

IN THE SUPREME COURT OF MISSOURI

Public Service Commission
of the State of Missouri,

Respondent,

v.

Union Electric Company, d/b/a
Ameren Missouri,

Appellant.

Case No. SC96222

**SUBSTITUTE BRIEF OF RESPONDENT
PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI**

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JURISDICTIONAL STATEMENT

This case is before the Court on post-opinion transfer from the Court of Appeals for the Western District of Missouri under Rule 83.04. The Court granted the application for transfer filed by Union Electric Company d/b/a Ameren Missouri (Ameren).

SUMMARY OF ARGUMENT

The question presented is whether the Public Service Commission of the State of Missouri (Commission) erred when it granted Staff's motion for summary determination and denied Ameren's motion for summary determination. The Commission ultimately found Ameren violated a 2012 stipulation (Stipulation) between Staff and Ameren that had been approved by the Commission, and regulation 4 CSR 240-20.093(1)(F).

The Commission's order granting Staff's motion for summary determination (Order) directed Ameren to provide its independent demand-side program evaluators with the company's most recently-adopted 2014 cost data to complete an annual calculation required by the Stipulation. The Commission rejected Ameren's argument that the Stipulation and Rule (1)(F) required the company to provide the evaluators with previously-adopted cost data.

In its first point, the Commission argues that the Order should be affirmed because the Stipulation requires the amount of Ameren's Performance Incentive to be determined based upon three annual calculations of "net shared benefits" that are measured, verified and documented through independent evaluation reports following each program year 2013, 2014 and 2015. The Performance Incentive is subject to Rule (1)(F)'s requirement

that Ameren provide the evaluators with the company's most recently-adopted cost data to complete the required calculations.

In its second point, the Commission argues the Order should be affirmed because the Commission properly interpreted the meaning of the terms as they are used in the context of Rule 20.093(1)(F). The Commission's Order interprets the terms of Rule (1)(F) consistent with other Commission rules and consistent with the Commission's order approving the Stipulation.

In its third point, the Commission argues the Order should be affirmed because the Stipulation's Performance Incentive, as interpreted by the Commission, provides Ameren with a timely earnings opportunity that is associated with cost-effective measurable and verifiable efficiency savings.

STATEMENT OF FACTS

On November 18, 2015, the Commission issued the Order under review, granting Staff's motion for summary determination. (LF 210; PSC Appendix 1-8). Ameren is an electrical corporation subject to the jurisdiction of the Commission. (LF 211). The Commission's Staff participates in cases before the Commission and is authorized to file complaints. (LF 211). The 2012 *Unanimous Stipulation and Agreement Resolving Ameren Missouri's MEEIA Filing* is the Stipulation approved by the Commission in EO-2012-0142. (LF 7-8; PSC Appendix 9-43).

The Stipulation sets forth Ameren's demand-side investment plan for 2013-2015 under the Missouri Energy Efficiency Investment Act (MEEIA), Section 393.1075, RSMo (2016). (LF 7). MEEIA authorizes the Commission to adopt rules, approve

corporation-specific settlements, and develop cost recovery mechanisms for investment in approved “demand-side” programs that are designed to modify the net consumption of electricity on the retail customers’ side of the electric meter. *Id.*

Staff Complaint

Staff filed its complaint to the Commission on June 1, 2015, alleging Ameren violated the 2012 Stipulation and Rule (1)(F). (LF 12; PSC Appendix 55-56). The Stipulation describes the terms and conditions of Ameren’s demand-side cost recovery mechanism, including Ameren’s Performance Incentive. (LF 9). The Stipulation’s Performance Incentive is a “utility incentive” as defined in 4 CSR 240-20.093(1)(EE), because it allows the utility to receive a portion of “annual net shared benefits achieved and documented through evaluation, measurement, and verification (EM&V) reports.” (LF 212; PSC Appendix 56).

Stipulation paragraph 5.b.ii, Ameren’s Performance Incentive, requires the amount of “net shared benefits” that Ameren may recover to be calculated as measured and documented through independent, third-party evaluation reports that are filed with the Commission following each demand-side program year 2013, 2014, and 2015. (LF 9). To calculate “net shared benefits” under the Commission’s regulations, evaluators perform studies and other activities called “EM&V” to measure and document the energy and demand savings achieved by the utility’s annual demand-side investment program. (LF 9-10; PSC Appendix 56). To complete the annual net shared benefits calculation through EM&V reports required by the Stipulation, each year the utility must provide the independent evaluators with the company’s long-range “avoided cost” data, which

forecasts the utility's costs to generate, transmit and distribute electricity over the next 20 years. (LF 9-10, 52 ¶ 13; Rule 4 CSR 240-20.093(1)(C), (1)(F); PSC Appendix 55-56).

The evaluators apply the avoided cost data that is provided to them by the utility to the annual measurement of energy and demand savings, yielding a monetary amount of estimated long-range cost savings. (LF 9-10). From this amount, the evaluators subtract the annual demand-side programs' cost to determine the annual net shared benefits. (LF 9-10).

The Stipulation provides that evaluators shall file EM&V reports following each program year 2013, 2014 and 2015, documenting the amount of net shared benefits that Ameren may recover through the Performance Incentive, depending on the savings achieved by Ameren's demand-side investment. (LF 9-10). Stakeholders may comment on the EM&V reports and recommend changes. (PSC Appendix 24).

Ameren's evaluators filed the Performance Incentive's program year 2014 (PY 2014) EM&V report in EO-2012-0142 on May 15, 2015, as required by the Stipulation paragraph 5.b.ii. (LF 9). After reviewing the PY 2014 EM&V report, Staff alleged that Ameren provided the independent evaluators with outdated 2011 avoided cost data to complete the Performance Incentive's PY 2014 net shared benefits calculation. (LF 9-10). Staff's position was that the Stipulation required Ameren to provide the evaluators with the company's most recently-adopted avoided cost data, which was filed with Ameren's most recently-adopted October 2014 integrated resource plan (IRP). (LF 9-10).

