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

James B. Lowery, #40503
Matthew R. Quetsch, #67102
SMITH LEWIS, LLP
Suite 200, City Centre Building
111 South Ninth Street
P.O. Box 918
Columbia, MO 65205-0918
lowery@smithlewis.com
quetsch@smithlewis.com

Wendy K. Tatro, # 60261
Director - Assistant General Counsel
Ameren Services Company
1901 Chouteau Avenue
P.O. Box 66149, MC-1310
St. Louis, MO 63101-6149
amerenmoservice@ameren.com

ATTORNEYS FOR UNION ELECTRIC COMPANY d/b/a AMEREN MISSOURI

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This Substitute Reply Brief addresses the Public Service Commission's ("Commission" or "Respondent") points in the order in which they appear.

I. Reply to Respondent's Arguments on Point Relied On I

A. Under the terms of the Commission-approved DSIM,[1] avoided cost estimates are not to be updated when calculating net benefits. This is necessarily true for both the share of net benefits that covers the throughput disincentive and the share of net benefits that covers the performance incentive because the Stipulation did not change the DSIM's terms in any way relevant to this appeal.

Boiled down to its essence, Respondent's argument in response to Point Relied On I is that the Commission-approved Stipulation required Ameren to update avoided cost estimates when determining net benefits used in the calculation of the performance incentive. Thus, Respondent argues, the terms of the DSIM provided for by the Report are irrelevant: "There is no evidence in the record to support Ameren's conclusion that the terms of Table 2.12 support its motion for relief."[2] The Order[3] that is on appeal in this Court (and the record on appeal), however, belies Respondent's argument.

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[1] Terms defined in Ameren's Substitute Appellant's Brief and used in this Substitute Reply Brief have the meanings given them in the Substitute Appellant's Brief.

[2] Respondent's Substitute Brief, p. 22.

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

Understanding why requires only that one review the documents that set the terms of the utility incentive component (i.e., the performance incentive) of the DSIM approved by the Commission.[4]

The starting point is Chapter 2 of the Report, entitled "Demand-Side Investment Mechanism."[5] The DSIM outlined in the Report has "two main components: [a] direct program cost recovery and [b] a sharing of net benefits to remove economic disincentives and provide timely earnings opportunities."[6] The Report explained that sharing of net benefits in item [b] had two components: the removal of economic disincentives (i.e., the throughput disincentive that arises from lower electricity sales because of the energy efficiency programs),[7] and the provision of timely earnings opportunities (the utility incentive component, also referred to as the performance incentive):

> The sharing percentage is determined based on two main issues: removal of the throughput disincentive *and* providing an earnings opportunity equivalent to a supply-side alternative. Removing the throughput

[4] Those terms are binding on both the Commission and Ameren. 4 CSR 240-20.093(2)(J).

[5] Report, Appx. A62 to A86; L.F. 50, ¶ 2.

[6] Report, p. 22, Appx. A69.

[7] The Report explained that this removal of economic disincentives, which it referred to as the "throughput disincentive," was necessary because of the loss of revenue to the utility caused by operating energy efficiency programs. Report, p. 18, Appx. A65.

> disincentive simply makes the utility whole for the revenues it would have collected absent the implementation of its energy efficiency programs whereas the earnings opportunity compensates for the foregone earnings opportunities associated with supply-side investments.[8]

Consequently, the DSIM provided for two separate and distinct shares of the net benefits of the energy efficiency programs: (1) the throughput disincentive (representing lost revenues from foregone electricity sales) which is compensated by the "TD-NSB share"; and (2) the loss of earnings opportunities associated with supply-side investments which are compensated by the performance incentive.

Determining net benefits requires a consideration of several factors, as explained in the Report.[9] First, total energy savings must be determined using the number and kind of energy efficiency measures installed by customers, to which a per-measure energy savings amount (in kWhs or MWhs) is applied. Those energy savings are then converted to dollars using the avoided cost estimates. That dollar figure is then compared with the costs of implementing and operating the energy efficiency programs, resulting in a *net* benefit number, which in turn is reduced to present value using a discount rate. Once one knows the net benefits, the proposed DSIM's terms then dictated the share to be received by Ameren. The share at issue in this case is the percent of net benefits for the performance incentive, which is 5.03% (for performance at 100% of target), or different

[8] Report, pp. 24-25, Appx. A71 to A72 (emphasis added).

[9] Report, p. 38, Appx. A85.

potential percentages depending on performance, as outlined in the table appearing in Appendix B to the Stipulation.[10]

The Stipulation made only one change to the net benefits calculation used for the performance incentive: Instead of using deemed energy savings from the proposed Technical Resource Manual ("TRM"), the energy savings estimated through EM&V were to be used in the net benefits calculation used for the performance incentive.[11]

The fact that the Stipulation only changed the source of the *energy savings* used in the net benefits calculation for the performance incentive necessarily means that the remaining provisions of Section 2.6 of the Report, including Table 2.12, *apply to the determination of the performance incentive share* of the net benefits just as they do to the determination of the throughput disincentive share of the net benefits. *Nothing* in the Stipulation changed this fact, which means that the terms of the DSIM the Commission approved dictate that the net benefits must be determined without updating avoided cost estimates, as Section 2.6 and Table 2.12 of the Report indicate:

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[10] Page 1 of Appendix B to *Unanimous Stipulation and Agreement Resolving Ameren Missouri's MEEIA Filing*, Appx. A122, L.F. 50-51, ¶ 3.

