BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of the Union Electric Company's (d/b/a Ameren Missouri) Gas Service Tariffs Removing Certain Provisions for Rebates from Its Missouri Energy Efficient Natural Gas Equipment and Building Shell Measure Rebate Program.	)))))))	Case No. GT-2011-0410

INITIAL BRIEF OF THE OFFICE OF THE PUBLIC COUNSEL

The Office of the Public Counsel ("OPC") agreed to the terms of the Stipulation and Agreement ("Agreement") resolving Case Numbers GR-2010-0363,[1] GT-2011-0130,[2] and GO-2011-0131[3] because OPC received a commitment by the Union Electric Company d/b/a Ameren Missouri ("UE" or "Ameren Missouri") to uninterrupted administration of the energy efficiency rebate programs as written in the tariffs attached as Appendix C to the Agreement,[4] and a commitment by UE to expand the existing energy efficiency programs by adding new cost-effective measures.[5] OPC also entered the Agreement because UE agreed to allow these programs to continue until December 2012 to allow for an independent third-party evaluation of cost-effectiveness.[6] In

[1] *In the Matter of Union Electric Company d/b/a Ameren Missouri for Authority to File Tariffs Increasing Rates for Natural Gas Service Provided to Customers in the Company's Missouri Service Area*, GR-2010-0363, Case opened June 11, 2010.
[2] *In the Matter of Union Electric Company d/b/a Ameren Missouri's Tariff Filing to Implement Changes to the Energy Efficient Natural Gas Equipment and Building Shell Measure Rebate Program*, GT-2011-0130, Case opened November 2, 2010.
[3] *In the Matter of the Energy Efficiency Programs of Union Electric Company d/b/a Ameren Missouri.* GO-2011-0131, Case opened November 2, 2010.
[4] Staff Exhibit (Ex.) 6, Unanimous Stipulation and Agreement, p. 5, ¶ 6(G).
[5] *Id.*, p. 3.
[6] *Id.*, pp. 3-4.

exchange for these commitments from UE: 1) OPC agreed not to contest a $9,000,000 rate increase;[7] 2) OPC agreed not to object to a decoupling rate design that shifted risk from shareholders to consumers;[8] 3) OPC agreed to dismiss the case investigating UE's administration of its energy efficiency programs;[9] 4) OPC agreed to forfeit its decision-making role in planning and administering UE's energy efficiency programs by agreeing to change program decision-making from a consensus collaborate to an advisory group;[10] and 5) OPC agreed that ratepayers, not shareholders, would provide contemporaneous funding of UE's energy efficiency programs in the amount of $700,000 annually in the new rates resulting from the rate case.[11]

The parties to the Agreement also agreed on the details of the energy efficiency rebate programs. The parties agreed that UE would maintain existing programs that predated the rate case, and would add equipment rebates for residential customers that purchased natural gas tank storage water heaters (Tiers 1 and 2), natural gas tankless water heaters, and building shell measures.[12] The parties also agreed to add equipment rebates for commercial customers that purchased natural gas griddles, natural gas ovens, natural gas tank storage water heaters (Tiers 1 and 2), natural gas tankless water heaters, natural gas boiler replacements, and building shell measures.[13]

It took eighteen (18) days after UE's new rate increase went into effect on February 20, 2011 before it became obvious that UE was actively seeking to limit

[7] *Id.*, p. 1.
[8] *Id.*, p. 2.
[9] *Id.*, p. 6.
[10] *Id.*, p. 4.
[11] *Id.*, p. 1.
[12] *Id.*, Appendix C.
[13] *Id.*

program rebates and back away from the commitments it made in the Agreement.[14] UE notified the Energy Efficiency Advisory Group (EEAG) on March 10, 2011 that it sought to eliminate rebate program availability for residents of the City of Columbia.[15] UE dropped its efforts when OPC explained to UE that "the proposed changes do not appear to be consistent with the settlement that resulted in the currently effective natural gas energy efficiency tariff sheets."[16]

UE's efforts to decrease its energy efficiency expenditures continued with the current request that UE brought to the EEAG only two (2) months after UE's new rate increase went into effect.[17] This second effort seeks to eliminate a substantial portion of the rebate programs that UE expressly agreed to continue uninterrupted until the end of 2012 to allow sufficient time to gather usage data for an independent third-party evaluation of cost-effectiveness. The rebate measures UE seeks to eliminate include many of the rebate measures that the parties agreed would be added just two (2) months before UE sought this tariff change, including Tier 2 natural gas tank storage water heaters, tankless water heaters, and building shell measures.[18] Eight (8) of the measures UE seeks to eliminate are ENERGY STAR® labeled.[19]

The Request for Proposal (RFP) for program evaluation has already been issued, and in only six (6) months the evaluation period will reach its April 30, 2012 completion

[14] OPC Ex. 1, p. 10; Staff Exhibit (Ex.) 3, proposed Sheet No. 79.
[15] *Id.*
[16] OPC Ex. 1, Attachment A.
[17] *Id.*, pp. 10-12.
[18] *Id.*, p. 11.
[19] MDNR Ex. 1, p. 18.