Staff cited Rule (1)(F), which states that Ameren shall provide its evaluators with the same avoided cost "methodology" used in the company's most recently-adopted

preferred resource plan to complete the net shared benefits calculations for PY 2013, PY 2014 and PY 2015. (LF 9-10). Staff stated Ameren violated Rule (1)(F) when Ameren provided the evaluators with the avoided cost data from the company's previously-adopted 2011 resource plan and not its most recently-adopted October 2014 avoided cost data. (LF 9-10). Staff's complaint stated that Ameren's use of the outdated avoided cost data would grant Ameren a Performance Incentive that was based on initial projections rather than on measured achievements as required by the Stipulation. (LF 11).

Ameren's Answer

Ameren answered Staff's complaint on July 2, 2015. (LF 23). Ameren admitted that it provided its independent evaluators with the avoided cost data from its previously-adopted 2011 resource plan, and not the avoided cost data from its most-recently adopted October 2014 resource plan, for the Performance Incentive's PY 2014 calculation. (LF 24).

Ameren disagreed that it violated the Stipulation or (1)(F) by providing the 2011 avoided cost data to the evaluators. (LF 25). Ameren denied that the Stipulation or Rule (1)(F) required Ameren to provide the October 2014 avoided cost data as asserted by Staff. (LF 24 ¶ 17).

Motions for Summary Determination

Staff and Ameren agreed to resolve the complaint through cross-motions for summary determination, responses and replies, and oral argument. (LF 48) Ameren argued it provided the avoided cost data required by the Stipulation. (LF 73). Ameren

argued that Staff had misinterpreted the word “methodology” as used in Rule (1)(F). (LF 78).

Staff’s motion relied on the facts Ameren admitted in its answer. (LF 86-93). Staff argued that the Stipulation requires the Performance Incentive to be based upon net shared benefits that are measured and document through EM&V reports following each program year 2013, 2014, and 2015. (LF 90). Staff argued Rule (1)(F) requires Ameren to provide its evaluators with the most recently-adopted avoided cost data to complete the annual net shared benefits calculations that the Stipulation requires for the Performance Incentive. (LF 90).

Undisputed Facts

This case involves three different resource plans adopted by Ameren as its “preferred” resource plan, each using a different set of avoided cost data. (LF 9-10, 50-59). The resource plans are Ameren’s 2011 resource plan described in EO-2011-0271 (LF 9-10, LF 53, ¶¶ 19-23); Ameren’s 2012 MEEIA resource plan described in EO-2012-0142 (LF 50 ¶ 1- 51 ¶ 4, 129, 213); and Ameren’s October 2014 resource plan described in EO-2015-0084. (LF 9-10, 56 ¶ 32, 213). Each preferred resource plan is supported by a different set of avoided cost data. (LF 7-10, 52 ¶ 13, 53 ¶ 23-54 ¶ 26, 56 ¶ 32-33, 213).

Ameren described its avoided cost “methodology” in its statement of fact No. 31. (LF 55-56). The “avoided cost” data is a forecast of Ameren’s future costs to generate, transmit and distribute electricity, including probable environmental costs, over a 20-year period. (LF 51 ¶ 9-11, 52 ¶ 13). To create this forecasted avoided cost data, Ameren models the electric grid using ranges of values for “key driver variables,” or “critical

uncertain factors” that are likely to affect the market price of energy. (LF 55; 4 CSR 240-22.060(5), PSC Appendix 62). Ameren analyzes “current or recent transactions in the visible capacity market within the Midcontinent Independent System Operator, Inc. (MISO) market,” and estimates the “levelized cost of a simple cycle gas combustion turbine generator” under MISO’s tariff. (LF 55). Ameren evaluates budgets for transmission and distribution projects and estimates the portion that is attributable to serving incremental demand as adjusted for the age, condition and reliability of the infrastructure. (LF 56). Utilities develop avoided cost data to evaluate and select long-range resource plans under the Commission’s Chapter 22 regulations. (LF 51).

Ameren’s 2011 IRP and avoided cost data

Ameren made its triennial IRP filing in February 2011 in EO-2011-0271. (LF 9-10, 53 ¶ 19). This 2011 IRP filing included avoided cost data that Ameren developed to assess the performance of alternative and contingency resource plans, and to select a preferred resource plan as described in the 2011 IRP filing. (LF 9-10, 53 ¶ 24, 54 ¶ 25).

Ameren’s 2011 IRP identified an energy efficiency contingency plan that depended on a regulatory framework to encourage utility investment in energy efficiency. (LF 53 ¶ 19-23; EO-2011-0271, PSC Appendix 66-68; EO-2012-0127, PSC Appendix 69). Ameren’s 2011 preferred resource plan, with the 2011 avoided cost data, was in place when Ameren filed its proposed energy efficiency resource plan under MEEIA. (LF 53 ¶ 23).

Ameren's 2012 MEEIA Resource Plan and avoided cost data

Ameren filed its MEEIA application (Application) on January 20, 2012, in case number EO-2012-0142. (LF 50). Along with the Application, Ameren submitted the details of its proposed 2012 MEEIA energy efficiency resource plan in a report (Report). (LF 50).

Ameren based its 2012 MEEIA plan on the energy efficiency contingency resource plan identified in its 2011 IRP, with some updates. (PSC Appendix 90). One of the updates Ameren made was to the avoided cost data underlying the MEEIA energy efficiency resource plan. (LF 53-54). Ameren's 2012 MEEIA resource plan used avoided cost data that was different from the avoided cost data in the 2011 IRP. (LF 54).

Ameren used software called DSMore to create the updated avoided cost data for the 2012 MEEIA plan. (LF 53 ¶¶ 17-18). Ameren's Report described the updated avoided cost data underlying the 2012 MEEIA resource plan. (LF 54 ¶ 26-28). Staff testified in the MEEIA docket that Ameren's avoided cost estimates were reasonable. (LF 54 ¶ 29).

Ameren used the 2012 avoided cost data described in the MEEIA Report to perform the total resource cost test required by Section 393.1075.2(6), RSMo (2016). (LF 58 ¶¶ 50-51). The 2012 avoided cost data supported Ameren's calculations of the estimated customer rate impacts and future company revenue requirement impacts of its 2013-2015 demand-side investment plan. (LF 59 ¶¶ 52-54).