[11] "The cumulative net megawatt-hours ("MWh") *determined through EM&V* . . . will be used to determine the amount of Ameren Missouri's Performance Incentive Award . . ." (meaning will be used to determine the net benefits to which the performance incentive percentage that is earned is applied). Stipulation, p. 4, Appx. A92.

Table 2.12 Description of Update Process[12]

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%

Despite Respondent's new litigation position, Respondent in fact agrees, as did the complainant (the Staff) below.

The Commission Staff – which commenced this case by filing its complaint – no doubt understood that under the DSIM the Commission approved, the prohibition on

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

updating avoided cost estimates reflected in Section 2.6 and Table 2.12 continued to apply, because if that prohibition did not apply, the linchpin of the entire complaint would have come loose. The linchpin is that Ameren *failed to obtain a variance* from 4 CSR 240-20.093(1)(F) – the "avoided cost" definition. The Staff's complaint and the Commission's Order make much of the fact that Ameren got variances from numerous other rules. Thus, goes the argument on which the entire complaint is based, even though the approved DSIM prohibits updating avoided cost estimates, the rule trumps the DSIM because no variance was granted.

That lack-of-a-variance based-argument, which is also the basis for the Order, would be completely irrelevant if what Respondent now claims were true – that the Stipulation has made the Report's terms irrelevant – because the approved utility incentive component of the DSIM would have been entirely consistent with the rule, meaning no variance would have been needed. Nothing in the terms of that DSIM would have prohibited updating avoided cost estimates. Lacking a DSIM term (from the Report) that prohibits updating avoided cost estimates, the DSIM would have simply been subject to the rule – which Respondent says requires that they be updated – and the complaint would have simply alleged: "The rule requires Ameren to update the estimates, and Ameren failed to update the estimates." That is not, however, the basis of the complaint. There would have been no need to talk about Ameren's supposed failure to obtain a variance from that rule because the approved Plan would not purport to contain a term in conflict with the rule, as written.

Yet the fact that the approved DSIM *does* conflict with that rule permeates this entire case. The Order quotes the rule in its entirety, highlighting the sentence upon which the Commission based its summary-determination ruling in the Staff's favor and against Ameren.[13] Indeed, the Commission identified that highlighted sentence as being "at the heart of the Staff's complaint against Ameren Missouri."[14] Having set the stage for its ultimate ruling, the Commission then said that Ameren Missouri gave the EM&V contractors the "2012 MEEIA 1 Plan methodology" instead of the "2014 IRP Methodology," following that discussion with the Commission's clear admission that the Plan it approved in fact dictated use of those 2012 figures:

> Indeed, the DSIM as proposed by Ameren Missouri in its 2012 MEEIA filing, specifically subsection 2.6 and Table 2.12 of that filing, does not allow for the use of avoided cost estimates.[15]

The Commission followed this statement with a discussion of the fact that Ameren *did not obtain a variance* from 4 CSR 240-20.093(1)(F), and that therefore Ameren was required to use the 2014 IRP methodology (i.e., that used updated, 2014 avoided cost estimates), in contravention of the terms of the Plan. Similarly, the Staff, in opposing Ameren's motion for summary determination, pointed out that Ameren's position was incorrect because Ameren failed to obtain a variance:

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[13] *Order*, pp. 3-4, ¶7, Appx. A54 to A55.

[14] *Id.*, p. 4, ¶7, Appx. A55.

[15] *Id.*, p. 5, ¶10, Appx. A56.

> Indeed, the 2012 Stipulation includes express waivers of several provisions of the Commission's MEEIA rules, but Rule 4 CSR 240-20.093(1)(F) is not among them.[16]

The Staff also noted that although it found the avoided cost estimates that underlie the MEEIA Plan to be "reasonable" – even though they are different than the avoided cost estimates from the prior IRP preferred resource plan – the Staff's reasonableness determination "cannot be construed as, a waiver of . . . [the subject rule]."[17]

To this day, and despite now claiming that the Report is irrelevant in determining the performance incentive, Respondent continues to argue that the lack of a variance from Rule 1(F) is relevant, as evidenced by the fact that its Substitute Brief points out Ameren's failure to obtain one eight times.[18] Again, if only the Stipulation defines the DSIM (for the performance incentive) (as Respondent now seems to argue), then one need not talk of a variance. The rule would control.

The Commission cannot escape from the fact that the basis of the complaint was that although the utility incentive component prohibited updating the avoided cost estimates (per Section 2.6 and Table 2.12 in the Report), the rule trumped, and there was

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[16] *Staff's Suggestions in Support of Its Motion for Summary Determination*, L.F. p. 110.