date.[20] Prematurely cutting a substantial portion of the programs just months away from the end of the evaluation period will undercut the effort to have usage data through April 30, 2012 available for evaluating the agreed-upon programs.[21]

The RFP seeking an independent third-party evaluation requires the initial draft of the evaluation to be submitted by July 1, 2012, and the final evaluation completed by July 31, 2012.[22] These evaluation results will soon be available, and will help determine the cost-effectiveness of UE's rebate "measures, programs, and portfolio" by reviewing actual cost data specific to UE and UE's customers.[23] The evaluation will use no fewer than three (3) known cost-effectiveness tests; the Total Resource Cost (TRC) test, the Utility Cost Test (UCT) and the Participant Cost Test (PCT).[24] The independent evaluation will include cost-benefit calculations using three (3) levels of gas commodity prices (base, high, and low).[25] This is the evaluation required by the Agreement and ordered by the Commission.[26] UE's "analysis" is not an evaluation as contemplated in the Agreement, and is based on data that is not specific to Missouri or to UE's program participants.[27]

Sound energy policy demands rejection of the proposed tariff change because a post-implementation evaluation has not been performed to provide reliable data upon which to determine whether to continue or modify the existing programs. The

[20] Staff Ex. 6, p. 4, ¶ 6(C); OPC Ex. 2, Scope of Work, Evaluation of Residential and Commercial Natural Gas Energy Efficiency Programs, Issued by Ameren Missouri ("RFP"), October 3, 2011.
[21] TR. 253-254.
[22] OPC Ex. 2, p. 7.
[23] *Id.*, pp. 2-3.
[24] *Id.*, pp. 2, 4.
[25] *Id.*, p. 3.
[26] Staff Ex. 6, pp. 3-4.
[27] *Id.*, pp. 3-4.

evidentiary hearing provided the Commission with substantial evidence to conclude that UE's proposed tariff revisions violate the terms of the Agreement, and are otherwise contrary to the public interest. In addition, the evidence presented by UE does not provide a reliable basis for concluding that the agreed-upon rebate programs, or any individual rebate measure within the rebate programs, are not cost-effective.[28]

Ratepayers, not UE shareholders, are funding the $700,000 in energy efficiency spending, which includes $263,000 for UE's low-income weatherization program, and $437,000 for UE's non low-income weatherization programs.[29] If spent evenly over the year, UE should spend approximately $36,416 per month on non low-income energy efficiency. The evidence shows that at the time rebuttal testimony was filed in September 2011, UE's non low-income expenditures were only $64,217.[30] "Of this amount, $39,734 was rebated for the measures that the Company is now seeking to remove from its program."[31] In other words, UE wants to eliminate over sixty percent (60%) of its current non low-income program expenditures. UE has not proposed to add any measure to the rebate programs.[32]

[28] Transcript (Tr.) 286.
[29] Staff Ex. 6, p. 1.
[30] Staff Ex. 1, Stahlman Rebuttal, p. 15.
[31] *Id*.
[32] MDNR Ex. 1, p. 19; Tr. 75-76.

Had the measures UE wants to remove never been incorporated into UE's rebate program, UE's energy efficiency expenditures would be a measly $24,483 of non low-income program spending, or roughly five percent (5%) of the $437,000 annual non low-income funds. Modifying the programs as requested by UE would drastically reduce UE's energy efficiency spending for non low-income consumers.

Argument

I. Is Ameren Missouri's tariff filing in this case consistent with the Stipulation and Agreement in GR-2010-0363?

UE's tariff filing violates the Agreement terms providing that UE "agrees to file no later than January 31, 2011, the tariff sheets attached hereto as Appendix C" and that UE "shall provide for uninterrupted availability of these energy efficiency programs through December 31, 2012."[emphasis added].[33] UE wants the Commission to interpret the word "programs" in the Agreement to mean nothing more than a program shell that only needs to include one available rebate, thus allowing UE to virtually eliminate the rebate programs.[34] UE's argument should be rejected because the parties agreed on the details of what was to be included in the rebate programs through sample tariffs attached as Appendix C to the Agreement.[35] "Programs" refer to the programs as they appear in the sample tariffs, including all measures the parties agreed to include in the programs, which are to remain uninterrupted through December 2012.[36] UE has not pointed to any

[33] OPC Ex. 2, p. 5.
[34] Tr. 106-107, 112.
[35] Matters incorporated into a contract by reference are as much a part of the contract as if they had been set out in the contract *in haec verba,* Metro Demolition & Excavating Co. v. H.B.D. Contracting, Inc., 37 S.W.3d 843 (Mo.App. E.D. 2001).
[36] Staff Ex. 6, p. 5 and Appendix C.

language in the Agreement to suggest that the term "programs" refers to anything less than how those programs appear in the sample tariffs.