In its 2012 MEEIA Application, Ameren proposed a demand-side investment mechanism (DSIM) to recover its costs for the 2013-2015 energy efficiency plan. (LF 51, PSC Appendix 89). Ameren requested relief from the effect of sales revenue that is lost to

energy efficiency, called the “throughput disincentive.” (PSC Appendix 76, 89). Ameren also proposed an earnings opportunity for its DSIM. (PSC Appendix 89). Ameren proposed to recover both the throughput disincentive and the earnings opportunity as separate portions of net shared benefits that were not to be measured and documented through full annual EM&V reports. (PSC Appendix 76-81, 89, 91-95).

Ameren proposed to collect the throughput disincentive by including \$32.5 million in rates during the three-year program. (PSC Appendix 76-81, 89). For the earnings opportunity, Ameren proposed to perform a net benefits calculation at the end of the three-year plan, using estimated, or “deemed,” savings values and deemed avoided cost data in the Technical Resource Manual and specific DSMore software, with no full annual EM&V and only limited evaluation to track the number of measures and final program costs. (PSC Appendix 77-79; Ameren Appendix 85-86). Ameren requested Commission approval to calculate net benefits for its proposed throughput disincentive amount and its proposed earnings opportunity without using full annual EM&V. (PSC Appendix 76-81, 85-88, 91-96).

Ameren’s Application requested variances from the Commission’s regulations to the extent they require “net shared benefits” to be “achieved and documented” or “measured and verified” through EM&V reports and calculated on an “annual” basis, along with other rules with which the proposed DSIM was inconsistent. (PSC Appendix 76-81). Ameren’s Application did not request a variance for Rule (1)(F). (PSC Appendix 76-81).

After negotiating Ameren's proposed MEEIA plan and cost recovery mechanism, Ameren, Staff, and other signatories submitted the 2012 Stipulation to the Commission for approval EO-2012-0142 on July 5, 2012. (LF 50-51). The Stipulation's terms and conditions modified Ameren's proposed DSIM. (LF 51 ¶ 8).

The terms of the Stipulation's Performance Incentive in paragraph 5.b.ii modified Ameren's proposed earnings opportunity by requiring full EM&V reports following each program year 2013, 2014 and 2015 to measure and document the amount of "actual" net shared benefits, instead of calculating that amount using "deemed" values that are estimated before the measures are installed. (PSC Appendix 12, 91-95). The Stipulation's annual calculations for the Performance Incentive require Ameren to provide the evaluators with avoided cost data each year 2013, 2014 and 2015. (PSC Appendix 12).

The Stipulation's Performance Incentive does not refer to Ameren's Technical Resource Manual or DSMore software. (PSC Appendix 12). The Performance Incentive Appendix B shows how Ameren's share of the actual evaluated and documented net benefits amount will be determined, using sample calculations. (PSC Appendix 42-43). The Stipulation's paragraph 23 lists a number of variances, but Rule (1)(F) is not among them. (PSC Appendix 32-33). The Stipulation reflects a higher budget for EM&V than Ameren originally proposed. (LF 52 ¶ 16; PSC Appendix 23).

The Stipulation also provided Ameren with its requested recovery of net shared benefits relating to the throughput disincentive in the "TD-NSB Share" in paragraph 5.b.i. (PSC Appendix 11). The TD-NSB Share calculates net shared benefits differently than the Stipulation's Performance Incentive. (PSC Appendix 11-12). Instead of EM&V,

the TD-NSB Share calculates the net shared benefits amount using the Technical Resource Manual and specific DSMore software, with only limited updates for installed measures and program costs, as Ameren requested. (PSC Appendix 17). The TD-NSB Share is not at issue in this case, because the Stipulation requested several variances that exempt the TD-NSB Share from rules requiring EM&V to calculate annual net shared benefits. (PSC Appendix 32-33).

On February 8, 2013, Ameren notified the Commission that it had adopted the 2012 MEEIA plan as its preferred resource plan. (EO-2013-0392, PSC Appendix 100-104). The basis for the change was the Commission's order in ER-2012-0166, which fully implemented the MEEIA Stipulation as approved in EO-2012-0142. (LF 53 ¶ 22; PSC Appendix 100-104). With the Commission's approval and implementation of the Stipulation's demand-side cost recovery mechanism, Ameren changed its preferred resource plan to reflect the long-term pursuit of energy efficiency programs, as originally described in the 2011 IRP's energy efficiency contingency plan. (LF 53 ¶ 22, 213; PSC Appendix 100-104).

Ameren's October 2014 IRP and avoided cost data

Ameren made its next triennial IRP filing in October 2014. (LF 90). In the October 2014 IRP, Ameren adopted a new preferred resource plan, using a new set of avoided cost data. (LF 56 ¶ 33). Ameren's October 2014 filing included continued energy efficiency investment. (PSC Appendix 105). Estimates of market prices for energy fell significantly between 2011 and 2014. (LF 57 ¶ 37). Ameren's 2014 IRP reflected

reductions in the price of natural gas resulting from the continued shale boom, and a corresponding reduction in wholesale prices for electricity. (PSC Appendix 106).

On May 15, 2015, Ameren's independent evaluators filed their PY 2014 EM&V reports showing the annual net shared benefits as measured and documented through the year-end evaluation. (LF 90). To complete the Performance Incentive's annual net shared benefits calculation, the evaluators used the avoided cost data supplied to them by Ameren. (LF 90).

In its response to Staff's motion for summary determination, Ameren admitted that it provided the evaluators with the avoided cost data from its 2012 MEEIA resource plan and not the avoided cost data from its most recent October 2014 resource plan to complete the net shared benefits calculation for the Performance Incentive PY 2014. (LF 129, 213). Staff maintained its allegation that Ameren violated the Stipulation and Rule (1)(F) when Ameren provided the evaluators with the cost data from its previous resource plan and not the cost data from its most recently-adopted October 2014 resource plan. (LF 90). Staff maintained its allegation that Ameren must provide the October 2014 avoided cost data for the Performance Incentive's PY 2014 calculation. (LF 90). The ultimate conclusion of law for the Commission decided by summary determination was whether Ameren must provide its evaluators with the 2012 MEEIA cost data or the October 2014 cost data for the Performance Incentive's PY 2014 calculation. (LF 92).