[17] *Staff's Response to Ameren Missouri's Motion for Summary Determination*, L.F. p. 115. Staff used the term "waiver" here; a "waiver" and a "variance" in this context are the same.

[18] Respondent's Substitute Brief, pp. 9, 10, 13, 19, 20, 22, 30, 31.

no variance. Both the Staff and the Office of Public Counsel, its ally in this litigation, agreed:

> MR. LOWERY [Ameren counsel]: Okay. So if we stop here, I think that – if this [Table 2.12] was the only source of information and we didn't have a stipulation that might or might not modify this table, then I think that Staff and OPC would both agree we wouldn't be here today, there would be no complaint, they would agree that's what you approved, you don't have to update avoided costs, period. But I agree –
>
> CHAIR HALL: Let me – let me cut to the chase. Do you guys [referring to Staff and OPC's counsel] agree with that statement?
>
> MR. THOMPSON [Staff counsel]: Could you repeat the statement, so I –
>
> MR. LOWERY: If we –
>
> MR. THOMPSON: -- can make sure we understand it?
>
> MR. LOWERY: -- imagine that we filed the MEEIA plan and the Commission just approved it, said –
>
> MR. THOMPSON: Approved it.
>
> MR. LOWERY: --approved.
>
> MR. THOMPSON: --as filed?
>
> MR. LOWERY: Approve it as filed.
>
> MR. THOMPSON: Right.

MR. LOWERY: In that case I think you agree we wouldn't be here today.

MR. THOMPSON: *I agree.*[19]

While it is true that Staff counsel later clarified that the approved Plan (which is reflected in the Report and the Stipulation, to the extent the Stipulation modified the Report) would still be subject to the rule defining "avoided cost," the point remains: the complainant itself (and its ally, OPC) unequivocally agreed with Ameren (as does the Order) that Table 2.12 says that avoided cost estimates would not be updated for purposes of determining the performance incentive – period.

Neither the Staff, nor OPC, nor the Commission itself can reasonably argue that Table 2.12 does not apply to the performance incentive given the complaint, the portion of the transcript just cited, and the Order. Not to mention the Report itself.

As noted earlier, the Stipulation, upon which Respondent now so heavily relies, also rebuts Respondent's argument. Not only does paragraph 5.b.ii of the Stipulation not state or even imply that the prohibition on updating avoided costs was to be eliminated by the Stipulation, but Appendix B to the Stipulation makes it quite clear that avoided costs are not to be updated. Appendix B to the Stipulation contains a sample performance incentive calculation at the second page of Appendix B.[20] That example uses the phrase "actual net benefits" and defines that phrase in a footnote, as follows:

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[19] Tr., pp. 62-63 (emphasis added).

[20] Stipulation, Appendix B, p. 2, Appx. A123.

> Actual net benefits are based on [1] actual program costs for the three-year MEEIA plan and [2] the actual net MWh savings as determined by EM&V.[21]

Consistent with Table 2.12, "avoided costs" are not part of the Stipulation's definition of "actual net benefits" (in this context, the actual net benefits used for the performance incentive).

For the Stipulation to trump or modify the prohibition on updating avoided cost estimates, it would have been necessary for Appendix B to define "actual net benefits" as follows:

> Actual net benefits are based on [1] actual program costs for the three-year MEEIA plan, *[2] updated avoided costs*, and [3] the actual net MWh savings as determined by EM&V.

But that is not what Appendix B provides for – if it had, Ameren would agree that the Stipulation modified the DSIM's terms as outlined in the Report and that updating avoided costs would have been necessary, regardless of the terms of the rule. But Appendix B did *not* modify the DSIM's terms.

As also noted above, nor did the performance incentive-related provision in the body of the Stipulation (which appears in paragraph 5.b.ii). In that provision, all that is discussed is the use of two actual, updated figures to calculate net shared benefits: (1) a discussion of a determination of actual net energy savings as determined by EM&V; and

[21] *Id.*

(2) use of the actual number of customer opt-outs.[22] Neither has anything to do with avoided cost estimates.

The terms of the Stipulation are also crystal clear: the approved Plan – including the approved DSIM (which includes the utility incentive component) – must be found by reference to *two* sources: (1) the Report and, (2) the Stipulation, to the extent – but only to the extent – the Report is modified therein:

> Subject to the terms and conditions contained herein, the Signatories agree that Ameren Missouri's demand-side program plan should be approved. For purposes of this Stipulation, Ameren Missouri's three-year demand-side program plan (the "Plan") consists of the 11 demand-side programs ("MEEIA Programs") described in Ameren Missouri's January 20, 2012 MEEIA Report, *the demand-side programs investment mechanism ("DSIM")* ***described in the MEEIA report, modified to reflect the terms and conditions herein***, and the Technical Resource Manual . . ..[23]

That the MEEIA Plan the Commission approved is found not just in the Stipulation but also in the Report – with the Report controlling unless the Stipulation

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[22] Stipulation, p. 4, Appx. A92.