Under Missouri law, words should be taken in their ordinary sense in construing contracts, and the parties' mutual intention should be ascertained from the language of the contract and the circumstances surrounding its making.[37] It is clear from the language of the Agreement, and the circumstances surrounding the Agreement terms providing for uninterrupted availability of the agreed-upon programs through 2012, that UE would maintain the programs as they appear in the sample tariff through 2012, and that UE was expected to add measures to increase expenditures.

Missouri law also dictates that if there is a conflict between a technical definition within a contract and a meaning which would reasonably be understood by the average lay person, a lay person's definition will be applied unless it plainly appears that the technical meaning is intended.[38] UE argues that there is a technical difference between "program" and "measure" that should be implied from the Agreement. UE's argument would not be consistent with a lay person's understanding that uninterrupted availability of the programs agreed to in the sample tariffs would keep the existing measures intact until an independent post-implementation evaluation could be preformed.

UE's witness testified that under UE's interpretation of the Agreement, UE would not interrupt the availability of the rebate programs so long as there is one measure remaining in each program.[39]

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[37] Fulkerson v. Great Lakes Pipe Line Co., 75 S.W.2d 844 (Mo. 1934).
[38] Rodriguez v. General Ac. Ins. Co. of America, 808 S.W.2d 379 (Mo. 1991).
[39] Tr. 112.

It is illogical to argue that it was the intent of OPC, Staff and MDNR to agree to allow UE to single-handedly remove all rebate measures but one. Under UE's interpretation, UE could remove all measures except $5 faucet aerators, and still have programs that are consistent with the programs as they appear in the agreed-upon sample tariffs. OPC urges the Commission to reject UE's absurd interpretation of the Agreement and recognize that the parties intended, absent extraordinary circumstances, for UE to maintain the programs as they appear in the sample tariffs in Appendix C to the Agreement.

UE's tariff proposal also violates the Agreement where the Agreement provides, "Post-implementation evaluations of all programs or measures shall include usage data for program participants through the end of the month of April, 2012, and be completed by December 31, 2012."[40] This requires the independent post-implementation evaluations, when preformed at the program level and when preformed at the measure level, to use participant usage data through April 30, 2012. If UE is allowed to remove measures prematurely, this condition of the Agreement cannot possibly be met because usage data will not be available through April 30, 2012 for the agreed-upon measures. This requirement is recognized in the RFP soliciting an independent third-party evaluator, which clearly states that one of its objectives is "to determine measure, program and portfolio savings."[41]

Under Missouri law, UE is bound to the terms of the Agreement as it would be bound by a contract,[42] and UE cannot substitute the ordinary and common sense meaning

[40] Staff Ex. 6, p. 4.
[41] OPC Ex. 2, RFP, p. 2.
[42] State ex rel. Missouri Cable Telecommunications Ass'n, et al. v. P.S.C., 929 S.W.2d 768 (Mo.App. W.D. 1996).

of the language in the Agreement with an extraneous one-sided interpretation.[43] The terms of an Agreement are based on the language of that agreement, and cannot be based upon the understanding or supposition of just one of the parties.[44]

In interpreting the Agreement, the Commission should also consider what the parties were attempting to accomplish.[45] One important issue the parties resolved with the Agreement was OPC's objection to UE's decision in October 2010 to abruptly cease the rebate program, which prompted OPC to request the investigation that opened Case Number GO-2011-0131.[46] The parties resolved the issues raised in Case Number GO-2011-0131 with the language in the Agreement stating that UE would offer its rebate programs without interruption until the reasonableness of the agreed-upon programs would be reconsidered in light of a third-party evaluation.[47] It would not make sense to conclude that OPC, the Missouri Department of Natural Resources (MDNR), and the Staff insisted on specific language stating that the programs would not be interrupted, while their intentions were to allow UE to immediately interrupt the availability of the agreed-upon programs. Language of the Agreement should be given a fair, reasonable and practical construction, since it is to be presumed that the parties intended a fair, reasonable and practical result.[48]

When the parties signed the Agreement, OPC, Staff, and MDNR all understood that the Agreement preserved the existing energy efficiency rebate programs as written in

[43] Wilshire Const. Co. v. Union Electric Co., 463 S.W.2d 903 (Mo. 1971).
[44] White v. Pruiett, 39 S.W.3d 857 (Mo.App. W.D. 2001).
[45] Glass v. Mancuso, 444 S.W.2d 467 (Mo. 1969).
[46] OPC Ex. 1, pp. 7-8.
[47] Staff Ex. 6, pp. 5-6.
[48] Tureman v. Altman, 239 S.W.2d 304 (Mo. 1951).

the sample tariffs until after an independent third-party evaluation was complete.[49] UE knew or should have known that this was the interpretation recognized by the three other parties to the Agreement. The objective intent of the parties, as measured by their words and actions, determines the essential terms of the Agreement; a party's subjective intent is not controlling.[50] UE should not be allowed to make commitments to get results that benefit the Company in settling a rate case and an investigation case, and then immediately back out of those commitments by hiding behind an insincere and one-sided interpretation of the Agreement.

a) Was there a change of circumstances as that phrase is used in the Stipulation and Agreement in Paragraph 6G? If so, does the change warrant the removal of thirteen (13) residential and seven (7) general service measures from the energy efficiency program?