EC-2015-0315 Commission Order

The Commission based its Order on the undisputed facts in Staff's complaint, Ameren's answer, and Staff's and Ameren's cross-motions for summary determination. (LF 211).

The Commission determined that the Performance Incentive is governed by the Commission's rules and the terms of the 2012 Stipulation as approved by the Commission. (LF 215). The Stipulation's Performance Incentive requires three calculations of annual net shared benefits through EM&V reports in 2013, 2014, and 2015. (LF 212-213). Each calculation requires Ameren to provide cost data to its evaluators. (LF 212-213). Paragraph 23 of the Stipulation does not include a variance for (1)(F). (LF 214). The Commission determined that the calculation of annual net shared benefits under the Stipulation's Performance Incentive remained subject to the requirements of Rule (1)(F). (LF 214).

The Commission determined that in the context of the Rule (1)(F), the avoided cost "methodology" includes the "formula" by which experts forecast avoided cost data, as well as the variable "inputs" that drive the formula. (LF 214). The Commission determined that this interpretation is consistent with the goal of the MEEIA statute to protect the utility's financial interest while also protecting consumers. (LF 214). The Commission determined that the use of updated avoided cost data connects the company's Performance Incentive to how much money ratepayers actually save as a result of the company's energy efficiency program. (LF 214). Demand-side ratemaking uses estimates, and in this situation the Stipulation requires the use of the company's

most recent avoided cost estimates, which is consistent with the Commission's general preference for the use of actual numbers to calculate cost savings. (LF 214).

The Commission granted Staff's motion for summary determination. (LF 216). The Order directed Ameren to provide its independent EM&V contractors with the most recent avoided cost information necessary to calculate the portion of annual net shared benefits that are to be awarded to Ameren as a Performance Incentive as a result of the energy efficiency savings the utility has achieved from its MEEIA demand-side programs for PY 2014. (LF 216).

The Order denied Ameren's cross-motion for summary determination. (LF 216). On motion from Ameren and over Staff's objection, the Commission clarified that the avoided costs estimates from the October 1, 2014 IRP should be used only to calculate the net shared benefits arising from megawatt-hours saved after that date. (LF 280).

Ameren filed timely requests for rehearing, which the Commission denied. (LF 281). Ameren appealed to the Western District. The Western District affirmed the Commission's Order. This Court granted transfer.

STANDARD OF REVIEW

The Commission's order is presumed valid, "and the burden is on the party attacking it to prove its invalidity." *State ex rel. Laclede Gas Co. v. Pub. Serv. Comm'n*, 392 S.W.3d 24, 32 (Mo. Ct. App. W.D. 2012). The role of the reviewing court is to determine whether the Commission's order is lawful and reasonable. *Id.*

A Commission decision is lawful if the Commission had the statutory authority to act as it did. *Public Serv. Comm'n v. Mo. Gas Energy*, 388 S.W.3d 221, 227 (Mo. Ct.

App. W.D. 2012). All legal issues presented by a Commission order are reviewed *de novo*. *State ex rel. Union Elec. Co. v. Pub. Serv. Comm'n*, 399 S.W.3d 467, 478 (Mo. Ct. App. W.D. 2013). When *de novo* review of a legal issue is conducted under the reasonableness prong, a finding of error is tantamount to a finding that the Commission's order is both unreasonable and an abuse of discretion. *Id.* A Commission decision is reasonable if the order is supported by substantial and competent evidence on the whole record, if the order is not arbitrary, capricious or unreasonable, or if the order is not an abuse of the Commission's discretion. *Id.*

This standard of review applies to the following points relied on.

POINTS RELIED ON

I. The Commission's Order granting Staff's motion for summary determination and denying Ameren's motion for summary determination should be affirmed because it is lawful and reasonable under Section 386.510 in that Staff was entitled to summary determination because the 2012 Stipulation requires three annual calculations of net shared benefits measured and documented through EM&V reports for the Performance Incentive, subject to Rule (1)(F)'s requirement that the utility provide the EM&V evaluators with the company's most recent cost data.

Statute

Section 393.1075, RSMo (2016).

Cases

State ex rel. Mo. Gas Energy v. Pub. Serv. Comm'n, 210 S.W.3d 330 (Mo. Ct. App. W.D. 2006).

Fowler Land Co., Inc. v. Mo. Dept. Nat. Res., 460 S.W.3d 502 (Mo. Ct. App. S.D. 2015).

ITT Commercial Fin. Corp. v. Mid-Am. Marine Supply Corp., 854 S.W.2d 371 (Mo. banc 1993).

Other Authority

4 CSR 240-2.117(1)(E)

4 CSR 240-20.093(1)(C)

4 CSR 240-20.093(1)(F)

4 CSR 240-20.093(1)(M)

4 CSR 240-20.093(1)(EE)

4 CSR 240-20.093(2)(J)

4 CSR 240-20.093(13)

II. The Commission's Order granting Staff's motion for summary determination should be affirmed because it is lawful and reasonable under Section 386.510 in that the Commission's interpretation of the word "methodology" is consistent with the plain meaning of the term, consistent with the term as used in other Commission rules and orders, and avoids absurd results.

Statutes

Section 393.1075, RSMo (2016).

Cases

Matter of Trenton Farms Re, LLC v. Mo. Dept. of Nat. Resources, 504 S.W.3d 157 (Mo. Ct. App. W.D. 2016).

Other Authority

4 CSR 240-20.093(1)(F)

4 CSR 240-20.093(1)(EE)

4 CSR 240-22.060

III. The Commission's Order granting Staff's motion for summary determination should be affirmed because it is lawful and reasonable under Section 386.510 in that the Stipulation's Performance Incentive and the Commission's Order provide Ameren with a timely earnings opportunity associated with cost-effective measurable and verifiable efficiency savings.

Statute

Section 393.1075, RSMo (2016).

Cases

State ex rel. Union Elec. Co. v. Pub. Serv. Comm'n, 765 S.W.2d 618 (Mo. Ct. App. W.D. 1988).

State ex rel. Mo. Gas Energy v. Pub. Serv. Comm'n, 186 S.W.3d 376 (Mo. Ct. App. W.D. 2005).