[23] *Id.*, p. 2, ¶4, Appx. A90 (emphasis added). The parties admit that the approved Plan is found not just in the Stipulation, but also in the Report, unless the Stipulation modified the Report. *Ameren's Statement of Undisputed Material Facts*, pp. 1-2, ¶¶ 2-4, Appx. A23 to A24.

modified it – is an admitted, undisputed fact.[24] As outlined above, the DSIM described in the MEEIA Report was *not* modified by the Stipulation in any respect relevant to the issue on appeal here. Not a single word in the Stipulation, including paragraph 5.b.ii (dealing with the performance incentive), expressly or impliedly eliminates the prohibition on updating avoided costs reflected in Section 2.6 or Table 2.12. Notably, Respondent fails to point to any such word.[25]

What Respondent does do is mischaracterize the modifications the Stipulation did make to the DSIM's terms for the performance incentive, as the DSIM was originally proposed. At page 10 of its Substitute Brief, Respondent claims that the Stipulation requires "full EM&V reports" instead of "deemed values" after each program year. The clear implication of this statement (and additional statements appearing later on page 10 and carrying over to page 11) is that this means that the EM&V process somehow trumped the terms of the DSIM – specifically the prohibition on updating avoided cost estimates in Table 2.12 of the Report. This implication is false. EM&V *has nothing to*

[24] *Ameren's Statement of Undisputed Material Facts*, p. 2, ¶ 8 (admitted as true by the Staff).

[25] At page 22 of its Substitute Brief, Respondent boldly claims that the "terms of the Stipulation apply and required Ameren to use its most recently-adopted cost data for the Performance Incentive annual calculations." Notably, there is not a single citation to the record, or anything else for that matter, to support that claim.

do with avoided costs, as Respondent admits.[26] Avoided costs are measured in dollars per kilowatt-hour. The Stipulation only required so-called full EM&V in determining *energy savings*, which are measured in kilowatt-hours. Ameren had originally proposed using the predetermined energy-savings data listed in the technical resource manual. By requiring EM&V for purposes of calculating these energy savings (measured in kWh), the Stipulation did in fact amend the Report. But the Stipulation did not, as the Commission argues, change anything about the avoided costs (measured in dollars per kWh).

Consequently, because the Stipulation did not modify the prohibition on updating avoided cost estimates in Section 2.6 or Table 2.12 of the Report, the utility incentive component of the DSIM approved by the Commission, by its terms, prohibits updating avoided cost estimates.[27] And remember that a DSIM is binding on both Ameren and the Commission (4 CSR 240-20.093(2)(J)).

Respondent's most recently adopted argument – that the Stipulation and not the report governs the calculation of net shared benefits for purposes of calculating the performance incentive – is remarkable. It makes Ameren's failure to get a variance irrelevant, even though this failure was the linchpin of the Staff's complaint and the

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[26] *Ameren's Statement of Undisputed Material Facts*, p. 9, ¶ 46, Appx. A31.

[27] All of this renders Respondent's claim that Ameren "violated" the Stipulation when it did not update the avoided cost estimates completely false. Respondent's Substitute Brief, p. 19.

Commission's Order. If the Stipulation had done away with the portion of the Report that says not to update avoided costs, the parties would not have wasted time arguing about whether Ameren needed a variance. The Commission is abandoning its original position.[28] As the Commission said in its Order, "[T]he DSIM . . . proposed by Ameren Missouri . . . specifically subsection 2.6 and Table 2.12 . . . does not allow for the use of updated avoided cost estimates."[29] The Stipulation did not modify the Report in relevant part. The Commission's statement is still true. It can't undo it by taking a different position in its Substitute Brief now.

B. Respondent's other miscellaneous contentions in support of its arguments on Point Relied On I fail to support its position.

At page 20, Respondent argues that it is "reasonable" to "apply the utility's most recent cost data." Putting aside why that statement is flawed (a point already addressed in Ameren's Substitute Appellant's Brief), the statement is irrelevant. Respondent is arguing that the utility incentive component of the DSIM did not prohibit updating

[28] Judge Ahuja, in his dissent from the majority's decision in the Western District, went so far as to note that even the Commission did not make the argument the majority relied on there: that Table 2.12 simply did not apply to the performance incentive. However, it is clearly making that argument now, probably in an attempt to latch onto the majority's decision.

[29] Order, p. 5, ¶10, Appx. A56.

avoided costs. As explained above, it did. Whether this particular DSIM reflects wise policy making is not at issue.

At page 22, Respondent notes that the DSMore software is used in the TD-NSB calculations. That's true, but the fact that the software is used proves Ameren's point: DSMore is run to determine net benefits. Those net benefits are also used in the performance incentive calculations, as explained earlier.

As noted at the outset of this portion of this Substitute Reply Brief, Respondent claims there is no evidence of record to support applying the terms of Table 2.12 to the performance incentive.[30] That claim is false: see above.