Paragraph 6G of the Agreement states, "The Parties agree that Ameren Missouri may file with the Commission proposed revised tariff sheets concerning the Energy Efficiency programs, if Ameren Missouri believes circumstances warrant changes."[51] This general settlement provision allowing UE to request changes cannot overcome the far more specific requirement that the agreed-upon rebate programs remain uninterrupted through December 2012, or the specific language requiring the post-implementation evaluation to consider usage data for all programs or measures through April 2012. A pertinent rule of construction is that specific terms of a contract are given preference over general ones.[52]

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[49] Staff Ex. 6, p. 5.
[50] TEAM Scaffolding Systems, Inc. v. United Broth. of Carpenters and Joiners of America, 29 Fed.Appx. 414 (8th Cir. 2002); *see also* Purcell Tire & Rubber Co., Inc. v Executive Beechcraft, Inc., 59 S.W.3d 505 (Mo. 2001).
[51] Staff Ex. 6, p. 5.
[52] Phillips v. Authorized Investors Group, 625 S.W.2d 917 (Mo. App. 1981).

For many of the measures UE seeks to eliminate, the TRC results from UE's June 2010 TRC analysis are the same as the TRC results from UE's June 2011 analysis, and cannot be used to support the claim that there was a change in circumstances. These measures include wall insulation, door weather stripping, Energy Star® doors, window replacements, commercial griddles, and commercial food service ovens.[53] UE's TRC analysis from June 2010 produced the same results as UE's analysis from June 2011.[54]

The only changed "circumstance" is UE's decision to perform a new cost-effectiveness analysis on a limited number of the measures that UE seeks to eliminate – an analysis that was based on unreliable evidence not directly related to results from UE's gas efficiency programs. There was no credible change of circumstances between February 1, 2011, when the new tariffs went into effect, and just a few months later when UE proposed to drastically alter its Residential and General Service programs. It is clear from the evidentiary hearing that UE had no intention from the beginning of honoring its commitments, as it immediately set out to remove rebate measures and made no attempts to add rebate measures.[55] The TRC analysis is simply the latest chapter in UE's ongoing effort to reduce rebate expenditures (even though it has already received funds from ratepayers for these expenditures), this time by creating a misperception that the rebate programs are ineffective.

When questioned about the circumstances that caused UE to run a new TRC analysis immediately after the new tariffs became effective, Mr. Lovett first suggested that nobody directed Mr. Shoff to run the new TRC analysis, and that Mr. Shoff ran the

[53] Commission Ex. 1.
[54] *Id*.
[55] OPC Ex. 1, pp. 10-11.

test on his own based on "changes" being monitored by Mr. Shoff.[56] In subsequent testimony, Mr. Shoff supported Mr. Lovett's testimony at the hearing that nobody asked him to perform a new analysis in 2011.[57] However, in his prefiled direct testimony, Mr. Shoff testified that he was asked to analyze the cost-effectiveness of UE's 2011 natural gas energy efficiency tariffs.[58] Upon being reminded of his prior testimony, Mr. Shoff changed his testimony and testified that it was "probably Greg [Lovett] or Dan Danahy" who directed him to perform the new TRC analysis.[59] In other words, Mr. Lovett's testimony that the new TRC analysis was performed as a result of changes being monitored by Mr. Shoff is not true. The new TRC analysis was really performed because Mr. Lovett or Mr. Dan Danahy directed Mr. Shoff to run the analysis. UE's decision to enter into the Agreement, and then turn around and run TRC tests to see what measures it could eliminate, was properly characterized during the evidentiary hearing as having the perception of "subterfuge."[60] This perception is heightened when UE's witnesses mischaracterize the reasons that caused UE to perform a new test.

b) Was the evaluation performed by Ameren Missouri in this case done at an appropriate time pursuant to the Stipulation and Agreement in this case?

[56] Tr. 86-87.
[57] Tr. 227.
[58] Tr. 227; UE Ex. 3, p. 2.
[59] Tr. 227.
[60] Tr. 213-214.

The analysis performed by UE was not done at an appropriate time. The Agreement specifically provides in Paragraph 6C that "Post-implementation evaluations of all programs or measures shall include usage data for program participants through the end of the month of April 2012, and be completed by December 31, 2012." UE's analysis does not include usage data for programs through the end of April 2012, and is therefore premature. In six (6) months the evaluation period will conclude, and the independent third-party evaluator will have the data necessary to perform the post-implementation evaluation.

