which utilities (and customers) win or lose depending on factors they *don't control*. Yet the Order creates a lottery by completely overlooking (or ignoring outright) the fact that what "actual" avoided costs will turn out to be over the next 20 years is unknown and unknowable, as well as largely beyond everyone's control, Ameren included.

Turning a utility incentive component into a lottery ticket, as the Order does, renders the Order unreasonable under the applicable standard of review

[98] At least for a while. If MEEIA programs are good for customers, but the utilities cannot count on their approved terms, as noted utilities will be discouraged from pursuing them in the first place, thus depriving customers of such programs in the long run.

3. There is no evidence later estimates are better; energy market prices have little if anything to do with earnings on supply-side investments.

The Commission weakly attempts to bolster its theory that forcing updated avoided cost estimates to be used as a MEEIA plan proceeds promotes a goal of MEEIA by suggesting that later estimates of avoided costs are better than earlier ones, and by stating that changes in energy market prices somehow impact supply-side investments.

This case was decided on the undisputed material facts included in the record. Not one of them supports a finding that later-in-time avoided cost estimates are somehow better. In fact, while the Commission's Order seems to imply that such is the case, it does not outright say so; it certainly makes no finding supporting such a conclusion. The closest the Commission comes in this regard (without any factual support) is its "encouragement" of the use of what it calls "actual numbers."[99] By "actual numbers" the Commission meant later (2014) avoided cost estimates not those that underlie the 2012 MEEIA 1 Plan.

Commission decisions are unreasonable when not supported by competent and substantial evidence of record, or when they fail to make sense to the reviewing court, or for the other reasons discussed earlier. Calling slightly later estimates of avoided costs "actual numbers" 15 or 20-plus years before the energy efficiency measures lives are over is nonsense, yet it is apparent that it is at the heart of the decision the Commission

[99] Order, p. 5, ¶ 11 Appx. A56.

made in this case. Twenty years from now someone could theoretically look back to see what costs were actually avoided. But in this case the benefits will be calculated based on estimates, regardless whether the estimates were developed in 2012 or 2014.

Similarly, in the discussion of its decision (but not as part of any finding of fact or conclusion of law determined by the Commission), the Commission speculates that as energy markets rise or fall an electric utility like Ameren "may be able to earn greater [or lower] profits."[100] There are no facts of record to support this claim. Indeed, the claim is false.[101]

As a review of dozens of prior appellate opinions on rate case appeals demonstrate, what a utility earns on a supply-side resource depends not on market energy prices, but on the net *investment* the utility makes in the supply-side resource (e.g., the utility's investment in a power plant) that is then reflected in the utility's rate base for ratemaking purposes. *E.g.*, ***State ex rel. Mo. Office of Pub. Counsel v. Pub. Serv. Comm'n***, 293 S.W.3d 63, 75–76 (Mo. App. S.D. 2009) (quoting ***State ex rel. Union Elec. Co. v. Pub. Serv. Comm'n***, 765 S.W.2d 618 (Mo. App. W.D. 1988)).

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[100] Order, p. 7, Appx. p. A58.

[101] With one minor caveat. There is a tiny grain of truth in the statement since Ameren has a fuel adjustment clause ("FAC") that includes margins on off-system sales, the five percent sharing mechanism in the FAC could create a small amount of greater (or lower) earnings if those sales proceeds increase (decrease) as energy prices change. *See* ***State ex rel. Union Elec. Co***, 399 S.W.3d 467, for a description of the FAC.

For example, if Ameren has a net investment in a power plant of $500 million and if the overall rate of return (weighted by the cost of debt and equity) is 8%, Ameren's rates would be set to recover a return (earnings) on that power plant in an amount equal to $40 million annually. The $40 million does not change if energy prices go up or down between rate cases. What this means is that the Order doesn't in any way treat energy efficiency investments equally with how supply-side investments are treated, as MEEIA's policy dictates. To the contrary, under the order, the utility incentive component and the earnings it produces depend on uncontrollable energy prices, but for a supply-side investment, this is simply not the case.