Lastly, what Ameren calls an energy-cost lottery the Commission accepts as a "reasonable apportionment of market risk."[31] In doing so, the Commission advocates for arbitrariness. Generally, incentives reward behavior; and under the DSIM, Ameren's incentive was supposed to depend not on the vagaries of a market Ameren does not control, but on the number of energy-efficiency measures Ameren's operation of the energy efficiency programs induced customers to install, and on Ameren's ability to manage the costs incurred to induce customers to install those measures. The Commission's order arbitrarily exposes Ameren – and its customers – to variables they do not control, which makes no sense.

[30] Respondent's Substitute Brief, p. 22.

[31] Respondent's Substitute Brief, p. 24.

II. Reply to Respondent's Arguments on Point Relied On II.

A. Respondent claims that its interpretation is consistent with the plain and ordinary meaning of the term "methodology," but then fails to explain how.

In support of Respondent's Point II (page 25 of its Substitute Brief), Respondent says that "the Commission's interpretation of the word 'methodology' is consistent with the plain meaning of the term, consistent with other Commission rules and orders, and avoids absurd results." Nowhere does Respondent state what this claimed "plain meaning" is, nor does Respondent cite any source for its unstated plain meaning, or point to these "other Commission rules and orders" that it claims apply this unstated "plain meaning." All Respondent says (at pages 25-27 of its Substitute Brief) is that avoided cost estimates, which then become inputs for other determinations, are necessary in various activities at the Commission. Ameren agrees.

Utilities must apply a methodology to come up with avoided cost estimates when the utilities are evaluating various alternative resource plans in the IRP process. And utilities must apply a methodology to come up with avoided cost estimates used in the calculation of net benefits in MEEIA plans. Ameren has never argued that avoided cost estimates are not to be used in determining the performance incentive. They are being used; they must be used, for one cannot determine net benefits (which are then shared) without them. The question is *which* avoided cost estimates are to be used. The approved DSIM tells us: those that underlie the MEEIA plan (because the estimates are not updated).

We will not repeat our entire discussion of the plain meaning of the term "methodology" here.[32] Respondent entirely failed to rebut it. To recap, in order for the phrase "same methodology" to include the inputs, the Commission would have had to have written an "avoided cost" definition 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.

[32] See pages 52-59 of Ameren's Substitute Appellant's Brief. Respondent has to claim its interpretation is consistent with the plain meaning of "methodology" in order to attempt to invoke the principle that courts sometimes give some deference to agency interpretations of the agency's rules so long as the interpretation is not inconsistent with the plain meaning. No such deference is owed; Respondent's interpretation bears no resemblance to the plain meaning of the term.

Or perhaps even more accurately, would have had to have written the definition to read as follows:

> The utility shall use the same ~~methodology~~ **avoided cost estimates** used in its most recently-adopted preferred resource plan to calculate its avoided costs.

If that's what the Commission intended, it should not have written the rule the way it did.

The rule says to use the same *methodology* used in the most recently adopted preferred resource plan, meaning the same process or procedure. This interpretation *is* consistent with the plain and ordinary meaning of the term Respondent used – "methodology." This interpretation is faithful to the rule the Commission actually wrote, and to the one the Commission is bound. And this interpretation avoids the problems created by the re-writes inherent in Respondent's position, as depicted above. Those problems include putting the "avoided cost" definition at odds with the definition of the "utility incentive component" and putting Respondent's approval of the Plan at odds with the definition of "avoided costs," which would mean the Commission approved an unlawful plan, all as explained in Ameren's Substitute Appellant's Brief. Applying the plain meaning of the term it used, however, avoids both of those problems and is completely consistent with the terms of the DSIM, as outlined in the Report and, to the extent, but only to the extent, modified by the Stipulation.

B. Respondent has altered the basis of one of its claims before the Court of Appeals by now claiming that Ameren's use of different avoided cost estimates for its MEEIA Plan than were used for Ameren's 2011 IRP did not (under Respondent's position) violate its rule.

It is undisputed that the avoided cost estimates from Ameren's 2011 IRP (including the preferred resource plan in effect, i.e., its "most recently completed preferred resource plan") when the MEEIA Plan was filed, and when it was approved approximately eight months later, are *different* than the avoided cost estimates that underlie that MEEIA Plan. It is similarly undisputed that Respondent interprets the "avoided cost" definition to require that those estimates be the *same*. Until the filing of Respondent's Substitute Brief, no party – not the Staff, not OPC, not Respondent – had ever suggested that the avoided cost estimates were the same, nor had any party ever rebutted Ameren's contention that because they are in fact different, adoption of Respondent's interpretation of "avoided costs" meant that Respondent approved an unlawful MEEIA plan. The Staff and Respondent had pointed out that the Staff had found the avoided cost estimates that underlie the MEEIA Plan to be "reasonable," but regardless of their "reasonableness," the fact remained that they were *not* from the most recent preferred resource plan (at that time, 2011) and thus the point stood: Respondent's interpretation meant it approved an unlawful MEEIA Plan.

In an attempt to drive around this roadblock, the Commission argues – for the first time – that Ameren's MEEIA plan *was* the most recently adopted preferred resource

plan; and in support, the Commission uses a never before seen hybrid term: the "2012 MEEIA resource plan."