OPC also opposes the suggestion made by the phrasing of this issue because it suggests that UE provided an evaluation of the rebate programs. UE's own witness recognizes the distinction between the UE's study and a true evaluation of the program when he made a point to distinguish UE's TRC test as an "analysis" rather than a program "evaluation."[61] Mr. Shoff even made several corrections to his pre-filed testimony at the hearing to replace the word "evaluate" with the word "analyze" when referencing the work he did to determine cost-effectiveness.[62]

c) Does the proposed removal of these measures conflict with the terms of the Stipulation and Agreement that requires "uninterrupted availability of these energy efficiency programs through December 31, 2012," as required by Paragraph 6G of the Stipulation and Agreement?

The programs that UE agreed to provide with "uninterrupted availability" are those programs in the sample tariffs in Appendix C of the Agreement, which became effective on February 20, 2011. Paragraph 6G of the Agreement states, "Such tariffs shall provide for the uninterrupted availability of these energy efficiency programs

[61] Tr. 169-172.
[62] Tr. 156.

through December 31, 2012."[63] When the Agreement references "these energy efficiency programs" it is referring to the programs as agreed to in the sample tariffs. Changing the Residential and General Service programs as proposed would clearly interrupt the availability the agreed upon programs, and would violate the terms of the Agreement.

d) Did Ameren Missouri comply with Paragraph 6G of the Stipulation and Agreement to circulate proposed tariff sheets for review and comment by the EEAG prior to filing the proposed changes with the Commission?

UE's proposed tariff filing, File Number JG-2011-0620, does not comply with Paragraph 6G of the Agreement because UE did not circulate the tariff sheets to the EEAG prior to UE filing the proposed changes with the Commission. The Agreement states specifically in Paragraph 6G that, "Prior to filing any such proposed revised tariff sheets with the Commission, Ameren Missouri shall circulate those sheets for review and comment by the EEAG." The evidence proves that UE did not satisfy this requirement because it did not provide the EEAG with copies of the tariff it filed on June 8, 2011.[64] Accordingly, the tariff should be rejected and UE directed to comply with this provision before re-filing any proposed tariff changes.

e) How should "cost-effectiveness" as used in Paragraph 6B of the Stipulation and Agreement be interpreted?

The phrase "cost-effective" is not defined in the Agreement nor in the Commission's January 19, 2011 Order Approving Stipulation and Agreement that ordered the parties to follow the terms of the Agreement. The Agreement requires UE to obtain the assistance of "a post-implementation evaluation of the effectiveness of its non low income weatherization energy efficiency programs." An "outside firm" will conduct

[63] Staff Ex. 6, p. 5.
[64] UE Ex. 2, pp. 12-13.

the post-implementation evaluation and will assist in determining how "cost-effective" will be defined in the context of UE's energy efficiency program impact evaluation.

i) Should the TRC be the method used to determine cost-effectiveness under this stipulation and agreement?

The Agreement is silent as to which test will be used to determine cost-effectiveness. According to the RFP agreed upon by the EEAG and issued on October 3, 2011 seeking bids to perform the post-implementation evaluation, the independent third-party evaluator will use at a minimum three separate cost-effectiveness tests: the TRC, the UCT and the PCT cost-effectiveness tests.[65] These tests will be used to determine cost-effectiveness of UE's "measures, programs and portfolio."[66] Requiring the independent evaluator to use the UCT test follows the cost-effectiveness definition found in the Commission's Promotional Practices rule, 4 CSR 240-14.010(6)(D), and is also consistent with the comparison tests the Commission values when evaluating electric demand-side programs, which require both a TRC and a UCT analysis. 4 CSR 240-22.050(5)(E). Accordingly, the Commission should conclude that the TRC is *a* method that can be used to determine cost-effectiveness under the Agreement, but should not be established as *the* method. If the Commission concludes that the TRC is the only method that can be used to determine cost effectiveness under the Agreement, then the Commission will have redefined the term "cost effectiveness" to having a meaning that is the not consistent with the meaning of "cost effectiveness" in the Commission's Promotional Practices Rule.

ii) Was Ameren Missouri's implementation of the TRC proper?

[65] OPC Ex. 2, RFP, p. 2.
[66] *Id.*

It is not improper for UE to analyze its rebate programs using its own non-ratepayer resources. It was improper, however, for UE to attempt to use its TRC analysis to eliminate program measures when the post-implementation evaluation that is required by the Agreement "will generally be performed by an outside firm and include both a process evaluation and an impact evaluation."[67] While UE's decision to conduct its own premature analysis may not violate any term of the Agreement (assuming no ratepayer funds were used in the evaluation), UE's attempt to modify the Residential and General Service programs as a result of UE's TRC analysis is improper and inconsistent with the post-implementation evaluation required by the Agreement.