Other Authority

4 CSR 240-20.093(1)(C)

4 CSR 240-20.093(1)(F)

ARGUMENT

I. The Commission's Order granting Staff's motion for summary determination and denying Ameren's motion for summary determination should be affirmed because it is lawful and reasonable under Section 386.510 in that Staff was entitled to summary determination because the 2012 Stipulation requires three annual calculations of net shared benefits measured and documented through EM&V reports for the Performance Incentive, subject to Rule (1)(F)'s requirement that the utility provide the EM&V evaluators with the company's most recent cost data. [Responds to Ameren's Point I.]

A properly promulgated rule becomes the law of Missouri. *State ex rel. Mo. Gas Energy v. Pub. Serv. Comm'n*, 210 S.W.3d 330, 337 (Mo. Ct. App. W.D. 2006). The Commission's MEEIA regulations were affirmed in January 2013. *State ex rel. Pub. Counsel v. Pub. Serv. Comm'n*, 397 S.W.3d 441 (Mo. Ct. App. W.D. 2013). Administrative agencies are bound by the terms of the rules promulgated by them. *Fowler Land Co., Inc. v. Mo. Dept. Nat. Res.*, 460 S.W.3d 502, 507 (Mo. Ct. App. S.D. 2015). Commission Rule 4 CSR 240-2.117(1)(E) provides that the Commission may grant a motion for summary determination if the pleadings, testimony, discovery, affidavits and memoranda on file show that there is no genuine issue as to any material fact, that any party is entitled to relief as a matter of law as to all or any part of the case, and the Commission determines that it is in the public interest.

A demand-side investment mechanism (DSIM) must be approved by the Commission. 4 CSR 240-20.093(1)(M). The Commission may grant a variance from the rules in 4 CSR 240-20.093 upon request and for good cause shown. 4 CSR 240-20.093(13).

The 2012 Stipulation requires that the Performance Incentive shall be based upon the annual achieved net shared benefits as measured, evaluated and documented through EM&V reports at the end of each program year 2013, 2014 and 2015. (LF 212-213). This annual EM&V requirement for the Performance Incentive means Ameren must provide avoided cost data to the evaluators each year to complete the calculations for 2013, 2014, and 2015. (LF 212-213). The Stipulation does not contain a variance to Rule 4 CSR 240-20.093(1)(F). (LF 214).

Ameren adopted a new preferred resource plan in October 2014. (LF 213). This was Ameren's most recently-adopted preferred resource plan at the time of the Performance Incentive's PY 2014 calculation required by the Stipulation. (LF 213). Rule (1)(F) required Ameren to provide the evaluators with the October 2014 avoided cost data for the PY 2014 calculation. (LF 214). When Ameren provided the evaluators with the avoided cost data from its previously-adopted 2012 MEEIA preferred resource plan, Ameren violated Rule (1)(F) and the Stipulation. (LF 216).

The Commission's Order granted Staff's motion for summary determination and directed Ameren to provide the evaluators with the cost data from its October 2014 resource plan for the Performance Incentive's PY 2014 net shared benefits calculation. (LF 216). The Order is reasonable because it connects Ameren's Performance Incentive

to the most recent available estimate of the cost-savings benefits of its demand-side investment, as determined through independent annual evaluation, measurement and verification performed after the demand-side investment plan begins. (LF 214).

Demand-side ratemaking uses many estimates. The net shared benefits calculation is an estimate of the long-term cost-savings benefit achieved by a utility's demand-side investment. (LF 9, Rule 4 CSR 240.20.093(1)(C)). EM&V evaluators estimate energy and demand savings. (LF 9-10, Rule 4 CSR 240-20.093(1)(V)). The utility's avoided costs are also estimates. (LF 55-56). The evaluators apply the avoided cost data that the utility provides. (LF 213).

Full EM&V produces the most recent estimate of the demand-side investments' long-term energy and demand savings, by evaluating and measuring the effects of the investment after the plan begins, and by documenting the results following each program year. To determine the net shared benefits amount, it is reasonable to apply the utility's most recent cost data, because the purpose of the calculation is to estimate the long-term cost savings performance of Ameren's demand-side investment. It is a forecast and cannot be perfect, but timely recovery requires such estimates in order to complete the calculations. The Commission's Order reasonably connects the most recent savings estimates with the utility's most recent avoided cost data that is available at the time the net shared benefits calculation must be performed.

The Stipulation requires this result for the Performance Incentive, where net shared benefits are subject to full annual EM&V that requires Ameren to provide cost data for each annual calculation, with no variance to Rule (1)(F). The Commission's

interpretation of Rule (1)(F) reflects the Commission's general preference for recent data in ratemaking. This means Ameren must provide its most recent October 2014 avoided cost data that is available for the Performance Incentive's PY 2014 net shared benefits calculation.

Neither Ameren nor the Commission may ignore the application of Rule (1)(F) to the calculations required by the Commission-approved Stipulation. The law requires Ameren to use the October 2014 cost data for the Performance Incentive's PY 2014 net shared benefits calculation. The Commission's Order is lawful and reasonable and must be affirmed on this point.

I.A. The Commission's Order is lawful and reasonable because Staff is entitled to relief as a matter of law and Ameren is not. [Responds to Ameren's Point I.A]

"The key to summary judgment is the undisputed right to judgment as a matter of law; not simply the absence of a fact question." *ITT Commercial Fin. Corp. v. Mid-Am. Marine Supply Corp.*, 854 S.W.2d 371, 380 (Mo. 1993). A Commission order is presumed lawful and reasonable. *State ex rel. Laclede Gas Co. v. Pub. Serv. Comm'n of State*, 392 S.W.3d 24, 32 (Mo. Ct. App. W.D. 2012).

In its 2012 MEEIA Application, Ameren requested relief from the throughput disincentive, and Ameren requested an earnings opportunity. (PSC Appendix 89). Ameren proposed to recover both the throughput disincentive and the earnings opportunity based on portions of a net shared benefits amount that was not subject to full annual independent EM&V. (PSC Appendix 77, 89). Ameren proposed only limited

evaluation to track installed measures and program costs. (PSC Appendix 77-79, 85-88, 91-95; Ameren Appendix 85-86).