The Commission's novel argument arises from a concept not found in any Commission rule or order, nor in any filing of record in this case, nor in Respondent's Substitute Brief in the Court of Appeals. In fact, as outlined in the *Motion to Strike* filed concurrently with the filing of this Substitute Reply Brief, the Commission is violating Rule 83.08(b) by altering the basis of one of its claims before the Court of Appeals. Putting aside, however, the impropriety of Respondent's alteration of its claim, we address this novel argument on the merits below.

The concept Respondent is advancing rests on a label Respondent has for the first time placed on the avoided cost estimates that underlie the MEEIA Plan at issue in this case. That label is something Respondent calls the "2012 MEEIA resource plan."[33] Respondent argues that because more than six months *after* Respondent approved the Stipulation (which approved the Plan) Ameren notified the Commission that it was changing its preferred resource plan to a contingency plan that it had included in its 2011 IRP, this somehow meant that the approved MEEIA Plan was the most recently adopted preferred resource plan and that this somehow means that the avoided cost estimates that underlie the MEEIA Plan are the avoided cost estimates that the MEEIA rule (the definition of "avoided costs") requires. Thus, goes Respondent's new argument,

[33] Respondent's Substitute Brief, p. 28.

applying its interpretation to the definition does not mean that it approved an unlawful MEEIA plan. If this sounds convoluted, it is because it is.

First, the approval of the MEEIA Plan took place on August 1, 2012.[34] The most recently adopted preferred resource plan as of August 1, 2012, was the preferred resource plan adopted by Ameren in October 2011.[35] The avoided cost estimates that underlie that preferred resource plan are *not* the same as those that underlie the MEEIA Plan.[36] Since they are not the same, the Plan violated the subject rule; that is, if the subject rule meant what Respondent claims it means.

Second, the subject Rule required (again if Respondent's interpretation is correct) Ameren to use those avoided cost estimates that underlie that 2011 preferred resource plan *when Ameren filed the MEEIA Plan on January 12, 2012*. Ameren did not do so. No party – including complainant – claimed that Ameren's failure to do so violated the "avoided cost" definition, but it clearly did, *if Respondent's interpretation were correct*.

Consequently, Respondent's new claim that "the Commission's order approving the Stipulation is consistent with the Commission's interpretation of Rule (1)(F) . . ." is demonstrably false.[37] There is no such thing as a "MEEIA 2012 resource plan."[38] There

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[34] Order, Appx. A124.

[35] *Ameren's Statement of Undisputed Material Facts*, p. 4, ¶¶ 21-23, Appx. A26; L.F. p. 53 (admitted as true by the complainant, Staff).

[36] *Id.*, p. 5, ¶¶25-26, Appx. A27 (also admitted as true).

[37] Respondent's Substitute Brief, p. 28.

are resource plans arising from the 2011 IRP, which used the 2011 IRP avoided cost estimates; and there are resource plans from the 2014 IRP, which used the 2014 IRP avoided cost estimates. Under the plain meaning of the term "methodology," the same process or procedure was used to develop all those estimates (as well as the separate estimates that underlie the MEEIA Plan). But the MEEIA Plan is not a resource plan; it is not part of an IRP.

Once again, the Order itself also betrays the Commission's argument. The Order, being premised on the claim that the "same methodology" means the "same inputs" or "same avoided cost estimates," describes the avoided costs that underlie the MEEIA Plan as the "2012 MEEIA 1 Plan methodology."[39] To distinguish those avoided cost estimates from those that underlie the 2014 IRP, the Order refers to the "2014 IRP methodology."[40] These descriptions are in keeping with Respondent's theory that each set of avoided cost estimates is itself a "methodology." Note that there is no claim or finding that the "2012

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[38] Respondent's Substitute Brief also includes the false claim that the existence of a "2012 MEEIA Resource Plan" is an "undisputed fact." Respondent's Substitute Brief, p. 6. The material undisputed facts in this case are set forth in *Ameren's Motion for Summary Determination*, Appx. A23 to A32; L.F. 50 - 53. This claimed "fact" is not among them, nor is it stated anywhere in the record on appeal before this Court.

[39] *Order*, p. 4, ¶ 9, Appx. A55.

[40] *Id.*

MEEIA 1 Plan methodology" is a "resource plan," let alone the "most recently adopted preferred resource plan."

Staff's filings below also betray the Commission's novel position. Staff said, "The phrase 'most recently adopted preferred resource plan' can only mean the preferred resource plan adopted *next prior to* the date upon which the avoided costs are calculated."[41] When the MEEIA plan was filed, the phrase, according to this quotation, could only have referred to the 2011 preferred resource plan. Staff did not think the MEEIA plan itself was a preferred resource plan.