This is but another glaring example of the Commission's flawed analysis in an attempt to support the result reached in its Order. The Order lacks evidentiary support; it doesn't make sense (and is just plain wrong); and it works an injustice by allowing the Commission to disregard the plan it approved and that Ameren relied upon, to Ameren's detriment. The Order is unreasonable under the applicable standard of review.

4. <u>It makes no sense for the Commission to base its entire decision to approve a MEEIA plan on one set of avoided cost estimates, but to then disregard them as the plan proceeds.</u>

When a MEEIA plan is submitted for approval, the MEEIA rules require a significant amount of information to be submitted so the Commission can consider it in deciding if it should approve the proposed plan. For example, 4 CSR 240-3.163(2)(D) requires the utility to provide estimates of the impact of the DSIM on customer rates over the next five years. Those estimates are derived by comparing the utility's revenue

requirement with and without the proposed DSIM. The revenue requirement in turn determines the utility's overall rates charged to customers. Clearly, the point of these requirements is to enable the Commission to assess how the plan will impact customer rates so that the Commission can take that impact into account in deciding whether to approve the plan, including the DSIM, in the first place. In the case of the MEEIA 1 Plan at issue in this appeal, avoided cost estimates that underlie the Plan were used to calculate a number of financial and rate-related metrics, and the signatories, on that basis, agreed to the Modified Plan, and the Commission approved it for a term covering three full program years.

Among those metrics is a "with the proposed DSIM" revenue requirement. A significant part of the "with the proposed DSIM" revenue requirement analyses naturally depend on the net benefits to be realized from the plan, which in turn depend heavily on the avoided cost estimates used in the plan filing. To take a simple example, if it is estimated that running the energy efficiency programs will allow the utility to avoid $50 of energy costs per MWh of energy not consumed[102] because of the programs, the net monetary benefits will be a lot higher than if the figure is $30 per MWh, and if the net monetary benefits are a lot higher, the utility's revenue requirement will be a lot lower. A reduced revenue requirement impact resulting from the MEEIA programs will naturally make them more attractive, and this logically

[102] I.e., the avoided cost estimate for energy costs is $50 per MWh.

would influence the Commission's decision to approve (or disapprove) the MEEIA plan that was filed.

Another example of information that must be submitted to obtain approval of a MEEIA plan (and that is also impacted significantly by the avoided cost estimates that underlie the MEEIA filing) is the cost-effectiveness calculations required by the MEEIA rules. Specifically, 4 CSR 240-3.164(2)(B) requires the MEEIA plan filing to include a demonstration of the cost-effectiveness of each demand-side program included in the plan, including a calculation of the TRC (total resource cost) for each. The TRC calculations are heavily dependent on the avoided cost estimates that are used when the TRC calculations are made. The MEEIA rules indicate that the criteria the Commission must use when making its decision as to whether to approve the MEEIA plan at all is heavily based on those TRC results that were submitted with the filing (which, again, rely on the avoided cost estimates used in the filing). Rule 4 CSR 240-20.094(3)(A) specifically requires the Commission to approve programs with a TRC of greater than one if three criteria listed in that same rule are met. The TRC calculations in the Report used the avoided cost estimates used to calculate the net benefits reflected in the Report and the Stipulation.

The point is that the Commission is confronted with a decision whether to approve a MEEIA plan *at a given point in time* – here, in 2012. The Commission had to make a decision using the information that was available to it *then*, including the customer rate impact and cost-effectiveness information, which depended heavily on the avoided cost estimates at the time. The Commission saw fit to impose rules that

require such information to be filed in order to seek approval of a MEEIA plan and then relied on that information to give that approval. The Commission doesn't "de-approve" a plan two or three years later if the avoided cost estimates developed for a later IRP go down as compared to the estimates that underlie the MEEIA filing, any more than does the Commission "re-affirm" the MEEIA plan as being even better if avoided cost estimates go up.