Most of the measures that UE proposes to eliminate are building shell enhancement measures that are part of its Residential and General Service audit improvement programs.[68] To be eligible for building shell measure rebates, such measures must be recommended by a Qualified Auditor following an energy audit.[69] Mr. Ryan Kind, Chief Energy Economist, for OPC testified that, "There should not be a problem with the measures recommended by a Qualified Auditor being cost effective so long as UE is providing proper oversight of the program and dropping any auditors from the Company's Value Added Partner Network that are found to be recommending measures in their audit reports that are not cost effective under the specific circumstance in the dwelling or business premises where the audit took place."[70] Requiring an audit of the specific customer's dwelling, equipment, and usage by a qualified auditor, as required

[67] Staff Ex. 6, pp. 3-4.
[68] OPC Ex. 1, p. 18.
[69] *Id*.
[70] *Id*.

by UE's rebate program, should eliminate concerns that the building shell measures recommended by the auditor are not cost-effective.[71]

UE's TRC analysis is also improper because it does not rely upon Missouri-specific or participant specific data. UE witness Mr. Lovett testified in response to an inquiry from Commissioner Jarrett:

> We have not done a - - there was not an evaluation that has been done in Missouri, so we have not used Missouri-specific data. We used national databases, and also we just received new information from our sister company over in Illinois, Ameren Illinois, and we used data from that.[72]

Mr. Lovett later testified that UE did not rely upon Missouri-specific data "because we don't have any Missouri-specific data available."[73] When asked directly by Commissioner Jarrett whether UE's analysis proved the Missouri programs were inefficient, Mr. Lovett's answer suggests an admission by UE that the proof provided by UE is insufficient:

> Q. But you can't tell me here today whether or not these specific programs in Missouri are, in fact, inefficient; just based on data nationally and from Illinois, they're inefficient?
>
> A. It's the best of my knowledge, we do not have any Missouri-specific measure data.[74]

UE witness Mr. Schoff confirmed Mr. Lovett's testimony that UE's analysis did not use specific customer data from program participants.[75] If the Commission maintains the existing programs and allows the independent third-party evaluation of those programs to occur as agreed, the Commission will soon have the results of a credible evaluation that is

[71] *Id.*
[72] Tr. 111.
[73] Tr. 114.
[74] Tr. 115.
[75] Tr. 166.

based on Missouri-specific data and participant-specific data.[76] UE's premature analysis is based upon neither, and was performed by an analyst with no prior experience in performing evaluations of the cost-effectiveness of energy efficiency programs.[77]

In a late-filed exhibit UE provided the results of UE's TRC analysis performed by Mr. Shoff in June 2010 and again in June 2011.[78] This exhibit shows that the source data for UE's analysis relies primarily on Illinois, with no indication that Missouri data was considered.[79] Of the nineteen (19) measures that UE's analysis indicates has a TRC value of below 1.0, the source data for fifteen (15) of these measures uses Illinois, Wisconsin, or California data,[80] and the remaining four (4) measures rely upon national data including data regarding *electric* energy efficiency programs.[81] UE did not provide any evidence to prove that data from other states and data regarding electric programs can be reliably used to analyze Missouri gas programs.

Another flaw in UE's TRC analysis is that it is based on "the most up to date" national building codes" that were "the most stringent anywhere possible."[82] The problem with these most stringent inputs is that they are not representative of the homes in Missouri where the rebates measures are being applied. On cross-examination, Mr. Shoff explained how using this most stringent building code impacted UE's TRC analysis:

> So if you have a more stringent building code that requires you to have, for instance, as a baseline higher insulation values or more efficient

[76] Staff Ex. 6, pp. 3-4; OPC Ex. 2.
[77] Tr. 169-170.
[78] Commission Ex. 1.
[79] *Id.*
[80] Commission Ex. 1. Mr. Shoff testified that the California study may be based on national data, but that Mr. Shoff was "not really sure." Tr. 209.
[81] Commission Ex. 1; Staff Ex. 1, p. 9.
[82] Tr. 191-192.

> furnace or so on and so forth, to get the same level of incremental savings, you would have to increase the efficiency.[83]

Mr. Shoff concluded that "your savings would be less with more stringent building codes."[84] Here Mr. Shoff acknowledges that by using more stringent building codes, a higher level of efficiency is required to show cost-effectiveness than would be required if a less stringent building code were used. When asked if most homes in Missouri were built to the more stringent building codes, Mr. Shoff testified, "Probably not."[85] This evidence is significant because it shows that UE's TRC analysis inflates the baseline level of home efficiency by assuming UE homes adhere to a more stringent building code standard, thus requiring greater gas savings from efficiency improvements to show cost-effectiveness.

The evidence of the case demonstrates that UE's TRC analysis was improper for a multitude of reasons, including the fact that it was: 1) premature; 2) not independently conducted; 3) not based on Missouri data; 4) not based on participant data; and 5) based on incorrect assumption data such as stringent building codes that distorts the results.

iii) Is the relevant cost effectiveness test defined in Commission Rule 4 CSR 240-14.010(6)(D)?

UE's rebate programs are by definition promotional practices, and are included in the Promotional Practices section of UE's tariff.[86] 4 CSR 240-14.010(6)(L). According to the Commission's Promotional Practices Rule, "cost-effective" for utility promotional practices "means that the present value of life-cycle benefits is greater than the present value of life-cycle costs to the provider of an energy service." 4 CSR 240-14.010(6)(D).