In the Stipulation, Ameren received variances to collect the TD-NSB Share as requested, but Ameren and Staff negotiated a Performance Incentive based on full independent EM&V reports filed following the end of each program year, with no variance to Rule (1)(F). (PSC Appendix 12, 32-33; LF 213). The terms of the Stipulation apply and require Ameren to use its most recently-adopted cost data for the Performance Incentive's annual calculations. For PY 2014, that is the October 2014 avoided cost data.

The Stipulation uses specific language to define the terms and conditions of Ameren's approved demand-side cost recovery mechanism. (PSC Appendix 10-17). The TD-NSB Share paragraph 6.b states that full EM&V will not be performed, similar to Ameren's Report. (PSC Appendix 17). The TD-NSB Share uses Ameren's Technical Resource Manual (TRM) and Ameren's specific DSMore software discussed in Ameren's Report and shown in Table 2.12. (PSC Appendix 11, 17). In contrast, the Performance Incentive does not refer to the Technical Resource Manual or DSMore software. (PSC Appendix 12-13). The Performance Incentive places no limit on the annual EM&V. (PSC Appendix 12-13). The Stipulation shows that the Performance Incentive modified Ameren's proposed earnings opportunity, so the terms of the Stipulation must control the PY 2014 net shared benefits calculation.

There is no evidence in the record to support Ameren's conclusion that the terms of Table 2.12 support its motion for relief. The terms of the Stipulation and the plain language of Rule 4 CSR 240-20.093(1)(F) control the calculation of the Performance

Incentive. The evidence in the record supports the Commission's Order on this point, so it should be affirmed. If the Court concludes that the Commission erred in its Order granting Staff's motion for summary judgment, the Court should remand the case to the Commission for further fact finding, because the evidence in the record does not support Ameren's motion for relief as a matter of law.

I.B. The Commission's Order is lawful and reasonable because the Commission's rules bind both the Commission and Ameren to the Performance Incentive the Commission approved, including the Performance Incentive's required calculation of annual net shared benefits measured and documented through EM&V reports following each program year 2013-2015, subject to Rule (1)(F)'s requirement that the utility provide the evaluators with the company's most recent cost data. [Responds to Ameren's Point I.B.]

A "utility incentive" component of a DSIM is a "methodology approved by the Commission to allow the utility to receive a portion of annual net shared benefits achieved and documented through EM&V reports." 4 CSR 240-20.093(1)(EE). If the Commission approves a utility incentive component of a DSIM, such utility incentive component shall be binding on both the Commission and the electric utility for the entire term of the DSIM. Rule 4 CSR 240-20.093(2)(J). The Stipulation's Performance Incentive at issue in this case is a "utility incentive" as defined in (1)(EE) because it allows the utility to receive a portion of annual net shared benefits achieved and documented through EM&V reports. (LF 10, 212).

The rules for the Performance Incentive were established when the Commission approved the 2012 Stipulation negotiated by Ameren and Staff. The Commission's Order is not driven by the fact that avoided costs for 2014 are lower. The Order holds Ameren to the terms and conditions of the 2012 Stipulation and Rule 4 CSR 240-20.093(1)(F).

The Stipulation was approved by the Commission subject to the risk of changes to the avoided cost forecast that Ameren must provide the evaluators, due to the yearly EM&V evaluation and calculation requirements. Holding Ameren to the risks inherent in the Stipulation is reasonable because, had the October 2014 filing shown higher avoided cost estimates, Ameren would have collected more earnings under the Commission's interpretation of the Stipulation and Rule (1)(F). Using the utility's most recent data for the Performance Incentive's required calculations reflects a reasonable apportionment of market risk to Ameren's shareholders and ratepayers. (LF 213-214).

The Commission's Order complied with Rule (2)(J) by applying Rule (1)(F) to the calculations required by the terms and conditions of the Stipulation. The Commission's Order is lawful and reasonable, and should be affirmed on this point.

II. The Commission’s Order granting Staff’s motion for summary determination should be affirmed because it is lawful and reasonable under Section 386.510 in 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.

[Responds to Ameren’s Point I.C and Point II.]

Administrative rules and regulations are interpreted under the same principles of construction as statutes. *Matter of Trenton Farms Re, LLC v. Mo. Dept. of Nat. Resources*, 504 S.W.3d 157, 164 (Mo. Ct. App. W.D. 2016). “The interpretation and construction of a statute by an agency charged with its administration is entitled to great weight.” *Id.* “However, it is inappropriate to defer to an agency’s interpretation of its own regulation that in any way expanded upon, narrowed, or was otherwise inconsistent with the plain and ordinary meaning of the words used in the regulation.” *Id.* Regulations should be interpreted reasonably, and absurd interpretations should not be adopted. *Id.* When interpreting a regulation, a court looks to the words used and gives each word its plain and ordinary meaning. *Id.*

The avoided cost “methodology” Ameren described is the “integrated resource plan analysis” set forth in Commission Rule 4 CSR 22.060. (LF 55-56; PSC Appendix 60). The avoided cost methodology includes the results of modeling the electric grid using “key driver variables,” or “critical uncertain factors” that are likely to affect the market price of energy. (LF 55). The methodology includes estimates for the “levelized cost of a simple cycle gas combustion turbine engine” based on the MISO capacity

market, and the methodology includes budgets for transmission and distribution projects. (LF 55-56). The avoided cost methodology is used to evaluate alternative resource plans and select a preferred resource plan in the utility's triennial IRP filing. (LF 55).

The Commission's Order determined that, in the context of Rule 4 CSR 240-20.093(1)(F), the avoided cost methodology includes the key market drivers that affect the 20-year forecast of the utility's costs to generate, transmit, and distribute electricity. (LF 212-213). The methodology also includes the "formula" that Ameren's experts develop to integrate specific values for critical uncertain factors to produce long-range hourly avoided cost data. (LF 214).

The Commission's Order is reasonable because the avoided cost methodology is used to analyze the performance of alternative resource plans under the Chapter 22 IRP analysis. This analysis requires specific values for critical uncertain factors in order to compare the performance of alternative resource plans. (Rule 4 CSR 240-22.060; PSC Appendix 60-63). The avoided cost methodology is also used to calculate net shared benefits for a MEEIA plan, which require specific cost data to calculate a specific monetary amount of net shared benefits that may be collected by the utility for its demand-side investment.