Nevertheless, Respondent now claims, by reference to the transcript where the Staff's counsel was arguing the complaint, that this has been its position all along.[42] But the transcript reveals no such thing. The transcript reveals only that: (a) Staff admitted that the avoided cost estimates from the IRP were different than those for the MEEIA Plan, and (b) that Staff's argument during oral argument was that the "avoided cost" definition was not violated because on January 12, 2012, when the MEEIA Plan was filed, there "was no DSIM."[43] But Staff Counsel goes on to admit (Tr. p. 108, l. 15-25) that a DSIM *was approved* in August 2012, bringing us back to the same flaw in Respondent's argument: the preferred resource plan adopted next prior to the MEEIA filing was the 2011 IRP, with different avoided costs. All Staff Counsel could say at that

[41] *Staff's Suggestions in Support in Its Motion for Summary Determination*, L.F. p. 108 (emphasis added).

[42] Respondent's Substitute Brief, p. 28.

[43] Tr. p. 108, l. 5-14.

point is that the Staff applied the "avoided cost" definition "on a going forward basis" because it found the avoided cost estimates that underlie the MEEIA Plan "reasonable." *Id.* Presumably it is true that the Staff found the avoided cost estimates to be reasonable, but the rule doesn't say it is to be applied "on a going forward basis" or that avoided costs other than those from that most recently adopted preferred resource plan can be lawfully used if the Staff "found them to be reasonable." The rule says they must be the same. They weren't. And at the urging of all parties, including the Staff, the Commission approved the Plan anyway.

III. Reply to Respondent's Arguments on Point Relied On III.

At pages 31-32 of its Substitute Brief, Respondent makes what is truly a nonsensical argument, claiming that since the Stipulation subjects the determination of the performance incentive to EM&V, Ameren was at risk that energy market changes could reduce its performance incentive. The argument is nonsensical because Respondent admits (this too was an undisputed material fact in the case below) that EM&V *does not involve or determine avoided costs.*[44] Applying retrospective EM&V to the performance incentive does mean that Ameren risked earning a lower incentive if its achieved energy *savings*, which *are* determined by EM&V, were lower than estimated, but that has absolutely nothing to do with energy *prices* (which drive avoided cost estimates) in energy markets.

[44] *Ameren's Statement of Undisputed Material Facts*, p. 9, ¶46, Appx. A31.

Respondent next argues that it is appropriate to use updated avoided costs (which, as of 2014 would result in lower net benefits) because doing so is the "best estimate of the cost-saving performance of its [Ameren's] demand-side investment."[45] There is not a shred of record evidence that supports that statement. All anyone knows is that the estimates, as of 2014, of what the avoided costs would be over the long lives of the energy efficiency measures installed up to that time (from 2012 to 2014), were lower than the estimates made in 2012. How it will turn out 15, 20-plus years from now no one knows.

Respondent's third point in response to Point Relied On III is to agree (without saying so) with Ameren's point that under the Order, the performance incentive truly has been turned into a lottery: "Neither Ameren nor its customers can control the market variables that affect the results of the avoided cost methodology."[46] As outlined in Ameren's Substitute Appellant's Brief,[47] turning a performance incentive into a lottery makes absolutely no sense. The "performance" incentive is supposed to act as an incentive for Ameren to do the best job it can to (a) control program costs – i.e., to operate the programs as cost-effectively as possible; and (b) to maximize energy savings. Appendix B to the Stipulation and its progressive table of higher incentive payments at higher levels of performance demonstrates this. But if Ameren cannot control the energy

[45] Respondent's Substitute Brief, p. 32.

[46] *Id.*, p. 32.

[47] Ameren's Substitute Appellant's Brief, pp. 69-70.

markets – and Respondent agrees it can't – then changes in energy prices (up or down) have nothing to do with the performance incentive.

Respondent's last argument in response to Point Relied On III reflects a completely flawed attempt to equate certain risks associated with earnings on a supply-side investment to risks associated with what the level of the performance incentive might be. In its Substitute Appellant's Brief, Ameren pointed out that the Order's claim that utility earnings on a supply-side investment depend on changes in energy prices is false because changes in energy prices do not change the rate revenues (a part of which are based on returns on supply-side investments) the utility receives from its customers when they pay their electric bill.[48] Instead, the earnings on a supply-side investment included in the utility's rate base depend on the return allowed when rates were set. Respondent points out – correctly – that just because Respondent sets rates based on an allowed return of, say 8%, does not mean the utility will earn exactly 8%. For example, operating costs could be higher or lower than assumed in the rate-setting process, with the same effect on earnings. But the fact that an allowed return used to set rates may not be exactly realized provides no support for turning a performance incentive into an energy cost lottery. There are at least two reasons.

First, if the underlying assumptions hold true, the earnings will be exactly as assumed; i.e., the actual return will equal the allowed return. In that sense, Respondent argues against itself because its position in this case is that one should not approve a

[48] *Id.*, pp. 71-73.

MEEIA plan and then hold the assumptions used to approve it constant, but rather, that those assumptions should change as we move forward over the three-year term of the plan. However, assumptions aren't changed while rates set in a rate case are in effect. To the contrary, rates don't change (regardless of changes in underlying costs or revenues) until another rate case occurs.