[83] Tr. 224-225.
[84] Tr. 225.
[85] Tr. 225-226.
[86] Union Electric Company Gas Service Tariff, P.S.C. Mo. No. 2, Sheet Nos. 75 to 83.

The TRC test performed by UE does not follow this definition of cost-effective because UE included more than just the "costs to the provider" in its calculation and included participant costs.[87] By including participant costs in its TRC calculation, UE has created cost benefit ratio values that are lower than what would result from following the definition of cost-effective from 4 CSR 240-14.010(6)(D).[88] Had UE provided a cost-effectiveness analysis that follows the requirements found in 4 CSR 240-14.010(6)(D), UE's cost effectiveness test results "would be significantly higher".[89]

UE claims that the definition of "cost-effective" used in the Promotional Practices Rule "appears to be very similar to the definition of the UCT, or Program Administrator Cost Test."[90] Mr. Shoff attempts to refute Mr. Kind's testimony that such an analysis would produce a higher cost-effectiveness result than a TRC analysis.[91] The basis for Mr. Shoff's disagreement is the following:

> Typically, programs with high administration costs or high incentive costs have lower UCT results when compared to the program level TRC. Some programs that fall into this category include Appliance Recycling and Home Energy Performance.[92]

On cross-examination, however, Mr. Shoff admitted that the programs he identified as having high administrative and high incentive costs, the Appliance Recycling program and the Home Energy Performance program, are *Illinois programs* not offered in Missouri.[93] When asked during cross-examination whether the energy efficiency programs offered in Missouri have high administrative costs, Mr. Shoff answered, "I'm

[87] OPC Ex. 1, p. 16.
[88] *Id.*, p. 16-18.
[89] *Id.*
[90] UE Ex. 4, p. 9.
[91] OPC Ex. 1, p. 16.
[92] UE Ex. 4, p. 10, emphasis added.
[93] Tr. 177-178.

not sure."[94] When asked to identify the Ameren Missouri energy efficiency programs with high incentive costs, Mr. Shoff testified, "I don't see very many that would be high except for maybe the modulating burner, the commercial."[95] In Illinois, the incentives for home audit type programs were as high as $1,200, $1,400 and $2,400, whereas in Missouri, the maximum incentive is $250.[96] According to Mr. Shoff's own testimony, since the Missouri programs do not have high administrative or high incentive costs, a UCT would show higher cost-effectiveness. Perhaps this is why UE chose not to provide UCT results, even though Mr. Shoff admitted that UE looked at UCT results.[97]

The Commission does not have specific rules for natural gas energy efficiency programs. For comparison purposes, it is helpful to look at the Commission's electric utility resource planning rules. These rules provide that "the total resource cost test shall be used to evaluate the cost effectiveness of the potential demand-side programs and potential demand-side rates" and "the utility cost test shall also be performed for purposes of comparison." 4 CSR 240-22.050(5)(B) and 4 CSR 240-22.050(5)(C). The utility is required to "provide results of the total resource cost test and the utility cost test for each potential demand-side program evaluated". 4 CSR 240-22.050(5)(E). Obviously the Commission finds merit in relying upon more than just a single type of cost effectiveness test analysis. UE's entire case, however, is built upon a single type of cost effectiveness test without the benefit of a second test conducted for comparison purposes.

If the Commission allows the analysis requested in the recently issued RFP to occur before allowing modifications to the programs, the Commission will receive an

[94] Tr. 175.
[95] Tr. 176.
[96] Tr. 177-178.
[97] Tr. 181.

evaluation using no fewer than three (3) cost-effectiveness tests; the TRC, the UCT and the PCT.[98] The TRC compares program administrator and customer costs to utility resource savings.[99] The UCT, also known as the PACT, compares the program administration costs to supply-side resource costs.[100] And the PCT compares the costs and benefits of the customer installing the measure.[101] Each test as merit, and program changes that remove measures should be put on hold until after these evaluations are performed and the full range of cost-effectiveness test results are known.

II. Should the Commission adopt a definition of general applicability of "cost-effectiveness" in this case? If yes, should the test apply to all Missouri gas utilities?

The Commission should not adopt a definition of general applicability in this case since this case involves a tariff change request of a single gas company and does not involve any other gas utility. All parties appeared to be in agreement on this issue.[102] This issue was added due to UE's desire for the Commission to determine in this case that the TRC test is the best method to evaluate the cost-effectiveness of natural gas energy efficiency measures and programs.[103] Such a finding by the Commission would have impacts beyond UE, and without participation of the other Missouri gas utilities that would be impacted from a general finding regarding the TRC test, OPC cautions the Commission against determining that the TRC test is the best evaluation method.

[98] OPC Ex. 2, p. 2.
[99] Staff Ex. 11.
[100] *Id.*
[101] *Id.*
[102] Tr. 37.
[103] UE Ex. 3, p. 8.