Ameren's argument is unreasonable because an avoided cost methodology devoid of its specific key driver "inputs" would not produce any specific avoided cost results, and therefore could not be used to select resource plans under Chapter 22 or calculate a specific monetary amount of net shared benefits in a MEEIA plan. Ameren's own facts

say that avoided cost results depend on grid models that require specific values for key driver variables to produce results. (LF 55-56).

Under MEEIA, energy and demand savings can never be precisely measured. EM&V's field measurements are expensive, time consuming, and inherently risky (PSC Appendix 94), but EM&V reports provide a measurable and verifiable estimate of the cost-savings benefits of Ameren's demand-side investment. (LF 214). The most recent methodology is preferable for ratemaking because it incorporates the most recent information about the key drivers that affect the energy market. (LF 55). For example, a long-term forecast of natural gas prices is one variable in an avoided cost methodology. (LF 55-56; 4 CSR 240-22.060(5)(D)). An avoided cost methodology developed before the natural gas shale boom will show a higher cost of natural gas, and therefore produce a higher estimate of avoided costs, compared to a methodology developed after the natural gas shale boom that incorporates the latest market information. (PSC Appendix 106). Using the most recent data captures the latest trends in the energy market where Ameren's demand-side investment is performing.

The Commission's Order is reasonable and should be affirmed on this point. If the Court does not agree that the Commission's interpretation of the terms of Rule (1)(F) are reasonable, the Court should remand the case to the Commission for further findings on this point.

II.A. The Commission’s Order is lawful and reasonable because it is consistent with the order approving the 2012 Stipulation. [Responds to Ameren’s Point I.C and II.B.]

Ameren’s 2012 MEEIA filing represented a contingency: if the Commission approved Ameren’s 2012 MEEIA plan, Ameren would adopt the energy efficiency contingency resource plan first outlined in the 2011 IRP, as updated in the 2012 MEEIA Report. (LF 53 ¶ 22; PSC Appendix 66-70, 100-104). This included the updated avoided cost methodology, which Staff testified was reasonable. (LF 54). When the Commission approved the 2012 Stipulation and the immediate rate recovery for the throughput disincentive, along with its negotiated Performance Incentive, Ameren implemented its energy efficiency resource plan beginning in program year 2013. (LF 53 ¶22, PSC Appendix 100-104).

At the oral argument, Staff expressed its understanding that when Ameren began operating the Stipulation’s demand-side investment plan, including its demand-side investment cost recovery mechanism, Ameren adopted the 2012 MEEIA resource plan as its preferred plan. (Tr. Vol. 2 p. 107 ln. 4 – 108 ln. 25; PSC Appendix 100-104). This fulfilled the contingency outlined in the 2011 IRP, and aligned all the calculations in the Report and Stipulation with Ameren’s most recently-adopted avoided cost methodology. Therefore, the Commission’s order approving the Stipulation is consistent with the Commission’s interpretation of Rule (1)(F) in its Order granting Staff’s motion for summary determination. There is no dispute about the Performance Incentive’s PY2013 calculation because Ameren provided the evaluators with the “same methodology” used

in its 2012 MEEIA preferred resource plan, the most recently adopted plan at the time of the PY 2013 calculation.

Staff's complaint occurred after Ameren adopted a new preferred resource plan, with a new avoided cost methodology, in its October 2014 IRP. (LF 9-10). When Ameren provided its evaluators with the previously-adopted 2012 MEEIA avoided cost data for the PY 2014 calculation, Ameren violated Rule (1)(F), because Ameren had adopted new avoided cost data in October 2014. By law, that most recent data must be applied to the Performance Incentive's required calculations. The Order reflects a consistent interpretation of Rule (1)(F) and should be affirmed on this basis.

II.B. The Commission's Order is lawful and reasonable because the Commission's interpretation of Rule 4 CSR 240-20.093(1)(F) is consistent with the definition of "utility incentive component" in 4 CSR 240-20.093(1)(EE). [Responds to Ameren's Point I.C and Point II.B.]

Rule (1)(EE) defines "utility incentive component of a DSIM" 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." Rule 4 CSR 240-20.093(1)(EE).

The Stipulation Paragraph 5.b.ii and Appendix B is the methodology approved by the Commission to allow Ameren to receive a portion of annual net shared benefits achieved and documented through EM&V as its 2013-2015 Performance Incentive. (LF 212). The Commission approved the Performance Incentive requiring annual achieved net shared benefits to be calculated through EM&V reports at the end of each program

year 2013, 2014 and 2015. When the Stipulation was approved by the Commission with no variance to Rule (1)(F), the Stipulation required Ameren to provide the evaluators with its most recently-adopted cost data for each annual calculation called for by the Stipulation. After Ameren adopted a new preferred resource plan in its October 2014 IRP filing, the Stipulation required Ameren to provide its most recently-adopted October 2014 avoided cost data to the evaluators for the Performance Incentive's PY 2014 net shared benefits calculation.

This is the agreement the parties entered for the Stipulation's Performance Incentive. The Commission's Order enforced, not changed, Ameren's Commission-approved Performance Incentive and should be affirmed on this point.

III. The Commission's Order granting Staff's motion for summary determination should be affirmed because it is lawful and reasonable under Section 386.510 in that the Stipulation's Performance Incentive and the Commission's Order provide Ameren with a timely earnings opportunity associated with cost-effective measurable and verifiable efficiency savings.

[Responds to Ameren's Point III.]

MEEIA provides that it shall be state policy "to value demand-side investments equal to traditional investments in supply and delivery infrastructure." Section 393.1075.3, RSMo (2016). Under MEEIA, the Commission shall "[p]rovide timely earnings opportunities associated with cost-effective measurable and verifiable efficiency savings." Section 393.1075.3(3), RSMo (2016).