Second, utilities have some control over some of their costs, so they can take steps to try to keep their earnings at or near that allowed return. For example, they can manage operating expenses (e.g., labor, materials, supplies) when mild weather reduces revenues below those assumed when rates were set. They can also reduce capital investment if revenue or cost pressures are affecting earnings, thus reducing the equity in the balance sheet, which will produce higher earned returns with lower net profits. In sum, utilities have some control over the earnings they can realize on those supply-side investments. By contrast, they have no control over energy markets.

So yes, earnings on supply-side investments are to some extent at risk, just as the performance incentive amount is at risk if the utility does not control program costs or fails to generate energy savings from the operation of the energy efficiency programs. However, those risks are far different, both quantitatively and qualitatively, than the risk shifted to the utility by Respondent's position in this case with respect to the performance incentive. That risk-shifting means that even if Ameren did a stellar job of getting the absolutely highest level of energy savings for the lowest possible level of programs costs – both of which increase net benefits – Ameren could receive a substantially reduced performance incentive due to factors that all agree are totally beyond its control.

Respondent's attempt to equate what it has done here to how earnings on supply-side resources work fails.

IV. The Proper Disposition of this Appeal.

Twice in its Substitute Brief the Commission makes the same odd request: if the Court finds that the Commission's Order was unreasonable, it should remand to allow the Commission to find additional facts.[49] But the Commission decided this case on undisputed material facts.[50] There are no material facts left for the Commission to find. The Court shouldn't remand for further fact finding.

Instead the Court should remand with instructions to grant Ameren's motion for summary determination. While the Court cannot usurp any of the Commission's legislative functions (such as rate making), this Court can do more than just affirm or reverse. *State ex rel. K.C. S. Ry. Co. v. Pub. Serv. Comm'n*, 30 S.W.2d 112, 118 (Mo. banc 1930); *see State ex rel. GTE N., Inc. v. Mo. Pub. Serv. Comm'n*, 835 S.W.2d 356, 363 (Mo. App. W.D. 1992). Under § 386.510, RSMo (2016), it can remand for further action, and it can "review, reverse, correct or annul any order or decision of the commission."

Remanding with instructions to grant Ameren's motion for summary determination would be an appropriate disposition in this case, because based on the stipulated facts, there are only two possible outcomes. Ameren says it was supposed to give the EM&V contractors the avoided cost estimates from the 2012 MEEIA plan.

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[49] Respondent's Substitute Brief, 23, 27.

[50] Order, pg. 2, Appx. A53.

Respondent, on the other hand, says that Ameren was supposed to give the EM&V contractors the avoided cost estimates from the 2014 preferred resource plan, based on its claims about the Stipulation and Rule (1)(F). Based on the undisputed facts, one side has to be right. So if the Court does not affirm the Order, it should remand with instructions to grant Ameren's motion for summary determination. It should not remand for further fact finding, as the Commission suggests.

For the reasons given in Appellant's Substitute Brief and this Substitute Reply Brief, and based on the record on appeal, the Order on appeal here should be reversed and the case remanded to the Commission with instructions to grant Ameren's summary determination motion.

Respectfully Submitted,

/s/ James B. Lowery

James B. Lowery, #40503
Matthew R. Quetsch, #67102
Smith Lewis, LLP
111 S. Ninth Street, Suite 200
P.O. Box 918
Columbia, MO 65205-0918
Telephone (573) 443-3141
Facsimile (573) 442-6686
lowery@smithlewis.com

Wendy K. Tatro, # 60261
Director - Assistant General Counsel
Union Electric Company
1901 Chouteau Avenue
P.O. Box 66149, MC-1310
St. Louis, MO 63101-6149
Phone (314) 554-3484
Facsimile (314) 554-4014
amerenmissouriservice@ameren.com

Attorneys for Union Electric Company d/b/a Ameren Missouri

CERTIFICATE OF COMPLIANCE WITH RULE 84.06

I hereby certify, pursuant to Rule 84.06(c) of the Missouri Rules of Civil Procedure, that the Substitute Reply Brief of Appellant Union Electric Company d/b/a Ameren Missouri was prepared using Microsoft Word, in 13-point Times New Roman font and that it contains 7,365 words, excluding the cover, signature page, this certification, and the certificate of service, as determined by the Microsoft Word-counting system in compliance with Rule 84.06(b).

/s/ James B. Lowery

CERTIFICATE OF SERVICE

I certify that this Substitute Reply Brief of Appellant Union Electric Company d/b/a Ameren Missouri was served on the counsel identified below by the e-filing system on this 25th day of May, 2017:

John D. Borgmeyer
Public Service Commission
P.O. Box 360
Jefferson City, MO 65102-0360
john.borgmeyer@psc.mo.gov

Jennifer Heintz
Public Service Commission
P.O. Box 360
Jefferson City, MO 65102-0360
jennifer.heintz@psc.mo.gov

Alexander Antal
Missouri Division of Energy
P.O. Box 1157
Jefferson City, MO 65102
alexander.antal@ded.mo.gov

Dustin Allison
Office of the Public Counsel
P.O. Box 2230
Jefferson City, MO 65102
staffcounselservice@psc.mo.gov

/s/ James B. Lowery