III. Should the Commission find that there is a need to specify how cost effectiveness will be determined for gas utilities in Missouri and state its intention to address this issue and other related energy efficiency issues associated with gas energy efficiency programs in a new Commission rulemaking?

All Missouri gas utilities, and other interested parties, should have an opportunity to participate in setting cost-effective standards for gas energy efficiency programs. The best way to accomplish this would be for the Commission to initiate a rulemaking for natural gas energy efficiency programs. Rules that help provide a framework for all natural gas energy efficiency programs will help provide consistency across the state, and should help avoid many of the energy efficiency disputes that require a significant amount of time and resources to address.[104]

IV. Should the Commission take factors other than measure level cost effectiveness tests into account when determining what measures should be included in programs like the home energy audit program included in Ameren Missouri's tariffs?

The Commission should consider all relevant factors when determining what measures should be included in Residential and General Service programs. This should include common sense factors, such as a consideration of the likelihood that customers would pay $300-$600 for a home energy audit in order to be eligible for a $10 incentive for a low flow showerhead, or a $5 incentive for a faucet aerator.

V. Is this new tariff in the public interest?

The proposed tariff is not in the public interest in that it seeks to eliminate the availability of a large portion of UE's Residential and General Service rebate programs during a time when, per Commission order, UE should be looking to *ramp up* cost-

[104] OPC Ex. 1, pp. 14, 20.

effective energy efficiency expenditures.[105] UE's witness Mr. Shoff testified that the tariff revision would eliminate sixty-nine percent (68%) of the residential rebate program and twenty-five percent (25%) of the commercial program.[106]

Mr. Gregory Lovett testified that UE would only be open to adding new cost-effective measures on the condition that the measures it seeks to remove are removed.[107] Mr. Lovett further testified that UE has no intention of doing anything to "increase participation" until after this case is resolved,[108] despite UE's unsupported claim that UE has "identified measures that could be cost-effective measures that could be put in place very quickly."[109] This attempt to hold the program ramp up hostage to UE's attempts to eliminate rebate measures suggests a serious disregard for UE's commitment to increase program expenditures to $850,000 in three (3) years. It shows that UE wants to drastically reduce the number of rebates offered before UE is even willing to consider adding new rebate measures that it claims would be cost-effective. These actions by UE, as administrator of UE's energy efficiency programs, are not in the public interest.

Furthermore, UE's claim to have identified additional cost-effective measures should be disregarded because no such measures have been put forth and because UE has denied having even a shred of paper regarding these additional measures. When OPC requested all such programs analyses in a data request, UE claimed that it could not

[105] *Order Approving Stipulation and Agreement*, Case No. GR-2010-0363, January 19, 2001.
[106] Tr. 45, 106.
[107] Tr. 100.
[108] Tr. 101.
[109] Tr. 109.

provide a single email, analysis or any document regarding any of these other measures UE is supposedly considering.[110]

The proposed tariff is also not in the public interest because it seeks to eliminate a substantial portion of the Residential and General Service programs without a proper and timely analysis, suggesting that UE's motives for seeking to drastically reduce its Residential and General Service programs expenditures is based upon UE's cash flow and earnings erosion concerns rather than a proper analysis of programs and measures.[111]

UE's tariff change proposal is also not in the public interest for those ratepayers that already received a reservation for a rebate. These customers may have purchased or be in the process of purchasing equipment to improve that customer's energy efficiency under the assumption that a rebate will be available. MDNR witness Mr. John Buchanan testified that UE had recorded at least 554 such reservations.[112] For these reasons, UE's request to prematurely eliminate measures before they can be evaluated is against the public interest.

Conclusion

OPC expected UE to take on their new role as decision-makers regarding their energy efficiency rebate programs with a desire to show the Commission and the parties that UE can be trusted with the vital role of overseeing an important energy efficiency program. Surprisingly, UE's first action was to use its decision-making authority to attempt to gut the agreed-upon energy efficiency program in an effort to decrease rebate

[110] Tr. 118.
[111] OPC Ex. 1, p. 12.
[112] MDNR Ex. 1, pp. 19-20.

payments.[113] Even more surprising is UE's attempts to mischaracterize the Agreement reached between the parties. OPC urges the Commission to reject this tariff and admonish UE for its attempt to dishonor its Agreement and violate the Commission's order. This tariff filing is in direct violation of a Commission order directing the parties to abide by the terms and conditions of the Agreement. By causing this case to be heard by the Commission, UE is trying to re-litigate issues that other parties thought were resolved by the Agreement. In doing so, UE has wasted large amounts of resources of all the parties and the Commission, while raising questions about the future viability of the settlement process commonly used in Missouri to conserve resources and increase the efficiency of the regulatory process.

Respectfully submitted,

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[113] OPC Ex. 1, pp. 10-11.

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been mailed, emailed or hand-delivered to all counsel of record this 20th day of October 2011.

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