In supply-side ratemaking, one of the factors that determine utility rates is the Commission's setting of the rate of return the utility has an opportunity to earn. *State ex rel. Union Elec. Co. v. Pub. Serv. Comm'n*, 765 S.W.2d 618, 622 (Mo. Ct. App. W.D. 1988). "It is a well-accepted principle of regulation that common stockholders contribute what is known as 'risk capital' to the utility company for which they receive a compensatory rate of return." *Id.* "Among the uncertainties that common stockholders accept in return for this added compensation is the danger of an earnings shortfall, for whatever reason." *Id.*

Under traditional supply-side ratemaking, "utilities take the risk that rates filed by them will be inadequate, or excessive, each time they seek rate approval." *State ex rel. Util. Consumer's Council of Mo., Inc. v. Pub. Serv. Comm'n*, 585 S.W.2d 41, 59 (Mo. banc 1979). The law does not require that rates yield any particular return, *State ex rel. Missouri Gas Energy v. Pub. Serv. Comm'n*, 186 S.W.3d 376, 383 (Mo. Ct. App. W.D. 2005) citing *State ex rel. Capital City Water Co. v. Pub. Serv. Comm'n*, 298 Mo. 524, 252 S.W. 446, 456 (Mo. banc 1922).

The 2012 Stipulation requires that Ameren's Performance Incentive calculate "achieved" net shared benefits that are "measured, verified and documented" through annual EM&V reports for program years 2013, 2014, 2015. (LF 212-213). When the Stipulation was approved, the Stipulation subjected the amount of Ameren's 2013-2015 Performance Incentive to the uncertainty inherent in an independent, annual third-party evaluation that occurs after the demand-side investment has been made. The Stipulation does not include a variance for Rule 4 CSR 240-20.093(1)(F), so the Stipulation also

includes the risk of changes in the energy market that are reflected in a new resource plan that may be adopted while the Stipulation, with its three required calculations, is in effect.

In this case, the energy market declined between 2011 and 2014. (LF 58). Ameren's October 2014 avoided cost methodology reflected this decline through its key market driver variables. (LF 55-56). Providing the lower, most recently-adopted October 2014 avoided cost methodology for the PY 2014 net shared benefits calculation will produce a lower amount of net shared benefits than the 2012 MEEIA avoided cost data. This is appropriate because the net shared benefits amount reflects the cost-savings benefits of Ameren's demand-side investment. Using the most recent utility avoided cost data connects Ameren's Performance Incentive to the best estimate of the cost-saving performance of its demand-side investment. Although these net shared benefits estimates will not be perfect, a "timely" earnings opportunity must use the most recent data available in order to associate the earnings opportunity with cost-effective measurable and verifiable efficiency savings at the time the calculation must be performed.

Had the energy market's variables increased between 2011 and 2014, Ameren would collect more earnings than originally estimated because the higher avoided cost data would reflect a higher amount of cost-saving benefit achieved by the demand-side investment. Neither Ameren nor its customers can control the market variables that affect the results of the avoided cost methodology. The Commission's Order and its interpretation of Rule (1)(F) is reasonable because the Stipulation provides a level of uncertainty for both Ameren's ratepayers and its shareholders.

The “total resource cost test” reflects an estimate of the cost-effectiveness of Ameren’s proposed demand-side investment. By arguing that it must provide its evaluators with the same 2012 MEEIA avoided cost methodology in each program year 2013, 2014, and 2015 for the Performance Incentive’s net shared benefits calculation, Ameren seeks to collect a Performance Incentive based on its initial 2012 MEEIA estimates, rather than an amount of net shared benefits that is associated with measurable and verifiable cost savings through the annual EM&V reports that are required by the Stipulation. The Stipulation presents the risk that Ameren will recover more or less revenue than estimated, just as Ameren’s customers receive no assurance that Ameren’s demand-side investment will actually produce all the revenue requirement reductions that Ameren predicts.

Supply-side rates are also based on the most recent available data and present similar risks for ratepayers and shareholders. Utilities file rate cases based on recent “test years” that are updated and “trued-up” during the proceedings. Future rates are set based on the historic expenses and revenues. The rates include an opportunity for the shareholders to earn a reasonable profit. If actual expenses, revenues and profits turn out differently than either ratepayers or shareholders expected, the Commission is not authorized to retroactively adjust rates to match expectations.

Rate mechanisms like Ameren’s fuel-adjustment clause mitigate some supply-side risks. Similarly, Ameren’s TD-NSB Share mitigates some of Ameren’s demand-side investment risk by relying on deemed values and restricting the evaluation that occurs after the demand-side investment has been made. For the Performance Incentive, Ameren

and Staff negotiated a Performance Incentive subject to the additional risks inherent in annual EM&V and the requirements of Rule (1)(F). The Commission's Order holds Ameren to the agreement and must be affirmed.

In its response to Ameren's motion for summary determination, Staff put the Performance Incentive in perspective: The Stipulation includes \$49.1 million in each of three years for program costs, or \$147.3 million over the life of the plan. (LF 123). The Stipulation also includes \$30.45 million in each of three years, or \$91.35 million, to provide Ameren its requested recovery to mitigate the "throughput disincentive." (LF123).

The Commission's Order cannot be compared to removing investment from Ameren's rate base, because the Order does not change the amount of Ameren's demand-side investment or change the Stipulation. The Order upholds the Stipulation's terms that capture changes in the market through annual evaluated net shared benefits calculations subject to Rule (1)(F). Similarly, when the Commission authorizes Ameren to collect a "return on equity" for its shareholders of 9.5 percent, estimated as \$40 million a year, Ameren may not earn exactly \$40 million each year. That does not mean the Commission has changed Ameren's investment or its authorized return on equity. It means that the return on equity, like the Performance Incentive in this case, represents an earnings opportunity subject to some risk.

CONCLUSION

For the above reasons, the Commission respectfully requests that the Commission's Order granting summary determination in favor of its Staff be affirmed in its entirety, or remanded to the Commission for further findings. The Commission requests such other relief as the Court deems just and proper.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify that the foregoing Respondent's Brief of the Public Service Commission of the State of Missouri complies with the limitations contained in Rule 84.06(c) and that:

1. The signature block above contains the information required by Rule 55.03;
2. The brief complies with limitations contained in Rule 84.04(b);
3. The brief contains 8,136 words, as determined by the word count feature of Microsoft Word.

I hereby certify that the foregoing has been served by means of electronic filing to the following counsel of record this 15th day of May, 2017 to:

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