A decision to approve a MEEIA plan is analogous to decisions the Commission makes when, for example, it determines investing in a new supply-side resource (or adding to it) was prudent and includes that investment in rate base. Once the resource is deployed and included in rate base, the Commission doesn't, because of facts that changed later, reverse an earlier prudence determination and somehow force the resource out of rate base even if with hindsight it might appear in the short run (e.g., as is the case with the MEEIA 1 Plan, over just a three-year period) that perhaps the decision to add the supply-side resource would not, based on later information, have been made. The Commission had to decide whether to (in effect) approve the decision to deploy the resource based on the information it (and the utility) had at the time the decision was made.

To put a finer point on it, consider the example of a decision to put a scrubber on a coal-fired power plant, which might have been made based upon assumed limestone costs over the life of the scrubber. Limestone costs might later double or triple. This means that the operating costs of the scrubber may go up significantly, and had that been known when it was built and placed in service, it is possible that the decision to

build it might not have been made. But that doesn't mean the utility made a poor decision, nor does it mean the utility didn't operate the scrubber properly, and the Commission doesn't apply hindsight to the decision if later, updated limestone cost estimates make the decision less favorable.

In the same way, it simply makes no sense to evaluate the level of the incentive the utility is to receive using a totally different set of avoided cost estimates than was used when the utility and the Commission decided that the utility should pursue the energy efficiency programs. This is particularly true when one considers (as earlier discussed) that the energy efficiency measures installed in 2013 to 2015 have "lives" that extend well beyond that date, meaning it simply can't be said that the 2014 avoided cost estimates are any "better" than the 2011 avoided cost estimates or later avoided cost estimates that will undoubtedly be available as one moves through time.

The Order ignores these considerations and instead reaches a completely unjust result. It is unjust to approve a DSIM and its utility incentive component which states unequivocally (as the Order acknowledges) that avoided cost estimates will not be updated during its operation, but to then disregard it. It is unjust for the Commission to also disregard its own rule that binds it to the DSIM it approved. Once the Commission approved the Modified Plan and the DSIM, on the basis of the avoided cost estimates that underlie the MEEIA 1 Plan's filing, the Commission and Ameren should have lived with the results. This should be true whether avoided cost estimates go up (which would make the Plan more beneficial than initially thought) or down (which would make it less beneficial). The time to re-evaluate energy efficiency would come when a

new MEEIA plan is submitted, on the basis of avoided cost estimates available *at that time*. That is what the rules actually provide for. The Commission acted unreasonably under the applicable standard of review in ruling otherwise.

CONCLUSION

The Commission's decision in this case is at odds with the DSIM it approved. The Commission admits as much, but then comes up with a novel interpretation of a provision of its rules that is contrary to its own application of its rules when it approved the Plan, and that places it in conflict with other provisions of its MEEIA rules. The Order fails to make sense, and it reflects an unjust result.

This Court should hold the Commission to the utility incentive component of the DSIM it approved, as the Commission's own rules require, should correct the flawed legal interpretation of the Commission's rules, and should otherwise reverse the Order as being unreasonable under the applicable standard of review and find that the Commission should have granted summary determination in favor of Ameren on the Staff's complaint.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 84.06

I hereby certify, pursuant to Rule 84.06(c) of the Missouri Rules of Civil Procedure, that Ameren Missouri's Substitute Appellant's Brief was prepared using Microsoft Word, in 13-point Times New Roman font and that it contains 17,597 words, excluding the cover, signature block, this certification, and the certificate of service, as determined by the Microsoft Word-counting system in compliance with Rule 84.06(b).

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CERTIFICATE OF SERVICE

I certify that Appellant Ameren's Substitute Appellant's Brief was served on the counsel identified below by the e-filing system on this 24th day of April, 2017:

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